

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2023/0262

BETWEEN

FLEX OCEAN FREIGHT LTD.

CLAIMANT/RESPONDENT

AND

CENTURY INSURANCE AGENCY LIMITED

1st DEFENDANT/APPLICANT

NAGICO INSURANCE COMPANY LIMITED

2nd DEFENDANT/APPLICANT

Appearances: Dancia Penn K.C., Astra Penn and Khyra Powell for the Claimant/Respondent
John Carrington K.C. for the Defendants/Applicants

**2024: March 6th
May 15th**

DECISION

- [1] **YOUNG J:** The 1st Defendant is an agent of the 2nd Defendant, a licensed insurer (we shall refer to them collectively as the Insurers). They both conduct business in the British Virgin Islands.
- [2] The Claimant (the Company) owned a vessel which was the subject of a Marine Hull Policy of Insurance (the Policy) issued in 2015 and renewed by the 2nd Defendant in 2016. It remained valid up to 20th October 2017.

- [3] The Company's vessel was destroyed during the passage of a hurricane over the Virgin Islands and Puerto Rico between the 17 – 20 September, 2017. The captain, unfortunately, lost his life but his wife and their children (also aboard) were rescued. Attempts to salvage the vessel failed.
- [4] In June 2018 the Company filed an insurance claim with the 2nd Defendant. It was rejected that same month. The Company has now filed the instant claim with the court seeking damages for breach of contract for the rejection of the insurance claim.
- [5] The Insurers did not submit to the jurisdiction of this court. They filed an acknowledgement of service and an application for a declaration that the court ought not to exercise its jurisdiction on the fixed date claim filed but should instead stay the proceedings pursuant to section 18(1) of the Arbitration Act (the Act) and Rule 9.8 of the Civil Procedure Rules 2023 and award costs on the application and the proceedings thus far. This decision concerns this application.
- [6] The Insurers say that the parties are bound by an arbitration clause (the Agreement) entered into as part of the Policy by virtue of a General Change Endorsement #1 which reads:
- "Assured agrees to submit any and all controversies arising under this schedule to arbitration. This includes if that person is entitled to recover at all and if so how much damages...."
- [7] They posit that undoubtedly their refusal of the insurance claim falls easily within the scope of that clause and the directive to arbitrate is mandatory. Despite the arbitration agreement, the Respondent has initiated this claim.
- [8] The Company, by its affidavit, countered that the Insurers should be estopped from relying on the arbitration clause since the arbitration agreement has been rendered inoperable by the Insurers' own conduct. In any event the Insurers failed to give full and frank evidence when they neglected to mention the attempts to settle which had been made by the Company. Finally, the granting of the application would only cause further delay and substantial additional cost.
- [9] The Court intended to focus its consideration mainly on whether the Insurers were estopped from claiming the right to arbitrate by their conduct as this would render the agreement inoperative.

However, the Company's submissions in response went far beyond what had been alleged in their affidavit. The issues blossomed and the Court will deal with the following

1. Whether the Claim should be stayed:
 - A. Whether there was an arbitration agreement within the meaning of section 17 of the Act;
 - B. Whether the dispute in the Claim is solely arbitrable;
 - C. Is the Agreement invalid, inoperative or incapable of being performed for any of the following reasons:
 - i. Abandonment or repudiation
 - ii. Contradictory or ambiguous
 - iii. Against public policy
 - iv. unconstitutional
 - v. Contrary to the overriding objective
 - vi. Non-disclosure
 - vii. Further delay and increased cost

[10] Before embarking on this enquiry this Court is guided by the words of **Francis Travel Marketing v Virgin Atlantic Airways**¹:

"When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."

Whether the Claim should be stayed:

A. Whether there was an arbitration agreement within the meaning of section 17

[11] Section 17(1) of the Act defines an arbitration agreement as follows:

- (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

¹ [1996] 39 NSWLR 160 at 165

Subsections [2] and [3] mandates that:

- (2) The arbitration agreement shall be in writing.
- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.....

The evidence:

[12] By paragraph 14 of their affidavit the Company stated:

“... it is agreed that there is an arbitration clause contained as part of the Policy as General Change Endorsement #1 which contains an arbitration agreement worded as quoted in paragraph 12 of the Singh Affidavit (filed on behalf of the Insurers).”

[13] The Affiant revealed in her next paragraph that she believed that the “arbitration agreement had been rendered null and void, inoperative, and incapable of being performed.”

Courts Consideration:

[14] There was absolutely no evidence before the Court which alleged that the agreement did not exist. But there was an admission as stated above. It is now quite disturbing to note that the Company, by its submissions, appeared to be attempting to resile from their very clear admission. Surely, this can not be.

[15] The Company, undoubtedly, had knowledge of the Arbitration Clause as it is stated by the Insurers, and admitted by the Company, to have formed part of the Policy on which the Company relied to bring their claim.

[16] Again, by its submissions only, the Company argued that there is no evidence of a common intention to arbitrate and the agreement was being applied retroactively.

[17] There is no allegation of a lack of a common intention made whether in the Company's pleadings or affidavit. The Court certainly can not infer this simply because it is an insurance policy. This is even less likely when the only evidence is that the Policy was offered by the Insurers, accepted by the Company, was paid for, issued and renewed. The renewal itself stated that it was being made

“subject to all the terms, conditions, agreements and limitations set forth in the said policy and endorsements attached thereto”.

- [18] It is impossible for the Court to simply infer that the Agreement was being applied retroactively perhaps because the Endorsement is described as a General Change Endorsement. There must be some evidence placed before the Court as to when this particular endorsement was issued and the circumstances surrounding its issue. There is no factual background offered to the Policy or the Agreement for that matter.
- [19] Importantly though, the document exhibited by the Insurers at paragraph 4 contained the particular endorsement among others and together they were stated to be the Policy. The Company accepted this to be correct in paragraph 8 of its own affidavit. One can not now fathom how a denial of this sort could be made.
- [20] When all of this is viewed in light of the Company’s own admissions and its main allegation being that the Insurers should not be allowed to invoke the Agreement, the Court finds that there was in existence an arbitration agreement, within the meaning of section 17, made between the parties.

Is the dispute in the Claim solely arbitrable:

- [21] Section 18(1) and (4) of the Act provide:
- (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.
 - (4) Where the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action.
- [22] The combined effect of section 18(1) and (4) of the Act imposes a mandate on the court to refer the parties to arbitration and impose a stay where the subject of the claim falls within the scope of the arbitration agreement as being solely arbitrable. The court must determine the nature of the dispute

and whether the Agreement covers such a dispute. Fulfillment of both limbs of this test is required - **Heyman v Darwins Ltd**².

[23] But even after this test is satisfied and the issue has been raised, the court must ensure that the arbitration agreement is valid or has legal effect - **Albon v Naza Motor Trading SND BHD and Another**³, operative and capable of being performed, that is, the absence of any external cause preventing performance - **The Rena K**⁴.

[24] In determining whether or not the subject of a claim falls within the ambit of the agreement, **Siong Beng Seng and Ors v Caldicott Worldwide Ltd**.⁵ urged a practical common sense approach.

The Court's Consideration:

[25] The Company conceded that the sole matter pleaded is whether the Company was entitled to recover for the loss suffered and if so in what quantum. These fall squarely within the scope of matters mandated to be arbitrated. No difficulty there.

[26] Moving on to the second limb of the test, the Court recognised that the Agreement also mandated that arbitration was the sole mechanism for dispute resolution of all such matters under the Policy. There was no discretion or other options given.

[27] The subject of the Claim now before the Court is, clearly, solely arbitrable.

[28] There remains only for the Court to determine whether for any reason the parties should not be bound by the agreement to arbitrate.

Is the Agreement void, inoperative or incapable of performance;

i. Abandonment or Repudiation:

The evidence:

² [1942] AC 356

³ (2007) ALL ER 501

⁴ [1979] QB 377)

⁵ BVIHMAP 2020/0020

- [29] The Insurers, at paragraph 14 of their affidavit, alleged that the arbitration agreement was valid, operative and capable of being performed.
- [30] The Company at paragraph 14, of their affidavit in response, referred to paragraphs 12 – 15 of the Insurers' affidavit and agreed that the Policy included an arbitration clause which contained an arbitration agreement worded as quoted.
- [31] Nothing was alleged of the Agreement being invalid or otherwise inoperable. Rather, at paragraph 15 the Company urged that "in all of the events which have happened in this matter, and the protracted efforts which the Claimant/Respondent and the Applicant/Defendant have engaged in the matter, it is not now appropriate for the Applicant/Defendant, several years after the Claimant/Respondent first made a claim under the Insurance Policy, to now seek to invoke the arbitration clause. I verily believe that the arbitration agreement has been **rendered null and void, inoperative and incapable of being performed** within the meaning of section 18(1) of the Arbitration Act, 2013." (Emphasis mine)

The Parties' Case:

- [32] The Company stated, and it has not been denied, that one of the attempted avenues for settlement of the dispute between the parties was a claim filed by the Company with the Insurance Tribunal of the Financial Services Complaints Tribunal in September, 2019. While those proceedings were ongoing the Insurers did not seek to invoke the Agreement but submitted themselves to the tribunal's jurisdiction and participated fully.
- [33] They further submitted that the Insurers have, therefore, acted inconsistently with the right to arbitrate and in so acting have caused prejudice to the Company. Consequently, they have waived any right they had to rely on the agreement. This is supported by their delay in seeking to arbitrate.
- [34] The Insurers counter that in order to waive or abandon the right to arbitrate there must have been an agreement between the parties whether expressly or impliedly that arbitration would no longer be the final means of dispute resolution. In this case, there was no representation, or any common understanding that the parties would not arbitrate.

The Court's Consideration

- [35] The Insurers drew **Costain Ltd v Tarmac Holdings Ltd**⁶ to the Court's attention **and** referenced the applicable test to determine the inoperability of an arbitration agreement as outlined there which the Court accepts. In order for an agreement to be inoperative by abandonment there must be an agreement between the parties that arbitration would no longer comprise the final means of dispute resolution. For an agreement to be inoperative by way of repudiation there has to be a clear common understanding that the parties would not arbitrate.
- [36] The Company relied on **Kenneth Kryz v New World Value Fund Limited & Others**⁷ where a stay was refused as the applicant was found to have waived the right to arbitrate. That case may not be of as much assistance to the Company as they intended. In **Kryz** the applicant was asked by the respondent what its preference was and it rejected arbitration wholesale in favor of the court proceedings. The respondent yielded to the applicant's expressed preference and commenced court proceedings. The court found that by their own conduct the applicants were estopped from "changing tack" by seeking to arbitrate instead.
- [37] There is nothing in the evidence provided by the Company that it was the Insurers who sought to go to the Tribunal. In fact, it was the Company which initiated those proceedings and simply informed the Insurers of the action it had taken. There was no correspondence or reference to any discussion between the parties before this was done.
- [38] The correspondence which the Company did exhibit revealed that the Insurers even had to ask the Company to provide them with a copy of the tribunal claim. This was not of the Company's doing. There was no new agreement made or common understanding forged.
- [39] I find it somewhat bitter in the Company's mouth now to seem to say that the Insurers' cooperation was some clear and unequivocal statement that they no longer wished to arbitrate in accordance with the Agreement. At best, what their action seemed to say is we will go along and see where this leads as it relates to the settlement of this dispute. It led nowhere.

⁶ 171 Con LR

⁷ BVIHCom 2013/0026

[40] The Company also relied on an American case **Grisby Inc v M Securities Investment**. It was not provided to the court and lacked a citation. Since it would not have been a binding authority the court saw no need to attempt to seek out the useful guidance the Company promised it offered.

ii. Contradictory or Ambiguous

[41] The Company in its submissions raised that the wording of the clause was contradictory and ambiguous.

[42] The use of the term Pre-Dispute Arbitration Clause was perceived as problematic. This Court can not agree. It is a pre dispute clause as it was agreed before any dispute arose and its object is arbitration.

[43] The Company continued that the sentence “Assured(s) by accepting this Policy agree(s) that the following disclosures are conditions precedent to the issue of any policy” was also problematic. It could not be a condition precedent to the issue of the Policy when it was came into existence after the Policy had already been issued and seemed to have been applied retroactively.

[44] Since there has been no factual background provided to either the policy or the endorsement, it is impossible for this Court to find that the Policy was issued before the endorsement and the endorsement was applied retroactively. As the Insurers stated in their submissions in response the statement “not only ties the clause back to the policy itself... but also refers to “following disclosures”.

[45] The Claimant also submitted that the disclosures themselves were contradictory. They seem to say that the parties’ waiver of their right to seek remedies in court and the acceptance that the arbitration would be final and binding on the parties was contradictory to the provisions that pre arbitration discover was generally more limited than and different from court proceedings, the arbitrator’s award is not required to include factual findings or legal reasoning and any party’s right to appeal or seek modification of rulings by the arbitration is strictly limited.

[46] This submission was, admittedly, difficult for the Court to follow. Even attempting to articulate it here was difficult and consequently it may not be as the Company intended by its submissions. For this the Court apologizes. But as understood, the Court finds that each of these disclosures was information being provided by the insurer to the insured on how the arbitration would operate. It is a laundry list of what to expect from the arbitration process. This Court could find no contradiction and many of the disclosures were extracted from the Arbitration Act itself.

[47] As there was no ambiguity found the Court saw no need to invoke the contra proferentem rule as requested by the Company relying on **Insurance Corporation of Belize Limited v Kathaleen Resorts International Limited**⁸. Even if there were parts of the disclosures that were not as clear as they could have been, subsection B) which mandates the arbitration of controversies, including if a person is entitled to recover at all and if so how much in damages, is crystal clear and precise. This ground fails.

iii. Against Public Policy

[48] The Company submitted that the Agreement was contrary to public policy where it sought to oust the Court's jurisdiction and stipulate that the arbitration was final and binding on the parties, the arbitrator need not give reasons and the right to appeal or modify the ruling was limited.

[49] The Insurers were of the strong view, and this Court agrees, that by mandating that the court **must** stay court proceedings in favour of arbitration where the dispute or matter is subject to an arbitration agreement, the Act embraces a clear pro arbitration policy. The legislators were not shy in their articulation and they would certainly have embraced such a policy only after having balanced all competing considerations.

[50] Furthermore, decisions like **Fleming v Lindsay**⁹ and **Artemis Trustees Limited et al v KBC Partners LP et al**¹⁰ have already interpreted the legislation as pro arbitration, so it could not be said to be contrary to public policy.

⁸ [2024] CCJ5 (AJ) BZ paragraph 52

⁹ AXAHCVP2015/006

¹⁰ BVIHCOM 2012/0137

[51] In **Fleming** (ibid) the Court of Appeal explained:

“In **Fleming v Lindsay AXAHCVAO 2015/006 at para. 35**, the Court of Appeal stated “It is axiomatic that one of the main aims of arbitration, as with other forms of alternative dispute resolution, is to transfer the power of resolve disputes into the hands of the parties’ chosen representatives – arbitrators, mediators or experts. The courts have shown an increasing tendency to uphold the parties’ choice of alternative dispute resolution, especially arbitration. The courts have gone as far to uphold arbitration agreements that oust the court’s statutory jurisdiction provided that the arbitrator has the power to grant the relief that is claimed.”

[52] It would seem quite proper, therefore, that there could be no injury to the public good if parties have chosen to arbitrate rather than litigate a particular dispute. Such a choice should be recognised and given support by the court.

[53] Section 65 of the Act allows the parties to agree that no reasons are to be given for the award. Kings Counsel for the Insurers raised, and this Court agrees, that any issue of interpretation relating to this clause is for the arbitrator under the kompetenz-kompetenz principle.

[54] Section 79 of the Act also limits recourse against an award to an application for setting aside. There is no statutory right of appeal. He insisted that all of this is statutory and could therefore not be against public policy.

[55] As far as this Court is concerned, a no appeals provision does not exist in this agreement. It simply states that the right to appeal is limited. And that right is limited because of the Act and the avenues available to a party who is not satisfied with an award.

[56] **National Infrastructure Development Company Limited v Construction OAS**¹¹ considered a no appeals provision in an arbitration Agreement. However, the court acknowledged that although it had both a statutory and inherent jurisdiction to set aside an award in certain circumstances there also existed a right to review the decisions in the exercise of its supervisory jurisdiction. The use of the phrase “final and binding” did not diminish this right. At paragraph 33 Justice Seepersad said:

In the instant case the Arbitration Agreement references the words “final and binding” and these words relate to the efficacy to be attached to the Award. For example, an Order of the High Court is final and binding but same is subject to an appeal. This Court holds the view

¹¹ Claim No. CV2022-01832

that if on the face of the arbitration award there are evident errors of law or the decision is irrational, the review jurisdiction of the High Court can be invoked so as to remit the decision back to the tribunal for further consideration. The power exercised by the Court is not appellate in nature but falls within the remit of the Court's supervisory jurisdiction. The High Court must always ensure that the processes are engaged in a fair and transparent manner which strictly accords with the tenets of natural justice.

[57] For completion, that decision also gave useful guidance on treating with awards where there was no reasoned evaluation of material evidence and the findings appear unsupported by the evidence adduced. At paragraph 26 the court accepted that even then "the court may intervene and remit the decision back to the Tribunal for further consideration." This ensures that by submitting to arbitration even where no reasons need be given, a party is not shut out from approaching the court for redress.

[58] This ground also can not succeed.

iv. Unconstitutional:

[59] There is nothing submitted or found to be unconstitutional about the arbitration agreement. Section 16(9) of the Constitution guarantees a right to a "fair hearing within a reasonable time before an independent and impartial court or other authority established by law." The arbitration tribunal is an authority established by law, there is no infringement or deprivation proven.

[60] All of the authorities on which the Company sought to rely dealt with upholding certain Arbitral awards. As the Company admitted, we are not there yet. There is nothing about the arbitration agreement alleged or proven which to my mind would shock the conscience.

v. Contrary to the Overriding Objective

[61] The overriding objective is inapplicable here. It applies only to the exercise of a discretion given to it by the Civil Procedure Rules 2023 or the interpretation of those Rules. The Court at this time is exercising its statutory power under the Arbitration Act. It is from there that the court derives its jurisdiction. Rule 9.8 simply outlines the procedure for applying to the court for the stay.

[62] More importantly, the parties agreed to this particular course of action and one or other can not now be heard to say that they are placed on an unequal footing. In fact, there is no evidence before this Court of the Company's financial position to support any contention that it is unable to bear the financial burden. This ground too must fail.

Non disclosure

[63] The Company's less earnest attack was the Insurers' failure to give full and frank evidence when they neglected to mention the attempts to settle which had been made by the Company. These exhaustive efforts, they informed, spanned many years (2018 – 2023) and the court claim was now only a last resort.

[64] It has not gone unnoticed that the Claim itself is absolutely silent on the arbitration clause. Much of the issues raised in the submissions by the Company could properly have been raised in their statement of case had they disclosed that arbitration formed part of the Policy they sought to enforce.

[65] This application was on notice and the Company was given ample time to respond which they did most adequately. Since this was a fully inter partes hearing, there is no duty of full and frank disclosure. The Insurers presented what they thought to be relevant or material and beneficial to their case. The Company was also able to present as it saw fit. In those circumstances the Insurers' failure to inform the Court of all that the Claimant thought to be relevant is in no way fatal.

Further delay and increased cost

[66] The Company's final attack related to the further delay and substantial additional cost which would be occasioned by the granting of the application. This submission was unsupported by any evidence.

[67] Arbitration is not intended, as the Claimant submitted, to be a genuine effort to amicably resolve issues before resorting to legal proceedings. Rather, section 2 of the Arbitration Act defines arbitration as "a process of settling a dispute between parties before an arbitral tribunal...." Section 3 (1) informs that "The object of this Act is to facilitate and obtain the fair and speedy resolution of disputes by arbitration without unnecessary delay or expense." This seems to run contrary to the Company's own perception.

[68] The parties are to have the opportunity to allow their chosen and agreed process to work for them as mandated by the Act.

[69] **Disposition:**

1. The claim herein is stayed pursuant to section 18(1) of the Arbitration Act.
2. Costs to the Applicant on the application and the proceedings in a sum to be assessed if not agreed within 21 days of this judgment.

**Sonya Young
High Court Judge**

By the Court

Registrar