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Binding but Not Final: The Enforceability of Dispute Board Decisions in Indian Construction Arbitration

GRISHMA BRAHMBHATT* AND DR. ASEEM CHANDRA PALIWAL**

ABSTRACT

Dispute boards are now a standard feature of major construction contracts, and their value rests on one idea: a board's decision binds the parties immediately, even though it is not final, so that cash flow and progress are not held hostage to a full arbitration. That idea works only if a non-compliant party can be compelled to comply quickly. This paper asks whether Indian law supplies that compulsion. Using a doctrinal and comparative method, it analyses the enforcement gap in the 1999 FIDIC conditions, the repair attempted in the 2017 editions, the Singapore litigation known as Persero*, the English decision in* Peterborough*, and Indian authority on dispute review boards and pre-arbitral requirements. It reaches three findings. First, Indian courts have so far treated boards mainly as a mandatory gateway to arbitration and, in the decisions examined, have not squarely decided whether a binding but non-final decision can be enforced in isolation. Second, the Arbitration and Conciliation Act, 1996 already contains the tools that Singapore used to close the gap, namely interim awards and interim measures, so legislative amendment is not strictly needed. Third, many public-sector contracts, where most Indian construction disputes arise, use boards whose output is a recommendation and not a binding decision, and recent procurement policy favouring mediation over arbitration for large contracts adds uncertainty about the final forum. The paper proposes a three-part framework: an express compliance-and-referral clause in the contract, deliberate use of interim awards by tribunals, and alignment of procurement guidelines with board practice. It concludes that India can enforce board decisions without new legislation, but only if contracts and tribunals are deliberate about doing so.*

Keywords: *Dispute boards, FIDIC, construction arbitration, interim awards, binding but not final, India, Singapore*

I. INTRODUCTION

Construction disputes rarely wait for the end of a project. Variation, delay, valuation and payment disagreements arise while the works are in progress, and the cost of resolving them

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late is borne by the project itself. Dispute boards, known variously as Dispute Adjudication Boards (DABs), Dispute Avoidance and Adjudication Boards (DAABs) and Dispute Review Boards (DRBs), were developed to resolve such disputes in real time through a panel that knows the project.[1] In the standard FIDIC forms, a board's decision is binding on the parties as soon as it is given. A party that disagrees must give a notice of dissatisfaction, which preserves its right to arbitrate, but both parties must in the meantime comply promptly with the decision.[2] The decision is therefore binding but not final.

The design works only if compliance can be compelled quickly. A board decision that the losing party can ignore for years gives the winning party little more than a claim, and the contractor's cash flow, which the mechanism exists to protect, remains at risk.[3] The most extensively litigated illustration is the Singapore litigation between PT Perusahaan Gas Negara and CRW Joint Operation, known as the *Persero* litigation. A contractor holding a binding board decision for about US$17.3 million needed two arbitrations and several rounds of court proceedings, over a period of about six years, to obtain interim enforcement.[4]

India presents the question in a sharp form. Public employers dominate large construction and infrastructure procurement, dispute boards appear in standard national highways contracts, and the Arbitration and Conciliation Act, 1996 (the 1996 Act) governs arbitrations seated in India.[5] Yet the reported Indian decisions examined in this study deal with boards chiefly as a pre-arbitral step and not as a source of enforceable payment obligations. This paper asks whether, and how, a binding but non-final dispute board decision can be enforced in an Indian-seated construction arbitration. The study is doctrinal and comparative, and it is confined to contractual

[1] *See generally* Nicholas Gould, *Enforcing a Dispute Board's Decision: Issues and Considerations* (paper for FIDIC Middle East Conference, Feb. 2012), https://www.fenwickelliott.com/sites/default/files/nick_gould_-_enforcing_a_dispute_boards_decision_-_issues_and_considerations_paper_for_fidic_me_conf_feb_2012.indd_.pdf.

[2] INT'L FED'N OF CONSULTING ENG'RS (FIDIC), CONDITIONS OF CONTRACT FOR CONSTRUCTION cl. 20.4 (1st ed. 1999) [hereinafter FIDIC 1999 Red Book]; INT'L FED'N OF CONSULTING ENG'RS (FIDIC), CONDITIONS OF CONTRACT FOR CONSTRUCTION cl. 21.4.3 (2d ed. 2017) [hereinafter FIDIC 2017 Red Book].

[3] *See PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2015] SGCA 30, [2015] 4 SLR 364, ¶¶ 71–72 (Sing.) [hereinafter *Persero II*]; *see also How the FIDIC Red Book Handles Enforcing Dispute Adjudication Board Decisions*, PINSENT MASONS: OUT-LAW GUIDE (July 15, 2025), https://www.pinsentmasons.com/out-law/guides/fidic-red-book-enforcing-dispute-adjudication-board-decisions [hereinafter Out-Law Guide] (describing the remedies available where a party fails to comply with a board decision).

[4] Robbie McCrea, *The Court of Appeal in Persero II: How to Enforce "Binding but Non-Final" Dispute Board Decisions Under the FIDIC Form of Contract*, INT'L Q. (Fenwick Elliott), Issue 14 (Aug. 7, 2015), https://www.fenwickelliott.com/knowledge-hub/international-quarterlies/issue-14/the-court-of-appeal-in-persero-ii-how-to-enforce-binding-but-non-final-dispute-board-decisions-under-the-fidic-form-of-contract/.

[5] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996) [hereinafter 1996 Act].

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dispute boards; statutory adjudication regimes, which attach enforcement to a statute and not to a contract, are outside its scope.[6]

II. Dispute boards: conceptual foundations

A. Standing and ad hoc boards; review and adjudication

Two distinctions matter. The first is between standing boards, appointed at the start of the project and following it to completion, and ad hoc boards, appointed only when a dispute arises. The 1999 FIDIC Construction (Red) Book provides for a standing board, while the Plant and Design-Build (Yellow) and EPC/Turnkey (Silver) Books provide for ad hoc appointment.[7] The second distinction is between review boards, whose output is a recommendation that the parties may accept or reject, and adjudication boards, whose output is a decision that binds the parties at once.[8] The enforcement problem arises only for the second kind, since a recommendation does not purport to oblige anyone to pay. The 2017 FIDIC editions retain the binding decision and add an express dispute-avoidance function, reflected in the new name DAAB.[9]

B. "Binding but not final": the logic of interim compliance

The phrase "binding but not final" captures a compromise. Immediate compliance protects cash flow and progress; the right to arbitrate protects against an erroneous decision. A court or tribunal asked to enforce a board decision must resist two temptations. One is to treat the decision as final and refuse to hear the merits at all. The other is to treat the notice of dissatisfaction as suspending the obligation to comply, which would reduce the board's decision to a formality. The Singapore Court of Appeal's eventual reading in the *Persero* litigation, discussed in Part IV, gave effect to the purpose of requiring the paying party to pay first, so that the contractor's cash flow is facilitated.[10]

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[6] *See, e.g.*, Housing Grants, Construction and Regeneration Act 1996, c. 53 (UK); Building and Construction Industry Security of Payment Act 2004 (Sing.); Construction Industry Payment and Adjudication Act 2012 (Act 746) (Malay.).

[7] *Peterborough City Council v. Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC), ¶¶ 12–13 (Eng.) [hereinafter *Peterborough*].

[8] *See generally* Gould, *supra* note 1.

[9] FIDIC 2017 Red Book, *supra* note 2, cl. 21; *see generally* Robbie McCrea, *The 2017 FIDIC Dispute Resolution Procedure: Part 1 – The New Dispute Resolution Mechanism*, Fenwick Elliott (Sept. 27, 2018), https://www.fenwickelliott.com/knowledge-hub/articles-papers/the-2017-fidic-dispute-resolution-procedure-part-1-the-new-dispute-resolution-mechanism/.

[10] *Persero II*, [2015] SGCA 30, ¶ 71.

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C. A board is not an arbitral tribunal

Under the FIDIC forms a board is expressly deemed not to be acting as an arbitrator.[11] Its decision is therefore not an arbitral award and cannot be enforced as one under the enforcement provisions of an arbitration statute. Its force is contractual: it rests on the parties' promise to comply. Enforcement must accordingly pass through a forum that can order performance of that promise, which, in a contract with an arbitration clause, means the arbitral tribunal itself.

III. The FIDIC architecture and the enforcement gap

A. The 1999 conditions

Under the 1999 conditions, disputes are referred to the board under Sub-Clause 20.4, and the board must give a reasoned decision within 84 days. The decision binds the parties, who must promptly give effect to it. A party dissatisfied with the decision may give notice within 28 days, failing which the decision becomes final and binding.[12] After a notice of dissatisfaction the parties must attempt amicable settlement under Sub-Clause 20.5, though arbitration may begin after a waiting period of 56 days even if no attempt has been made.[13] Sub-Clause 20.6 then sends to arbitration any dispute in respect of which the board's decision has not become final and binding. Sub-Clause 20.7 deals with failure to comply with a decision that has become final and binding, allowing the other party to refer the failure itself directly to arbitration without the preceding steps. Sub-Clause 20.8 dispenses with the board and the amicable settlement step where no board is in place.[14]

B. The gap

The difficulty lies between Sub-Clauses 20.6 and 20.7. The direct route in Sub-Clause 20.7 is available only where the decision has become final and binding, that is, where no notice of dissatisfaction has been given. Where a notice has been given, the decision is binding but not final, so Sub-Clause 20.7 does not apply on its terms, and Sub-Clause 20.6 requires the dispute to proceed to arbitration on the merits. If the unsuccessful party then refuses to comply, the other party appears to have two imperfect options: to start a full arbitration in which the tribunal may reopen the board's decision, or to seek a further board decision on the non-compliance itself. Either route consumes the time that the mechanism was meant to save. This is the "gap"

[11] *Peterborough*, [2014] EWHC 3193 (TCC), ¶ 14 (setting out Sub-Clause 20.4 of the conditions, under which the board is deemed not to be acting as arbitrator).
[12] FIDIC 1999 Red Book, *supra* note 2, cl. 20.4; *Peterborough*, [2014] EWHC 3193 (TCC), ¶ 14 (reproducing Sub-Clauses 20.4 to 20.8 as incorporated in the contract).
[13] FIDIC 1999 Red Book, *supra* note 2, cl. 20.5; *Peterborough*, [2014] EWHC 3193 (TCC), ¶ 14.
[14] FIDIC 1999 Red Book, *supra* note 2, cls. 20.6–20.8; *Peterborough*, [2014] EWHC 3193 (TCC), ¶ 14 (noting that the contract in that case substituted the courts of England and Wales for arbitration).

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that was argued in the English case of *Peterborough*, discussed below, and its practical effect is that a party in default can resist compliance for as long as the process takes.[15]

C. The 2017 conditions

The 2017 conditions respond directly. Sub-Clause 21.4.3 provides that the board's decision binds the parties, who must comply promptly whether or not a notice of dissatisfaction has been given. Sub-Clause 21.7 then provides that a party's failure to comply with a board decision, whether it is binding or final and binding, may be referred directly to arbitration under Sub-Clause 21.6, in which case the board and amicable settlement steps in Sub-Clauses 21.4 and 21.5 do not apply.[16] Sub-Clause 21.8 deals separately with the case where no board is in place.[17] Commentators regard Sub-Clause 21.7 as the repair for the problem exposed by the first *Persero* decision.[18]

Two cautions follow. First, many contracts, including those still being performed, use the 1999 forms or amended versions, so the gap remains a live concern. Second, Sub-Clause 21.7 operates as an agreement to arbitrate the failure to comply. Whether a given arbitral law lets the tribunal grant effective interim relief on that reference remains a question for the law of the seat, which in an Indian-seated arbitration is the 1996 Act. That question is taken up in Part V.

IV. Comparative Jurisprudence

A. Singapore: *Persero I*

The contract in the *Persero* litigation was a pipeline construction contract between PT Perusahaan Gas Negara (Persero) TBK (PGN), an Indonesian state-owned company, and CRW Joint Operation (CRW). It was based on the 1999 Red Book with modifications and was governed by Indonesian law. A sole-member board decided on 25 November 2008 that PGN must pay CRW about US$17.3 million. PGN gave a notice of dissatisfaction and did not pay.[19] CRW began an ICC arbitration in which it sought immediate payment, and a majority of the tribunal made a final award to that effect on 24 November 2009.[20]

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[15] *Peterborough*, [2014] EWHC 3193 (TCC), ¶ 24 (recording the argument that, after a notice of dissatisfaction, the aggrieved party's only remedy may be a further adjudication); *see generally* Frederic Gillion, *Enforcement of DAB Decisions Under the 1999 FIDIC Conditions of Contract: A Recent Development: CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33*, [2011] Int'l Constr. L. Rev. 388.

[16] FIDIC 2017 Red Book, *supra* note 2, cls. 21.4.3, 21.6, 21.7; *see* Out-Law Guide, *supra* note 3.

[17] FIDIC 2017 Red Book, *supra* note 2, cl. 21.8.

[18] Paul Sandosham, *The New Suite of FIDIC Contracts: Good News or Bad?* (Clifford Chance, Mar. 16, 2018) (conference slides), https://www.39essex.com/sites/default/files/PaulSandosham-FIDIC-Slides-501960-4-1438-v0.7.pdf.

[19] *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, [2011] 4 SLR 305, ¶¶ 5, 9 (Sing.) [hereinafter *Persero I (CA)*]; *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2010] SGHC 202, [2010] 4 SLR 672, ¶¶ 2–4 (Sing.) [hereinafter *Persero I (HC)*].

[20] *Persero I (HC)*, [2010] SGHC 202, ¶¶ 1, 4, 7.

The Singapore High Court set the award aside on 20 July 2010. It held that the tribunal had exceeded its jurisdiction by treating a binding but non-final decision as if it were final and converting it into a final award without examining the merits. In its view CRW had conflated Sub-Clauses 20.6 and 20.7: Sub-Clause 20.7 was available only for decisions that had become final and binding, and an arbitration under Sub-Clause 20.6 had to resolve the underlying dispute.[21] The High Court suggested a way forward, namely to obtain a second board decision on the discrete question of non-compliance and then take that to arbitration.[22] The Court of Appeal dismissed CRW's appeal on 13 July 2011, holding that the tribunal had exceeded its jurisdiction by giving the board's decision the force of a final award without a hearing on the merits, and that PGN had not been given a real opportunity to present its case.[23]

The decisions drew criticism. Commentators criticised the reasoning and described the message the courts sent about enforcement of board decisions as confusing.[24] FIDIC itself issued guidance to the effect that a failure to comply with a board decision should be capable of being referred directly to arbitration under Sub-Clause 20.6, without a further board decision and without the amicable settlement step.[25] The episode shows that the enforcement gap is not a theoretical drafting point.

B. Singapore: *Persero II*

CRW did not abandon its claim. In a second ICC arbitration, begun in 2011, it changed its approach. It placed both the underlying dispute and the question of compliance before the tribunal, seeking a final determination on the merits and, pending that determination, an interim award requiring PGN to comply with the board's decision.[26] A majority of the tribunal granted the interim award on 22 May 2013. The Singapore High Court declined to set the award aside on 16 July 2014, and the Court of Appeal upheld the interim award, by majority, on 27 May 2015.[27]

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[21] *Persero I (HC)*, [2010] SGHC 202, ¶¶ 24–25, 29–31, 33, 37; *see generally* Paul Teo, *Enforcement of DAB Decisions Under FIDIC Contracts: Pitfalls and Solutions: PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2010] SGHC 202* (Hogan Lovells Lee & Lee), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/dabarticle_pdf.pdf.

[22] McCrea, *supra* note 4 (describing the High Court's suggestion).

[23] *Persero I (CA)*, [2011] SGCA 33, ¶¶ 93–94, 100–102; *Enforceability of Dispute Adjudication Boards Decision in FIDIC Contracts*, HERBERT SMITH FREEHILLS (June 2015), https://www.herbertsmithfreehills.com/latest-thinking/enforceability-of-dispute-adjudication-boards-decision-in-fidic-contracts.

[24] Gillion, *supra* note 15, at 389; Christopher R. Seppälä, *How Not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero*, [2012] INT'L CONSTR. L. REV. 4.

[25] *Contract Corner – FIDIC Guidance on Enforcing DAB Decisions*, INT'L Q. (Fenwick Elliott), Issue 6, 2013, https://www.fenwickelliott.com/sites/default/files/issue_06_-_iq_2013.pdf.

[26] *Persero II*, [2015] SGCA 30, ¶ 14; *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation (Indonesia)* [2014] SGHC 146, ¶ 13 (Sing.) [hereinafter *Persero II (HC)*].

[27] *Persero II (HC)*, [2014] SGHC 146, ¶ 1; *Persero II*, [2015] SGCA 30, ¶¶ 1–2, 18, 111; McCrea, *supra* note 4.

The Court of Appeal's reasoning has three strands. First, it treated the obligation in Sub-Clause 20.4 to give effect promptly to a binding board decision as a distinct contractual obligation, separate from the underlying merits. Secondly, it held that a failure to comply with that obligation could be referred directly to arbitration, and that such an arbitration could be conducted either as a stand-alone reference on non-compliance or together with the underlying dispute. Thirdly, it rejected the idea that all differences between the parties had to be resolved in a single reference before any payment could be ordered, thereby departing from the one-dispute approach favoured earlier.[28] It also confirmed that interim awards made under Singapore's International Arbitration Act are final awards that can be enforced as such.[29]

Two points are important for Indian law. The first is the vehicle: *Persero II* gave effect to the board's decision through an interim award, leaving the merits of the underlying dispute for later determination. The second is time: even after the Court of Appeal's clarification, the sequence took about six years from the board's decision, so drafting that avoids the sequence altogether is preferable to relying on judicial rescue.[30]

C. England: *Peterborough*

The English decision in *Peterborough City Council v. Enterprise Managed Services Ltd* arose on a different footing. The contract there was made on the 1999 FIDIC EPC/Turnkey conditions, but the arbitration clause had been removed and the courts of England and Wales were the final forum.[31] The Council sued after the contractor, EMS, gave notice of its intention to refer the dispute to adjudication, and EMS applied for a stay. Edwards-Stuart J held that the contract required the dispute to go first to the board and to amicable settlement, and only failing that to litigation.[32] Sub-Clause 20.8 did not give the Council a unilateral right to opt out of adjudication, because it applied only where no board was in place when the dispute arose.[33]

The judge accepted that the "gap" might be arguable where an arbitration clause exists but said that it loses force where the final forum is a court. In that setting he saw no reason why the court could not order specific performance of the obligation to comply with a board decision, or alternatively refuse a stay of court proceedings begun by the aggrieved party.[34] He also recognised the force of the argument that adjudication might prove a costly detour, but he

[28] *Persero II*, [2015] SGCA 30, ¶¶ 55–57, 60, 64–70, 83–87; McCrea, *supra* note 4; *Enforceability of Dispute Adjudication Boards Decision in FIDIC Contracts*, *supra* note 23.
[29] *Persero II*, [2015] SGCA 30, ¶¶ 105, 109.
[30] McCrea, *supra* note 4.
[31] *Peterborough*, [2014] EWHC 3193 (TCC), ¶¶ 10, 14, 26.
[32] *Id.* ¶¶ 7–9, 36.
[33] *Id.* ¶¶ 32–35.
[34] *Id.* ¶¶ 26–27.

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applied the presumption in favour of leaving parties to the dispute resolution method they chose, and he stayed the action.[35]

Peterborough is instructive in two ways. It shows a court holding parties strictly to the contractual sequence, even at the cost of delay, which parallels the Indian approach to the pre-arbitral requirement discussed in Part V. And it shows that the enforcement gap is easier to close where the final forum is a court with remedies such as specific performance. Where the final forum is an arbitral tribunal, as in most Indian construction contracts, the question becomes what interim relief the tribunal can grant, which is the question that *Persero II* answered.

D. Comparative summary

Table 1 summarises how each source treats a binding but non-final decision.

Source	Enforceable in isolation?	Route
FIDIC 1999 as read in *Persero I* (Singapore, 2010–11)	No: a binding decision could not be converted into a final award without examining the merits	Second board decision on non-compliance, or full arbitration on the merits
Persero II (Singapore, 2015)	Yes, by majority	Direct arbitration on the failure to comply; interim award; stand-alone or with the merits
FIDIC 2017, Sub-Clause 21.7	Yes, by contract	Direct reference of the failure to arbitration under Sub-Clause 21.6; Sub-Clauses 21.4 and 21.5 do not apply
Peterborough (England, 2014)	Contemplated by the court's reasoning where a court is the final forum	Specific performance or refusal of a stay; board stage must be completed first
India (decisions examined)	Not squarely decided	Interim award under s. 31(6) or interim measure under s. 17 of the 1996 Act, untested for this purpose

Table 1: Treatment of binding but non-final board decisions

Four lessons emerge. First, the obligation to comply with a board decision is best analysed as a distinct contractual obligation, separate from the merits. Secondly, the effective vehicle in an arbitration setting is an interim or partial award that leaves the merits open. Thirdly, drafting that states the position expressly, as Sub-Clause 21.7 does, is more reliable than litigating over silence. Fourthly, courts in each jurisdiction hold parties strictly to the board stage of the sequence, which makes it important that the stage produces a decision with practical consequences.

[35] *Id.* ¶¶ 38–44; *see also DGT Steel & Cladding v. Cubitt Building* [2007] BLR 371 (Eng.), *cited in Peterborough*, [2014] EWHC 3193 (TCC), ¶ 41.

V. THE INDIAN POSITION

A. Boards in public-sector construction contracts

Boards are a recognised feature of Indian public works contracts, particularly in national highways projects. In *Somdatt Builders-NCC-NEC (JV) v. National Highways Authority of India*, decided by the Supreme Court on 27 January 2025, the contract provided for resolution of disputes at the first instance through a Dispute Review Board before arbitration. The board and the arbitral tribunal both found that an increase in executed quantities over the bill of quantities was not a "variation" entitling re-rating under the contract. The Supreme Court restored the arbitral award that the High Court had set aside on appeal under Section 37, emphasising the limited scope of judicial interference under Sections 34 and 37.[36] The judgment shows that board findings can form part of the record on which a tribunal's award is later defended. It is not, however, a case about enforcing a board decision.

The older NHAI model, as it appeared in litigation before the Supreme Court, shows a board whose output is styled a recommendation. A dissatisfied party could take the matter to arbitration, where the tribunal was empowered to open up, review and revise the board's recommendation.[37] Where the board's output is only a recommendation, the enforcement question described in this paper does not arise in the same form. It arises when parties adopt decision-based clauses of the FIDIC type, whose binding character is the point.

B. The board as a mandatory gateway

Indian courts have so far treated the board mainly as a gateway to arbitration. In *Union Territory of J&K v. S.P. Singla Constructions Pvt. Ltd.*, the High Court of Jammu and Kashmir and Ladakh, hearing an appeal under Section 37 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997, considered a turnkey contract based on the FIDIC general conditions. Clause 20 required a notice of dispute, referral to the board, and arbitration only of claims that remained unsettled after the board's decision. The contractor had gone directly to arbitration. The State argued that the pre-arbitral steps were mandatory and that the contract itself stipulated waiver as the consequence of non-compliance. The Court held that the arbitration clause covered only claims raised before the board and left unsettled, set aside the award on the contractor's prolongation claim, which had never been put to the board, and on several other

[36] *Somdatt Builders–NCC–NEC (JV) v. Nat'l Highways Auth. of India*, 2025 INSC 113, ¶¶ 8, 10–11, 34, 36, 42–43, [2025] 2 SCR 203 (India) [hereinafter *Somdatt*].

[37] *See Nat'l Highways Auth. of India v. Bumihiway DDB Ltd. (JV)*, (2006) 10 SCC 763 (India) (setting out Sub-Clause 67.3 of the contract).

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claims, and allowed the appeal.[38] Other reported decisions suggest that where the employer fails to constitute the board within the contractual time, a court may permit recourse to arbitration under Section 11(6) of the 1996 Act.[39]

This strict approach has a consequence for enforcement. If the board stage is a mandatory precondition whose breach can render claims non-arbitrable, then a party that has obtained a board decision has complied with the contract's own gateway, and it is open to argue that the counterparty that ignores the decision is the party in breach. There is also an argument that treating pre-arbitral non-compliance as going to arbitrability sits uneasily with the limited scrutiny that a referral court applies under Section 11, as explained by the Supreme Court in *Vidya Drolia v. Durga Trading Corporation*.[40] That tension is not resolved in the decisions examined for this study.

C. Statutory routes to interim enforcement

A board's decision is not an arbitral award, so it cannot itself be enforced under Section 36 of the 1996 Act. Enforcement must instead proceed through an arbitral order that gives effect to the parties' promise to comply.[41] Three provisions are relevant.

First, Section 31(6) permits the tribunal, at any time during the proceedings, to make an interim award on any matter on which it could make a final award, and Section 2(1)(c) treats an interim award as an arbitral award. On this analysis, a claim that the respondent must comply with a binding board decision pending the final outcome is a claim on a matter on which a final award could be made, namely whether a contractual obligation to pay has been breached. An interim award on that claim would leave the merits of the underlying dispute for the final award, which replicates the structure that succeeded in *Persero II*.[42] Secondly, Section 17(1) empowers the tribunal to order interim measures, including measures for securing the amount in dispute, and gives it the power to make orders that a court could make in relation to proceedings before it. Under Section 17(2) such orders are enforceable as orders of a court, and Section 37 provides for appeals against them.[43] Thirdly, Section 28(3) requires the tribunal, in deciding and making

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[38] *Union Territory of J&K v. S.P. Singla Constructions Pvt. Ltd.*, 2023 LiveLaw (JKL) 150, AA No. 06/2020, ¶¶ 1, 4, 6–7, 24, 32 (J&K & Ladakh HC Feb. 2, 2023) (India).

[39] *Pardeep Electricals & Bldg. Pvt. Ltd. v. Union of India*, Arb. P. No. 47/2023, ¶¶ 14–17, 22 (J&K & Ladakh HC Nov. 8, 2024) (India) (applying, at ¶ 16, the same court's decision of Feb. 21, 2023 in Arb. P. No. 37/2022); *see High Court of Jammu & Kashmir and Ladakh Appoints Arbitrator; Holds Delay and Inaction in DRB Formation Violates Contractual Obligations, Justifying Arbitration*, RAWLAW, https://rawlaw.in/?p=2798; 1996 Act, *supra* note 5, § 11(6).

[40] *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1 (India).

[41] 1996 Act, *supra* note 5, §§ 2(1)(c), 36.

[42] 1996 Act, *supra* note 5, §§ 2(1)(c), 31(6); *Persero II*, [2015] SGCA 30, ¶¶ 106, 109.

[43] 1996 Act, *supra* note 5, §§ 17(1)(ii)(b), 17(2), 37(2)(b).

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an award, to take into account the terms of the contract, which include the promise to comply promptly with the board's decision.[44]

There are risks. A respondent will argue that an interim award for payment pre-judges the merits and will challenge it under Section 34, relying on public policy and patent illegality. The answer is that the interim award does not decide the merits. It enforces a contractual obligation that the parties accepted precisely so that payment would precede the final decision, and the final award can adjust or reverse the payment with interest. The restraint that the Supreme Court has recently reiterated in reviewing awards supports the view that such an award is unlikely to be disturbed merely because another view is possible.[45] Until the point is decided, however, the technique remains untested in India.

D. Independence and neutrality of board members

The enforceability of a board decision depends in part on confidence in the neutrality of those who made it. Indian law applies strict standards to arbitrator independence: Section 12(5), read with the Seventh Schedule, renders ineligible persons with specified relationships to the parties, and the Supreme Court has applied that principle to unilateral appointments.[46] A board is not an arbitral tribunal, and those rules do not apply to it directly. But a board whose members are chosen unilaterally by a public employer would invite the objection that its decision lacks the neutrality that justifies prompt compliance, and a tribunal asked to enforce such a decision might be receptive to the objection. Contracts should therefore provide for jointly agreed or institutionally nominated board members.

E. The policy environment

Policy is moving in a direction that bears on boards. The Ministry of Finance's Office Memorandum of 3 June 2024 issued guidelines on arbitration and mediation in contracts of domestic public procurement. The guidelines recommend that arbitration should not be routinely or automatically included in procurement contracts, especially large ones, and they promote mediation and negotiated settlement as alternatives. They draw in part on Section 48 of the Mediation Act, 2023, which allows the government to frame schemes for the resolution of disputes by mediation or conciliation.[47] As reported, the guidelines address arbitration and

[44] 1996 Act, *supra* note 5, § 28(3).
[45] *Somdatt*, 2025 INSC 113, ¶¶ 36, 42.
[46] 1996 Act, *supra* note 5, § 12(5) & sch. VII; *TRF Ltd. v. Energo Eng'g Projects Ltd.*, (2017) 8 SCC 377 (India); *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760 (India); *Voestalpine Schienen GmbH v. Delhi Metro Rail Corp.*, (2017) 4 SCC 665 (India).
[47] DEP'T OF EXPENDITURE, MINISTRY OF FIN., GOV'T OF INDIA, Office Memorandum No. F.1/2/2024-PPD, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement* ¶¶ 6–7 (June 3, 2024); The Mediation Act, No. 32 of 2023, INDIA CODE (2023), § 48.

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mediation, and they do not appear to speak to dispute boards specifically. The practical risk is that large public contracts that drop arbitration clauses will make a court the final forum, which brings the *Peterborough* scenario into play and raises the question whether Indian courts would order interim compliance with a board decision. A board system whose decisions can be enforced only after years of litigation does not serve its purpose.

VI. A FRAMEWORK FOR ENFORCING BOARD DECISIONS IN INDIA

A. Contract drafting

The most reliable fix is contractual. Employers and contractors should adopt, in the particular conditions, a clause modelled on Sub-Clause 21.7 of the 2017 FIDIC conditions and tailored to the 1996 Act. Such a clause should do five things. It should state that the board's decision is binding when given and must be complied with whether or not a notice of dissatisfaction is given. It should state that failure to comply may be referred directly to arbitration without further board or amicable settlement steps. It should authorise the tribunal expressly to make an interim or partial award requiring compliance without reopening the merits, an outcome that Sections 17 and 31(6) already permit in principle. It should provide for the board to be constituted at the start of the contract, with default appointment by an institution if the parties fail to agree, so that the absence of a board cannot be used to avoid the gateway. And it should provide for repayment with interest if the final award revises the decision.

B. Tribunal and court practice

Tribunals should treat a claim for compliance with a board decision as distinct from the underlying dispute and should be willing to issue an interim award on it where the contract is clear. Courts hearing challenges under Sections 34 and 37 should apply the restraint described in *Somdatt* and should not treat an interim award enforcing a board decision as a determination of the merits. Referral courts under Section 11 should not allow the non-constitution of a board to defeat arbitration where the employer was responsible for it. A clear pronouncement from the Supreme Court on the enforcement of binding but non-final decisions would remove the remaining uncertainty.

C. Procurement policy

Policy makers should align procurement guidelines with board practice. If arbitration is to be limited in large public contracts, the guidelines should say whether, and how, boards are to be used, and should require that board decisions be enforceable in the forum of final resort, whether that is a tribunal or a court. Standard-form public contracts should include a Sub-Clause 21.7-

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style clause and a neutral, jointly agreed or institutionally nominated board, and should make clear that a public employer's duty to comply promptly is an ordinary contractual obligation.

D. Anticipated objections

Three objections deserve a reply. The first is that interim payment risks paying money that must later be returned. That risk is the price of the mechanism, and it can be managed by repayment with interest and, where appropriate, security. The second is that public employers face budgetary and audit constraints that make prompt payment difficult. Those constraints already apply to certified payments, and a board decision is the product of a neutral and reasoned process and not of a unilateral assessment. The third is the one-dispute objection, that all differences must be resolved in a single reference before anything is paid. The Singapore Court of Appeal rejected that objection in *Persero II*, and nothing in the text of the 1996 Act requires it.

VII. Conclusion

This paper asked whether, and how, a binding but non-final dispute board decision can be enforced in an Indian-seated construction arbitration. The answer that emerges is that Indian law contains the tools but has not yet been asked to use them. The 1996 Act permits interim awards and interim measures, and the *Persero* litigation shows how an interim award can give effect to a board decision while leaving the merits open. Indian courts, for their part, have so far been concerned with holding parties to the board stage and not with what follows it.

Three findings follow. The enforcement gap in the 1999 FIDIC conditions is real and has been costly where it has been litigated. The 2017 conditions close it by contract, and Indian parties can do the same in their own drafting. And the policy shift towards mediation in public procurement makes it more important, not less, to settle what the final forum is and what interim relief it can give. The study has limits. It is doctrinal, it relies on published decisions, and it contains no empirical data on how boards perform in Indian projects. A study of board usage and compliance in Indian infrastructure contracts, and a test case before an Indian tribunal or court on interim enforcement, would be the natural next steps.

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