IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC No. 328 of **2018**

BETWEEN	:	**HOUSING AUTHORITY**
		PLAINTIFF
AND	:	**TOP SYMPHONY SDN. BHD**
		DEFENDANT
BEFORE	:	M. Javed Mansoor, J
COUNSEL	:	Mr. D. Sharma with Mr. S. Deo for the plaintiff
	:	Mr. J. Apted with Ms. W. Chen for the defendant
DATE OF DECISION	:	12 May 2023

DECISION

INTERNATIONAL ARBITRATION Stay application – Arbitration agreement – Illegality – Separability of arbitration agreement – Repudiation of arbitration agreement – Party autonomy – Sections 12, 22, International Arbitration Act 2017 – Section 5, Arbitration Act 1965 – Order 12 rule 7 High Court Rules 1988 – Singapore International Arbitration Centre Rules 2016

The following cases are referred to in this decision:

a. *Fiji Roads Authority v Stantec New Zealand Ltd [2019] FJHC 736; HBC227.2017 (26 July 2019)*
b. *Stantec New Zealand Ltd v Fiji Roads Authority [2019] FJHC 867; HBC 324.2016, HBC227.2017 (14 September 2018)*
c. *South Pacific Fertilizer Ltd v Allied Harvest International Pte Ltd [2019] FJHC 400; HBC 142.2017 (8 May 2019)*
d. *Gulf Canada Resources Limited v Arochen International Limited [1992] BCJ 500*
e. *P. Elliot & Co. Limited (In Receivership and In Liquidation) [2012] IEHC 361.*
f. *Rederi Kommanditselskaabet Merc-Scandia v Couniniotis S.A (The Mercanaut") [1980] 2 Lloyd's Rep 183*
g. *BDMS Ltd v Rafael Advanced Defence System [2015] 1 All ER (Comm) 627*
h. *Willesford v Watson [1873] UKLawRpCh 15; [1872-1873] LR 8 Ch App 473*
i. *Roadworx Fiji Ltd v Fletcher Construction (Fiji) Ltd [2016] FJHC 952; HBC108.2016 (20 October 2016)*
j. *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1992] 2 All ER 609*
k. *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd and others [1993] 3 All ER 897*
l. *Westacre Investments Inc v Jugoimport-SPDR Holdings Co Ltd and others [1998] 4All ER 570*
m. *Fiona Trust & Holding Corporation and others v Privalov and others [2007] 4 All ER 951*

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1. The plaintiff and the defendant entered into an agreement for the construction of houses and industrial and premises. The plaintiff filed this action stating that the defendant conducted itself in such a way as to repudiate the agreement, and the plaintiff accepted such repudiation and terminated the agreement on 21 July 2016. The plaintiff has asked for declarations that the master agreement and the

dispute resolution agreement were validly terminated. The plaintiff sought general damages and reliefs under sections 146(1) and 147(1) of the Commerce Commission Act. Leave was granted for service of the writ and other documents to the defendant out of jurisdiction.

Stay application

2. The defendant filed a summons on 31 January 2019 to stay court proceedings and sought the following orders;

a. "All proceedings herein between the plaintiff and the defendant, other than the proceedings relating to this application, be stayed pending the determination of this application;

b. All proceedings herein between the plaintiff and the defendant be stayed pursuant to section 12 of the International Arbitration Act 2017 or alternatively, section 5 of the Arbitration Act 1965, or further or alternatively Order 12, rule 7 of the High Court Rules 1988, the plaintiff and the defendant having by a written Design-Build Master Agreement dated 11 May 2012 agreed to refer to arbitration the matters in respect of which this action is brought ("Arbitration Agreement");

c. The parties are at liberty to refer to arbitration the matters in respect of which this action is brought in accordance with the Arbitration Agreement and the terms and conditions therein;

d. A declaration that in the circumstances of the case this Honourable Court has no jurisdiction to hear and determine the subject matter of the claim and/or to grant the reliefs/remedies sought in the action;

e. The plaintiff do pay to the defendant its costs of and occasioned by this action including the costs of this application;

f. The said costs to be paid by the plaintiff to the defendant before any matter is referred to arbitration, and

g. Any other reliefs that the court deems fit and just".

3. The application was supported by the affidavit of Wong Chung Sing, the defendant's director. The affidavit was filed on 31 January 2019. The plaintiff's

affidavit in response was filed by Salimoni Karusi, the plaintiff's board secretary and legal counsel. Thereafter, the plaintiff moved by summons filed on 6 May 2019 to file an additional affidavit to adduce evidence concerning the registration of a foreign company through the defendant to do business in Fiji. The defendant opposed the application. After hearing both parties, court granted leave on 28 June 2019 to file a further affidavit of Salimoni Karusi before the stay application could be heard. The plaintiff also wanted to take up as a preliminary issue the question whether the master agreement dated 11 May 2012 was a valid and legal contract. Court declined to take up this question for determination as a preliminary issue.

4. The affidavit of Wong Chung Sing, filed on behalf of the defendant, stated that the parties executed a design build master agreement dated 11 May 2012 (master agreement) whereby the plaintiff appointed the defendant as a contractor to exclusively undertake the development and construction of a project known as Waila City on a freehold land situated at Waila measuring approximately 821 acres and described as lot 1 DP 7071 in Calia, Nausori.

5. Wong Chung's affidavit stated that the plaintiff and the defendant are bound by the arbitration agreement. The plaintiff claimed to have terminated the master agreement based on the defendant's alleged breaches of the agreement. The defendant disputed the termination by letter dated 7 September 2016 sent by its solicitors. The defendant stated that it requested mediation under clause 53 of the master agreement and that sub clauses 53.2 and 53.3 required good faith consultation between the parties' representatives. The plaintiff, the defendant said, refused to participate in the clause 53 process and instituted the current proceedings. The defendant stated that the plaintiff's claim is premised upon the defendant's alleged breach of the master agreement, and that the claim is caught by the arbitration agreement. The defendant states that it has complied with the arbitration agreement, and has not filed pleadings or taken other steps in the present action.

6. The plaintiff filed an affidavit in response through Salimoni Karusi. The affidavit stated that the plaintiff is the owner of freehold land at Waila. Pursuant to the master agreement, the plaintiff engaged the defendant on a turnkey basis to

construct on its land low cost, medium cost and high end housing and industrial premises as well as facilities over a term of seven years.

7. The plaintiff stated that four years after the master agreement was executed, the defendant had failed to achieve the outcomes that were critical to achieving the start of the Waila Project. The plaintiff stated those outcomes in this way:

a. "Putting in place the Principal's Programme and the Project Schedule (or Work Schedule);

b. Obtaining all necessary Approvals for the procurement of the Waila Project;

c. Obtaining Project Finance for the Waila Project as a whole or for any single phase;

d. Submitting designs with sufficient details to enable pricing to be carried out (which was a precondition to entry into a Supplementary Agreement for each phase) and which addressed affordability for the target market;

e. Entering into Supplementary Agreements with respect to any phase".

8. The plaintiff stated that the defendant had no reasonable prospect of completing the activities in the remaining years. The plaintiff said that the defendant's proposals did not meet the master agreement and that the several breaches by the defendant manifested an intention on its part to no longer be bound by the terms of the agreement. Due to the defendant's breaches, the plaintiff said it terminated the master agreement on 21 July 2016.

9. The plaintiff stated that on 7 September 2016, the defendant's solicitors served a notice pursuant to clause 53 of the master agreement. This dispute notice, it was said, did not address any of the factual and legal assertions raised by the plaintiff. The plaintiff stated that clause 53.2 required the party claiming a dispute to serve a notice containing all relevant details of the dispute, and that the defendant did not provide such details. The dispute notice only mentioned that the dispute is to be mediated, the plaintiff stated, even though there was no provision for mediation in the dispute resolution agreement. The plaintiff stated that by letter dated 16 September 2016 its solicitors wrote to the defendant's

solicitors advising that the dispute notice failed to operate as a notice under clause 53 of the master agreement as the termination letter set out in detail the plaintiff's entitlement to terminate the agreement.

10. It is pertinent to refer to the material parts of the dispute resolution clause of the master agreement, which is reproduced below:

> "53.1 A Party must, when any dispute arising out of or in connection with this agreement, including any question regarding its interpretation, existence, validity or termination, invoke the dispute procedure specified in this clause before commencing arbitration or court proceedings (except proceedings for interlocutory relief).
>
> 53.2 A Party claiming a Dispute shall send written notice of the Dispute to the other containing all relevant details includ9ng the nature and extent of the Dispute. Upon receipt of the notice, the Parties must appoint at least one senior representative, who must, within five (5) working days from the date of receipt, meet with each other, and attempt to resolve the Dispute.
>
> **Parties to resolve Dispute**
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> 53.3 Following notice under Clause 53.2 the Parties shall consult in good faith to try to resolve the Dispute. If agreement is not reached within ten (10) days from the date of the meeting, the Dispute will be escalated to each of the Parties respective Chief Executive Officer or the Chief Executive Officer's nominee, who must then meet and attempt to resolve the Dispute within five (5) Days.
>
> 53.4 If the Dispute is not resolved by this point, the Parties agree that:
>
> a. the Dispute must be referred to an finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Center ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause;
>
> b. the Tribunal shall consist of two (2) arbitration, one (1) to be chosen by each the Principal and the Contractor, and a chairman to be chosen by the two (2) nominated arbitrators;
>
> c. if the two arbitrators fail to select a chairman within one month of their appointments, then the chairman's position will be filled by a person appointed by the SIAC secretariat; and

d. the language of the arbitration shall be English and the choice of law is set out under Clause 54.1 of this Agreement." ("Arbitration Agreement")

53.6 The decision of the arbitrators, in the absence of manifest error, will be conclusive and binding. Such reference shall be deemed to be arbitration pursuant to the Arbitration Act of Fiji [Cap 38] or any statutory modification of that Act.

11. The plaintiff stated that the defendant did not evince any intention to be bound by and comply with the dispute resolution agreement until 1 December 2016 after termination of the master agreement on 21 July 2016. By its conduct, the plaintiff said, the defendant was in breach of the dispute resolution agreement, and was unwilling to be bound by the procedure contained in the agreement. Therefore, the plaintiff stated, it was entitled to construe the defendant's conduct as dilatory, and to accept the repudiation and terminate the dispute resolution agreement.

12. On 6 December 2016, the plaintiff wrote to the defendant's solicitors terminating the dispute resolution agreement. The dispute resolution agreement, the plaintiff said, is inoperative as it was validly terminated for the reasons stated in the termination letter. The plaintiff said that termination followed the defendant's repudiation of the dispute resolution agreement. According to the plaintiff, the defendant failed to rectify the repudiation despite the many opportunities it was provided to do so.

13. The plaintiff's affidavit in response explained that termination was on the following basis:

a. "the Plaintiff had repeatedly sought in recent correspondence compliance by the defendant with the procedure for the referral of disputes under the Dispute Resolution Agreement;

b. since 16 September 2016, the Plaintiff had sought from the Defendant a notice in accordance with the requirements of clause 53.2;

c. the defendant had refused to comply with the Plaintiff's requests for compliance with clause 53.2 and rather had preferred in its correspondence to deal with irrelevancies;

d. the Defendant's refusal to comply with clause 53.2 was evidence of its repudiation of the Dispute Resolution Agreement and that the threats made in its letter of 1 December 2016 was further and new evidence that the Defendant did not consider itself to be bound by the Dispute Resolution Agreement which in itself was repudiatory;

e. The Plaintiff accepted the repudiation and terminated the Dispute Resolution Agreement".

14. After the dispute resolution agreement was terminated, the defendant's solicitors wrote to the plaintiff stating that it was not in breach of the master agreement and that it would proceed accordingly. The plaintiff stated that there was no further correspondence between the parties from 6 December 2016 to 20 November 2017. On 21 November 2017, the defendant's solicitors wrote to the plaintiff giving notice under clause 53.2 of the dispute resolution agreement. The notice requested a response within 14 days. The plaintiff responded stating that it was not bound by the dispute resolution agreement and was also not amenable to the jurisdiction of the Singapore International Arbitration Centre (SIAC) without a valid binding agreement. By letter dated 25 January 2018, the defendant's solicitors wrote to the plaintiff and enclosed a draft notice of arbitration. The plaintiff states that the defendant has not filed any notice of arbitration with SIAC in order to commence arbitration.

15. The defendant's stay application relied on Order 12 rule 7 of the High Court Rules 1988, the Arbitration Act 1965 and the International Arbitration Act 2017.

16. Both parties made submissions on Order 12 rule 7 (1) of the High Court Rules, which states that a defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any irregularity mentioned in rule 6 or on any other ground must give notice of intention to defend the proceedings and apply to court for the reliefs stated in the rule. The application can be made by summons or motion, and supported by an affidavit verifying the facts on which the application is based. A defendant who makes an application under rule 7 (1) will not be treated as having submitted to jurisdiction of the court by reason of

having given notice of intention to defend the action. The defendant's application by summons to stay court proceedings is not inconsistent with the rule.

Arbitration Act 1965

17. The plaintiff submitted that section 5 of the Arbitration Act cannot be the basis of this application as the supporting affidavit did not show proof of any submission for arbitration. It was submitted that the defendant had not shown what matters were agreed to be referred to arbitration and that it was willing to do all things necessary for the proper conduct of the arbitration. The plaintiff submitted that the defendant has failed to satisfy the pre-requisites of section 5 of the Arbitration Act 1965 in order for a stay of proceedings to be granted.

18. Section 5 of the Arbitration Act 1965 provides:

> "If any party to a submission, or any person claiming through or under him or her, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him or her, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, 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."

19. The provision was examined in *Roadworx Fiji Ltd v Fletcher Construction (Fiji) Ltd*[1], Ajmeer, J held:

> "The court has power under section 5 of the Arbitration Act to stay proceedings where there is submission to arbitration by the parties to the proceedings. It is an admitted fact that the agreement entered between the parties consists of an arbitration clause (cl.23). According to cl.23 the parties have agreed to arbitration irrevocably. The plaintiff has commenced legal proceedings in this court against the defendant, a party to the submission, in respect of the matter agreed to be referred to arbitration. The defendant after appearances and before delivering any pleadings or taking other steps in the proceedings has applied to the court to stay the

[1] [2016] FJHC 952; HBC108.2016 (20 October 2016)

proceedings. The defendant was successful in establishing all the requirement envisaged in section 5 of the Act for stay of proceedings. I am satisfied that there is no sufficient reasons why the matter should not be referred in accordance with the submission and that the defendant 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. I therefore hold that the parties have submitted to arbitration in express terms and that the High Court has no jurisdiction over the matter at this stage. Accordingly, acting under section 5 of the Arbitration Act, I stay the legal proceedings commenced by the plaintiff in this court."

20. The defendant made the application for stay of proceedings by summons prior to delivering pleadings or taking steps in the proceedings.

International Arbitration Act 2017

21. Section 5 of the International Arbitration Act states:

Interpretation of Part 2

(1) "In the interpretation of this Act, reference shall be made to the Arbitration Model Law.

(2) Without affecting the generality of subsection (1), in making reference to the Arbitration Model Law, regard is to be had to the international origin of the Arbitration Model Law and to the need to promote uniformity in its application and the observance of good faith.

(3) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which the Arbitration Model Law is based.

(4) Where a provision of this Act, except section 46, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.

(5) Where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

(6) Where a provision of this Act, other than in section 42 (a) and 50 (2) (a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to such counterclaim".

22. The International Arbitration Act 2017 has been enacted:

> "To make provisions for the conduct of international Arbitrations based on the Model Law adopted by the United Nations Commission on International Trade Law on International Commercial Arbitration and to give effect to the New York Convention on the recognition and enforcement of foreign arbitral awards and for related matters."

23. Section 12 of the International Arbitration Act states:

Arbitration agreement and substantive claim before court

(1) "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests no later than when submitting his or her first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

(3) If the court refuses to refer the parties to arbitration, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall have no effect in relation to those proceedings.

(4) If the court refers the parties to arbitration under subsection (1), it shall make an order staying the legal proceedings in that action.

(5) A decision of the court to refer the parties to arbitration under subsection (1) shall be subject to no appeal.

(6) For any appeal from any decision of a court to refuse to refer the parties to arbitration under subsection (1), leave of the court making that decision shall be required.

(7) A decision of the court to refuse leave under subsection (6) shall be subject to no appeal".

24. Section 22 of the Act states that an arbitral tribunal may rule on its own jurisdiction.

25. The plaintiff states that a substantial part of the obligations under the master agreement were to be performed in Fiji for the development of the Waila project. The plaintiff's office was located at Valelevu House in Nasinu from 2012 to 2016. During this time, the plaintiff stated, the defendant's place of business was at 37, Gladstone Road, Suva. The plaintiff states that the directors of the defendant have a local company called Top Symphony (Fiji) Ltd, having been incorporated under the Companies Act 1983 on 12 November 2010, with its registered office in Suva. The plaintiff states that the defendant corresponded with the plaintiff concerning the master agreement through its locally incorporated company, Top Symphony (Fiji) Ltd. These matters were stated in support of continuing court proceedings.

26. In support of its submissions, the plaintiff referred to the following decisions: *Fiji Roads Authority v Stantec New Zealand Ltd*[2], *Stantec New Zealand Ltd v Fiji Roads Authority*[3], *South Pacific Fertilizer Ltd v Allied Harvest International Pte. Ltd*[4], *Gulf Canada Resources Limited v Arochen International Limited*[5], *P. Elliot & Co. Limited (In Receivership and In Liquidation)*[6] *and Fiji Road Authority v Stantec New Zealand Ltd*[7].

Party Autonomy

27. Parties to an arbitration agreement are at liberty, among other matters, to agree upon the procedure to be followed in referring a dispute for arbitration.

28. In its submissions, the plaintiff submitted that the parties did not agree under the master agreement for the matter to be referred to arbitration under the

[2] [2019] FJHC 736; HBC227.2017 (26 July 2019)
[3] [2018] FJHC 867; HBC324.2016, HBC227.2017 (14 September 2018)
[4] [2019] FJHC 400; HBC 142.2017 (8 May 2019)
[5] [1992] BCJ 500
[6] [2012] IEHC 361
[7] [2019] FJHC 736; HBC227.2017 (26 July 2019)

International Arbitration Act. The plaintiff submitted that if a dispute is to be referred for arbitration, it has to be done in accordance with clause 53.4 of the master agreement and not under the SIAC rules. The plaintiff submitted that the parties cannot compel the other to agree to the provisions of the International Arbitration Act to be invoked in agreements where parties have agreed otherwise. The plaintiff further submitted that the court cannot compel parties to agree to the provisions of the International Arbitration Act over the terms of an agreement.

29. The arbitration agreement provides a mechanism to resolve potential disputes. The mechanism is one that the parties to these proceedings expressly agreed upon.

30. In *Willesford v Watson*[8], cited by the defendant, the court observed:

> "If parties choose to determine for themselves that they will have a domestic forum instead of the ordinary courts, under that Act of Parliament, and since that Act was passed, a *prima facie* duty is cast upon the courts to act upon such an agreement, the parties have made such an agreement here; they probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against so doing, and they have made it part of their mutual contract that these questions should be so determined. They cannot, therefore, be heard to complain if that part of their contract is carried into effect."

Illegality

31. In his further affidavit, Mr. Karusi stated *inter alia*:

a. "At paragraph 7 of that Affidavit, Mr. Singh states that the Plaintiff admitted at paragraph 11 of my earlier Affidavit that any dispute arising from the Termination Letter was amenable to the arbitration agreement. Rather, what I said at paragraph 11 is that provided the Dispute Resolution Agreement remained on foot, any Dispute arising from the Termination Letter would have been amenable to the procedures prescribed by the Dispute Resolution Agreement. The Termination Letter only addressed contractual breaches by the Defendant of the Master Agreement. It did not address a claim under the Commerce Commission Act 2010 (Fiji) (CCA). The Plaintiff does not say that its claim in these proceedings under the CAA is or even could be amenable to arbitration;

[8] [1873] UKLawRpCh 15; [1872-1873] LR 8 Ch App 473

b. At paragraphs 11.2 and 11.3, Mr. Singh makes reference to the "negotiations" that took place in Fiji in May 2018 with the Defendant's representatives and states that, on that basis, the Defendant did not commence arbitration pending further negotiations. Annexed hereto and marked "A" is a copy of two letters dated 15 December 2017 and 16 March 2018 from the Plaintiff's solicitors, Squire Patton Boggs, to the Defendant's solicitors, Ranjit Singh & Yeoh, in respect of the negotiations. As the letter records, the meeting in May 2018 took place on a without prejudice basis including that such meeting was not considered a step taken in accordance with clause 53 of the Master Agreement. Thus, Mr. Singh's account of the meeting and the basis upon which the Defendant did not commence arbitration are incorrect".

32. Mr. Karusi stated that he obtained copies of the investment registration certificates issued to the defendant under the Foreign Investment Act of 1999 and the Foreign Investment Amendment Act of 2004. He exhibited the relevant certificates and stated that the defendant was not authorised to enter into the master agreement and perform the obligations under the agreement. He was also of the belief that the defendant did not provide Investment Fiji with the necessary compliance documents during the specified period.

33. The plaintiff submitted that there is a very clear distinction in the master agreement between an arbitration agreement/arbitration clause and the dispute resolution clause. The plaintiff submitted that there is a dispute resolution process to be followed prior to commencing arbitration or court proceedings and that these are stated in paragraphs 53.2 and 53.3 of the master agreement. It was submitted that in terms of the Arbitration Act, submission to arbitration is mandatory in order to succeed in a stay application. The plaintiff submitted that there are differences between the terms "arbitration agreement clause", "submission" and "dispute resolution clause". It was submitted that the dispute resolution clause was to express procedures if parties were to invoke the dispute resolution mechanism under the agreement. The plaintiff submitted that the master agreement has not spelt out specified procedures to be adopted in court proceedings, as the agreement cannot bind the way in which a court can operate.

34. The plaintiff referred to letter dated 7 September 2016 from the defendant's previous solicitors containing a request to resolve the matter pursuant to clause 53 of the master agreement and stated that this was the defendant's first request to resolve the matter. The letter is reproduced below:

> "RE: PROPOSED WAILA CITY DEVELOPMENT DESIGN BUILD MASTER AGREEMENT DATED 11 MAY 2012 (AGREEMENT)
>
> You letter dated 21.7.2016 to our client Top Symphony Sdn Bhd refers.
>
> We are instructed by our client that the contents of your letter dated 21.7.2016 is fallacious and is misrepresentation of the actual facts that has occurred.
>
> Our client instructs us that all necessary steps for the success of the Waila City Development (herein known as "the Project") was undertaken by our client but however the Housing Authority is the principal party that has failed to carry out its obligations accordingly causing the Project to be stalled.
>
> We are further instruct to put on notice that despite numerous and repeated requests from our client to give the relevant approvals in writing you have chosen completely to ignore our client and now Project is declared null and void by you.
>
> Our client as of todate has suffered in excess of minimal loss of USD8,000,000.00 (United State Dollars Eight Million) which our client will make a counterclaim against you and all relevant parties. This counterclaim is only on estimate as there are other losses suffered by our client.
>
> TAKE NOTE all evidence of your breach and the losses incurred by our client will be produced accordingly in due time.
>
> TAKE FURTHER NOTICE we put you on notice that pursuant to clause 53 the Master Agreement the dispute between the parties are to be mediated accordingly. Kindly confirm your stance on this.
>
> Thank you."

35. Referring to the above letter, the plaintiff submitted that there is no provision in the master agreement to mediate disputes between the parties.

36. The defendant referred to the decision in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*[9], where the English Court of Appeal stated.

> "Many types of contract provide for some preliminary step to be taken before there is an arbitration. I cannot see that this entitles a party to disregard the arbitration procedure altogether and start an action at law, merely because the preliminary step has not been taken. In many cases the arbitration agreement could be altogether bypassed if that were permitted ... The defendant in the court proceedings who applies for a stay may not have any claim which he wishes to make against the plaintiff, or any reason either to start an arbitration or to carry out any preliminary action before there can be one; he may merely wish to resist the plaintiff's claim. I can see no reason why he should not say to the plaintiff: 'I dispute your claim. If you wish to pursue it, you must carry out the preliminary step and then proceed the arbitration. I am ready and willing to arbitrate if you do, but if you go to court instead, I shall apply for a stay."

Separability of arbitration clause

37. The defendant submitted that the doctrine of separability of the arbitration agreement/ clause is to be found in the International Arbitration Act. Section 22 of the Act provides:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause."

38. In *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* and others[10], the English Court of Appeal held:

> "In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it foes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract ad to ask, as the House of Lords did

[9] [1992] 2 All ER 609 at 618
[10] [1997] 3 All ER 897 at 914

in *Heyman v Darwins Ltd*, whether the rule strikes down the arbitration clause as well."

39. In *Westacre Investments Inc. v Jugoimport-SPDR Holdings Co Ltd and others*[11], the court stated:

(a) "There is no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on arbitrators to determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable.

(b) Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract and, in the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration".

40. Invalidity of the arbitration clause was discussed in the judgment of the House of Lords in *Fiona Trust & Holding Corporation and others v Privalov and others*[12]. The House of Lords affirmed the Court of Appeal's decision in granting a stay of proceedings and stated:

"The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties' claims that he never agreed to anything in the document and that his signature is forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged."

[11] [1998] 4 All ER 570 at 593
[12] [2007] 4 All ER 951 at 959

41. Lord Hoffmann went on to state:

> "It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the validity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But s 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidity of the main agreement."

42. In the same case Lord Hope stated[13]:

> "The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do."

43. Fiji's International Arbitration Act is closely tied to the UNCITRAL Model Law. Article 16 (1) of the Model Law states:

> Competence of arbitral tribunal to rule on its jurisdiction
> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

44. Rule 28 of the SIAC Rules 6th edition, 2016 deals with the jurisdiction of the tribunal. Rule 28 (2) deals with the power of the tribunal to rule on its own jurisdiction. The rule states:

> Jurisdiction of the Tribunal
> "The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement. An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of contract. A decision by the Tribunal that the contract is null and void shall not entail ipso jure the invalidity of

[13] At 964

the arbitration agreement, and the Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void."

Repudiation

45. The plaintiff submitted that by its conduct the defendant repudiated the arbitration agreement.

46. In *Russell on Arbitration*[14], the author says this concerning repudiation:

> "A party may repudiate the arbitration agreement and if the other party accepts that repudiation the arbitration agreement will come to an end. The repudiation may be express or may be inferred from the conduct of a party acts in a way that is inconsistent with the continued operation of the arbitration clause and evinces an intention not to be bound by it. However, a failure to comply with the general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings is not a repudiation of the arbitration agreement".

The author went on to state:

> "Similarly, a party may abandon its right to arbitrate, for example by delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However, the courts are slow to find such abandonment without very clear evidence of an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned, that does not necessarily mean that the arbitration agreement itself has been abandoned."[15]

47. In *Rederi Kommanditselskaabet Merc-Scandia v Couniniotis S.A (The Mercanaut")*[16], the court said that repudiation must not be lightly inferred.

> "I cannot agree with that submission. It must be remembered that repudiation is something which is not lightly to be inferred. Where repudiation is inferred from conduct, the conduct must be clear and unequivocal. The conduct in the present case falls far short of repudiation. Moreover, the owners knew at least as early as Feb. 2, 1977, the day on which they are said to have accepted the repudiation, that the

[14] 23rd edition, 2007, page 90, Sweet & Maxwell
[15] Page 91
[16] [1980] 2 Lloyd's Rep 183 at 185

characters were seeking an adjournment of the Danish proceedings in order to pursue their claim in arbitration.

In those circumstances, it is impossible to say that the charterers were evincing an intention not be bound by the arbitration agreement, either at the time when the proceedings were commenced or when the repudiation is said to have been accepted."

48. In *BDMS Ltd v Rafael Advanced Defence System*[17], the English High Court concluded that the breach was not repudiatory even though it was potentially repudiatory. The court stated:

"In my judgment, however, the breach was not repudiatory in this case. My reasons for so concluding are as follows:

(1) This is not a case in which the defendant was refusing to participate in the arbitration. It was in fact actively participating in the arbitration, as illustrated by its involvement in the settling of the TOR and in exchanges as to the scope of the preliminary issue hearing. Its refusal to 'play by the rules' was limited to the issue of payment of its advance share on costs, a matter which was due to be addressed at the forthcoming preliminary issue hearing. Further, the refusal was not absolute, but was a refusal to pay unless security for costs was provided.

(2) That breach did not deprive the claimant of its right to arbitrate. It was at all times open to the claimant to proceed with the arbitration by posting a bank guarantee for the defendant's share and then seeking an interim award or interim measure order that the advance to be paid by the defendant. On any view it could have sought such an order in a final award. It could also have objected against withdrawal to the ICC Court pursuant to r 30(4).

(3) Although it is correct to state that the claimant had no obligation either to pay the defendant's share of advance costs or to object to withdrawal, the Rules provide means whereby the arbitration could be proceeded with and the withdrawal of the claim avoided. The Rules contemplate, address and provide machinery for dealing with this situation.

(4) For a breach to go to the root of the contract it is generally necessary to show that the innocent party has been deprived of substantially the whole benefit of the contract. It is difficult to see how the claimant is 'deprived' of that benefit when

[17] [2015] 1 All ER (Comm) 627 at 638

he has the means, expressly afforded to him by the Rules, to prevent that occurring and to seek recourse.

(5) It has to be proved that the arbitration agreement was repudiated, not merely the arbitration reference. Even if a claim is deemed withdrawn as a result of default in payment of the advance on costs, there is no restriction on the same claim being brought to arbitration again at a future time (art 30(4)). Future arbitration of the same claim is expressly contemplated so that irrevocable consequences as to arbitrability do not necessarily attach to the consequence of a failure to pay the advance on costs.

In summary, for the reasons set out in (2) to (5) above I am not satisfied that the refusal and/or failure of the defendant to pay its advance share of costs in this case was repudiatory in circumstances where it did not form part of a wider pattern of repudiatory conduct, as it did not for the reasons set out in (1) above"

Conclusion

49. The parties entered into a master agreement, which also contained an agreement to arbitrate. The parties agreed upon a procedure to resolve potential disputes. The International Arbitration Act is applicable to these proceedings. The scope of the Act is explained by section 4. The provision sets out the instances in which an arbitration is considered "international". Arbitration is regarded an appropriate way of resolving international commercial disputes, and courts give effect to arbitration agreements wherever possible[18]. In terms of the Act, the parties may submit their disputes to be resolved in the manner they have agreed upon. An arbitration clause is a self-contained contract, collateral to the main contract. It can stand on its own notwithstanding an attack on the containing contract. The arbitration agreement in this case remains valid. Rarely will a court deem an arbitration agreement to be repudiated. The authorities say so. The facts in this case do not support a finding of repudiation by the defendant, though it may have been tardy in its response. The arbitral tribunal is competent to arbitrate upon the issues raised by the parties, including the question of repudiation. It can rule upon its own jurisdiction. This is provided by section 22 of Fiji's International Arbitration Act, Article 16 (1) of the UNCITRAL Model Law on

[18] Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Thomson, Sweet & Maxwell, 160

Arbitration and rule 28 (2) of the SIAC rules. The tribunal may have its say if illegality or the failure to take a preliminary step affects its competency to adjudicate. The tribunal gains its jurisdiction from the agreement of the parties. Arbitration is consensual. The context and the contractual terms are material in construing what the parties intended. The plaintiff and the defendant are entities that have embarked upon a commercial venture. They have decided – after negotiations, in all probability – of how they will resolve their differences. The parties have agreed to follow the rules of the Singapore International Arbitration Centre. They have agreed upon the place of arbitration and the governing law. The court will not lightly disregard the principle of party autonomy. A stay of proceedings, therefore, will be an appropriate order in this instance. The parties may refer their disputes or differences to arbitration.

ORDER

A. Proceedings in this case are stayed as prayed for by the defendant's summons.

B. The parties may refer the matters concerning this action to arbitration in terms of the arbitration agreement.

C. The plaintiff is to pay costs summarily assessed in a sum of $2,000.00 to the defendant within 21 days of this decision.

Delivered at **Suva** this **12th** day of **May, 2023.**

HIGH COURT OF FIJI
SUVA

M. Javed Mansoor
Judge