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Housing Authority v Top Symphony: Non-compliance with a Multi-tiered Dispute Resolution Clause is Not Repudiation of an Arbitration Agreement

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This article discusses the approach taken by the High Court of Fiji ("Court") on the oft written about topic of whether failure to adhere to a multi-tiered dispute resolution clause is an issue of jurisdiction or admissibility. As previously reported, last year, in *Housing Authority v Top Symphony* [2023] FJHC 301 ("*Top Symphony*"), the Court granted a stay application and decided that non-compliance with a multi-tiered dispute resolution clause did not render an arbitration agreement "null and void, inoperative or incapable of being performed" under section 12(1) of Fiji's International Arbitration Act 2017 ("IAA") (which adopts Article 8(1) of the UNCITRAL Model Law). In doing so, the Court therefore confirmed that the effect of non-compliance with such a clause was a matter for the arbitral tribunal's determination.

Background

In 2012, the Plaintiff, a statutory body established under the Housing Act of Fiji, and the Defendant, a company incorporated in Malaysia, entered into a master agreement under which the Defendant was to develop and construct the Waila City housing project. The master agreement included the following multi-tiered dispute resolution clause ("Dispute Resolution Agreement"):

> *"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 including 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.*
>
> …

> *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:*
>
> *1. the Dispute must be referred to and 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; …"*

In July 2016, the Plaintiff purported to terminate the master agreement citing breaches by the Defendant which it claimed amounted to repudiation. In response, the Defendant, in a letter dated 7 September 2016, contested the termination and stated that "pursuant to clause 53… the dispute between the parties are [sic] to be mediated accordingly". In the Defendant's submission, its letter thus requested mediation as part of the "good faith" pre-arbitral consultations between the parties mandated by the Dispute Resolution Agreement.

However, the Plaintiff, on 16 September 2016, pointed out to the Defendant that its letter did not fulfil the criteria of a valid notice of dispute under the Dispute Resolution Agreement. The Plaintiff submitted that this was due to the absence of the necessary details of the dispute as required in clause 53.2 and the proposal of mediation, a process that was not part of the pre-arbitration procedure stipulated in the Dispute Resolution Agreement. The Plaintiff further alleged that despite attempts to seek the Defendant's compliance with the Dispute Resolution Agreement, it was unsuccessful. Consequently, in December 2016, it wrote to the Defendant purporting to terminate the Dispute Resolution Agreement, citing the Defendant's failure to adhere to pre-arbitral steps as tantamount to repudiating the Dispute Resolution Agreement.

Subsequently, there was a prolonged period of inactivity as between the parties until 21 November 2017, when the Defendant issued another notice of dispute under the Dispute Resolution Agreement. However, the Plaintiff contended at this point that the Dispute Resolution Agreement was no longer binding and thus refused to entertain the submission of any dispute to arbitration. Despite this, in January 2018, the Defendant sent the Plaintiff a draft notice of arbitration (although no arbitration proceedings were initiated at that point). Matters further escalated when, in October 2018, the Plaintiff brought legal proceedings in the Court,[1)] which led to the Defendant's application for a stay of the court proceedings.

The Plaintiff opposed the Defendant's stay application, arguing that the Dispute Resolution Agreement had been rendered inoperative due to the Defendant's alleged repudiation in failing to comply with pre-arbitral steps. On the other hand, the Defendant asserted that it had complied with the Dispute Resolution Agreement by requesting mediation, but the Plaintiff refused to participate in the process.

Judgment

The Court granted the Defendant's stay application.

In recognition of the separability doctrine provided for under section 22 of the IAA, the Court first ruled that an arbitration clause is indeed a "self-contained contract" which "can stand on its own notwithstanding an attack on the containing contract". Accordingly, the alleged repudiation of the master agreement did not affect the validity of the Dispute Resolution Agreement.

On the issue of repudiation of the Dispute Resolution Agreement, the Court, referring to *Rederi Kommanditselskaabet Merc–Scandia IV v Couniniotis S.A. (The "Mercanaut"*) [1980] 2 Lloyd's Rep 183 and *BDMS Ltd v Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm), adopted the English position that:

- repudiation must not be lightly inferred — where it is inferred from conduct, the conduct must be clear and unequivocal; and
- a repudiatory breach of an arbitration agreement requires that the breach go to the root of the agreement in depriving a party of the right to arbitrate.

In this case, non-compliance with preliminary steps did not permit a party to disregard an arbitration agreement and start a court action. On that basis, the Court found that the facts in *Top Symphony* did not amount to repudiation of the Dispute Resolution Agreement, although the Defendant may have been tardy in responding to the Plaintiff.

The Court went on to add that under the *kompetenz-kompetenz* principle enshrined in section 22 of the IAA, an arbitral tribunal has power to rule on its own jurisdiction irrespective of whether the underlying contract containing the arbitration clause is non-existent or null and void. More importantly, the effect of non-compliance with preliminary steps and whether it amounts to repudiation are issues within the arbitrator's power to decide.

Comments and Conclusion

The Court's approach in *Top Symphony* is consistent with similar cases in the region. For instance, in Australia in *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505 and *Construcciones y Auxiliar de Ferrocarriles S.A. v CPB Contractors Pty Limited* [2022] NSWSC 1264, the Supreme Court of New South Wales held in stay applications that the determination of whether an arbitration agreement is "inoperative" under the equivalent legislation should generally be entrusted to the arbitral tribunal and that a failure to adhere to pre-arbitral procedures does not automatically render an arbitration agreement "inoperative".

Further, although Fiji has yet to decide the issue in the context of applications to set aside an award, the Court's finding that non-compliance with tiered pre-arbitral dispute resolution mechanisms is an issue that fell within an arbitrator's purview under the *kompetenz-kompetenz* principle shows that the Fijian courts, when faced with the issue in determining the validity of an award, will likely follow the position of leading common law jurisdictions[2)] that non-compliance with pre-arbitral steps is an issue of admissibility.

Finally, it has been said that the level of international confidence in Fiji as a credible arbitration

destination is dependent on how Fijian courts will deal with arbitration-related proceedings.[3] In this regard, the Court's readiness to grant the Defendant's stay application in *Top Symphony*, one of the few cases in Fiji applying the IAA, serves to affirm Fiji's commitment to be the "place for international arbitration…in the Pacific Region."[4]

The author of this post was involved as co-counsel for the defendant in Housing Authority v Top Symphony [2023] FJHC 301.

References

[1] See an earlier judgment, *Housing Authority v Top Symphony Sdn. Bhd [Company No. 802021-X]* [2019] FJHC 629, at para. 2

[2] See e.g. *C v D* [2023] HKCFA 16; *Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm); *NWA and others v NVF and others* [2021] EWHC 2666 (Comm) and as discussed in this blog post.

[3] C. Pak, 'Country Update: Fiji', in Romesh Weeramantry and John Choong (eds), Asian Dispute Review, (2019, Volume 21, Issue 3), pp. 126-133.

[4] See Justice *Suresh Chandra*, International Arbitration – The Fiji Perspective, 26 March 2019.

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