National Irrigation Authority formerly the National Irrigation Board v Satom SA (Civil Appeal E933 of 2023) [2025] KECA 1472 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KECA 1472 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E933 OF 2023

SG KAIRU, F TUIYOTT & P NYAMWEYA, JJA

SEPTEMBER 12, 2025

BETWEEN

NATIONAL IRRIGATION AUTHORITY FORMERLY THE NATIONAL IRRIGATION BOARD .... APPELLANT

AND

SOGEA SATOM SA .... RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 26th September 2023inComm. Cause No. E320 of 2022)

JUDGMENT

1. Arising in this appeal is the extent of judicial intervention in contracts entered under the FIDIC Conditions of Contract for Construction, MDB Harmonized Edition, FIDIC 2010 (the FIDIC Pink Book).

2. Desirous of construction of Link Canal III and related structures, irrigation and drainage facilities, farm roads and ancillary works, improvement of existing Link Canals I and II, and building works including the construction of a permanent engineer's site office and permanent house at Mwea Irrigation Development Project, The National Irrigation Board, the predecessor in title of The National Irrigation Authority (NIA or the appellant), entered into a contract based upon the General Conditions of Contract (the General Conditions) under the FIDIC Pink Book as amended by the Particular Conditions with SOGEA-SATOM SAS (Sogea or the respondent). The contract, number NIB/T/096/2011-2012, was entered on 26th August, 2016 at an agreed contract price of the equivalent of Kshs.3,534,724,981.00.

3. As sometimes happens, disputes do arise, and some arose between NIA and Sogea in respect to the contract. Sub-clause 20.4 of the FIDIC Pink Book provides that any dispute arising out of the contract is to be referred to a Dispute Board (DB) to be appointed according to sub-clause 20.2 of the General

Conditions. Sub-clause 20.2, as amended by the Particular Conditions, provides for a sole member Dispute Board. On 28th January 2019, Ms. Aisha Nadar was appointed the sole member Dispute Board (the Dispute Board) by the FIDIC President and with the agreement of the parties in respect to the dispute.

4. More on the provisions of sub-clause 20.4:

    a. Where any party refers a dispute to the DB, the DB must give its decision within 84 days of referral of the dispute, or within such other period as may be proposed by the DB, and/or as agreed by the parties.

    b. A decision of the DB 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 arbitral award.

    c. If either party is dissatisfied with a decision of the DB, either party may, within 28 days after receiving the decision, issue a notice of dissatisfaction indicating its dissatisfaction and intention to commence arbitration. No party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction is issued in accordance with sub-clause 20.4 of the General Conditions.

    d. Where no notice of dissatisfaction is given in compliance with sub-clause 20.4 of the General Conditions, the DB's decision shall be Final and Binding on the parties.

5. At the High Court, Sogea claimed payment with respect to four (4) decisions of the DB, two (2) were Binding and two (2) were Final and Binding. The Binding decisions were decision No. 5 for Kshs.191,005,283.00 and decision No. 6 for Kshs.383,750,624.25 (including an outstanding sum of Kshs.150,452,027.41 from Decision No. 5). The Final and Binding decisions were decision No.7 of Kshs.150,814,745.30 and decision No. 8 of Kshs.16,721,426.16.

6. To be noted is that Sogea terminated the contract effective 6th February 2020 due to NIA's failure to pay it for works done and certified by the Engineer.

7. Other than the amounts set out above, Sogea sought costs of the suit and interest on the claimed sums at commercial rates from the date of filing of the suit until payment in full.

8. NIA entered appearance to the High Court proceedings on 9th October, 2022 and through a chamber summons dated 13th October, 2022 filed much later on 20th November, 2022 sought stay of the proceedings and referral of the matter to arbitration.

9. NIA asserted that Sogea filed the plaint dated 23rd August, 2022 without exhausting the mandatory dispute resolution mechanisms preceding litigation in that: with respect to referral number 5, the dispute remains live and subject to amicable resolution and subsequently arbitration for final settlement; with regard to referral number 6, NIA's notice of dissatisfaction dated 9th September 2020 automatically provided other avenues for settlement of the dispute; in regard to referral number 7, the contract agreement required Sogea to refer the matter to arbitration; and with regard to referral number 8, sub-clause 20.7 of the contract agreement required the respondent to refer the matter to arbitration where there is an alleged failure to comply.

10. Responding to the chamber summons by NIA, Sogea contended that the application was bad in law as it was filed 42 days after NIA had filed its memorandum of appearance on 9th October, 2022 and therefore in violation of the provisions of section 6 (1) of the *Arbitration Act* (the Act). Further, that there was no dispute between the parties with regard to the matters agreed to be referred to arbitration.

11. On its part, Sogea through a notice of motion also dated 13th October, 2022 sought summary judgment against NIA on the ground that NIA did not have a reasonable defence for non- payment of the sums awarded by virtue of the decisions of the DB.

12. In resisting the motion for summary judgment, NIA contended that: enforcing the decisions of the DB directly without exhausting the mechanisms set out in the contract would lead to a perverse outcome being that: (a) either employees will avoid nominating DBs in the contract or (b) ensure that DBs so appointed lean towards the employer with the consequence that the intended objective of having DBs will have been lost; where a party alleges non-compliance with a DBs decision, such a party must refer such a failure to arbitration; the decisions of the DB were non- contractual, unlawful and illegal; all claims were settled following termination of the contract; there was irregular and non- contractual termination of the contract; and the DB made decisions which were non-contractual, one of which purported to oust the application of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA).

13. The trial court (Majanja, J.) delivered a composite ruling in respect to the two applications. The learned Judge held that the interpretation to be given to clause 20 was not novel and had been the subject of consideration in our courts and in other jurisdictions. Citing some of those decisions the learned Judge held that:

> " 27. In SBI International Holdings (Kenya) v Kenya National Highways Authority ML HCCC No. E375 of 2020 [2020] eKLR, Mativo J., (as he then was), agreed with the above position by stating that:
>
> Sub-Clause 20.4 creates contractual obligations which are immediate and which must be performed promptly. By dint of the said clause, the fact that a party had engaged the other to attempt amicable settlement or the fact that a party had reserved the right to appeal the decision of the DB to arbitration by giving notice to the other party of its dissatisfaction and intention to commence arbitration does not suspend the duty to perform the obligations determined by the DB, and conversely does not bar a successful party before the DB from enforcing the decision of the DB.
>
> Determinations of the DB being an assessment of rights and obligations of parties under the contract is enforceable, binding and continue to be binding unless upset by amicable settlement of the parties or by an arbitral award.
>
> 28. The same issue was dealt with in SBI International Holdings AG v Kenya National Highways Authority, ML HCCC No. E968 of 2022 (UR) where Mwita J., agreed with the aforementioned conclusions on the interpretation of Clause 20.4. I do not see any legal or factual basis to depart from what I consider settled principle that the Plaintiff is entitled to enforce the decisions of the Dispute Board as the same have not been upset by either an amicable settlement or arbitration. The enforcement of these decisions precedes any determination by way of an amicable settlement or arbitral tribunal in line with the parties' commitment to give prompt effect to such decisions. I therefore reject the Defendant argument that these proceedings are premature. The inescapable result is that I must conclude that there is in fact no dispute for resolution hence there is no reason to stay the proceedings as the Plaintiff is entitled to the enforce the Dispute Board's decisions regardless of whether the Defendant seeks to challenge them in arbitration."

14. The learned judge reached a decision that there was no dispute for resolution and no reason to stay the proceedings before him. Further, that no issue for trial or determination had been disclosed by way of affidavit evidence or otherwise. In consequence, the trial court entered summary judgment against NIA for Kshs.150,452,027.41, Kshs.231,931,127.64,Kshs.150,814,745.30 and Kshs.16,721,426.16 together with costs of the suit. On interest, ordered for its payment at court rates from the date of filing of suit until payment in full.

15. NIA is aggrieved by that decision and is before us on the following grounds of appeal:

    i. The trial court erred in law and in fact by directing the defendant to file a response to the plaintiff's application dated 13th October 2023 seeking a summary judgment whilst the defendant had filed an application under section 6 of the *Arbitration Act* No. 4 of 1995 seeking to stay the proceedings and to refer the matter to arbitration. The trial court's directions amounted to an amendment to section 6 of the *Arbitration Act*.

    ii. The trial court erred in arriving at the conclusion that there is no issue for trial or determination by the trial court despite the fact that:

        a. The appellant adduced evidence to the fact that all claims by the respondent had been settled following the termination of the contract dated 26th August 2016 (hereinafter "the contract") between the appellant and the respondent;

        b. The decisions of the Dispute Board which the trial court relied on were non-contractual, unlawful and illegal as they were made after the mandate of Dispute Adjudication Board had lapsed following the termination of the contract by the respondent;

        c. The decisions by the Dispute Board were incurably defective as the Board misapprehended the statutory provisions regulating procurement for public institutions and government agencies.

    iii. The trial court erred in law and in fact in holding that there was no distinction between a provisional decision and a binding decision of the Dispute Adjudication Board as per contract between the appellant and the respondent whilst clause 20.1 and 20. 8 of the Contract provided a step-by-step dispute resolution mechanism, and from where the distinction is clear.

    iv. The trial Court erred in law and in fact in finding that there was no dispute for resolution between the appellant and the respondent, and consequently declined to refer the matter to arbitration, while it is evident that the parties had not exhausted the available dispute resolution mechanisms as provided under the Contract which included arbitration as part of the process.

    v. The trial court erred in law and in fact in allowing the application for summary judgment dated 13th October 2022, whilst the contract between the plaintiff and the defendant does not foresee a situation where parties would approach the court for substantive reliefs without exhausting the dispute resolution mechanisms provided under the Contract.

    vi. The learned Judge erred in law and in fact in finding that the court had the requisite jurisdiction to entertain the dispute despite the fact that there is a valid arbitration clause in the Contract between the parties. By dint of section 17 of the *Arbitration Act*, the appointed arbitrator would have the jurisdiction to determine its own powers under the doctrine of Kompetenz – Kompetenz.

vii. The trial court erred in law and in fact by relying on authorities that relied on in decisions rendered in South African Courts i.e. Tubular Holdings (Pty) Ltd v DTB Technologies (Pty) Ltd 06757/2013 which was made in 2013 prior to South Africa adopting the (UNICITRAL) Model Law on International Commercial Arbitration whilst the Kenyan jurisdiction has already modelled its Arbitration Law on the (UNICITRAL) Model Law on International Commercial Arbitration."

16. This appeal raises matters of law only which we shall, as a first appeal court, consider and determine on the basis of the relevant law and on our on evaluation of the material placed before the trial court. The issues we are called upon to resolve are;

   a. Was the application for stay and referral of the matters raised in the civil suit for arbitration time-barred in terms of section 6(1) of the *Arbitration Act*?

   b. Is the failure to comply with a Binding and or a Binding and Final decision of the DB a dispute referable to arbitration?

   c. Depending on the answers to (a) and (b) above was the trial court justified in holding that NIA did not raise any reasonable defence to the claim by Sogea?

17. During plenary hearing of the appeal, learned counsels Mr Moses Kipkogei, Mr Delbert Ochola and Mr Crispus Kitala appeared together for NIA while learned Senior Counsel Dr Fred Ojiambo appeared together with learned counsel Ms Elizabeth Onyango for Sogea.

18. At the trial, Sogea had attempted to thwart the plea by NIA to stay the proceedings and to refer the matter to arbitration on a preliminary matter that NIA had waived such right by failing to file the summons for stay and referral at the time of entering appearance. Sogea is right that the learned trial Judge did not render himself on this objection and we are now invited by the notice to affirm the decision to determine this demurrer.

19. Sogea contends that the impugned application was filed 42 days after the NIA had entered appearance, exceeding the prescribed period for such applications under section 6(1) of the *Arbitration Act*. Sogea cites the decision in Charles Njogu Lofty v Bedouin Enterprises Ltd (Civil Appeal 253 of 2003) [2005] KECA 336 (KLR) to support the argument that such applications should be made at the time of entering appearance or filing the first pleading or taking any step in the proceedings. Also relied on is the decision in Mt. Kenya University v Step Up Holding (K) Ltd [2018] KECA 125 (KLR). Sogea submits that stay of proceedings, as provided in subsection 6(2) of the

    Arbitration Act, is only operational if a party applies not later than the time when the party enters an appearance, as mandated by section 6(1). Further, even where there was a dispute to refer to arbitration, the superior court's jurisdiction to stay the proceedings and refer the alleged dispute to arbitration was ousted on account of the late filing by NIA.

20. Responding, counsel Kitala argued that the effect of the said provision is that a party who wishes to stay the proceedings should apply not later than the time when the party enters appearance or otherwise acknowledges the claim against which the proceeding is sought. It was submitted by counsel that in as much as the application was not filed at the time of filing the memorandum of appearance, it cannot be said that his client acknowledged Sogea's claim as it did not file a statement of defence. In addition, NIA did not take any further steps to acknowledge the claim. Cited is the decision in Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] KECA 736 (KLR), for the proposition that where a defendant has not taken any further steps in the proceedings beyond entering appearance by filing a suitable defence, does not constitute acknowledgment of the claim. As well referred to is the decision of this

Court in Adrec Limited v Nation Media Group Limited [2017] KECA 106 (KLR). Counsel argues that notwithstanding that the chamber summons was filed after NIA had entered appearance on 9th October, 2022, it did not take any further steps to acknowledge the claim and the chamber summons was properly before the trial court.

21. It is common ground that NIA entered appearance on 9th October, 2022 and filed the chamber summons sought to be impeached on 20th November, 2022. This would be about 42 days after the appearance.

22. The provision that requires the prompt filing of a stay and referral application is section 6(1) of the *Arbitration Act* which provides:

> " Stay of legal proceedings
>
> 1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
>
>   a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
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>   b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

23. Arbitration is touted as an expeditious mechanism for dispute resolution. In line with this objective, section 6 (1) requires a party to an arbitration agreement to signal, at the earliest opportunity, its insistence to have a dispute resolved in accordance with the arbitration agreement. So how early is early enough in the contemplation of this provision?

24. A controversy that is resolved by construing the meaning to be given to the words "applies no later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought." Does it mean that, so as to benefit from the provisions of section 6(1), the party must apply before or at the time of entering appearance, or where the party does not enter appearance, before or at that time it otherwise acknowledges the claim or does it mean, as proposed by NIA, that even where the party enters appearance, it can file the summons at any time after but before taking any further steps?

25. In Adrec Limited (supra), this Court held:

> " Consequently, in pursuance with Section 6(1) of the *Arbitration Act*, it was open to the respondent to apply "not later than the time when the respondent entered appearance or otherwise acknowledged the claim against which the stay of the suit was sought. The record shows clearly that the respondent merely filed a notice of appointment of advocates and proceeded to apply for stay of the suit. Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the *Arbitration Act*. It should be emphasized

that the right to seek and obtain stay of proceedings under section 6(1) of the *Arbitration Act* is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position."

26. Ironically this holding does not support the position of NIA who cited the decision.

27. In Eunice Soko Mlagui (supra), this court sets out the position of section 6(1) now as against how it read before it was amended in 2009. Prior to the amendment it read;

> " 6.
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—
>
> a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

28. The Court then observed:

> " The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision."

29. Importantly the Court concluded:

> " Be that as it may, to the extent that after amendment section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of section 6(1) are still good law to that extent."

30. NIA invites us to read this decision as authority for a proposition that it is permissible, where a party has entered appearance, to still bring a section 6 application after entering appearance as long as it has not filed a defence or in any other manner acknowledge the claim. We decline the invitation as the decision does not say so.

31. Sogea, on the other hand, relied on decisions in Mt. Kenya University (supra) and in Charles Njogu Lofty (supra). In Mt. Kenya University, this Court was unequivocal:

> " We have construed section 6 of the *Arbitration Act* on our own and..... We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference

to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter."

32. A clear understanding of the import of section 6 (1) as it currently reads starts with survey of how that provision has evolved over time.

33. The *Arbitration Act*, 1968 (No. 53 of 1968) that commenced on 22nd November, 1968 and The Arbitration (Foreign Awards No. 34 of 1930) Ordinance were repealed by The *Arbitration Act*, 1995 (Act No. 4 of 1995). Section 6(1) of the 1968 statute read:

> " 6. (1) If a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a person claiming through or under him, in respect of a matter agreed to be referred—
>
> a. any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings; and
>
> b. that court, if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

34. Without equivocation, the then section 6(1) permitted applications for stay of proceedings to be made at any time after the applicant entered appearance as long as it was before delivery of pleadings or taking any other steps in the proceedings. See for instance Kisumuwalla Oil Industries Limited v Pan Asiatic Commodities PTE Limited & another [1997] KECA 107(KLR).

35. The 1968 statute was repealed by the *Arbitration Act*, 1995. The new law was based on the Model *Arbitration Act* of United Nations Commission on International Trade Law. Section 6(1) was changed to read as follows:

> " 6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—
>
> a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

36. We agree with the interpretation of this provision made by this Court in Charles Njogu Lofty that the change made was that the application for stay had to be made at the time of entering appearance or

if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. The Court endorsed the following holding by Githinji J (as he then was);

> "In my view, section 6(1) of the *Arbitration Act*, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6(1) of the *Arbitration Act*, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.
>
> Section 6(1) of the *Arbitration Act*, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the *Arbitration Act*, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed."

37. Section 6(1) was to be further amended through the Arbitration (Amendment) Act 2009 (Act No. 11 of 2009) to its current form, which reads, it bears repeating:

> "Stay of legal proceedings
>
> 1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
>
>   a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
>   b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

38. This provision must be construed in tandem with the interpretation made in Charles Njogu Lofty as tightening the time when a stay application must be made. This is also in line with the aspiration that a party insisting on the implementation of an arbitration agreement must do so at the earliest opportunity so that arbitration can be commenced without delay. It yields one answer: a party seeking to stay court proceedings which is subject of an arbitration agreement shall, in addition to satisfying matters set out in 6(1)(a) and (b), file the stay application not later than when the party enters appearance, and where no appearance is entered, not later than when the party otherwise acknowledges a claim against which the stay of proceedings is sought. We do not agree with the position posited by NIA that, having filed an appearance, it could still properly mount the stay application simply because it had not filed a defence or taken any other step in the proceedings. Perhaps, for good measure, we need to add this. The phrase "otherwise acknowledges a claim against which the stay of proceedings is sought" in the provision does not mean when the party concedes or admits the claim.It simply means when the party first formally signals to court, by other means than entering appearance, that it is aware that the claim has been filed before the court. Say by the party's advocate filing a notice of appointment or the party or its advocate filing a notice protesting jurisdiction. In which event the stay application should be filed simultaneously with the notice of appointment or the protest notice, whichever the case.

39. Indeed this very matter aptly demonstrates the danger in acceding to the proposition by NIA. Here, because the summons for stay was filed 42 days after appearance was entered, this would have been the period in which commencement of arbitration would have suffered delay.

40. In closing on this aspect, we fully identify with the position taken consistently by this Court that Article 159 (2) of *the Constitution* is not a panacea for the non-observance of the requirement of section 6(1). The provision is well thought out to support the objective that arbitration ought to be a speedy and efficient dispute resolution mechanism. We echo the words of this Court in Eunice Soko Mlagui when it held that:

> "With respect, the conditions set out in section 6(1) are anything but mere procedural technicalities that may be waived courtesy of the overriding objective."

41. The lateness in NIA filing the stay application was enough reason for the trial court to decline it. By not filing an application for stay of legal proceedings within the prescribed time, NIA disentitled itself of recourse to arbitration. However, it would be remiss for us to fail to address the submission by NIA that the learned judge erred in his finding that there was no dispute to be resolved

through arbitration if only because it raises issues that may not have previously arisen for consideration by this Court.

42. NIA's primary contention is that the High Court erred by assuming jurisdiction and adjudicating the matter when the FIDIC Pink Book explicitly stipulated a multi-tiered dispute resolution mechanism that mandates arbitration as a crucial step. This contractual provision means that parties cannot bypass arbitration and refer matters directly to the High Court thus an arbitral award is the only means of judicial intervention permissible under the *Arbitration Act* for interim remedies or enforcement. NIA posits that the emerging questions are twofold; whether the dispute resolution clause ought to be exhausted before invoking the court's jurisdiction; and whether the court can entertain a dispute when there is an extant dispute resolution clause. NIA answers the two questions in the negative.

43. NIA acknowledges that sub-clause 20.4 indeed creates a contractual obligation for parties to promptly give effect to a DB decision, regardless of whether it is Binding or Final and Binding. However, it strongly disputes Sogea's contention that this obligation is underpinned by a "pay now, argue later" principle, arguing this principle is inapplicable in this context as DB decisions are intended to be interim until final adjudication through arbitration. NIA maintains that while the "pay now, argue later" principle has been established in law in certain jurisdictions, the FIDIC Pink Book itself does not explicitly incorporate it. NIA further contends that Sogea misinterprets the relationship between the obligation to comply with DB decisions and their enforceability, asserting that the obligation to give effect to a DB decision does not override sub-clauses 20.6 and 20.7, which explicitly mandates arbitration if a party expresses dissatisfaction with a DB decision or if the DB fails to issue one. NIA firmly asserts that the FIDIC Pink Book, particularly sub- clause 20.4, lacks provisions for the enforcement of non-final DB decisions without proceeding to arbitration. Referencing the decision of the Court of Appeal of Singapore in CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33, which confirmed the High Court of Singapore's decision in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202, NIA maintains that a DB decision, even if Binding but non-final, is not intended for automatic non- arbitral enforcement through local courts. Instead, the arbitral tribunal retains jurisdiction to rule on the merits of such decisions, and any enforcement of the obligation to comply should be through interim or partial arbitral awards. NIA further highlights that the parties' intention, as supported by cases like PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30, is for disputes to

be settled within the same arbitration, and that compliance with DB decisions is a distinct contractual obligation enforceable through arbitration, not by bypassing the agreed multi-tiered process.

44. NIA, further, emphasizes that the DB represents only the initial step of a three-step dispute resolution process as outlined in sub- clause 20.4, which progresses to amicable settlement (sub-clause 20.5) and then to arbitration (sub-clauses 20.6 and 20.7), with each step being distinct and having its own implementation. It argues that even foreign courts and arbitral tribunals have indicated that Binding and non-final DB decisions are enforceable through interim or partial arbitral awards, highlighting that arbitration remains the appropriate avenue for enforcement. NIA asserts that pursuing arbitration to enforce compliance with a DB decision does not undermine immediate compliance but rather establishes a balance between enforcing DB decisions and guaranteeing parties' right to arbitration as envisioned by the FIDIC Pink Book.

45. NIA addresses Sogea's contention that the DB agreement is severable from the main Contract and akin to an arbitration agreement, meaning contract termination would not impact the DB's jurisdiction. NIA argues that this reasoning is erroneous and clarifies that the DB is merely the first step in a multi-tiered dispute resolution process under the FIDIC Pink Book, with subsequent steps including Amicable Settlement and Arbitration. While citing the Superior Court of Québec in Capital JPEG Inc. v Corporation Zone B4 ltée, 2019 QCCS 2986, NIA posits that dispute resolution models within a multi-tiered system are distinct and subject to their own implementation and that these modes are separable as supported by the doctrine of separability in arbitration. In distinguishing the DB agreement from an arbitration agreement, NIA highlights that sub-clause 20.6 of the FIDIC Pink Book which provides that any dispute not amicably settled or whose DB decision has not become Final and Binding shall be finally settled by arbitration, underscoring arbitration as the final dispute resolution method that survives contract termination. Consequently, NIA concludes that in a multi-tiered dispute resolution clause, the modes are distinct and separate, and therefore, the DB agreement is not similar to the arbitration agreement in the FIDIC Pink Book.

46. Further, NIA seeks to rely on the Kompetenz-Kompetenz principle arguing that under section 17 of the *Arbitration Act*, the arbitral tribunal is competent to rule on its own jurisdiction. NIA cites the decision in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR, which emphasizes that an arbitral tribunal has the power to rule on its own jurisdiction and any objections concerning the validity of the arbitration agreement. NIA asserts that the High Court had no jurisdiction to determine whether or not there was an arbitrable dispute between the parties.

47. Turning to the summary judgment entered in favour of Sogea, NIA cites Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Company Limited v Lenny M. Kivuti [1997] KECA 70 (KLR), arguing that such judgment can only be entered in the clearest cases and even one triable issue entitles leave to defend. NIA sees at least three triable issues here: the invalidity of the DB decision; contravention of public procurement Law; and that the doctrine of “pay now, argue later” is inapplicable. NIA’s position on the latter issue has already been highlighted.

48. On the first, an argument is made that the DB decisions were irregularly obtained or entirely without basis because the contract had been terminated on 6th February 2020 and since the DB is a creature of contract, its jurisdiction is pegged on the continued existence of the contract. Thus, the DB clause does not survive the termination of the contract. NIA contends that from sub- clause 20.4, it is evident that the DB’s powers are drawn from the contract and do not have powers of an arbitral tribunal, therefore to the extent that referrals were made after termination of the contract, the DB did not have jurisdiction to hear and determine the referrals. It is asserted that unlike the DB clause, an arbitration clause is considered independent and severable from the main contract so that parties can enforce the arbitration agreement while contemporaneously dispute the validity of the agreement including

compliance. Thus, NIA contends that where a dispute resolution clause contains a multi-tiered dispute resolution process, it is only the clause that relates to arbitration which survives termination or annulment of the contract (cited is the case of Kenya Airports Parking Services Ltd & Another v Municipal Council of Mombasa [2010] eKLR).

49. Finally, given the involvement of public funds, NIA contends that as it is a public entity within the meaning of Article 227 of *the Constitution* and the *Public Finance Management Act* (PFMA) and the *Public Procurement and Asset Disposal Act* (PPADA), the determinations made by the DB contravened the PPADA and other national laws relating to public finance. An example is given from an excerpt of the DB decision in Contract Referral No. 7 that purported to oust the application of the PPADA to the contract. In addition, NIA submits that the DB unlawfully varied the contract sum upwards and beyond the 25% of the contract price allowable in law and, subsequently, it breached provisions of section 47 of the PPADA and regulation 31 of the Public Procurement Regulations. NIA contends that all the DB decisions were littered with illegal and irregular determinations including allowing costs which were not founded on the contract some of which were claims for legal fees owed to its lawyers, costs for their headquarters expenses and irregular extension of time and the associated prolongation costs for events which were wholly attributable to the contractor amongst other untenable claims. Therefore, all these awards apart from being illegal were non-contractual.

50. In response, Sogea reiterates that it obtained four DB decisions: Two decisions (14th March 2022 and 25th May 2022) for Kshs.150,814,745.30 and Kshs.16,721,426.16 respectively, became Final and Binding because NIA failed to file notices of dissatisfaction and two decisions (17th November 2020 and 12th August 2021) for Kshs.191,005,283.00 and Kshs.383,750,624.25 respectively, were Binding. While NIA filed notices of dissatisfaction for these, Sogea argues that under sub-clause 20.4, NIA had a contractual obligation to promptly comply with these decisions. Sogea strongly asserts that the obligation to promptly give effect to a DB decision, whether Binding or Final and Binding, is underpinned by the "pay now, argue later" principle. It is contended that this principle is not only applicable to the circumstances here but has also been consistently applied by the High Court in similar disputes. Cited are SBI International Holdings (Kenya) v Kenya National Highway Authority [2020] eKLR and SBI International Holdings (Kenya) v Kenya National Highway Authority [2021] KEHC 31 (KLR), both which affirm that sub-clause 20.4 creates immediate contractual obligations that must be performed promptly, and the filing of a notice of dissatisfaction does not suspend the duty to perform. Referred to as well is Strabag International GMBH v National Irrigation Authority (Formerly the National Irrigation Board) (Commercial Case E219 of 2023) [2024] KEHC 3744 (KLR) where it was held that DB decisions were binding and payment was obligatory despite notices of dissatisfaction. At par is the Singaporean decision in CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33. Sogea argues that there was no dispute to refer to arbitration concerning the payment of these amounts, as NIA was contractually obligated to pay them.

51. Responding to other arguments raised by NIA, Sogea submits, regarding the termination of the contract, that it was itself the subject of a DB decision (Contractor Referral No. 2), the DB holding that Sogea had valid grounds to terminate the contract and it, the DB, had jurisdiction to deal with matters even after termination. Furthermore, no party filed a notice of dissatisfaction regarding the DB's decision on termination, making it Final and Binding, and obligations like payment survive termination. Sogea argues that the DB agreement is severable from the main contract, allowing the DB's jurisdiction to continue post-termination.

52. Further, Sogea rejects NIA's argument that the DB decisions contravene public procurement law, stating that NIA's allegations of irregular procurement or lack of approvals are without merit. It is pointed out that the DB's reasoned decision in Contractor Referral Number 7, which NIA claims

was irregularly obtained, became Final and Binding when NIA failed to file a notice of dissatisfaction against it. This decision could only be challenged through arbitration, which NIA failed to pursue.

53. Sogea argues that the summary judgment was correctly granted because there were no triable issues that would entitle NIA leave to defend. Sogea contends that NIA's arguments relating to jurisdiction, the binding nature of the decisions, and the need for arbitration were adequately addressed by the High Court and are without merit. Further, that NIA is barred by res judicata from disputing the DB decisions that became Final and Binding due to its failure to file notices of dissatisfaction or to pursue arbitration.

54. In summary, it is Sogea's position that the High Court correctly interpreted the FIDIC contract's dispute resolution clauses, applied the "pay now, argue later" principle to enforce the immediate payment obligation of DB decisions (whether Binding or Final and Binding), and rightly dismissed NIA's time-barred and unmeritorious application to refer the matter to arbitration. It is contended that NIA's claims regarding contract termination, public procurement law, and the existence of triable issues are unfounded.

55. The all-important provision to the contract around which this matter revolves is clause 20 of the Pink Book on Claims, Disputes and Arbitration. More specifically are sub-clauses 20.3, 20.4, 20.5, 20.6, and 20.7.

56. In part, sub-clause 20.2 reads:

> " Disputes shall be referred to a DB for decision in accordance with sub-clause 20.4 (obtaining Dispute Board's Decision). The parties shall appoint a DB by the date stated in the Contract Data."

57. While sub-clause 20.4 reads:

> " If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under the Sub-Clause.
>
> For a DB of three persons, the DB shall be deemed to have received such reference on the date when it is received by the chairman of the DB.
>
> Both parties shall promptly make available to the DB all such additional information, further access to the Site, and appropriate facilities, as the DB may require for the purposes of making a decision on such dispute. The DB shall be deemed to be not acting as arbitrators(s).
>
> Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contact.
>
> If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give a Notice of Dissatisfaction to the other Party indicating its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then

either Party may, within 28 days after this period has expired, give a Notice of Dissatisfaction to the other Party.

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

Dissatisfaction has been given in accordance with this Sub-Clause.

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

58. Sub-Clause 20.5 reads:

> "Where a Notice of Dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, the Party giving a Notice of Dissatisfaction in accordance with Sub-Clause 20.4 above should move to commence arbitration after the fifty-sixth day from the day on which a Notice of Dissatisfaction was given, even if no attempt an amicable settlement has been made."

59. Sub-Clause 20.6, as is relevant, is in the following terms:

> "Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. Arbitration shall be conducted as follows:.."

60. Finally, the short sub-clause 20.7 reads:

> "In the event that a Party fails to comply with a final and binding DB decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference."

61. There is a common understanding by the parties as to the following elements of the dispute resolution mechanism:

    i. A dispute of any kind whatsoever arising between the parties in connection with, or arising out of the contract or the execution of the works would be referred to the DB for a decision.

    ii. The decision of the DB shall be binding on "both" parties who shall give effect to it promptly unless and until it is resolved in an amicable settlement or by an arbitral award.

    iii. A party, and it may be both, dissatisfied with a DB decision shall within 28 days after receiving the decision issue a notice of dissatisfaction indicating its dissatisfaction and intention to commence arbitration.

iv. No party shall be entitled to commence arbitration unless a notice of dissatisfaction is issued in accordance with sub- clause 20.4.

v. Where no notice of dissatisfaction is issued in compliance with sub-clause 20.4, the DB decision shall be Final and Binding.

62. It is also common ground that Sogea had moved the High Court for enforcement of 4 reasoned decisions of the DB, two (2) of which were Binding and two(2) of which were Final and Binding.

63. The divergence between the parties, and this is the crux of the matter, is that, while Sogea takes the view that both sets of decisions can be enforced by a court of law in the first instance, NIA contends that contractually, a party cannot move the court merely because a DB decision, whether "Final" or "Final and Binding" has not been honoured. NIA posits that the recourse of an aggrieved party is to initiate arbitral proceedings for purposes of obtaining an award, following which the award will be adopted and enforced by the High Court under section 36 of the *Arbitration Act*.

64. Citing High Court decisions in SBI International Holdings (Kenya) v Kenya National Highway Authority HCCA No. 075 of 2020 [2020] eKLR, SBI International HCCC No. E375 of 2020 and SBI International ML HCCC No. E968 of 2022 (UR) the learned trial Judge concluded that sub-Clause 20.4 creates a contractual obligation which is immediate and must be performed promptly and so there was no dispute for reference to and resolution by arbitration.

65. The requirement of a party to promptly give effect to a decision of the DB under the FIDIC arrangement embodies the principle of 'pay now, argue later' in construction adjudication. While we agree with counsel for NIA that one of the objectives of the principle is to keep projects alive and insulated from nonpayment and other disruptions while disagreements continue to be resolved, the express provisions of sub-clause 20.4 suggest a broader objective. After declaring the binding nature of a decision of the DB and the obligation to pay promptly unless the decision is revised in an amicable settlement or an arbitral award, it provides further:

> " Unless the contract has already been abandoned, repudiated or terminated, the contractor shall continue to proceed with the works in accordance with the contract."

66. To be deduced from this "unless" provision is that the principle of 'pay now, argue later' is equally applicable where the contract has been abandoned, repudiated or terminated. Notwithstanding the happening of either of the three, an aggrieved party should not be kept out of pocket while awaiting the final resolution of the dispute.

67. We now turn to reflect on the argument by NIA that a Binding decision of DB should be enforced in much the same way as a

Final and Binding decision. Put differently, must failure to comply with either shades of decisions be referred to arbitration first before resorting to court for enforcement under the provisions of the *Arbitration Act*?

68. Answering this question requires us to interpret the contract and we adopt the "golden rule" of interpretation. To discern the intention and purpose of the parties in submitting to the dispute resolution process set out in clause 20, we construe the language in that clause in its grammatical and ordinary meaning unless it leads to an absurdity or repugnancy or inconsistency with the rest of the contract. Words and phrases will therefore not be interpreted in isolation. In addition there would be the factual and commercial context of the contract. In this regard we must also bear in mind that we are asked to interpret the dispute resolution clause vis a vis the applicability the provisions

of the *Arbitration Act* to contentious provisions. Our statute, it bears repeating, substantially mirrors the UNCITRAL Model Law and we are a pro- arbitration nation. The interpretation we give must, unless it does violence to the intention of the parties or provisions of statute, leans towards promoting arbitration.

69. The following reflection by Mativo J (as he then was) in the High Court case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) on contract interpretation is not without value:

> " Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In Arnold v Britton, Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions."

70. The Arbitration Agreement is introduced in sub-clause 20.6 and for its importance, we again set out the opening words of that provision:

> " Any dispute between the parties arising out of or in connection with the contract not settled amicably in accordance with sub-clause 20.5 above and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by Arbitration." (our emphasis)

71. Clearly, the provision governs only disputes that have not been settled amicably in accordance with sub-clause 20.5 and in respect of which the DB's decision (if any) is only Binding and not Final and Binding. What the provision does not do is state whether or not a failure of a party to comply with a Binding DB decision amounts to a dispute which is arbitrable. That said, sub-clause

20. 4 requires parties to promptly give effect to a Binding DB decision and so the failure to do so amounts to a breach of a term of the contract. Indeed both sides have expressly acknowledged that the obligation to give prompt effect to a DB decision is contractual and failure to do so is therefore a breach of a term of the contract. Such breach will be a source of discomfort or tension between the parties and is, in our view, a "dispute between the parties arising out of or in connection with the contract."

72. As we shall see shortly this interpretation of sub-clause 20.6 rhymes with the rest of the dispute resolution provisions and in particular sub-clause 20.7 which directly makes non-compliance to a Binding and Final DB decision a dispute referable to arbitration.

73. But before we turn to discuss that latter sub-clause we make a short observation on the South African decision of Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd (06757/2013) [2013] ZAGPJHC 155; 2014 (1) SA 244 (GSJ) (3 May 2013) cited by the High Court and referred to us by Sogea. There, the court was called upon to interpret an aspect of sub-clause 20.4 and not, like here,

whether or not failure to comply with a Binding decision of the DB is a dispute to be referred to arbitration. The South African court identified its task as follows:

> " The essence of this dispute is the interpretation of clause 20.4. The applicant submits that the parties are required to give prompt effect to the decision by the DAB which is binding unless and until it is set aside by agreement or arbitration following a notice of dissatisfaction, whereas the respondent says that the mere giving of a notice of dissatisfaction undoes the effect of the decision. The respondent also raises other defences…"

74. That was also the issue in Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd (12/7442) [2013] ZAGPJHC 407 (12 February 2013).The two South Africa decisions are not directly relevant to the matter that confronts us.

75. Sub-clause 20.7 reads:

> " In the event that a Party fails to comply with a final and binding DB decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference."

76. An express construction of the provision is that by making the failure to comply with a Binding and Final decision of the DB a matter referable to arbitration, such failure amounts to a dispute, within the terms of the contract, referable to arbitration for resolution.

77. In interrogating the proposition by NIA that a party aggrieved by a failure of their counterpart to honour a Binding and Final decision is obligated to first commence arbitration proceedings, we are asked to address the meaning of the phrase "without prejudice to any other rights it may have" in sub-clause 20.7.But as we shall demonstrate it may not matter much whether we agree with the argument by counsel for NIA that the rights adverted to in the said sub-clause are those within the contract itself or whether the contention by counsel for Sogea that it refers to the right of a party to commence litigation is the correct one. We perceive the pivotal issue to be whether to construe the word "may" in the phrase "the other Party may, …… refer the failure itself to arbitration under Sub-Clause 20.6" as obligatory or simply permissive.

78. Although we were not addressed on this particular matter, we have reflected on it against past decisions regarding the debate. In Anzen Limited and others v Hermes One Limited [2016] UKPC 1 the Privy Council interpreted an arbitration clause which read;

> " The arbitration clause is found in clause 19.5 of the SHA and it reads:
>
> "This Agreement shall be construed in accordance with English law, without reference to its conflict of law principles. If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration. Such arbitration will be conducted by a sole arbitrator designated by the International Chamber of Commerce (ICC) and will be in accordance with the ICC's arbitration rules. The arbitration will be held at a neutral site in London, England. The arbitrator will determine issues of arbitrability, including the applicability of any statute of limitation, but may not limit, expand or otherwise modify the terms of the Agreement. The arbitrator's decision and award will be in writing, setting forth the legal and factual basis. The arbitrator

may in appropriate circumstances provide for injunctive relief (including Interim relief). An arbitration decision and award will only be subject to review because of errors of law. Each Party will bear its own expenses in connection with the arbitration, but those related to the site and compensation of the arbitrator will be borne equally. The Parties, other participants and the arbitrator will hold the existence, content and result of arbitration in confidence, except to the extent necessary to enforce a final settlement agreement or to obtain and enforce a judgment on an arbitration award. The language to be used in the arbitration procedure shall be English."(emphasis added)

79. The brief facts to the dispute in the case were that, the respondent commenced litigation proceedings against the appellants and another party (Everbread) claiming, inter alia, statutory remedies in relation to the appellant's alleged unfairly prejudicial conduct in the management of the affairs of Everbread, damages and/or the appointment of a liquidator over Everbread amongst other reliefs. The appellants, invoking similar statutory provisions as our section 6(1), applied to stay the proceedings on the ground that the arbitration clause was a valid and binding arbitration provision. The High Court dismissed the application on the basis that:

> "(i) clause 19.5 of the SHA conferred an option upon any party to the SHA to submit a dispute arising under or relating to the SHA to arbitration,
>
> (ii) if one party commenced litigation in respect of a dispute, the option under clause 19.5 was only exercisable by the other party by referring the identical subject matter to ICC arbitration, and
>
> (iii) since the appellants had not done this, but had merely sought a stay of the proceedings, they could not rely on section 6(2) of the Arbitration Ordinance."

80. The Court of Appeal upheld the said decision and the matter escalated to the Privy Council which observed:

> "On this basis, the key to this appeal lies in the construction of clause 19.5. The following possible analyses require consideration:
>
> a. The words "any party may submit the dispute to binding arbitration" are not only permissive, but exclusive, if a party wishes to pursue the dispute by any form of legal proceedings (analysis I).
>
> b. The words are purely permissive, leaving it open to one party to commence litigation, but giving the other party the option of submitting the dispute to binding arbitration, such option being exercisable either by:
>
> i. commencing an ICC arbitration, as the respondent submits and Bannister J and the Court of Appeal held (analysis II); or
>
> ii. requiring the party which has commenced the litigation to submit the dispute to arbitration, by making an unequivocal request to that effect and/or by applying for a corresponding stay, as the appellants have done (analysis III)."

81. After explaining why it preferred analysis III, the Board of the Privy Council concluded;

> "A rejection of analysis II provides further reinforcement of the Board's view that analysis I must be rejected, leaving analysis III as the correct analysis. Analysis III has none of the disadvantages of analysis II. It enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to. It comes close in effect to analysis I, save that, unless and until one party insists on arbitration, there is no promise by the other party not to litigate."

82. We too prefer analysis III. That is, the words in sub-clause 20.7, although permissive, gives the other party the option of insisting on arbitration by requiring the party which has commenced litigation to submit to arbitration by applying for stay. In the scheme of the contract, the parties place arbitration at the heart of its dispute resolution mechanism. It is the Arbitral Tribunal that must with finality settle an unresolved dispute that has not become Final and Binding [sub-clause 20.6]. It is to arbitration that a dispute arising between the parties where no DB is in place, whether by reason of the expiry of the DB's appointment or otherwise, is referred to for resolution [sub-clause 20.8]. It can hardly be the intention of parties to the Pink Book that they can casually opt out of the arbitral process in sub-clause 20.7.

83. Still on this issue. Analysis II which requires that a party insisting on arbitration can only do so by commencing arbitration itself is untenable in the circumstances here because under sub-clause 20.7 the right to commence arbitration is reserved to the offended party, in this case Sogea. NIA which is the alleged non-complying party to a Binding and Final decision would not have a right under that provision to commence arbitration, not in the least because it will not have issued a notice of dissatisfaction under sub-clause 20.4. The only way of insisting on arbitration is to do, as it did, by seeking a stay of proceedings and referral of the dispute regarding its own non-compliance to arbitration.

84. Ultimately it is our view that NIA would have succeeded in its application for stay of the litigation and referral of the disputes revolving around failure to give prompt effect to the Binding decisions and to comply to the Final and Binding decisions of the DB to arbitration under sub-clauses 20.6 and 20.7 respectively had the summons seeking stay and referral been filed at the time prescribed by section 6(1).

85. Let us now compare our view with the decision of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation ("CRW") [2015] SGCA 30 cited by both sides but for different reasons.

86. NIA sees the decision as supporting its position that enforcement of obligations arising out of DB decisions (whether Binding but not Final or Binding and Final) is vested in an arbitral tribunal first. On the other hand, Sogea relies on it for the argument that sub-clause 20.4 requires parties to promptly give effect to the obligation emanating from a DB decision and therefore creates a positive obligation on NIA to immediately pay the DB awards.

87. On our part we have given reasons why we think that whether it be failure to promptly give effect to a Binding decision or to comply with Binding and Final decision, the first port of call for enforcement is the arbitral tribunal. The following passage in Persero supports our position:

> "(b) Secondly, if the contention is that an order may be made to enforce the obligation to promptly give effect to a binding but non-final DAB decision, but only by the local courts and not by an arbitral tribunal established pursuant to the parties' contract, that would be a very narrow contention and one that seems implausible. This is because it would suggest that the intention

underlying the dispute resolution framework contained in the 1999 Red Book is to carve out from the jurisdiction of the arbitral tribunal all matters relating to the immediate enforcement of binding but non-final DAB decisions and to vest only that specific jurisdiction in the courts, while preserving for the arbitral tribunal the jurisdiction to rule on the merits of such DAB decisions. To our knowledge, it has never been suggested that this was FIDIC's intention when the predecessor of cl 20 was drafted. Moreover, such a construction fails to explain why a dispute over whether or not a binding but non-final DAB decision is to be immediately complied with cannot be directly referred to arbitration as set out at [61]–[66] above. To say that this is so because such a dispute is not a "dispute" as that term is used in cl 20.4, with respect, flies in the face of what constitutes a "dispute" for the purposes of an arbitration agreement (see Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] 4 SLR(R) 732 at [33]–[34]) as well as what PGN has in fact contended at various stages of this protracted dispute between the parties."

88. We have no doubt that the intention of sub-clause 20.4 is that a party is required to promptly honour and give effect to obligations emanating from DB decisions. We do not agree, however, that vesting enforcement of failure to comply first in an arbitral tribunal is inimical or waters down the objective for prompt compliance. That is because the arbitration mechanism can still ensure such prompt compliance by quickly dealing with the failure to honour the DB decision by immediately making a partial or final award as is applicable. This is explained in this passage in Persero:-

"88 To sum up our analysis at [83]–[87] above, cl 20.4 imposes a distinct contractual obligation on a paying party to comply promptly with a DAB decision regardless of whether the decision is final and binding or merely binding but non-final, and this obligation is capable of being directly enforced by arbitration without the parties having to first go through the preliminary steps set out in cll 20.4 and 20.5. Further, we consider that a tribunal would be entitled to make a final determination on the issue of prompt compliance alone if that is all it has been asked to rule on, as was the case in the 2009 Arbitration. On the other hand, where both the dispute over the paying party's non-compliance with a binding but non-final DAB decision as well as the dispute over the merits of that DAB decision are put before the same tribunal, as was done in the 2011 Arbitration and, hence, in the case before us now, the tribunal can: (a) make an interim or partial award which finally disposes of the first issue (i.e., whether the paying party has to promptly comply with the DAB decision); (b) then proceed to consider the second issue (i.e., the merits of the DAB decision), which is a separate and conceptually distinct matter as we have already noted; and (c) subsequently, make a final determination of the underlying dispute between the parties. This is consistent with the view expressed by Gerlando Butera in his article "Untangling the Enforcement of DAB Decisions" [2014] ICLR 36. He argues (at p 59) that where the paying party lodges a counterclaim in an arbitration commenced by the receiving party to enforce a binding but non-final DAB decision:

... The merits of the [DAB decision] would ultimately have to be considered within the same arbitration, but (it is submitted) there is no reason in principle why in that case the tribunal should not first deal with and make a final (partial) award in respect of [the paying party's failure to promptly comply with the DAB decision] without at the same time reviewing the merits of the first decision. On the contrary, it is submitted that that is precisely what the

tribunal should in that case do, having regard to the parties' agreement in clause 20.4 of the FIDIC Conditions that they "shall promptly give effect to" the decision. ..."

89. Undoubtedly, the route of a party to commence arbitration and then seek court enforcement through section 36 of the Act may be slower than direct judicial intervention. Yet, Sogea, who through party autonomy, chose to submit its dispute resolution process to the mechanism set out in Clause 20 of the FIDIC Pink Book, cannot be heard to complain that the process is circuitous.

89. As we wind up on the arguments around the stay proceedings, we make comments on two matters.

90. Section 17 of the *Arbitration Act* provides for the doctrine of Kompetenz-Kompetenz. The decision of Nyamu JA in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR), discusses this provision and its operation;

> " The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the *Arbitration Act* as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "Competence to decide upon its competence" and as expressed elsewhere in this ruling in German it is "Kompetenz/Kompetenz" and in French it is "Competence de la Competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

89. An argument by NIA is that whether there exists an arbitrable dispute between the parties can only be determined by the Arbitrator on the basis of section 17 and the Kompetenz- Kompetenz doctrine. We understand section 17 differently. It gives an arbitral tribunal power to rule on its own jurisdiction and scope of its authority. It is, as has been said, competence of an arbitral tribunal "to decide upon its competence". On this, the national court has no business.

90. Where, however, the argument fronted by a party, as did Sogea, is that there is not in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration, then by dint of section 6(1)(b), it is an argument to be resolved by the national court. The court will not be deciding, nor will it be called upon to determine, the jurisdiction and scope of authority of the arbitral tribunal but whether on the facts presented, there is a dispute that is referable to arbitration. It is a question that although matters which are agreed to be referred to arbitration are involved, there is in fact no dispute. In a word, the doctrine of Kompetenz- Kompetenz could not have been properly set up by NIA to support the application for stay.

91. The second issue is whether the DB clause survives the termination of the contract, it being common ground that the referrals to the DB were made after the termination of the contract. We think that this matter should not arise at all as both parties submitted themselves to the DB jurisdiction in the full knowledge that the contract had been terminated. Neither should they be permitted to resile from that position. Important as well is that in our reading of the DB clause (Sub clause 20.4), the DB jurisdiction post-lives the termination of the contract. As alluded to earlier, the provision expressly provides that the decision of the DB shall be promptly given effect (if not revised) and "unless the contract has already been abandoned, repudiated or terminated, the contractor shall continue to proceed with the works in accordance with the contract". This is an express contemplation that the DB jurisdiction can be invoked even where the contract has been abandoned, repudiated or terminated as long as obligations

of parties under the contract remain unfulfilled. In any event, the jurisdiction of the DB is to decide 'a dispute (of any kind whatsoever) arising between the parties in connection with, or arising out of the contract (see Clause 20.4)' which would include a dispute in respect to abandonment, repudiation or termination of the contract.

89. Having found, albeit for different reasons from those of the trial Court, that the summons for stay was for refusal, we turn to consider issues around the summary judgment.

90. The argument by NIA is that the learned trial judge should not have allowed the application because:

    a. There was no valid determination to the extent that the same were made after the contract had been determined.

    b. The DB determination were illegal to the extent that it purported to allow the contractors claims which exceeded 25% of the contract sum, prohibited by the *Public Procurement and Asset Disposal Act*.

    c. The doctrine of 'pay now, argue later' was inapplicable in the circumstances of the case.

    d. NIA had a counterclaim.

89. We make short thrift of two of those propositions because we have already decided them. We have held that the jurisdiction of the DB survives the termination of the contract and the DB had jurisdiction to determine the matters giving rise to the four impugned decisions. We have also held that the 'pay now, argue later' doctrine applies as much to live contracts as to abandoned, repudiated or terminated contracts. Merely because the contract had been terminated would not preclude NIA from pursuing the claims in respect to decisions which it had given proper notices of dissatisfaction. In the event of emerging victor, then it would enforce its award in the usual manner provided under the *Arbitration Act*.

89. In regard to the argument that the decisions are contra-statute (in particular the PPADA), we observe that NIA only points out the decision to contractor referral number 7 as ousting the application of the PPADA. Yet as rightly countered by Sogea, NIA did not file a notice of dissatisfaction against this particular decision and so it is both Binding and Final. It is too late for NIA to raise the issue.

90. On the counterclaim, before the High Court, NIA had asserted that should Sogea be allowed to claim under the DB decisions then it be allowed to counterclaim for Kshs.581,699,424.00 being the advance payment made to Sogea prior to the commencement of the contract and which had not been recovered at the time of termination of the contract. It is not clear to us why this claim would not be part of the matters arising in the DB disputes and if not resolved to the satisfaction of NIA, why it would not be raised in arbitration.The supposed counterclaim would be a dispute arising from the contract referable to resolution under the dispute resolution mechanism provided under clause 20 of the Pink Book and cannot be available to defeat prompt compliance of decisions already rendered by the DB.

89. In the end we dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER 2025.

S. GATEMBU KAIRU, FCIArb.

JUDGE OF APPEAL

....

F. TUIYOTT

JUDGE OF APPEAL

....

P. NYAMWEYA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.