In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2024 No: 11

BETWEEN:

FRONT STREET RE (CAYMAN) LIMITED

Plaintiff

v

(1) WINCHESTER GLOBAL TRUST COMPANY LIMITED
(2) CASTLE RE INSURANCE LIMITED

Defendants

RULING

Dates of Hearing: Wednesday 3 July 2024
Date of Judgment: Monday 5 August 2024

Plaintiff: Mr. Jonathan O'Mahony (Conyers Dill & Pearman Limited)
Defendants: Mr. John Hindess (Wakefield Quin Limited)

Application to stay proceedings - Arbitration clause – Conflicting dispute resolution clauses in cases involving a scheme of multiple contracts – Jurisdiction clause - Difference between legal principles applicable to domestic arbitrations and international arbitration

RULING of Shade Subair Williams J

Introduction

1. The present application is on the Defendants' 15 February 2024 summons ("the summons") seeking a stay of these proceedings which were commenced by a Specially Indorsed Writ of Summons filed on 16 January 2024.

2. The Plaintiff's pleaded case alleges contractual breaches of a Trust Agreement of the Castle Custody Trust Account dated 17 March 2015 (the "Trust Agreement"). The Trust Agreement is governed by Bermuda law and expressly envisages a Supreme Court action in the event of an unresolved dispute between the parties. Each of the parties to this action are privies of the Trust Agreement.

3. The Defendants, however, argue that the contract governing the Plaintiff's claim is in fact the Annuity Coinsurance Agreement, also dated 17 March 2015 (the "Coinsurance Agreement"). The Coinsurance Agreement is an agreement to which only the Plaintiff and the Second Defendant, Castle Re Insurance Limited ("Castle Re"), are privy. The dispute clause incorporated under the Coinsurance Agreement mandates in clear and unambiguous terms that any dispute, controversy or claim will be settled by arbitration.

4. The summons is supported by the affidavit evidence of Mr. David Goodwin, a consultant to the First Defendant, Winchester Global Trust Company Limited ("Winchester"). In reply, the Plaintiff filed affidavit evidence from Mr. George Nicholson, the Chief Financial Officer of the Plaintiff, Front Street Re (Cayman Island) Limited (the "Plaintiff" or "Front Street Re").

5. Having heard oral arguments and received written submissions from Counsel for both sides, I reserved my ruling which I now provide together with these reasons.

The Relevant Background

The Parties and their Commercial Arrangement

6. Castle Re is a company registered in the Turks & Caicos and in Bermuda as a Segregated Accounts Company ("SAC"). It provides long-term insurance policies.

7. Pursuant to the terms of the Coinsurance Agreement, Castle Re ceded the entire of its reinsurance liability to Front Re on a quota share basis. Under this arrangement, premiums that were paid to Castle Re were in turn submitted to Front Street Re for deposit into a Castle

Custody Trust Account (the "CCTA") in order to meet the segregated accounts requirements. The Plaintiff's case is that it is entitled to a return of premium on the CCTA assets. This is said to be the central commercial purpose for the Plaintiff's engagement in the contractual relationship it has with the Defendants.

8. Front Street Re and Winchester entered into a discretionary Investment Management Agreement (the "Management Agreement") with one another to govern the management and administration of the CCTA assets. (Castle Re, was not party to the Management Agreement.) Winchester was the account holder for the CCTA which, according to the Statement of Claim, was set up by Winchester with Fidelity (the "CCTA Fidelity Account"). Winchester is a Bermuda incorporated company which provides trust and administration services.

9. Part of the backdrop to this litigation is that the Plaintiff claims for breach of its contractual right to manage the CCTA assets at its discretion. It claims that the Defendants' actions resulted in the Plaintiff being blocked from accessing the CCTA assets.

The Statement of Claim ("SOC")

10. At paragraph 6 of the SOC it is claimed that Castle Re breached the terms of the Trust Agreement as follows:

    i. Obstructed Front Street from discretionarily managing the Assets in the CCTA with the terms of the Coinsurance Agreement and/or the Discretionary Management Investment Agreement;

    ii. Failed reasonably to cooperate with Front Street and/or Winchester in causing or permitting Front Street to discretionarily manage the assets in the CCTA in accordance with the terms of the Coinsurance Agreement and/or the Discretionary Management Investment Agreement.

    iii. Prevented the withdrawal by Front Street of excess assets in the CCTA as permitted by the Coinsurance Agreement.

11. At paragraph 7 of the SOC it is claimed that Winchester breached the terms of the Trust Agreement as follows:

    i. Prevented Front Street from discretionarily managing the Assets in the CCTA account with the terms of the Coinsurance Agreement and/or the Discretionary Management Investment Agreement;

ii. Failed reasonably to cooperate with Front Street in causing or permitting Front Street to discretionarily manage the assets in the CCTA in accordance with the terms of the Coinsurance Agreement and/or the Discretionary Management Investment Agreement.

…

12. Further allegations of Winchester's breach of the Trust Agreement are pleaded in relation to the Plaintiff's claim that it was deprived of its right to manage the investment and reinvestment of the CCTA assets. The Plaintiff also claims that Winchester failed to provide quarterly statements and access to any online CCTA account and that Winchester made unlawful withdrawals and payments from the CCTA assets.

13. Whether alternatively or additionally, the Plaintiff claims "*where relevant the said breaches amounted to gross negligence and /or willful misconduct by Winchester*."

The Possibility of a Counterclaim

14. Mr. Hindess invited me to take account of the Defendants' intention to counterclaim against Front Street Re. This is stated in the Second Affidavit of Mr. David Goodwin on behalf of Winchester. To make good his submission that the Plaintiff had early notice of the allegations which would form the basis of a counterclaim, Mr. Hindess pointed to his 21 August 2023 letter (the "letter") to Mr. O'Mahony where the Defendants allege material breaches of contract on the part of Front Street Re. Summing up their position, Mr. Hindess wrote:

"*The real issue at hand is that FSR never took any steps to invest the funds properly and simply does not want to abide by the way the custody and investment arrangement is set out in the Coinsurance, Trust and Investment Agreements*…"

15. Notwithstanding the above, Mr. O'Mahony, however, implored the Court to disregard any allusion to a non-existing counterclaim given the Defendants' ample opportunity to produce a draft or formalized pleading.

16. In relation to the Plaintiff's criticism of the Defendants' non-production of a pleaded counterclaim, I would note that the Specially Indorsed Writ of Claim of 16 January 2024 closely preceded the Defendants' 15 February 2024 summons for a stay of proceedings. While no order for an interim stay was imposed, it would seem that the parties are of one accord that the present application for a stay would operate to suspend the pleadings timeline. I say this because no complaint has arisen about the standstill on the pleadings stage and sensibly so. Through those lenses, one can hardly criticize the Defendants for not having filed a counterclaim.

17. However, it was nevertheless open to Mr. Hindess as Counsel for the Defendants to annex a draft copy of a defence and counterclaim to his written submissions given his reliance on the argument that the Defendants' could not answer to the Plaintiff's case and plead its own case without invoking the recapture remedies under section 7 of the Coinsurance Agreement. Notwithstanding, I have determined this matter on the basis of a pending defence and counterclaim of the nature outlined by Mr. Hindess during the hearing.

The Trust Agreement between All Parties

18. Under the Trust Agreement, Winchester is termed the "Trustee" and Front Street Re is referred to as the "Reinsurer".

19. The interplay between the Trust Agreement and the Coinsurance Agreement is evident. The Trust Agreement's references to the Coinsurance Agreement are plainly made for the convenience of the Trustee so to facilitate the Trustee's understanding of the Trust Agreement which sets out the role it has to play as Trustee. In the opening part of the Trust Agreement it states:

"…*It is understood that the expectation of the Parties is that it will not be necessary for the Trustee to reference the Coinsurance Agreement, including without limitation definitions set forth therein, in order for it to ascertain and perform its duties hereunder. The Reinsurer and the Company nevertheless agree to provide a copy of the Coinsurance Agreement to the Trustee in the event the Trustee determines in its sole discretion that it needs to reference the Coinsurance Agreement for any reason*."

20. The recitals stated in the Trust Agreement also foreshadow the scope and purpose of the Trust Agreement. Front Street Re's establishment of the CCTA account for the sole use and benefit of Castle Re is the express language used in the recital to refer to the Coinsurance Agreement to which only Castle Re and Front Street Re are party.

21. The purpose for the making of the Trust Agreement is also stated unambiguously:

"*WHEREAS, the Trustee* [Winchester] *has agreed to act as trustee hereunder, and to hold assets in trust in the Castle Custody Trust Account for the purposes set forth herein;*

and

WHEREAS, this Agreement is made for the purpose of setting forth the duties and powers of the Trustee with respect to the Castle Custody Trust Account."

22. Article II governs the withdrawal of assets from the CCTV account. Under that provision Castle Re is given a liberal entitlement to make withdrawals upon delivery of a written instruction to Winchester. The purposes for any such withdrawal is prescribed by section 2.2.

23. Winchester's duties to make distributions as the Trustee is outlined under section 2.3. Distributions made by Winchester may only be made in accordance with the purposes specified under that section. Those purposes are expressly stated as follows:

"…

(a) to pay any Recapture Amount in respect of any Reinsured Contract due from the Reinsurer to the Company pursuant to Section 7.3(a) of the Coinsurance Agreement;

(b) to pay or reimburse the Company for any other amounts in respect of any Reinsured Contract due from the Reinsurer to the Company under the Coinsurance Agreement;

(c) to pay the Reinsurer any remaining amount in the Castle Custody Trust Account in respect of any Reinsured Contract following the payment to the Company of the Recapture Amount in respect of such Reinsured Contract, pursuant to Section 7.3(a) of the Coinsurance Agreement;

(d) to pay the Reinsurer the Excess Amount for a Quarterly Accounting Period pursuant to Section 6.6 of the Coinsurance Agreement; and

(e) to pay the Reinsurer any remaining amount in the Castle Custody Trust Account once all Reinsured Liabilities in respect of all Reinsured Contracts have been paid and satisfied or have been recaptured."

24. Apart from a duty to provide Winchester with a copy of the Coinsurance Agreement upon request, the Trust Agreement does not outline the role or specific duties of Front Street Re as the Reinsurer. Those contractual duties are reserved for the Coinsurance Agreement and are owed by Front Street Re to Castle Re. Notwithstanding, Front Street Re does possess certain contractual entitlements under the Trustee Agreement.

25. Winchester's contractual duties to hold the CCTA assets on trust for Castle Re as the beneficiary is the clear and central purpose for the Trust Agreement. Within that context, Front Street Re is contractually entitled to receive certain payments from the Trustee under section 2.3 (c)-(e) of the Trustee Agreement.

26. Section 11.1 under Article XI on "General Provisions" sets out the Governing Law. Hereinafter, I refer to this clause as the "litigation clause" which states:

"*This Agreement shall be subject to and governed by the laws of Bermuda, without regard, to the maximum extent permitted by the law, to any principles of conflict of laws thereof that would result in the application of the law of another jurisdiction. Each party hereto hereby waives trial by jury in any judicial proceeding involving, directly or indirectly, any matter (whether arising in tort, contract or otherwise) in any way arising out of or related to this Agreement or the relationships established hereunder. Each Party hereby irrevocably submits to the exclusive jurisdiction of, and agrees that all proceedings relating hereto shall be brought in, the Supreme Court of Bermuda. This Section is a material inducement for the Parties to enter into this Agreement.*"

The Coinsurance Agreement between Front Street Re and Castle Re

27. Article I of the Coinsurance Agreement provides various definitions, many of which spotlight Front Street Re's contractual position as the Reinsurer. Under Article XV, the Trust Agreement is said to be part of the "Entire Agreement". Section 15.5 states:

"*This Agreement (including all exhibits and schedules hereto), the Maintenance Spreadsheet and the Castle Custody Trust Agreement constitute the entire agreement, and supersede all prior agreements, understandings, representations and warranties, both written and oral, among the parties with respect to the subject matter thereof.*"

28. The coaction between the Coinsurance Agreement and the Trust Agreement is also apparent under Article VI where the Coinsurance Agreement places a duty on the Plaintiff to establish the CCTA pursuant to the terms of the Trust Agreement. Section 13.3(a) under Article XIII obliges Front Street Re and the Castle Custody Trust Agreement to execute and to deliver to one another the Trust Agreement so that the inception date of the Coinsurance Agreement is the same date as the inception date of the Trust Agreement. Indeed, both of these Agreements were executed on 17 March 2015.

29. Paragraph 15.7 expressly provides that the Coinsurance Agreement itself "*is entered into solely for the benefit of the Company and the Reinsurer*." There is no scope under the Coinsurance Agreement for a third-party beneficiary.

30. Section 15.9 under Article XV prescribes the Governing Law to be exclusively carried out in accordance with the laws of Bermuda and pursuant to the arbitration clauses un Article XI. The terms of the arbitration clause of interest is as follows:

"*11.1 Agreement to Arbitrate; Request for Arbitration. As a condition precedent to any right of action arising hereunder, any dispute, controversy or claim arising out of, relating to, or in connection with this Agreement, the interpretation, performance or breach of this Agreement, as well as the formation and/or validity thereof, whether arising before or after termination of the Agreement, shall be referred to and finally settled by arbitration pursuant to this Article. Either Party may request arbitration in writing in accordance with the notice provisions set forth in Section 15.1.*"

The Management Agreement between Front Street Re and Winchester

31. The Management Agreement governs the contractual relationship between Front Street Re and Winchester as the Trustee. From its very title and the recitals which follow the preamble, it is evident that the Management Agreement is centrally about Front Street Re's provision and performance of investment management services for the CCTA. In this capacity, Front Street Re is said to be the investment manager for the CCTA.

32. It thus follows that under the Management Agreement, Front Street Re is not termed the "Reinsurer". The Management Agreement yields to the Coinsurance Agreement in respect of Front Street Re's contractual position as the "Reinsurer". This is at the least implicit under the following recital in the Management Agreement:

"*WHEREAS, Front Street (as reinsurer) and Castle Re Insurance Ltd. (as ceding company) ("Castle"), are parties to the certain Coinsurance Agreement (the "Coinsurance Agreement"), dated as of the date hereof, under the terms of which Front Street shall deposit certain assets in a trust account to be maintained by the Trustee for the benefit of Castle (the "Castle Custody Trust Account")*."

33. The continuance of the Management Agreement is contingent on the continuance of the Coinsurance Agreement, as is plainly contemplated under clause 11(c) of the Management Agreement. However, under clause 14 the definition of "Entire Agreement" makes no reference to the Coinsurance Agreement or the Trust Agreement.

34. Also, unlike the Trust Agreement and the Coinsurance Agreement which are both governed by Bermuda law, the Governing Law for the Management Agreement is New York State law.

Analysis and Findings

35. In this case, provisions from both the Coinsurance and the Trust Agreement are relevant to the issues for final adjudication. However, the dispute resolution provision in the Coinsurance

Agreement calls for private arbitration while the Trust Agreement requires the parties to submit to the jurisdiction of the Supreme Court of Bermuda. So, the question for this Court is which of the two prevail.

36. As a matter of statute law, the Court's power to stay proceedings under section 7 of the Arbitration Act 1986 (the "1986 Act") generally applies to domestic arbitration agreements. Section 8(1), however, governs the position on non-domestic arbitration agreements. It provides:

"***8. Staying court proceedings where party proves arbitration agreement***
(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the 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 the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings [my emphasis]."

37. Part III of the Bermuda International Conciliation and Arbitration Act 1993 (the "1993 Act") applies to international arbitrations. Pursuant to section 23(1) of the 1993 Act, the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law")[1] has the force of law in Bermuda. Article 8 of Chapter II of the Model Law is consistent with section 8 of the 1986 Act. Article 8(1) provides:

"*(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 not later than when submitting his 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*."

38. So, it appears that Article 8(1) is engaged where, as the starting point, it is accepted that the matter is indeed the subject of the arbitration agreement. It is then open to a defendant to request the Court to refer the matter to arbitration. However, the Court will only refrain to do so where it finds that the arbitration agreement is void, inoperative or incapable of being performed. Section 8 of the 1986 Act, while congruous with the Model Law, expressly puts it to the Court to determine whether there is in fact a dispute which falls within the matter(s) agreed to be referred.

[1] The Model Law was adopted by the United Nations Commission on International Trade Law on 21 June 1985. A copy of the Model Law is set out in Schedule 2 of the 1993 Act.

39. Mr. Hindess characterised the Coinsurance Agreement as the master agreement which supersedes the Trust Agreement and the Management Agreement. On his argument, the latter agreements are ancillary and subject to the Coinsurance Agreement. It is on that basis that he submitted that the unequivocal language employed by the arbitration clause in the Coinsurance Agreement ought to be applied.

40. This Court was referred to an earlier decision in *Canevale Management Ltd v Pearman* 2000 Civ. Jur. No. 357 where Meerabux J said [6]:

"*I will next consider how the Courts view parties' choice to refer disputes or differences to arbitration and arbitration clauses.*

I think where the parties have chosen to refer their disputes or differences to arbitration the Courts will enforce such a reference by staying legal proceedings concerning any matter agreed to be referred 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement'. See section 7 of the 1986 Act. In other words to arbitration they should go in the ordinary course unless there is some good reason to the contrary."

41. Meerabux J, however, was referring to section 7 of the 1986 Act in his pronouncement of a "good reason" test. Section 7 applies to domestic arbitrations. In the present case, however, this Court is concerned with the test applicable to international arbitration agreements. This is outlined under Section 8, which broadly aligns with Article 8(1) of the Model Law on international arbitration agreements, as defined under Chapter 1 (General Provisions) of the Model Law. In accordance with those provisions, before refusing an order of stay, I must first be satisfied that the arbitration agreement is either:

    (i) null and void;
    (ii) inoperative; or
    (iii) incapable of being performed

42. Also, under section 8(1) of the 1986 Act, the Court will decline a defendant's application for a stay where it finds that there is no dispute between the parties with regard to the matter agreed to be referred.

43. Section 8 of the 1986 Act appears to be a direct lift from section 1 of the now repealed UK Arbitration Act 1975 (the "UK 1975 Act") which was enacted to give domestic law effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (the "New York Convention Law"). Article 8 the Model Law is based on Article II(3) of the New York Convention Law which similarly provides:

"*3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*."

44. The UK 1975 Act was replaced by the Arbitration Act 1996 (the "UK 1996 Act") which is now the statutory authority for applications seeking a stay of legal proceedings on the contractual grounds that the matter is to be referred to arbitration. Section 9(4) of the UK 1996 Act bars the Court from granting a stay "*unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed*." Section 9(4) is to be read in the context of section 9(1) which provides:

"*A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*"

45. Collectively, sections 9(1) and 9(4) mean that the English Courts will, similar to the Bermuda Court applying section 8(1) of the 1986 Act, first determine whether the matter before the Court is in fact a matter which is the subject of matters agreed to be referred to arbitration.

46. In *FamilyMart China Holding Co Ltd v Ting Chuan* [2023] UKPC 33, the Board, concerned with the equivalent Cayman legislation, spoke about the importance of consistency between the contracting states to the New York Convention in relation to the recognition and enforcement of arbitration agreements. In its previous judgment from the BVI in *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21 the Board quoted from the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 where it was stated [126]:

"*… … The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that, according to Born, International Commercial Arbitration, 2nd ed (2014), p 113, the New York Convention has been implemented through national legislation in virtually all contracting states.*"

47. In *Gol Linhas Aereas* the Privy Council placed a special status on domestic law enacted to give effect to international instruments. Highlighting the significance of the origin of this statutory category, the Board held [75]-[76]:

"*75. As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in Stag Line Ltd v Foscolo, Mango & Co Ltd [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called "domestic precedents of antecedent date", but rather should be construed "on broad principles of general acceptation"; see also James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd [1978] AC 141, 152 (Lord Wilberforce); Fothergill v Monarch Airlines Ltd [1981] AC 251, 281–282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning.*

76. It follows that in interpreting and applying article V(1)(b) of the New York Convention, as transposed into English or Cayman law, the court should regard the domestic statutory provision as imposing a standard of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants. This does not mean that the court should be seeking to identify the lowest common denominator of standards required by different national systems. But it does mean that the court should be seeking to identify and apply basic minimum requirements which would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing."

48. Unsurprisingly, the uniform approach encouraged by the UK Supreme Court and approved by the Privy Council does not have universal application across its member states. Canada, for example, is reported to be the first country in the world to have adopted the Model Law through the enactment at the federal level. In British Columbia the statutory grounds for refusing to refer a dispute for arbitration by way of a stay are by and large the same as in Bermuda and the UK. So, under the Commercial Arbitration Act R.S.B.C. 1996, c. 55 the Court will stay the proceedings unless the arbitration agreement is void, inoperative or incapable of being performed.

49. Through the development of case law from the Supreme Court of Canada the question as to whether an arbitration agreement is void, inoperative or incapable of being performed appears to be a matter for the arbitrator to grapple with in the first instance as opposed to the Court. So, in Canada, the general approach is that the arbitrator should be given the first opportunity to determine his/her own jurisdictional scope. However, the expectation is that the Canadian Court will intervene where it finds that the dispute, unarguably, does not come within the scope of the arbitration agreement. In such a case, an application for a stay would be refused. In *Seidel v Telus Communications Inc*., (2011) 412 N.R. 195 (SCC). Binnie, J observed:

"*[113] A British Columbia court must grant a stay of proceedings unless it concludes that the arbitration agreement is "void, inoperative or incapable of being performed". However, the fact that a court can rule on its jurisdiction does not mean that it is required to do so. An argument that an arbitration agreement is void, inoperative or incapable of being performed constitutes a direct challenge to the arbitrator's authority to consider and resolve the dispute. In Dell, both the majority and the minority had to decide whether the arbitrator or the court should rule first on the validity and applicability of the agreement, and they also discussed, by extension, the type of review the court should conduct to determine whether the agreement is "void, inoperative or incapable of being performed".*

[114] The majority recognized that there were two schools of thought on this point - one being that the court must rule first on the issue, and the other that the arbitrator should do so - and that the debate was not conclusively resolved by either the New York Convention or the Model Law . However, a consensus was building in the international community that a court should engage in only a prima facie analysis and intervene only if the test of manifest nullity was met (Dell , at paras. 75-76). From this, a general rule was identified. Challenges to the arbitrator's jurisdiction - namely arguments that an agreement is void, inoperative or incapable of being performed - should be resolved first by the arbitrator. A court should depart from this general rule only if the challenge is based on a question of law, or on questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record, and is not merely a delaying tactic (see Dell, at paras. 84-86).

[115] This general approach is consistent with the one - developed by the British Columbia Court of Appeal in its 1992 decision in Gulf Canada - that many provincial appellate courts were following across Canada before Dell. According to the test from Gulf Canada, the court was to grant the stay unless it was "clear" that the dispute fell outside the scope of the agreement. If it was "arguable" that the agreement applied to the dispute, the question was to be left to the arbitrator:

"Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

"Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal." (paras. 39-40)"

50. To sum up the Canadian approach, which significantly differs from the English Courts, a Canadian Court will not likely exercise any first instance decision-making powers on the boundaries of arbitral jurisdiction insofar as it calls for a determination on the question of whether the agreement is *null and void, inoperative or incapable of being performed.* Instead, it seems that across Canada, a Court will be more inclined to refuse an application for a stay unless the dispute undoubtedly falls outside of the terms of the arbitration agreement. Where the correlation between the dispute and the arbitration agreement is arguable, the Court will be apt to refer the matter to the arbitrator.

51. Notwithstanding, the English Court of Appeal considered section 9(4) of the UK 1996 Act to be clear enough to find that the question of "*null and void, inoperative or incapable of being performed*" is a matter for the Court's first instance determination. In *Fulham Football Club Ltd v Richards* [2011] EWCA Civ 855, JA said [para 36]:

"*Section 9(4) also makes it clear that the determination of whether the agreement is null and void, inoperative or incapable of being performed is a matter for the Court whereas a challenge to the validity of the agreement ahead of any application for a stay might itself be considered to be arbitrable*."

52. The UK Supreme Court endorsed this construction of section 9 in favour of the Court's exercise of its power to rule on arbitral jurisdiction in the first instance. In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 [52] Lord Mance, with whom the full Court was in agreement, said:

"*Returning to the scheme of Part I of the 1996 Act, the principal focus is on the commencement, conduct, consequences and court powers with regard to an actual or proposed arbitration. In addition, Part I starts with sections 1 to 8 identifying the nature and certain features of the arbitration agreements to which it applies while sections 9 to 11 deal with stays of domestic legal proceedings where such an agreement exists. Section 9 runs contrary to JSC's general case, since it represents a situation in which the court, rather than the arbitral tribunal, rules in the first instance on arbitral jurisdiction, and does so bindingly. The Court of Appeal in Fiona Trust and Holding Corp v Privalov [2007] EWCA Civ 20; [2007] 1 All ER (Comm) 891, para 36 and Lightman J in Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 3) [2007] EWHC 665 (Ch); [2007] 2 All ER 1075, paras 14 to 20 correctly so held.*"

53. In the present proceedings, the application for the stay is grounded on the submission that the dispute falls within the scope of matters agreed to be referred to arbitration. In *Sian Participation Corporation ((in Liquidation)) v Halimeda International Ltd* [2024] UKPC 16 (where Lord Mance's judgment in *AES Ust-Kamenogorsk Hydropower Plant* was cited with approval) the Privy Council heard an appeal from the Court of Appeal of the Eastern Caribbean

Supreme Court (British Virgin Islands ("BVI")), where the governing legislation gives direct effect to Article 8(1) of the Model Law and the New York Convention. The Board quoted from *FamilyMart* where Lord Hodge outlined a two-stage process in determining whether the matter at hand falls within the arbitration agreement. Lord Hodge was quoted as follows:

"*(1) The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration Agreement" (para 58).*

(2) The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim" (para 59).

(3) A 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the 'matter' is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought. The Board agrees with the statement of Sundaresh Menon CJ in para 113 of Tomolugen [2016] 1 SLR 373 that a 'matter' requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. The Board agrees with Foster J's third proposition in WDR Delaware that a 'matter' is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings" (para 61).

(4) The exercise involving a judicial evaluation of the substance and relevance of the 'matter' entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay" (para 65)."

54. I am not only guided by the approach outlined by Lord Hodge but also bound by it as it was followed by the Privy Council in *Sian Participation Corporation*. While these authorities were not cited at the hearing, I have referred to them illustratively to profile the origins of the legal structure which applies to these kinds of applications.

55. I now turn to the authorities relied on by Counsel before me in deliberating the question as to whether the dispute between the parties falls within the scope of matters agreed to be referred. Mr. Hindess invited me to rely on Kawaley CJ's decision in *John Buchanan v Tom Lawrence* [2012] Bda LR 47. Mr. Hindess pointed out that it was argued by one party that the subject

matter of the dispute was not caught by the arbitration clause but that doubt should be resolved in favour of a referral for arbitration. Mr. Hindess relied on the following statement by Kawaley CJ [at para 9]:

"…*even where there is some doubt as to whether or not the dispute falls within the arbitration clause the policy of the Model Law is to grant a stay*…"

56. The Court in *Buchanan v Lawrence* was concerned with a claim for a refund of a £27,000 fee paid by the plaintiff as consideration under a golf club membership contract which contained a dispute resolution clause providing for arbitration in London. The 'doubt' as to the applicability of the arbitration clause arose on the question as to whether the Plaintiff's suit was against the Defendant personally or in his representative capacity. It was against that factual background that Kawaley CJ made the above statement of principle which was inspired by the below footnote in Robert Merkin's Arbitration Law (Informa Press, 2011):

"*This principle has been applied in numerous cases, eg, Kaiser v Krauss [2003] 122 ACWS (3d) 981 (stay granted where it was not clear whether the parties were bound by the arbitration clause in their capacities as individuals); Instrumenttitehdas Kytola Oy v Esko Industries Ltd [2003] BSSC 722 (dispute as to whether dispute fell within arbitration clause-stay granted as answer not clear)…*"

57. In the case of *Instrumenttitehdas Kytola Oy v Esko Industries Ltd [2003]* the defendant Canadian distributor supplied goods to the plaintiff, a Finnish manufacturer. This business relationship had been contractually governed by successive distribution agreements in which there was an arbitration clause for dispute resolution in accordance with the laws of Finland. The last executed agreement between the parties was for the year of 1998. The latest commencement period for the contract was 31 December 1999. Thereafter, subject to a termination clause allowing for either party to give 6 months' notice, the contract would automatically continue to be valid for successive periods of one calendar year at a time. So in December 2000 the plaintiff gave notice of termination within the requisite timeframe. However, negotiations subsequently took place between the two parties resulting in the continued distribution to the plaintiff. However, in the inside of a year, the plaintiff sought to summarily end the relationship to the point of refusing the defendant's orders for products.

58. The 'doubt' in *Instrumenttitehdas Kytola Oy v Esko Industries Ltd [2003]* '*as to whether or not the dispute falls within the arbitration clause*' (as Kawaley CJ put it in *Buchanan v Lawrence)*, resulted from the plaintiff's argument that the 1998 agreement had effectively terminated and was thereby replaced with a new oral agreement which contained no provision for arbitration.

59. There is a significant distinction to be made, as I see it, between the present proceedings and the cited one-contract cases such as *Instrumenttitehdas Kytola Oy v Esko Industries Ltd* and *Canevale Management Ltd v Pearman* in which the only express provision governing the dispute resolution process refers to adjudication by arbitration. In those cases, the Court operated on a strong presumption that the arbitration clause governed all forms of dispute due to the absence of any express and unequivocally clear language to exclude a particular type of dispute from the clause.

60. Where there are a scheme of contracts collectively governing the relationship of multiple parties and conflicting terms on the forum for dispute resolution, there is a heightened complexity to determining the contracting parties' intention. In one-contract cases, where the parties expressly agreed to arbitration under a one and only dispute resolution clause, the Court will be less likely to infer (from a position of doubt) that the parties ever intended to proceed to trial in a Court of law. The Court may likely resolve the doubt by granting the stay and referring the dispute for arbitration on the presumption that the parties mutually intended to proceed by arbitration. However, in multi-contract cases importing conflicting clauses a higher degree of scrutiny is necessary. This is because it may be questionable whether it was ever in the original contemplation of the parties that the dispute in issue would be resolved by arbitration.

61. In multi-contract cases, the Court will first be concerned, as a matter of construction, whether the pleaded breach of contract claim is capable of being brought under one particular agreement. If it is, then the one-contract case approach will apply. That is to say, doubt will likely be resolved in favour of arbitration if the Court is concerned with a contractual agreement which contains a clause giving exclusive jurisdiction to the arbitration process. In such cases, it is always open to the plaintiff to assume the burden of showing that there is a statutory basis for the judge to refuse to grant a stay.

62. In this case, I would first determine whether there is a single arbitration clause which exclusively governs the dispute between the parties. That question is dependent on whether the Plaintiff's claim jointly or severally engages the Coinsurance Agreement and the Trust Agreement. I have already found that the Plaintiff's claim etches on both agreements.

63. The claims made against Castle Re by Front Street Re, as the Reinsurer, engage allegations of breach of a scheme of contractual arrangement consisting of both the Coinsurance Agreement and the Trust Agreement. Without regard to any alternative claims in tort, the Plaintiff's action for breach of contract against Castle Re is substantially a complaint about its hindrance to access and management of the CCTA assets.

64. This is also the nature of the contractual claim against Winchester. The loss claimed by Front Street Re in respect of both Defendants is predicated on Front Street Re's inability to be contiguous with the CCTA assets. Front Street Re also claims that Winchester made unlawful withdrawals and payments from the CCTA assets. This clearly engages Winchester's distribution duties under the Trust Agreement and Front Street Re's entitlement to receipt of an "excess amount" under both the Trust Agreement and the Coinsurance Agreement.

65. In summary, it is plainly the case that the Plaintiff's claims are incapable of being tethered to only the Coinsurance Agreement. The Trust Agreement and the Coinsurance Agreement are not severable; they converge into a comprehensive regime creating contractual obligations and entitlements between all of the parties. So, to resolve the conflicting dispute provisions, I must effectively decide whether there is a proper basis for the side-stepping of the arbitration clause. So I am now to resolve whether the arbitration clause in the Coinsurance Agreement should prevail over the litigation clause in the Trust Agreement.

66. Mr. Hindess described the Coinsurance Agreement as the master agreement over the Trust Agreement. On his argument, the terms of the Coinsurance Agreement would subjugate those of the Trust Agreement in instances of conflict. The predominance given to the Coinsurance Agreement from this vantage point is supported by Section 15.5 under Article XV of the Coinsurance Agreement where the Trust Agreement is defined to be a part of the "Entire Agreement". Arguably, section 13.3(a) under Article XIII would also buttress the sovereignty of the Coinsurance Agreement insofar as it mandates Castle Re's and Front Street Re's execution of the Trust Agreement.

67. Mr. O'Mahony, on the other hand, produced an extract from Jurisdiction and Arbitration Agreements and their Enforcement (3rd Edition) at 5.32 stating:

"*If an incorporated document contains provisions which conflict with the express terms of the subject contract, then as a general rule the express terms will prevail. Greater weight will be placed upon the terms which the parties have expressly chosen than the provisions of pre-printed terms. In Indian Oil Corp v Vanol Inc the parties' express terms made provision for disputes to be submitted to the English courts. The contract also incorporated the claimant buyer's standard terms which made provision for arbitration. The court held that express terms prevailed over the incorporated terms.* … …"

68. In executing the Trust Agreement, as a condition precedent for the closing of the Coinsurance Agreement, all of the parties are to be taken as having expressly chosen the adjudication clause, particularly because the clause concludes: "*This Section is a material inducement for the Parties to enter into this Agreement.*"

69. In my judgment, it is significant that the parties were materially induced to enter into the Agreement on account of the adjudication clause. The intended gravitas of the adjudication clause is further borne out by the draftsman's employment of the terms "irrevocably" and "exclusive" as follows ". *Each Party hereby irrevocably submits to the exclusive jurisdiction of, and agrees that all proceedings relating hereto shall be brought in, the Supreme Court of Bermuda*". What is clear from this provision is that each of the parties expressly agreed to "irrevocably" submit to the "exclusive" jurisdiction of the Supreme Court for any proceeding related to the Trust Agreement or to any proceeding related to the relationships established under the Trust Agreement. Comparatively speaking, the arbitration clause in the Coinsurance Agreement does not use equally strong wording in its requirement for dispute resolution by arbitration. So in this case, the express terms are contained in the Trust Agreement while the incorporated terms in relation to dispute resolution is to be found in the Coinsurance Agreement. In my judgment, that is reason enough for the Court to refuse the application for a stay of proceedings as there is strong evidence of the parties' express intention to proceed by litigation before the Supreme Court.

70. However, it is also right to consider whether it would be reasonable to expect the Plaintiff's claim (and any possible counterclaim by the Defendants) to be resolved by way of two or more sets of proceedings. Both governed by Bermuda law, the Coinsurance Agreement and the Trust Agreement inextricably combine to form a contractual regime which has been defined by the Coinsurance Agreement as the "entire agreement". In my judgment, separate proceedings would only usher dubiety in this case. So, having regard to the whole scheme of the agreements, I find that it is most unlikely that the parties intended to bifurcate the resolution process between disputes falling under the Coinsurance Agreement and the Trust Agreement. The only reasonable conclusion in my judgment is that the parties intended for the whole of the claims to proceed in one forum and that one forum is most likely to have been in accordance with the provision containing their express terms for the matter to be adjudicated in the Supreme Court.

71. What of the Management Agreement which is expressly governed by New York law? Again, in my judgment, the parties could not have intended that a claim which bites into all three of the agreements would be severed by separate proceedings. I find that the Trust Agreement best reflects the parties' intention that any such dispute would be bought before the Bermuda Court which would then apply New York law if and where any issues uniquely relevant to the Management Agreement arise.

72. In *Fiona Trust & Holdings Corp v Privalov* [2007] UKHL 40 Lord Hoffman said:

"*In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the*

relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked at paragraph 17 'if any businessman did want to exclude disputes about the validity of a contract it would be comparatively easy to say so'."

73. The *Fiona Trust* principle also applies to conflicting clauses in multiple agreements which weld into an overall scheme. However, the starting place is a broad and purposive construction of the agreements. This is because the Court will be principally concerned with the parties' intention when the agreements were formed. In this case, the agreements were all executed on the same date. However, in the making of the Coinsurance Agreement, the parties contemplated the making of the Trust Agreement, to the extent that the execution and delivery of the Trust Agreement was a condition of the Coinsurance Agreement. To my mind, the parties' final intention is best measured by the terms of the Trust Agreement.

Conclusion

74. For all of these reasons the Defendant's summons for a stay is refused. Either party may be heard on the issue of costs upon filing a Form 31TC within 21 days of the date of this Ruling. Otherwise, costs of this application should follow the event and be granted in favour of the Plaintiff on a standard basis to be taxed if not agreed.

Dated this 5th day of August 2024

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT