

# DRBF Forum

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## The Persero Saga

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for Singapore and  
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*“...the ensuing six and a half years have seen a protracted legal battle between the parties, with CRW seeking - and PGN strongly resisting - the enforcement of the DAB’s third decision through arbitration and court proceedings in Singapore.”*

The story begins in February 2006, when PT Perusahaan Gas Negara (Persero) TBK (PGN), an Indonesian state-owned company, awarded a contract to a joint venture called CRW Joint Operation (CRW) for the design, supply and installation of 196 km of pipeline and optical cable as part of the South Sumatra - West Java Gas Pipeline Project in Indonesia. The contract price was around US\$ 35.7 million, and the contract was based on the FIDIC 1999 Red Book conditions including the usual provision for appointment of a DAB.

It is perhaps significant that an experienced three-member DAB (Toshihiko Omoto, Sarwono Hardjomuljadi and Peter Chapman) was duly appointed at the commencement of the project, but was apparently discharged after just three months in order to save cost. A single member DAB was then not appointed until two years after the contract, in February 2008, by which time numerous disputes had already arisen between the parties.

By May 2008, the new DAB had already

made two decisions in favour of CRW on disputes referred up to that time. One of those decisions, for payment of approximately US\$ 5.9 million, was accepted by PGN. The other related to a claim that was withdrawn by CRW after PGN gave notice of dissatisfaction in respect of the DAB’s decision.

Further disputes were then referred to the DAB, and in November 2008 CRW obtained a decision which awarded a sum of over US\$ 17 million. PGN promptly responded with a notice of dissatisfaction, and the ensuing six and a half years have seen a protracted legal battle between the parties, with CRW seeking – and PGN strongly resisting – the enforcement of the DAB’s third decision through arbitration and court proceedings in Singapore.

At the end of the battle, in May 2015, CRW has at last secured a judgement from Singapore’s highest court, the Singapore Court of Appeal (SGCA), confirming the validity of an interim arbitration award that had been

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## President's Page



**Paul Taggart**  
President  
DRBF Executive  
Board of Directors

Dear Members, Supporters and Friends of the DRBF,

This letter presents to you something of a mid-term report card on what progress is being made on the subject matters, which were intended as the corner stone of this president's term. If you recall the key issues to be given priority were communications with our markets, training and outreach, the website update, and the DRBF Manual update.

**Conferences:** The first half of the year has been dedicated to this task. Those of you who read the last edition of the Forum will be aware of our highly successful Regional conferences in Nairobi, Kenya and in Seattle, Washington, USA. Other country and local events have also be held in London, Bucharest, and Santiago, to name a few. I can now also gladly inform you that our Annual International Conference this year held in the Italian port city of Genoa, a place of great importance for the Americas, was a raging success being the best attended International Conference ever with over 180 delegates from Africa, Asia, Australia, North and South America and Europe itself. Amongst the delegates were many new faces, reflecting the growing interest internationally in Dispute Boards, in particular in Africa and South America. This presence comes with credit to our local Country Reps and the Region 1 and 2 collaboration. Commencing at the International Conference in Sao Paolo 2011, they have toiled and globetrotted to spread the word through conferences and training workshops, the recent DB 2020 Olympic DB member selection and training workshop being an example. Elsewhere, recent events in Peru, where the system is now law in public procurement contracts, have raised the bar. Indeed DB interest and activities are gaining traction in South America so much so that Region 2 has appointed its first Latin American director, Julio Bueno, and next year sees the International Conference move to Santiago, Chile. Elsewhere, we have still our 19th Annual Meeting & Conference to hold (the other port city of San Francisco - October 2015) and a second Region 2 Regional Conference in Istanbul, Turkey to come (November 2015), yet another famous waterway. So in summary all is well on the conference front. The use of DB's continues to diversify and I humbly encourage your support and attendance to ensure their success.

**Training and Outreach:** It is realized that our collective experience has much to offer the industry, wherever it may be. We also recognize that the globe is a smaller place and that we have much to learn from each other. To that end, Kurt Dettman from Region 1 and Simon Fegen from Region 2, along with DRBF General Manager Ann McGough met recently in Boston to exchange best practices. The ideas were shared with Alan McLennan, who represents Region 3 on the DRBF's cross-regional Training Committee.

**Website:** The first half the conference season having been successfully completed, we are now moving in determined manner to address the website. It is recognized that this has become outdated in this fast-paced internet world. So rather than a simple update, we are moving towards a major overhaul which better projects our im-



age and serves our membership, including providing for a better library and member directory, and includes foreign language sections and cross-links to regional DRBF groups to reflect the diversity of the Foundation's membership. I hope to be able to report some closure on the matter before the end of this presidency.

**DRBF Manual:** Likewise I am pleased to be able to report progress on the update of the DRBF Manual. We have retained a professional editor for the task and the new content is now under drafting.

We will continue to move these projects to conclusion throughout the remainder of my term of office.

Finally those of you who will have read this page in the last Forum will have noted my reference to the matter of DB "jurisprudence", I am glad to note that a favorable verdict has now been given in the Singapore Persero case which was under appeal, but not too much on that as it forms the basis of two articles on this occasion (see cover story on page 1 and ethics column on page 6).

I trust that this will bring you all up to date and that you are satisfied with progress.

Once again my thanks for your interest and support,

## Upcoming DRBF Events

October 1 - 3, 2015  
19th Annual Meeting & Conference  
San Francisco, California

November 19 - 20, 2015  
DRBF Regional Conference  
Istanbul, Turkey

**Complete details at [www.drb.org](http://www.drb.org)**

## Ron Finlay Awarded Prestigious “Order of Australia” by Australian Government



**Ron Finlay**  
Secretary  
DRBF Region 3,  
AI Mathews Award  
Recipient 2014,  
and Member of  
the Order of  
Australia

Ron Finlay, the well-known and longstanding Secretary of DRBF Region 3, has been honoured by the Government of Australia with the Award of a Member of the Order of Australia, the highest recognition for outstanding achievement and service which is given by the Australian honours system. The Australian system of honours and awards was established in 1975. At this time The Queen approved the institution of the Order of Australia: ‘an Australian society of honour for according recognition to Australian citizens and other persons for achievement or meritorious service’.

The citation recognises Ron’s “significant service to the law, particularly in the area of dispute resolution, through public infrastructure advisory roles, and to baseball”. In particular, the award reflects Ron’s major contribution to the promotion of Dispute Board concepts and processes in Australia. The Order of Australia honour follows Ron’s recent entry into the DRBF’s ‘Hall of Fame’ as the one of the winners of the AI Mathews Award in 2014.

Ron Finlay has been an active member of the DRBF’s Australasia executive group since its formation in 2003, serving as Secretary/Treasurer throughout. He has been responsible for all statutory and legal documents from the first Articles of Association to the recent establishment of DRBF Region 3. Despite a very busy professional life, he still finds time to continue these roles.

Ron has been a prime mover in convincing each of the major users of Dispute Boards in Australia of the benefits of DBs. He has been the driver of the recent adoption of the name “Dispute Avoidance Board (DAB)” by Roads & Maritime Services in the first instance, now being followed by Transport for New South Wales, National Broadband Network, and others.

In addition, Ron has had senior appointments from Commonwealth Government and NSW Government, and serves as Director of Macquarie Generation (NSW State Government owned Generator) and as an Independent Director, listed entity, of DUET Group (owner of majority interests in utility businesses Dampier to Bunbury Natural Gas Pipeline, Multinet and United Energy). He is also an Executive Board Member of the International Baseball Federation.

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The Forum welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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# Ethics in Today's World of DRBs

## Preparation of a Witness Statement by a DRB



**Jim Phillips Ph.D.**  
Chair  
DRBF Ethics  
Committee

In the lead article of this issue of the *Forum* my good friend and colleague Gerlando Butera chronicles the Persero decision which arose from a contract dispute on design, supply and installation of a pipeline and optical cable project which was part of the South Sumatra West Java Gas Pipeline Project in Indonesia. The case history, arbitration and litigation background is well discussed by Gerlando and is not included in this article. I might add that the case is replete with ethics issues, so I may be drawing on it for future articles.

The issue for this discussion is the fact, which apparently was not denied, that the DAB on the project prepared a statement for one of the witnesses during the DAB hearing. On appeal from the DAB decision, the Singapore Court of Appeal which heard the case noted the possibility of "...collusion between the DAB and CRW [a party]". The Court went on to point out that "...PGN [a party] had failed to cross the high threshold necessary to make out either bad faith on the DAB's part...or collusion between the DAB and CRW". PGN in its court filing had argued that if the Court did not overturn the DAB decision, based on the uncontroverted fact that the DAB had prepared the witness statement, this discrepancy and others would be "white-washed." The Court did not make any findings on this factual issue, and noted that PGN had failed to prove collusion or bad faith by the DAB.

First, this is a serious ethical issue, setting aside the fact that it might have been

legal grounds for a reversal by the Court. While a DAB and a DRB are not held to the strict rules of evidence and procedure as in court proceedings, this activity clearly crosses the ethical line of proper conduct. Obviously I am not aware of the circumstances surrounding this DAB proceeding, but I can think of no justification for neutral party preparing a statement for a witness.

Several of the DRBF's Canons of Ethics are relevant here. Canon 1 requires disclosure of any "interest or relationship" that could "create an appearance of partiality or bias." Even if the witness statement was completely objective or factual, this practice gives an appearance of bias by putting words in the mouth of a party in a hearing wherein the DAB or DRB is required to be impartial. Canon 2 provides "[c]onduct of Board members should be above reproach and "...[e]ven the appearance of a conflict of interest should be avoided." Even if you could imagine a judge in a courtroom preparing a witness statement, it is quite possible that the attorney for the party who is calling the witness would be outraged.

Finally Canon 4 provides that Board members "...shall conduct meetings and hearings in an expeditious... and impartial manner." Again the issue under discussion flies directly in the face of impartiality. I believe an argument could be made that the other Canons touch on this issue as well.

The mere fact that the Singapore Court mentions in its decision that "there is real



risk that the DAB was acting unfairly and/or may have colluded with [CRW]” should draw our attention, whether it was proven or not that CRW was colluding. As I have stated here many times, a conversation or a gesture may be innocent on its face. The risk is that other observers can interpret innocent actions as being biased partial. This why great pains are taken to avoid ex parte communications, to disclose financial or other interests and relationships that might appear to leave the impression of bias, and to conduct hearings in fair and objective procedures.

It has taken the advocates of the DRB and DAB process a long time to show that these practices save time, money, and provide the parties better recommendations than a court or arbitration decision can. Those of us who have made these arguments directly to owners know how difficult it can be to obtain access to make our pitch, let alone obtain a positive result. In my personal experience it took being on the witness stand for three days and part of a fourth for a state chief engineer to look at me and say “...there has to be a better way.” There is a better way and it is up to the membership of the Foundation and others who promote this practice to ensure that this message continues to ring true.

**ETHICS:  
FOR NEXT TIME**

Assume you are sitting on a DRB on a 10 year Public-Private Partnership (P3) highway project in the United States. Assume also that the prime contractor has had previous financial difficulties and has taken out several loans for equipment and other property being used on the job. Assume that these loans are from the same financial institution and it knows that there is a DRB on the project. What should you as a DRB member do in response to a letter from the president of the institution requesting updates and reports regarding the DRB activity, recommendations about money to be paid to the contractor, the project schedule progress, and the potential for claims at the end of the job?

**What should you do?**

**Ethics Commentary or Question?**

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(continued from page 1)

made (in May 2013) to enforce the DAB’s decision, and confirming that the award may be enforced against PGN in Singapore in the same manner as a court judgement.

However, whilst CRW has finally won that particular legal battle (no further appeal is possible), CRW has not necessarily won the war: PGN appears not to have any assets in Singapore, leaving CRW to seek enforcement of the award in Indonesia or in some other jurisdiction where PGN may have assets. In the meantime, arbitration proceedings are ongoing with respect to the merits of the issues that had been dealt with in the DAB’s third decision, and the arbitral tribunal has already decided (in September 2014) that the DAB had wrongly included certain heads of claim in his decision, on account of which it has revised the interim award down by approximately US\$ 3.6 million.

Before we all leap to the conclusion that PGN’s conduct is morally indefensible, it may be worth reflecting on some of the reservations which came out in PGN’s evidence in the Singapore court proceedings:

- PGN complained that the DAB had expanded CRW’s claim from four items to nine items, thereby increasing the amount claimed by over US\$ 3 million; moreover, some of the additional claims had been previously settled by the parties so, by including them, the DAB had double-counted amounts claimed by CRW.
- The DAB, who decided that a hearing was not necessary to deal with the referral, had made his decision on the basis of several English cases without any reference to Indonesian law (which was the governing law of the contract).
- The DAB himself had actually prepared a witness statement for one of CRW’s witnesses in the referral that led to the DAB’s third decision. This aspect is addressed further in Jim Phillips’ article on page 6.

The remainder of this article examines further the latest SGCA decision. First, it is helpful to summarise the procedural history following the DAB’s third decision:

Feb. 2009	Commencement of First Arbitration to enforce the DAB decision
Nov. 2009	Majority Award in First Arbitration enforcing the DAB decision
Feb. 2010	PGN application to set aside Majority Award in First Arbitration
July 2010	Singapore High Court sets aside Majority Award in First Arbitration
July 2011	SGCA upholds setting aside of Majority Award in First Arbitration
Oct. 2011	Commencement of Second Arbitration to enforce the DAB decision
May 2013	Award in Second Arbitration enforcing the DAB decision
July 2013	PGN application to set aside Award in Second Arbitration
July 2014	Singapore High Court refuses to set aside Award in Second Arbitration
May 2015	SGCA confirms validity of Award in Second Arbitration

The basis for CRW’s claims to have the DAB’s decision enforced was, of course, the well-known provisions in Sub-Clause 20.4 of the FIDIC conditions which stipulate as follows:

*“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 ... either Party may refer the dispute in writing to the DAB for its decision ...*

*“... 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 ...*

*“... neither Party shall be entitled to commence arbitration of a dispute unless notice of dissatisfaction has been given in accordance with this Sub-Clause.”*

Provision for arbitration is then contained in Sub-Clause 20.6 of the FIDIC conditions as follows:

*“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 ...*

CRW’s first attempt to enforce the DAB’s decision by an arbitral award involved commencement of the First Arbitration in the ICC by a Request for Arbitration, which was expressed to be *“limited to giving prompt effect to the DAB decision”*, and which sought the following relief:

*“Declare that the Respondent has an obligation 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 the Claimant.*

*“Penalize the Respondent to promptly make payment of US\$17,298,834.57 (seventeen million two hundred ninety eight thousand eight hundred thirty four United States Dollars and fifty seven cents) to the Claimant.”*

The 2009 arbitral tribunal, by a majority, made a “final” award accordingly, but this was held by the SGCA in 2011 to be invalid on the basis that:

*“... the Majority Members simply did not have the power under sub-clause 20.6 to issue the Final Award in the manner that they did, i.e. without assessing the merits of PGN’s defence and of the Adjudicator’s decision as a whole. ... an arbitration commenced under*

*clause 20.6 constitutes a re-hearing, which in turn allow the parties to have their dispute ‘finally settled’ in that arbitration.”*

The 2011 SGCA also held that there had been a breach of natural justice, in that PGN had not been given a real opportunity to defend itself against the claim for the sum it was ordered to pay to CRW under the DAB’s decision.

Although not supported in the judgement of the 2011 SGCA, the 2010 Singapore High Court also found that the Award in the First Arbitration was invalid because:

*“A particular feature of sub-clause 20.6 is that before a dispute can be subject to arbitration, it must first have been referred to the DAB ... The opening words of the first sentence of sub-clause 20.6 ... makes clear that a ‘dispute’ that may be submitted to arbitration under sub-clause 20.6 is one that has been referred to the DAB.*

*“In the present case, the “dispute” which CRW wanted the Arbitral Tribunal to resolve (ie, the Second Dispute) was whether CRW was entitled to immediate repayment by PGN of the sum set out in the DAB Decision.*

*“The Second Dispute, as characterised by CRW, was not only a different dispute, but was also one that had not been referred to the DAB yet ... Given the opening words of sub-clause 20.6, the Second Dispute was plainly outside the scope of sub-clause 20.6 of the Conditions of Contract.”*

However, both the 2010 High Court and the 2011 SGCA endorsed what was described as “a settled practice, in arbitration proceedings brought under sub-clause 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.” The SGCA put it in this way:

## CHARTER MEMBERS CONTINUED

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- Nadel Associates
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- John W. Nichols, P.E.
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- Traylor Brothers, Inc.
- Underground Technology Research Council
- URS Corporation
- Watt, Tieder & Hoffar, L.L.P.
- James L. Wilton
- Ed Zublin AG

*“... while a party has no express right to refer to arbitration the failure of the other party to comply with a DAB decision where a [notice of dissatisfaction] has been given by either party (ie where the DAB decision in question has not become final and binding), a party may include (in an arbitration commenced under sub-cl 20.6 of the [Red Book]) a claim for an interim award to enforce the DAB decision pending the final resolution of the dispute of the arbitral tribunal.”*

The Singapore courts in 2010/2011 thus appeared to contemplate that, so long as the underlying merits of the dispute are referred to arbitration, then the arbitral tribunal might make an interim provisional award to enforce the DAB decision pending the final resolution of the dispute on the merits.

Undeterred by the setbacks in its first outings in the Singapore courts, CRW then started a fresh ICC arbitration in 2011 to try to enforce the DAB’s third decision. This time, seemingly following the observations that had been made by the Singapore High Court and the SGCA regarding the “settled practice”, CRW sought a final determination that PGN was liable, on the merits, to pay CRW the sum awarded under the DAB’s third decision; and, pending that final determination, a partial or interim award for the same sum.

This resulted in an Interim Award made by the Second Arbitration tribunal (again, by a majority) in May 2013, the substantive part of which read as follows:

*“VIII. AWARD AND ORDER*

*56. Pending the final resolution of the Parties’ dispute raised in these proceedings, including the disputes which are set out in the Notice of Dissatisfaction, the majority of the Tribunal declares that:*

*(i) Upon a true construction of Clause 20 of the [Conditions of] Contract, [DAB No 3] is binding on both Parties who shall promptly give effect to it; and*

*(ii) [PGN] shall promptly pay the sum of US\$17,298,834.57 as set out in [DAB No 3].*

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

The final outing in the SGCA in 2015 was to challenge a decision of the Singapore High Court, made in July 2014, whereby this Award was upheld to be valid.

The main issues in the case before the 2015 SGCA may be summarized as follows:

1. Was the DAB’s decision enforceable directly by arbitration?
2. Was the Interim Award in the Second Arbitration an arbitral award of a permissible kind, given that Singapore Arbitration legislation proscribes provisional awards?
3. Does Sub-Clause 20.4 of the FIDIC Red Book have the effect that a DAB decision ceases to be binding as soon as an arbitral tribunal makes any award on the parties’ dispute over the underlying merits of the DAB decision?

In the following analysis, the relevant paragraphs of the SGCA judgments are identified in [square brackets].

**Direct Enforceability of the DAB’s Decision by Arbitration**

In respect of this issue, the majority of the 2015 SGCA was firmly of the view that Clause 20 of the FIDIC conditions should be “*interpreted in a manner which promotes prompt compliance with a DAB decision, including ... by enabling a failure to comply with a binding but non-final DAB decision to be directly referred to arbitration without the parties having to first go through the steps prescribed by cll 20.4 [referral back to the DAB] and 20.5 [attempt at amicable settlement]*” [75]. This, they considered, was FIDIC’s intention on how Clause 20 was to be interpreted, as evidenced by the 2013



Guidance memorandum [67–69], and drafting history of the FIDIC conditions [79–82].

The key sub-issue in relation to this was whether it was necessary to refer the paying party’s failure (to make payment) back to the DAB as a dispute under FIDIC Sub-Clause 20.4. This bears in mind the wording of the clause which is to the effect that any dispute (including, arguably, the dispute constituted by the paying party’s failure to make payment) must first be referred to the DAB.

On this point, the SGCA majority judgement presents the novel argument that a DAB’s decision which requires payment of a sum of money has also an “inherent premise” embedded within it; namely, that the adjudicated sum is payable forthwith. Hence, dissatisfaction expressed in a Notice of Dissatisfaction already inherently extends to the requirement that payment of the adjudicated sum is to be made forthwith. Accordingly, the issue regarding the immediate payability of the adjudicated sum has already been decided by the DAB, and therefore that issue may be referred on its own direct to arbitration under FIDIC Sub-Clause 20.6 [64 – 66].

It has to be said that this argument is truly ingenious, and it is one which (so far as the writer is aware) had not previously been aired by countless commentators on the previous Persero decisions, nor by countless commentators on the FIDIC conditions more generally. However, does it reflect reality?

In the 2013–2015 Singapore court proceedings, PGN did not dispute that FIDIC Sub-Clause 20.4 gave rise to an immediate obligation to make payment in accordance with the DAB’s third decision [163]. What PGN disputed was whether that obligation was directly enforceable by arbitration commenced under FIDIC Sub-Clause 20.6, and it might fairly be said to be stretching the imagination to consider that this issue had been addressed by the DAB (particularly on the facts of the Persero case itself).

Further, there is a strong argument that, when a party commences arbitration to enforce payment pursuant to a DAB decision, the dispute which it is thereby referring to the arbitral tribunal is the dispute which is constituted by the paying party’s failure to have made the required payment, which is one that necessarily post-dates the DAB’s decision. Hence, it may be said, *that dispute* could not possibly have been already decided by the DAB, and likewise the Notice of Dissatisfaction could not possibly have extended to *that dispute*, whether inherently or otherwise.

Further again, what if the paying party contends that there was a procedural irregularity in the DAB proceedings (eg a breach of natural justice), such that the DAB’s decision is not valid? Could it be said that a decision with respect to such an issue is inherently embedded within the DAB’s decision, so that the dispute on procedural irregularity has already been decided by the DAB?

Nevertheless, it appears that it is now the law – at least for arbitrations seated in Singapore, and as regards enforcement of the arbitral award in Singapore – as follows: if a DAB decision under FIDIC Sub-Clause 20.4 (in respect of which Notice of Dissatisfaction has been given) is not promptly implemented by the paying party, then it may be referred for enforcement direct to arbitration under FIDIC Sub-Clause 20.6, without first referring the paying party’s failure back to the DAB, and without at the same time referring to arbitration the merits of the underlying dispute.

In the writer’s opinion, this is undoubtedly as it should be. However, it remains to be seen whether the reasoning of the SGCA is followed by judges in other jurisdictions, or whether judges in other jurisdictions will continue to struggle with the unfortunate wording in FIDIC Clause 20 which appears to require reference of the paying party’s failure back to the DAB. In the meantime, the SGCA majority decision suggests a tactic for maximising the chances of successfully



relying in other jurisdictions on its ingenious reasoning: specifically, a party who refers a payment issue to a DAB under a FIDIC contract, and who expects to have to seek enforcement of the DAB's decision in due course, would be well-advised also to include *in the DAB referral* requests for decisions by the DAB as follows:

- that the paying party will have a contractual obligation under FIDIC Sub-Clause 20.4 to pay forthwith any sum that the DAB finds is payable pursuant to the referral; and
- that the aforementioned contractual obligation will be directly enforceable by arbitration under FIDIC Sub-Clause 20.6.

The party seeking enforcement will at least then have the benefit of explicit decisions from the DAB on those matters, eliminating controversy over whether they might fairly be said to be inherent within the DAB's decision.

The dissenting member of the 2015 SGCA, who is the former Chief Justice of Singapore, disagreed with the majority on this issue for a number of reasons:

- Like the majority, he disagreed with the view of the 2010 High Court that the dispute which arose from PGN's failure to pay CRW pursuant to the DAB's decision should have been referred to back the DAB under FIDIC Sub-Clause 20.4 for its decision. However, the dissenting judge's view was based on the somewhat odd reasoning that this dispute "*is not a "dispute ... in connection with, or arising out of, the Contract or the execution of the [w]orks [thereunder]" for the purposes of cl 20.4[1] as it arose upon the failure of PGN to comply with [the DAB decision] and has nothing to do with the Contract or the execution of the works thereunder*" [129].

The explanation for the dissenting judge's view appears to be some confusion in characterising the dispute which arose from PGN's failure to pay CRW pursuant to the DAB's decision. The 2010 High Court characterised it as "*whether CRW was entitled to immediate [payment] by PGN of the [Adjudicated Sum] set out in [the DAB's decision]*" [128(a)], while the 2014 High Court characterised it as "*whether, as a matter of law, [the DAB's decision] is enforceable by an interim award pending the resolution of the primary dispute by arbitration*" [114(a)]. The two are clearly different, but the dissenting SGCA judge uses the term "*the enforceability dispute*" to refer interchangeably to them both [128]. Even so, it is difficult to see why he considers that even the 2014 High Court's formulation is not a "*dispute ... in connection with ... the Contract*".

- Agreeing with the 2011 SGCA, he considered that the wording of FIDIC Sub-Clause 20.6, which states "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", only allows the submission to arbitration of the dispute as to whether or not a DAB's decision is a correct adjudication ie the merits of the underlying dispute [159 – 160].

However, here again the dissenting judge's reasoning is rather odd, as it focusses on the words "*Unless settled amicably...*" which, he opines, cannot relate to the dispute which arose from PGN's failure to pay CRW pursuant to the DAB's decision because that dispute is a question of law. On this, he stated: "*a dispute over a question of law cannot be settled amicably in the context of cl 20.6 – ie, PGN and CRW cannot settle among themselves whether, as a matter of law, DAB No 3 is enforceable by an*



*interim award pending the resolution of the primary dispute by arbitration. That dispute (viz, the enforceability dispute) can only be decided by a tribunal or a court” [160].*

Evidently, the dissenting SGCA judge is referring here only to the 2014 High Court characterization of the dispute as “*whether, as a matter of law, [the DAB’s decision] is enforceable by an interim award pending the resolution of the primary dispute by arbitration*”. It surely cannot seriously be contended that PGN and CRW could not settle among themselves the other formulation of the dispute, namely “*whether CRW was entitled to immediate [payment] by PGN of the [Adjudicated Sum] set out in [the DAB’s decision]*”. However, odder still, the dissenting SGCA judge goes on to say that “... *there can be no such dispute for the simple reason that cl 20.4[4] expressly provides that PGN (as well as CRW) ‘shall promptly give effect to [the DAB’s decision] unless and until it shall be revised in an amicable settlement or an arbitral award’*” [163].

- He disagreed with the majority’s views on the drafting history of FIDIC Clause 20, concluding that “*arbitration was deliberately omitted as a means to enforce such a DAB decision as it was not necessary in the legal environment in which the predecessor of cl 20 (viz, cl 67 of the 1987 Red Book) operated*” [164, 166-175].
- He also disagreed with the majority’s view that FIDIC’s 2013 Guidance memorandum evidenced how FIDIC intended Clause 20 to be interpreted, as distinct from what FIDIC intends in relation to the enforcement of DAB decisions [183 – 184].

Lastly, on this topic, it is noted that the 2015 SGCA majority decision means that the 2013-2015 Singapore court proceedings had been wrongly decided. In other words, so far

as the 2015 SGCA majority is concerned, the “final” award that had been made by the 2009 arbitral tribunal was entirely valid, and should not have been set aside by the High Court and SGCA decisions in 2010 and 2011 respectively [83 – 87].

### **The Nature of the Interim Award**

PGN’s case on appeal was that the Interim Award was inconsistent with Singapore arbitration legislation, because it was an award that was intended to be “*subject to future variation*”, and hence was not final (or, at best, had only so-called “interim finality”, which is really not “finality” at all). It was this consideration that had led one of the arbitrators in the Second Arbitration to dissent from the making of the Interim Award.

Given the context in which the Second Arbitration had been commenced (ie following the 2011 SGCA decision, which had endorsed the notion of “*includ[ing] (in an arbitration commenced under sub-cl 20.6 of the [Red Book]) a claim for an interim award to enforce the DAB decision pending the final resolution of the dispute of the arbitral tribunal*”), it might seem difficult to escape the conclusion that this is what CRW and the Second Arbitration tribunal had indeed intended. That conclusion might also seem to be supported by the fact that, before the case reached the 2015 SGCA, the Second Arbitration tribunal had in fact already revised the Interim Award on the grounds that the DAB had wrongly included certain heads of claim (as noted above). These factors feature prominently in the judgment of the dissenting 2015 SGCA judge.

Nevertheless, the majority of the 2015 SGCA came to the view that the majority arbitrators in the Second Arbitration had not intended that their Interim Award should be varied by future awards to be issued in the course of the Second Arbitration [89 – 104]. The SGCA majority held further that, even if that had been the majority arbitrators’ intention, the relevant Singapore legislation did



not make that illegitimate; on the contrary, because it required that every arbitral award shall be final, the legislation operated to render the Interim Award final and binding as regards the particular issue which that award decided (namely, PGN's obligation under FIDIC Sub-Clause 20.4 to make prompt payment to CRW of the sum awarded under the DAB's third decision) irrespective of what the tribunal actually intended [105].

The dissenting member of the 2015 SGCA disagreed. In his opinion, the Interim Award was, and was intended to be, in substance a provisional award that fell outside the ambit of an "award" as defined in the Singapore legislation, and hence was unenforceable [114(c), 192 - 232].

The 2015 SGCA's majority decision on this issue is very much particular to the facts of the case. However, the controversy on this issue highlights the importance of ensuring that arbitration proceedings commenced to enforce a DAB decision are formulated in an appropriate way. Specifically, a party that has the benefit of a DAB decision would be chancing its fortunes if it were to follow what in the 2011 SGCA judgment was described as "the settled practice" (ie including in an arbitration commenced under FIDIC Sub-Clause 20.6 a claim for an interim award to enforce the DAB decision "pending" the final resolution of the dispute of the arbitral tribunal). Such an interim award might well be treated as a provisional award which (depending on the jurisdiction) may not be permissible and/or may not be enforceable under the New York Convention. The so-called "settled practice" might now be said to be comprehensively discredited.

### **Effect of an Arbitral Award on the Parties' Dispute over the Underlying Merits**

In relation to this third main issue in the case before the 2015 SGCA, PGN contended that the effect of FIDIC Sub-Clause 20.4 was that the DAB decision ceased to be binding

when, in September 2014 (as noted above), the tribunal in the Second Arbitration made its partial award on the parties' underlying dispute, deciding that the DAB had wrongly included certain heads of claim and revising down the amount of the interim award.

The precise basis for that contention was not clear to the SGCA. It may have been the wording in FIDIC Sub-Clause 20.4 which states "... *The decision shall be binding on both Parties, who shall promptly give effect to it **unless and until it shall be revised** in ... an arbitral award.*" Alternatively, PGN may simply have been relying on the apparent incongruity of the notion that an interim arbitral award for US \$ X should be enforced, when the same arbitral tribunal had already decided by a binding (final) partial award that the amount properly due was no more than US \$ X-Y. We do not know.

Whatever, the SGCA gave the argument short shrift, finding that it was not a commercially sensible way of reading the contract, and that PGN had simply failed to discharge the burden of demonstrating why FIDIC Sub-Clause 20.4 had the contended effect [108 - 100].

### **Concluding Remarks**

Whilst the latest SGCA decision is a step in the right direction for the enforcement of DAB decisions under the FIDIC conditions, it may not be so robust as one would like, and fundamental issues remain open to debate in other jurisdictions.

The Persero saga has no doubt been an uncomfortable roller-coaster ride for the protagonists, as well as portraying a most unflattering image of what the DAB process might entail – how different things might have been if the experienced DAB had remained in place?

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## 15th Annual International Conference Brings Large, Diverse Audience to Genoa, Italy



The 15th International Conference took place in Genoa, Italy, from the 21st to the 23d of May, the first day being dedicated, as usual, to the workshops. Attendance was very high: 29 to the introductory workshop, 46 to the advanced and a total of 180 to the conference, coming from 35 different countries and from all over the world.

Both workshops received very good comments from the audience. The introductory workshop, conducted by Simon Fegen, Mark Entwistle, Malcolm Kelly and Paul Karekezi, was structured into four sessions, addressing the fundamental aspects of the DB process in a logical sequence, especially appreciated by the newcomers. The advanced workshop, conducted by Dick Appuhn, Romano Allione, Gordon Jaynes and John Papworth with contributions from Nicholas Gould, was also structured into four sessions, addressing practical aspects of performing the DB activity under different rules, and was characterized by a very high interaction between the tutors and the audience, also appreciated by the participants.

The theme of the conference, “Dispute Boards: the Continental Approach,” was developed in eight sessions with many non-DRBF members participating as speakers. This was probably not very traditional but it was the result of the efforts of the Organizing Committee and of the panel coordinators to bring together Dispute Board specialists, arbitration experts, institutional representatives and users to discuss the potential and the evolution lines of the DB practices vis à vis the traditional dispute management approaches, especially when applied in civil law countries.

The conference was opened by a keynote speech of Professor Ugo Draetta, professor of international law at the Catholic University of Milan, who performed a comparison between the international arbitration practices and ADR techniques, mainly Dispute Boards, in resolving disputes arising from

complex contracts and outlining the advantages that Dispute Boards may introduce in dispute management approaches, also considering their dispute avoidance and mitigation capabilities.

The issue of dispute avoidance and dispute mitigation capabilities offered by standing DBs was discussed quite extensively in the different sessions, outlining the efficiency of DB techniques as a dispute management tool, also for application to fields other than construction.

The first two sessions chaired by Marcello Viglino and by Jim Perry, were respectively dedicated to experiences and perspectives in the European and in the Mediterranean countries, and did report on interesting experiences and encountered problems as well as on expectations of European large scale operators performing worldwide. Experiences performed in Turkey and North Africa, although different in terms of approaches and techniques, have suggested the idea of a Mediterranean coordination of dissemination initiatives concerning dispute management and dispute board techniques.

The third session, chaired by Romano Allione, was dedicated to the relationships between contract and governing laws with respect to DAB Adjudication and the speakers, well qualified legal experts, have raised a very interesting technical discussion on the problem, also significantly involving the audience. The fourth session, chaired by Marco Padovan, was dedicated to the involvement of financing institutions. The speakers presented different approaches to the management of disputes as seen from their respective point of view.

On the second conference day, the fifth session, chaired by Dick Appuhn, presented a thorough discussion on the recent developments in Dispute Board rules, comprising FIDIC, CIARB, ICC and the new American rules contained in the ConsensusDocs. The



participation of the audience in the discussion was very animated and several interesting points have been raised up. The sixth session was chaired by Christopher Miers, and discussed the related topic of the evolution of Dispute Board practices; Siobhan Fahey presented the new approaches developed at FIDIC, and interesting applications were also presented by the other two speakers, including the case of the organization set up for the Rio 2016 Olympic and Paralympic Games in Brazil.

Session seven, chaired by Murray Armes, was dedicated to the use of dispute boards or similar practices in industries other than construction and the speakers presented interesting cases from the shipbuilding and aerospace industries and concerning the intellectual property rights sector. The last session, chaired by Marc Frilet, approached the use of

DBs on Public Private Partnership projects. The speakers discussed very extensively the experiences of the European Investment Bank and of large private investors and contractors.

Interested readers may access the presentations at the website:

**[www.drbfconferences.org](http://www.drbfconferences.org)**.

Participants and their accompaniers, some of them for their first time, also had the opportunity of meeting in some of the most attractive historic buildings of the city of Genoa and visiting the city and its surrounding rivieras.

*DRBF Representative for Italy and International Conference Chair Andrea Del Grosso can be reached by email at [delgrosso@dicat.unige.it](mailto:delgrosso@dicat.unige.it).*

## **DRBF Country Representative Update: The Geopolitical Position of Kazakhstan and its Place in International Politics**

Kazakhstan is located in the center of the EurAsian continent. The country takes the 9th place in the world, and is situated at the crossroads of Europe and Asia, interconnecting transport and communication lines connecting the West and East. Kazakhstan's geographical position in the center of the Eurasian continent predetermines its significant transport capacity in the area of transit transport. The length of the terrestrial transport highways of the Republic is 106,000 km. Of them, there are over 14,000 km of trunk Railways, over 87,000 thousand km of motor roads for general use with hard surface, and 4,000 km of river route.

The legendary Great Silk Road passed in

ancient times through the territory of Kazakhstan. Many countries are interested in establishing and developing multifaceted relations with Kazakhstan in this regard. The primary interest is natural resources, as there are vast mineral reserves. Generally Kazakhstan annually extracts over 1.5 billion tons of minerals.

Kazakhstan has the largest economy in Central Asia, the second largest economy in the post-Soviet area. The main source of economic growth is the mining of oil, metals and minerals, although in recent years the country has significantly increased the role of the engineering and manufacturing industry with the production of goods with high added value. The



Republic has been an active member of the EurAsEC Customs Union since 2010. In the structure of Kazakhstan's exports, the largest share falls on fuel and energy products (73,4%), metals (11,9%), and food/agricultural products (3.2 percent). Its main export markets are EU countries (53.5%), China (13.2%), and Commonwealth of Independent States of the former Soviet Union (CIS) (11.1%); of them, the countries in the Customs Union represent 5.9%. Kazakhstan's main imports are from Russia (35.6% of total imports) and China (18.5%). Given the fact that the share of exports in GDP is 54%, while the EU and China account for 68% of exports, demand from these two regions for products of Kazakhstan generates 37% of Kazakhstan's GDP.

Of exceptional importance in the foreign policy of Kazakhstan is being a member of the United Nations (UN). Kazakhstan was unanimously accepted as a member of this authoritative world organization by the decision of the 46th session of the UN on 2 March 1992. Our Republic became the 168th member of the UN. Particular importance for the Republic was also membership in the International Bank for Reconstruction and Development, the European Bank of Reconstruction and Development, the International Monetary Fund, and UNESCO.

A significant step in joining the world community was made in 1992 in the capital of Finland, Helsinki. The final act of the conference on security and cooperation in Europe transferred to the Finnish government, including the heads of newly independent States formed after the dissolution of the

Soviet Union and the Yugoslav Federation, and was signed by the President of Kazakhstan A. Nazarbayev. In the President's message to the nation in December 2012, he presented the strategy for development of Kazakhstan until the year 2050. Its main goal is to create a welfare society based on a strong state, a developed economy and the possibilities of universal labor, the occurrence of the top thirty most developed countries of the world.

In the next decade the priority of the state will be five key areas:

- preparing for post-crisis development;
- ensuring sustainable economic growth by accelerating diversification through industrialization and infrastructure development;
- investing in the future – improving the competitiveness of human capital to achieve sustained economic growth, prosperity and social well-being of Kazakhstan;
- providing the population with qualitative social, housing and utility services;
- strengthening inter-ethnic harmony, security, stability of international relations.

The programme aims to ensure sustainable and balanced economic growth through diversification and increased competitiveness.

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**Erik Imashev**  
DRBF Representative  
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## Arbitration and Dispute Boards Presented at Construction Seminar Held in Chile

The Santiago Arbitration and Mediation Center (CAM), International Chamber of Commerce – Chile (ICC Chile) and the DRBF co-presented a seminar “Arbitration and Dispute Boards in Construction”



on July 2, 2015. The DRBF was represented by Region 2 Past President Christopher Miers and DRBF Representative for Chile Eduardo Sanhueza, as well as several local DRBF members. There were 170 people present, representing owners from the Mining, Property, and Public Works sectors, contractors, law firms, and engineers.

The DRBF and ICC presented an overview of the use of Dispute Boards worldwide, and CAM presented their new DB rules, which were implemented in January 2015. The presenters discussed the advantages and disadvantages of DBs in construction contracts, and opportunities for their use, with emphasis on the prevention of disputes.

Challenges were also discussed, and how to incorporate DBs on current contracts which currently use arbitration as the method of dispute resolution. All these issues were raised from a legal (lawyer’s) and technical (engineer’s) perspective, and from the perspective of owners (both public and private) and contractors.

Furthermore, the seminar showed that there is an opportunity to incorporate Dispute Boards in public works contracts in Chile, which would be addressed through a major change in the local law to allow the use of DBs.

In conclusion, the new CAM DB Rules were launched, and showed the context in which they are to be incorporated in construction contracts, from the perspective of the owners, contractors, lawyers and engineers.

Before the seminar, there was a 16 hour training course about the new CAM DB Rules for 30 students.

In this way, the DRBF is supporting the implementation of Dispute Boards in Chile, promoting the process and coordinating with CAM, carrying out the cooperation agreement that was put in place with CAM last year.

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**Left to right:** José Silva, Arbitrator, CAM Santiago, Johanna Klein, Lawyer, and Eduardo Sanhueza, DRBF Representative for Chile



**Left to right:** Carlos Jorquiera, President of CAM Santiago, Christopher Miers, Past President DRBF Region 2, Macarena Letelier, Director of CAM Santiago, and Oscar Aitken, President of the Society of Construction Law Chile

## Welcome to New DRBF Members Member Additions March - May 2015

**Do you know  
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Help us expand by sharing information with your colleagues. Complete membership information can be found on the DRBF web site ([www.drbf.org](http://www.drbf.org)) or contact the main office for details.

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### Forum Newsletter Editorial Deadline

Our readers love to hear Dispute Board success stories, challenges facing the process, and the latest industry news and events.

If you have new information about Dispute Boards, DRBF members, or an article to share, please let us know!

Contact  
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## DRBF 19th Annual Meeting & Conference

October 1-3, 2015

Marriott Union Square San Francisco, California

The DRBF 19th Annual Meeting and Conference delivers an overview of the process shared by DB users with in-depth analysis from experienced practitioners. With an emphasis on the DRB's unique role in dispute avoidance as well as resolution, conference delegates will explore ethical and legal issues, lessons learned, and future expansion of the process.

- October 1 **Dispute Board Workshops** - A half-day Administration & Practice introductory workshop in the morning followed by a half-day Advanced/Chairing workshop in the afternoon. Register for both and save!
- October 2 & 3 **Annual Meeting & Conference** - Presentations and panel discussions on the latest developments in Dispute Board application.
- October 2 **AI Mathews Awards Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular AI Mathews Awards Dinner. Enjoy breathtaking views from the decks of the Hornblower Yacht, followed by a 3-course dinner. Not to be missed!



**Keynote Speaker**

**KARLA SUTLIFF**

Chief Engineer and Deputy Director - Project Delivery  
California Department of Transportation



## **DRBF Forum**

Dispute Resolution Board Foundation  
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# **DRBF Annual Meeting & Conference: AI Mathews Award Dinner**

Each year, the AI Mathews Award is given to a special recipient recognized for his/her unique contribution to the development of the Dispute Board process. In celebration of the 40th Anniversary of the first Dispute Review Board, special guest Michael Gay, Sr., P.E. who worked for Kiewit on the Eisenhower Tunnel project, will give a remembrance of the project and the people that brought DRBs to life for the first time.

The AI Mathews Award dinner will be held aboard the Hornblower Dinner Cruise. Enjoy the legendary landmarks of one of the most beautiful cities in the world from the comfort of a luxury yacht. As the sun sets and the city lights come up, you'll get a breathtaking view of the Golden Gate Bridge, Coit Tower, and the TransAmerica pyramid, among many other sights.

Boarding begins at 7:15 at Pier 3 on the Embarcadero at Washington Street, a short five minute drive from the Marriott Union Square. The cruise departs at 7:30 and returns at 10:30.

**Space is limited; register today!**

