

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA**

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

CASE NO. DOMHCV2019/0054

BETWEEN:

ACE ENGINEERING LTD

Claimant

AND

**[1] MONTREAL MANAGEMENT CONSULTANTS EST
DEVELOPMENT GENERAL SERVICE**

[3] NATIONAL BANK OF DOMINICA

Defendants

Appearances:

Heather Felix Evans of Optimum Legal for the Claimant

Lennox Lawrence with Jodi Luke of Platinum Law Chambers for the first
Defendant

Fernillia Felix of National Bank of Dominica for the second Defendant

2020: January 30th
May 18th

RULING

- [1] **STEPHENSON J.:** Before the court there are two opposing applications. There is an application by Montreal Management Consultants Est. Development General Service ('the first named defendant') to continue an anti-arbitration injunction which they obtained on an ex parte application and an application by ACE Engineering Ltd ('ACE') to discharge the said injunction.

- [2] Arbitration is a private dispute resolution process which effectively involves the parties to arbitration agreement contracting out the rights to Arbitration which they would otherwise submit to the High Court for resolution. Arbitration is said to be consensual and is to be construed depending on the intention of the parties as expressed in their agreements. One has to look at the agreement as it is only from that agreement is it possible to tell how disputes are to be resolved between the parties. In **Mitsui Construction Co Ltd –v- AG of Hong Kong**¹ it was held that it was a “*fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they had used, interpreted in the light of the relevant factual situation in which the contract was made*”.
- [3] It is therefore proper for the court in construing the terms of a contract to give effect, so far as the language of the contract permits to the commercial purpose of the arbitration clause. **Re: Fiona Trust and Holdings Corporation –v- Privalov**².
- [4] In seeking to ascertain the intention of the parties to a contract the court should seek to ascertain the meaning which the document would convey to the reasonable person having all the background knowledge which ought to have been available to the parties in the situation in which they were at the time of the contract. **Re: Investors Compensation Scheme Ltd –v- West Bromwich Building Society**³.
- [5] In **The Fiona Trust Case**⁴ it was decided *inter alia* that:
- “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 their relationship to be decided by the same tribunal and accordingly the arbitration clause ought to be construed in accordance with this presumption unless the language of the contract

¹ [1986] LRC (Comm) 245 (PC)

² [2007] UKHL 40, [2007] 4 All E R 951

³ [1998] 1 All E R 98, [1998] 1 WLR 896

⁴ *Supra*

clearly states that certain questions were intended to be excluded from the arbitrator”⁵.

- [6] In the case at bar ACE commenced arbitration proceedings against the first named defendant in the United States of America before the International Court of Arbitration International Centre for ADR numbered 24714/MK.
- [7] On 25th September 2019, the first named defendant applied for and obtained an *ex parte* order from this court restraining ACE from continuing the prosecution of its request for arbitration before the International Court of Arbitration for ADR dated 19th August 2019 and numbered 24714/MK. On the 8th November 2019 ACE applied for the said anti arbitration injunction to be discharged.
- [8] The following documents are before the court for its consideration in this ruling:
- a. An application by Ace to discharge or set aside the anti-arbitration injunction filed on 8th November 2019;
 - b. Affidavit of Anthony Le Blanc in support of the said application filed on even date with exhibits (“ALB23 – ALB28”);
 - c. Submissions filed on behalf of ACE filed on 8th November 2019;
 - d. Submissions in support of Anti-Suit injunction filed on behalf of the first named defendant filed on 15th November 2019;
 - e. The Court Order dated 30th January 2020 and entered on the 19th February 2020;
 - f. Answers to questions by the Court filed on behalf of the claimant on the 4th February 2020;
- [9] This court received written submissions and heard oral submissions from both counsel on the issue as to whether the anti-arbitration injunction should be continued or discharged. The court has reviewed the quite lengthy submissions filed by both counsel in this matter. Reference will be made to those submissions which were considered necessary to explain the court’s

⁵Fiona Trust Case *supra* per Lord Hope of Craighead at paragraph 28

conclusions. It is to be noted that failure to make specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account. Similarly, a good many issues of and points have been raised by both counsel which in the court's view is not necessary to discuss in order to resolve or to decide the main issue in the case at bar.

- [10] This is the court's ruling on this issue. For the sake of simplicity I shall refer to the injunction obtained as an "*anti-arbitration injunction*".

Jurisdiction of the court:

- [11] Learned Counsel Felix Evans on behalf of ACE in her submissions stated that in any event the question as to whether ACE could go directly to arbitration is a question of jurisdiction which should be canvassed before the Adjudicators and not the court. I do not agree with learned counsel in this regard.

- [12] The court has an inherent power to stay proceedings, to allow for arbitration to proceed or continue, even where the parties have contracted to resolve their disputes by arbitration. **Re: Channel Tunnel Group Ltd and another –v- Balfour Construction Ltd and others.**⁶

- [13] In **Hashwani v OMV Maurice Energy Ltd**⁷ the court addressed the issue of the principle relating to the curial powers of the High Court. Moore-Bick LJ suggested that it was the court's responsibility to decide a challenge to the jurisdiction of arbitrators. The learned Judge said where a party makes an application to the court to determine whether the tribunal in question has the jurisdiction to hear the matter is a question of law which can be dealt with by the court;

"...it is the court's responsibility to decide the question on the basis of the evidence the parties have chosen to put before it, unless there is some justification for not doing so. There is a good reason for that. Although

⁶[1993] 1 ALL E R 664

⁷[2015] EWCA Civ 1171

arbitrators have jurisdiction to decide their own jurisdiction, they do not have the final word on the subject, because it is open to the parties to challenge their award...”

- [14] During the arguments before the court I ruled that the issue before the court is as to what form the dispute resolution will take, that is an interpretation of the dispute resolution clause contained in the contract not the substantive issues arising as it regards the dispute.

The Contract

- [15] There is no dispute that there was a contract (the contract) entered between ACE and the first named defendant dated the 3rd January 2017 and executed on the 7th March 2017 for certain works to be executed at Bellvue Chopin in the island of Dominica.⁸
- [16] It is my view that both interpretations of the relevant sub paragraphs of Part 20 of the Contract are arguable and were in fact well argued before this court.
- [17] This case raises a short question of the construction of the dispute resolution clause in the Design and Build agreement entered into between the first named defendant and ACE.
- [18] It is the first named defendant's point that the dispute between the parties herein should have been referred to a Dispute Adjudication Board (DAB). ACE disputes this and contends that the matter could proceed direct to arbitration pursuant to the terms of Clause 20.8 of the contract.
- [19] It is clear to this court that the Clause 20 of the contract provides for two forms of dispute resolution that of DAB and arbitration. The contract contains what can be called a multi-tiered approach to dispute resolution between the parties.

⁸See Exhibit “ALB 3”... The Contract

- [20] Under the contract essentially ACE undertook to do works including design and the construction *inter alia* at the Affordable Development Housing Scheme Resettlement at Bellevue Chopin in the Commonwealth of Dominica.
- [21] Works commenced and there arose a dispute between the two parties to the contract.
- [22] I will lay out the relevant parts of Part 20 of the agreement as the issue before the court really concerns the true construction to be placed on this part of the contract.
- [23] The relevant clauses in the case at bar are set out below;

“Part 20.2 – Appointment of the Dispute Adjudication Board

Disputes shall be adjudicated by the DAB in accordance with Sub-Clause 20.4 [obtaining Dispute Adjudication Board’s Decision]. The parties shall jointly appoint a DAB by the date 28 days after a Party give notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub Clause 20.4.

...

The appointment of any member may be terminated by mutual agreement of both parties but not by the employer of the contractor alone. Unless otherwise agreed by both the Parties, the appointment of the DAB (including each member) shall expire when the DAB has given its decision on the dispute referred to it under Sub Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] unless other disputes have been referred to the DAB by the time under Sub-Clause 20.4, in which even the relevant date shall be when the DAB has also given directions on those disputes.

20.3 Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

- (a) the parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 2 [Appointment of the Dispute Adjudication Board],
- (b) either Party fails to nominate a member (for approval by the other Party) of the DAB of three person by such date,
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

Then the appointing entity or official named in the Appendix to tender shall upon the request of either or both of the Parties and after due consultation with both Parties, appoint the member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one half of the remuneration of the appointing entity or official.

20.4 Obtaining dispute Adjudication Board's Decision

If a dispute (of any kind what so ever) arises between the Parties in connection with or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to agree Dispute Adjudication Board] 20.3 [Failure to Agree Dispute Adjudication Board] either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other Party. Such reference shall state that it is given under Sub-Clause.

For DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is receive by the chairman of the DAB.

Both parties shall promptly make available to the DAB all information access to the Site and appropriate facilities as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s)

...

If either Party is dissatisfied with the DAB's decision, then either Party may within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or otherwise approved) after receiving such reference or such payment, then either party may within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, the notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 (Failure to Comply with Dispute Adjudication Board's Decision) and Sub Clause 20.8 [Expiry of Dispute Adjudication Board's appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above both parties shall attempt to settle the dispute amicably before

commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of with the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the rules of Arbitration of the International Chamber of Commerce,
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4[Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB relevant to the dispute. Nothing shall disqualify the engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the Dab to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the works.

Part 20.7 Failure to Comply with Dispute Adjudication Board's Decision

In the event that:

- (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
- (b) the DAB's related decision (if any) has become final and binding, and
- (c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub Clause 20.5 [Amicable Settlement] shall not apply to this reference.

20.8 Expiry of Dispute Adjudication Board's appointment.

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB' appointment or otherwise:

- (a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision and Sub –Clause 20.5 [Amicable Settlement] Shall not apply, and
- (b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

[24] What is the correct approach to be taken in the construction dispute resolution clauses in construction contracts? It is a fundamental rule of the construction of contractual or commercial documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made.

[25] The ultimate aim is to determine what the parties meant by the language used. This involves ascertaining what a reasonable person would have understood the parties to have meant. **Re Pink Floyd Music Ltd –v- EMI Records Ltd**⁹

[26] The reasonable person in this case would be “*One who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*” **Re: Investors Compensation Scheones Case**¹⁰. Lord Hoffman said:

- a. One must first look at the words which the parties have used in the contract itself;
- b. If the language of the contract leads clearly to a conclusion that one or the other of the constructions contended by each of the parties before the court is the correct one, the court should give effect that one.

⁹ [2010] EWCA 1429 @ paragraph 17

¹⁰ [1998] 1 ALL E R 98 at page 114 -115

- c. If there are two or more constructions then the court is entitled to reject the one which is unreasonable and, in a commercial context the one that flouts business commons sense.

[27] In **L Schular AG –v- Wickhman Machine Tools Ltd**¹¹ Lord Reid had this to say:

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make sure that intention is abundantly clear.”

[28] The issue between the parties in the case at bar is whether or not either of the parties can proceed directly to Arbitration or whether or no they should seek to settle their dispute before a DAB before proceeding to Arbitration.

[29] Unless the most natural meaning of the words produces a result that is so extreme as to suggest that it was unintended, the court must give effect to that meaning.

[30] Learned Counsel Mr Lawrence on behalf of the first named defendant made reference to and relied on the judgment of the court in the **Peterborough City Council case –v- Enterprise Managed Services Ltd**¹² in support of his submission that the dispute between the parties in the case at bar had to go to DAB before proceeding the Arbitration.

[31] In **Peterborough City Council**¹³ court proceedings were stayed pending determination of the dispute by an adjudicator. In that case the claimant local authority brought proceedings against the defendant in respect of a dispute arising out of a contract made between the authority and the defendant, by which the defendant agreed to design, supply, install, test and commission a solar energy plant on the roof of a building owned by the authority. The contract was made on the FIDIC General Conditions of Contract for EPC/Turnkey Projects issued by FIDIC in 1999. Clause 20.2 of the contract provided that

¹¹[1973] 2 ALL E R 39 at page 45

¹² [2014] EWHC 3193

¹³ibid

disputes 'shall' be adjudicated by a dispute adjudication board (DAB) in accordance with the procedures set out in clause 20.4. In addition, clause 20.8 provided that, if a dispute arose between the parties and there was no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise, clauses 20.4 and 20.5 (on amicable settlement) would not apply and the dispute could be referred directly to the court. The defendant applied for a stay of proceedings.

- [32] There were two broad issues were before the court. First, whether the contract had required any dispute to be referred to adjudication by a DAB, as a precondition of any action in the courts. Second, if it had, whether the court should order the authority's action to be stayed. The application was allowed.
- [33] It was held *inter alia* that the contract required that the determination of the dispute was to be by way of adjudication and amicable settlement under clauses 20.4 and 20.5 and, only failing that, by litigation. It was held that Clause 20.8 did not give the authority a unilateral right to opt out of the adjudication process, save in a case where, at the outset, the parties had agreed to appoint a standing DAB and that, by the time the dispute arose, that DAB had ceased to be in place, for whatever reason.¹⁴ It is to be noted that Clause 20.8 was in the same terms of clause 20.8 in the case at bar. (emphasis mine)
- [34] It is noted that in the case at bar the option was to go to DAB where as in the **Peterborough case** the option was to proceed to litigation. What is important for purposes of the case at bar is that the court was required to rule on an identical point to the case at bar and held that there was not right to go direct to the form of dispute resolution offered by Clause 20.8.
- [35] In that case the action was stayed¹⁵ and the parties were left to resolve their dispute in accordance with the contractual machinery as set up in the contract.
- [36] This interpretation of the contract was applied in the cases of **Tang –v- Grant Thornton International Ltd**¹⁶ and in **DGT Steel and Cladding Ltd v Cubbitt Building and Interiors Ltd**.¹⁷

¹⁴(see [35], [36] of the judgment).

¹⁵ Ibid at paragraph 44

¹⁶[2012] All ER (D) 200 (Nov)

¹⁷[2007] All ER (D) 43 (Jul)

- [37] It is noted that learned Counsel Mrs Felix Evans distinguished the **Peterborough Case** on the grounds that the defendant Enterprise Managed Services Ltd gave notice of its intention to refer the matter to adjudication whereas in the case at bar the first named defendant company never given any notice or indication that it wanted to go to DAB. Counsel submitted that for a DAB to be activated one of the parties must give notice of intention to send the dispute which has arisen to DAB as occurred in the Peterborough case. This is not so in the case at bar. Counsel noted in the case at bar that the neither party ever gave any notice of submission to a DAB.
- [38] Learned Counsel drew to the Court's attention that at no time did the first named defendant company even after ACE sought to terminate the contract followed by their application to prevent the bank from making payment to the first named defendant upon its demand on the performance bond did the first named defendant ever attempt to call for the appointment of a DAB. This is to be considered against the fact that from very early on ACE has continuously informed the defendant that it would seek arbitration in the matter. Learned Counsel further submitted that appointment of the DAB is by way of agreement as provided for by Clause 20.2 and there is no evidence that the parties attempted so to do.
- [39] Counsel Felix Evans submitted that if both parties to the contract cannot agree to a DAB there is nothing in the contract that could compel them to go to DAB. Counsel further submitted that Clause 20.3 of the contract makes provision for the appointment of an appointing authorities if the parties fail to agree on a DAB, that the mere fact that neither of the parties saw it fit to appoint or name that official is a clear indication that neither of them saw the appointment of a DAB as a precondition to arbitration. It is clear that the appointment of a DAB was just an option this intention is to be gleaned from the language of the contract.

- [40] It was submitted on behalf of ACE that at all material times ACE indicated to the first named defendant its intention to go to arbitration and the first named defendant never responded with the suggestion of the appointment of a DAB. Learned Counsel suggested to this court that the first named defendant's wanting to raise the issue of the DAB is but a last ditch effort on their part.
- [41] Counsel further submitted that in the circumstances of this case it was always the parties' intention to possibly make a direct referral to arbitration and in the circumstances of the case it is quite proper for ACE to refer the matter to arbitration.
- [42] Learned Counsel Felix Evans reiterated that in the case at bar the language of the dispute resolution provisions of the contract are not clear in the circumstances going first to DAB is not a condition precedent to arbitration. Counsel relied on **Victor International Corporation –v- Spanish Town Development Company Limited**¹⁸ where the court said that *"to be a condition precedent, the preliminary step must be expressed in clear mandatory terms. If not it is not a condition precedent to resorting to arbitration."*¹⁹
- [43] In her closing salvo learned counsel Felix Evans submitted *"If the court is to hold that the DAB is a condition precedent it would mean that the dispute would be unresolved as the claimant is not interested in having the matter resolved by DAB and the affidavit of Anthony Le Blanc states why. ..."* Learned Counsel further submitted that the first named defendant company is not interested in a DAB either and it would therefore leave the parties in a stale mate and the dispute between the parties would remain unresolved. Counsel also submitted that if the first named defendant company wished to have a DAB it is not too late for them to do so and that they should have given notice of their intention to do so.

¹⁸ BVIHCV2007/0293

¹⁹ Ibid paragraph 42

[44] The thrust of Learned Counsel Lennox Lawrence's submissions for and on behalf of the first named defendant can be briefly stated as follows:

(i) That ACE's filing their request for arbitration in the United States in the face of their existing claim and the specific provisions of the contract is oppressive and vexatious. I will pause here to say that it is clear to the court that the claim referred to by learned Counsel is not a substantive claim but one which was brought specifically to prevent the first named defendant from pursuing its attempt to call in the performance bond. This case as brought by ACE does not attempt to air the grievances ACE has with the first named defendant arising out of the contract. It therefore cannot be said that ACE is attempting to have the grievance dealt with by arbitration and by the court and in the circumstances that their actions are oppressive and vexatious. I do not agree with Learned Counsel Lawrence's submission in this regard.

(ii) The anti-arbitration injunction must be maintained as ACE's actions are oppressive and vexatious and until and unless ACE complies with the adjudication provisions of clause 20.2 and 20.4 of the contract which require the appointment of a DAB prior to the filing of any arbitration proceedings the anti arbitration injunction must remain in place.

[45] The first name defendant contended that ACE on the 1st March 2019 purported to exercise its right to terminate the contract on the 15th March 2019 and they contended that in doing this ACE did not adhere to the 28 days referred in clause 20.1 of the contract and accordingly ACE waived and or was not entitled to any additional payment under the contract. In this court's view that is not before the court for judicial consideration.

[46] Counsel Lennox Lawrence on behalf of the first named defendant further submitted that the parties to the contract must be held to the specific terms to the contract. Further that the said contract set out the rights and liabilities of the

Parties in relation to the subject matter of the contract. That all disputes must be first adjudicated by a Dispute Adjudication Board in accordance with sub clause 20.4.

[47] It was submitted by learned Counsel Lawrence that in the circumstances of the case at bar, the filing of the claim to settle the dispute between the parties without a reference to the specific mechanism set out at clause 20 of the contract for the settlement of claims, dispute and arbitration by ACE is null and void.

[48] Learned Counsel Lawrence on behalf of the first named defendant submitted that this case is governed by section 6 of the **Arbitration Act**²⁰ which provides as follows:

6(1) If any party to a domestic arbitration agreement 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 those legal proceedings may at any time after appearance, before delivering any pleadings or taking any other steps in the proceedings, apply to that 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 agreement, 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.

6(2) If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through 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 state 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 disputes between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

²⁰Chap. 4:50 of the Laws of the Commonwealth of Dominica

- [49] Counsel submitted that the director of ACE is a national of and habitually resident in Dominica and the claimant company as well as the 1st Defendant is incorporated in Dominica and that the protocol on adjudication as a prelude to arbitration provides for adjudication processing in Dominica.
- [50] It was there submitted on behalf of the 1st named defendant that in the circumstances, the 1st defendant has properly applied to the court for the staying of the proceedings until the adjudication and arbitration procedure and mechanism are set out and clause 20 of the contract is adhered to and exhausted.
- [51] Learned Counsel Lawrence submitted that however, the 1st defendant's position is that the agreement is a domestic arbitration agreement which is governed by section 6(1) of the **Arbitration Act**²¹ and assuming but not accepting the agreement is a domestic arbitration agreement and the above argument applies in total.
- [52] It was submitted further by the first named defendant that Clause 20 of the Contract sub-nom "*Claims Dispute and Arbitration*" provided for an extensive dispute resolution mechanism.
- [53] This request for arbitration is a clear concession by ACE that this matter is not a matter for litigation but for adjudication and arbitration pursuant to the dispute resolution mechanism in the contract. Learned counsel made this statement in support of his submission that in all the circumstances of the case ACE should not be permitted to maintain this suit in Dominica while at the same time arbitrating the very matter before the International Chamber of Commerce. I have stated above my view on the civil suit currently before the court.
- [54] It was submitted by Mr Lawrence that Section 20 of the contract is the applicable mandatory provision on settlement of claims and disputes and mandates that

²¹ *ibid*

prior to the filing of any arbitration proceedings all claims and or disputes were to be referred to a DAB. Learned counsel stressed that this is a condition precedent to the filing of any Arbitration Proceedings. It was contended on behalf of the first named defendant that ACE sidestepped that mandatory provision. Therefore in the circumstances of the case at bar the reference to arbitration by Ace is irregular and should be discontinued as the International Chamber of Commerce, International Court of Arbitration has no jurisdiction in the matter, whether to address or resolve any dispute between the parties or at all as such jurisdiction is expressly and/or impliedly excluded by reference to section 20 of the contract.

[55] It was also contended on behalf of the first named defendant that the Arbitration before the International Chamber of Commerce, International Court of Arbitration are extremely expensive and the net cost effect is that the net cost of those proceedings are in fact in excess of the value of the current claim. It is noted that ACE contends that the value of its claim is in excess of half million EC dollars which is much more than that which the first named defendant contends is in issue.

[56] Learned Counsel Lennox Lawrence made reference to the letter dated 23 September 2019 received by his client which informed them that the cost of one arbitrator is estimated at US \$48,607.00 and of three arbitrator is estimated at US\$145,821.00; Counsel also made mention of the additional cost relating to the expenses on travel, hotel, and so on which would operate to treble the cost of the hearing. Counsel submitted that it is estimated that in addition to legal cost and other legal fees, the cost of the irregularly filed arbitration renders is oppressive on the first named defendant.

[57] Mr Lawrence submitted that the provision in the contract of a DAB provided for in section 20.2 and 20.4 of the contract was expressly and impliedly for limiting and mitigating such high cost. Counsel went on to submit that by sidestepping

that provision ACE has now exposed the parties to what can be viewed as wasted cost in excess of US\$250,000.00

[58] It was submitted by Mr Lennox Lawrence that ACE should not be permitted to breach an express provision of the contract and at the same time to expose the first named defendant to substantial costs both at the High Court in Dominica by virtue of the suit and also before the International Chambers of Commerce, International Court of Arbitration via its irregularly filed Arbitration proceeding.

[59] The first named defendant contended that the issues therefore to be decided before the court is as follows:

- i. Whether on the face of this specific provision of the contract on dispute resolution and the adjudication and arbitration provisions as set out at clause 20, the Claimant can properly refer this matter to Arbitration;
- ii. Whether the reference to Arbitration has invaded or threatened to invade the 1st defendant's legal rights in the contract between the parties and more particularly to the specific mechanisms and protocol for adjudication and arbitration as set out at clause 20 of the agreement.

[60] Further, that the court would have to consider the law relating to anti-suit injunction and the restraining of foreign proceedings.

[61] Learned Counsel Lawrence submitted that the second mandatory provision of the contract which must be complied with by ACE is the appointment of a DAB as provided by clause 20.2 and 20.4 of the contract it was contended on behalf of the first named defendant that in the instant case ACE has not complied with the dispute adjudication mechanism and the obtaining of the Dispute Adjudication Board, which is a prerequisite to Arbitration.

[62] Counsel Lawrence on behalf of the first named defendant submitted that the prerequisites for a reference to arbitration are stated in the contract as follows where there is:

- i. evidence of a failure to settle a dispute amicably in respect of the DAB decision;
- ii. evidence that the decision of a DAB had not become final and binding; and
- iii. evidence of a failure by both parties to settle a dispute in reference to the DAB's decision otherwise than by the rules of Arbitration of International Chamber of Commerce.

[63] The first named defendant further contended that:

- i. That the request for adjudication was filed without ACE complying with the Dispute Adjudication Provisions at clause 20.2 and 20.4 of the contract.
- ii. ACE did comply with the 28 days limitation as set out at paragraph 20.1 of the contract.

[64] It was submitted that it is well settled law that the court has discretionary powers to grant an anti-arbitration injunction restraining a party from commencing or continuing as a claimant in foreign proceedings.

[65] It was also submitted that there are three categories where the discretion can and has been exercised in the granting of an anti-arbitration injunction which are applicable to the case at bar, namely:

- a. where there are two or more available forums for trial;
- b. where one party by bringing or threatening to bring proceedings abroad has invaded or threatens to invade a legal or equitable right not to be sued abroad; and
- c. where the bringing of the proceedings abroad would be unconscionable.

- [66] As his Authority Counsel cited Private International Law²², and **Albon v Naza Motors**²³. Counsel also made reference to and relied on **Amchem Products Inc. v British Columbia**²⁴ on appeal to the Privy Council where it was held that generally speaking what has to be shown is that the action is vexatious or oppressive.
- [67] Learned Counsel submitted that in **Albon v Naza Motor**²⁵ case at Longmore L.J. in delivering the judgment confirmed the well-known principle that a party will not be restrained from continuing foreign proceeding unless that applicant can show that in doing so that the party was being oppressive and vexatious and his action was unconscionable. Further that the threatened conduct was unconscionable, which primarily meant it must be conduct which is oppressive and vexatious or which interferes with the due process of the court. (paragraph 7)
- [68] Learned Counsel Lawrence made specific reference to paragraph 14 of his judgment where Longmore L.J stated:
- “In these circumstances it does seem to me that the immediate and co-extensive continuance of arbitration proceedings is indeed unconscionable (in the sense of being oppressive) for very much the reasons which the judge himself gave. It is a needless expense; it will be difficult to avoid over-proliferation of pleadings and disclosure if the parties do not know whether it will be ultimately determined that the JVA is genuine or not”;
- [69] Counsel also made reference to **The Sohio case**²⁶ which concerned litigation in the United States in the face of a choice of law clause which provided that the governing law be English law. In that case the court applied **The Lisboa**²⁷ and the dicta of Lord Dunn that an injunction should not be granted unless the foreign proceedings were vexatious and oppressive. Counsel submitted that in

²²Cheshire and North's (12th Edition), Pages 241 – 249, especially at page 242
2008 1All ER (Comm) 351, especially at paragraph 2 at 537²³ No.4)

²⁴ (1991) 75DLR (4th) especially at page 895 – 896

²⁵ (op cit)

²⁶Sohio Supply Company v Gatoil(USA) Inc. (1986) S No. 1915

²⁷Mike Trading and Transport Ltd v R Pagnan and Fratelli, The Lisboa1980 2 Lloyds Report 546

that case the court then took the view that the continuance of foreign proceedings in breach of contract where the contract provides for exclusive English jurisdiction may well be vexatious and oppressive in any given case²⁸.

[70] It was submitted that this is effectively the position in the case at bar. It was reiterated that the continuance of the arbitration proceedings instituted by ACE in breach of the contract which provides for the application of Dominican law is vexatious and oppressive.

[71] Learned Counsel further submitted that in applying the decision in **Albon v Naza Motors**²⁹ that the jurisdiction to grant an anti-suit injunction is necessary to protect the applicant's legitimate proceedings in England which must be the natural forum for the litigation. The conduct of ACE is therefore to be described as conduct which is not just and convenient within the definition as utilized by Ricks L.J. and quoted by Longmore L.J **AlbonTrading decision**³⁰.

[72] It was submitted by the first named defendant that in the case at bar the contract specifically provided for the application of Dominican law and that said contract further provided for a dispute resolution mechanism commencing with a Dispute Adjudication Board and continuing into Arbitration in limited situations as provided for in clause 20.6

[73] It was further submitted that any foreign arbitration therefore which deprive the 1st named defendant of the substantive benefit of Dominican law or the protection afforded it by clause 20.2 or 20.4. That the foreign arbitration as commenced by ACE is oppressive.

[74] Learned Counsel further submitted that Clause 20.8 only arises in two circumstances. That is:

²⁸ Ibid at page 10h to 11a

²⁹[2007] EWCA Civ 1124

³⁰ supra

- a. Where there is a dispute between the parties; and
- b. Where the standing DAB was not convened.

[75] Counsel made reference to and relied on the **Peterborough City Council –v- Enterprises Managed Services Ltd Case**³¹ in support of his submissions.

[76] In my judgment, clause 20 the “*Claims, Disputes and Arbitration Clause*” in the contract in the case at bar lends itself to two possible interpretations. It is important, based on my reading of the authorities that when construing this document I should at all times have an eye on the consequences of a particular construction. A balance has to be struck between the obvious meaning or a restraint upon adopting a meaning that will be either inconceivable or un-businesslike.

[77] In my view the bottom line is where a term of a contract is open to more than one interpretation it is generally appropriate to adopt the interpretation which is most consistent with business commonsense.

[78] Interpreting construction agreements and arbitration clauses will depend on the terms and likely intentions of the parties.

[79] Re: **Rainy Sky –v- KookminBant**³² it was held that where a term of a contract was open to two possible interpretations, it was appropriate for the court to adopt an interpretation which was most consistent with business commonsense in resolving questions of what would have been understood by the parties to have meant.

[80] The conundrum in the case at bar is whether clause 20 of the contract between ACE and the first named defendant posits an unequivocal expression of arbitration or whether it is hedged with a conditionality.

³¹ [2014] EWHC 3193 (TCC)

³²[2012] 1 All ER 1137

- [81] Courts have been called upon to consider whether or not the pre-arbitral steps in a multi-tier dispute resolution clause constitute jurisdictional conditions precedent to the commencement of arbitration. In some cases they have ruled that where a party fails to carry out the contractually mandated pre-arbitral steps, a tribunal does not have jurisdiction to hear a dispute.

The pre arbitral step must be provided for with certainty: (cases)

- [82] In **Sulamerica CIA Nacional de Seguros v. EnesaEngenharia**³³, the Court of Appeal was presented with a multi-tier clause that required that *'prior to a reference to arbitration, the contract stated that the parties will seek to have the dispute resolved amicably by mediation'*, and that: *'If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, or if either party serves written notice terminating the mediation under this clause, then either party may refer the dispute to arbitration.'*
- [83] The issue before the Court of Appeal was whether mediation was a binding condition precedent to the commencement of arbitration. It was held that it was not, as the contract did not contain clear language to that effect and further, the contract did not define the obligation to mediate with sufficient certainty.
- [84] The Court of Appeal more particularly held that the multi-tier clause *"did not set out any defined mediation process, or does it refers to the procedure of a specific mediation provider."* The Court of Appeal considered rather, that the contract 'contained merely an undertaking to seek to have the dispute resolved amicably by mediation' and that *"no provision was made for the process by which that was to be undertaken"*. Accordingly, the court ruled that mediation was not a jurisdictional condition precedent to arbitration.³⁴

³³[2012] EWCA Civ 638

³⁴ Ibid at paragraph 36

[85] In ***Tang Chung Wah and another v. Grant Thornton International Ltd***³⁵, the contract at issue contained a multi-tier dispute resolution clause that provided that prior to commencing arbitration, the parties were required to refer disputes to conciliation for one month, after which the parties were required to refer disputes to a panel of three individuals identified in the clause. The clause made clear that until those steps were undertaken ‘*no party may commence any arbitration procedures in accordance with this Agreement*’.³⁶

[86] The claimant in this case commenced arbitration proceedings against the defendant company without fulfilling the pre-arbitral steps as contained in the contract. The defendant company applied to the tribunal to dismiss the claim for lack of jurisdiction. The tribunal found that it had jurisdiction, so the defendant company sought to have this determination set aside by the High Court.³⁷ The High Court held that the pre-arbitral steps in the multi-tier clause did not constitute binding conditions precedent to the commencement of arbitration, because they did not contain clear language to that effect and did not adequately specify the form in which the pre-arbitral steps should proceed.(emphasis mine)

Hilary J in reviewing the dispute resolution clause had this to say:

“... However, no more is said in s 14.3(b) as to (i) what form the process of conciliation should take (apart from the injunction that it is to be undertaken “in amicable fashion”); nor as to (ii) who is to be involved in it and what (if anything) they are required to do by way of participation in the process; nor indeed as to (iii) what the obligation to attempt to resolve the dispute or difference requires the Chief Executive to do.”³⁸

[87] This court asks itself two question in seeking to construe the relevant parts section 20 of the contract in the case at bar:

- 1) Does the multi-tier clause expressly and unequivocally state that the pre-arbitral steps are conditions precedent to the

³⁵[2012] EWHC 3198 (Ch).

³⁶ Ibid at paragraph 27

³⁷The Chancery Division.

³⁸ Ibid at paragraph 63

commencement of arbitration, and that arbitration may not be commenced until such time as they have been fulfilled?

- 2) Are the pre-arbitral steps described in detail, with clear, unequivocal, and determinate language to ensure that they can be followed and enforced?

[88] Firstly, there should be dispute that is where one party files or makes a claim which has been rejected in part or in whole by the other party and the complaining party wishes to pursue its claim further. In the case at bar based on the averments in the affidavit of Mr Leblanc on behalf of ACE there arose a dispute regarding the payment of monies to his company by the first named defendant. Certain requests and demands were made which were not properly responded to or addressed. So there was without a doubt a dispute between the contracting parties.

[89] Construction contracts usually follow the precedent or form of FIDIC³⁹ contracts. In the case at bar it can be safely said that the contract was a form of a FIDIC contract⁴⁰ containing provisions for the resolution of disputes. In the contract at clause 20 there is provision for the reference of dispute to a DAB which is basically a dispute mechanism for the settlement of dispute whereby a private independent panel comprising of a specific number of experts considers a dispute and renders a decision which is binding on the parties under certain conditions.

[90] There are two types of DABs:

- a. A standing DAB which is constituted at the initial stage of the construction project. In the case at bar there was no standing DAB in place; and

³⁹FIDIC is a French language acronym for Fédération Internationale Des Ingénieurs-Conseils, which means the international federation of consulting engineers.

⁴⁰ In the Letter of Award exhibited at "ALB2" in the first affidavit of Anthony E Le Blanc dated the 13th March 2019 and filed on the 14th March 2019 at Paragraph 7 it stated that "the contract will be in the FIDIC Yellow book – contractor design and build.

- b. There is the Ad Hoc DAB which is appointed once the dispute has arisen. The contracts normally make provision regarding when the DAB's decision is to be completed and provision is also made for notices of dissatisfaction by the parties. If there is no notice of dissatisfaction it is usual that the DAB's decision is binding on the parties and the dispute is considered settled. It is to be noted that the contract in the case at bar was a "Yellow Book" FIDIC contract which is said to provide only for an ad hoc DAB.

[91] If there is a notice of dissatisfaction this triggers the next step in the dispute resolution process if the parties opt for the appointment of a DAB as provided for by clause 20.5.

[92] Under the usual provision of the FIDIC contracts the next step would be for the parties to attempt an amicable settlement before the commencement of Arbitral proceedings.

[93] Failing the amicable settlement the final stage of the dispute resolution settlement process under the FIDIC contract is to proceed to arbitration.

[94] Clause 20.8 states:

"If a dispute arises between the Parties in connection with or arising out of the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise;

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub Clause 20.5 [Amicable Settlement] shall not apply; and

(b) The dispute may be referred directly to arbitration under Sub Clause 20.6 [Arbitration]." (emphasis mine)

[95] In clause 20.8 the word "otherwise" when literally read creates the impression that where there is no DAB in place for whatever reason clauses 20.4 and 20.5 do not apply. The word "otherwise" suggests that the matter could be referred directly to arbitration where no DAB is in place.

- [96] The wording of clause 20.8 is for my part vague rendering the pre arbitral steps unnecessary. The wording utilised is broad and ambiguous leaving it open for ACE to bypass the pre arbitration process and go straight to arbitration.
- [97] A literal reading of clause 20.8 creates the opportunity for the party to bypass the pre arbitration steps and proceed to arbitration on the basis that there is no DAB in place. In the case at bar as has been said before there was no DAB in place therefore there was a leeway for ACE to proceed direct to arbitration.
- [98] For consideration is what is the effect of ACE's decision to proceed directly to arbitration without first going to DAB.
- [99] Learned Counsel Felix Evans on behalf of Ace stated that the first named defendant ought not to be heard on the issue of ACE failing to go to DAB as they themselves never made an effort to do so. It is noted as was stated in the affidavit of Anthony Le Blanc, that all along ACE give indications that due to the dispute ACE had with the first name defendant that ACE would proceed to arbitration. It is noted also that at no time based on the evidence adduced in this court did ACE say that they wanted or desired that a DAB be appointed and not at one time neither did the first named defendant raise the issue of the appointment of a DAB. It is to be noted that the Indian Court in the **Demerara Distilleries Case**⁴¹ discussed this issue, that is the failure of one of the parties to seek to trigger or initiate mediation which was supposed to be a pre arbitral step. The party could not having not sought to initiate mediation use that as an attempted bar to the other party proceeding directly to arbitration.
- [100] Based on the evidence adduced to this court upon the indication from ACE that there was a dispute and that ACE was terminating the contract, the first named defendant never sought to give any indication or make a request for the

⁴¹Demerara Distilleries Private Limited and Another –v- Demerara Distilleries Ltd. Supreme Court of India (24 November, 2014)

appointment of a DAB. The first named defendant instead sought to place a unilateral call on the performance bond which caused the proceedings to be commenced in Dominica for an injunction preventing the second named defendant (NBD) from paying out on the demand.

[101] This court's view is that the first named defendant ought not to be permitted to seek refuge in the pre-arbitration agreement clause when they themselves did not seek to utilise same or made no effort to set up a DAB. It can even be said, that the actions of the first named defendant company can be construed as non-compliance with the very clause that it is now seeking to enforce.

[102] It can be seen or viewed that the first defendant's action to attempt to make a call on the performance bond in the face of a dispute with ACE can be interpreted as a waiver of the very right they are seeking to enforce before this court. Based on the facts before the court, the first named defendant company by its own conduct, in this court's view disabled the pre arbitration steps from being taken. *"The party at fault cannot be permitted to set up the bar of the non-performance of the pre arbitration clause when that company has failed to do so itself"*⁴²

[103] This court considers that the actions of the first named defendant are capable of being construed as its waving by its own conduct or the conduct of its officials disabled the possibility of any dispute going to DAB. This is specifically in view of the fact that the DAB is an Ad Hoc DAB which has to be set up by both parties and also in view of the fact that ACE has in their communication and correspondence with the first named defendant has always informed the first named defendant of its intention to proceed to arbitration against the back ground that the first named defendant never counter offered or demanded a DAB but went and sought instead to call in the performance bond. In this court's view the first named defendant is deemed to have waived any procedural pre requisite it now seeks to rely on. The first named defendant cannot

⁴²M.K. Shah Engineers & Contractors v. State of M. P., (1999) 2 SCC 594 : (AIR 1999 SC 950)

and will not be permitted in the case at bar to set up the bar of non-performance of prerequisite obligation of going to DAB so as to exclude the applicability and operation of the arbitration clause

[104] Put another way the finding of this court is therefore that the first named defendant cannot seek to enforce clause 20.4 when by its own actions:

- i. It proceeded to call on the performance bond in the face of a dispute with ACE; and
- ii. It failed to seek to set up or call on ACE to set up a DAB in the face of a dispute particularly in view of the fact that ACE very early and consistently gave indication of its intention to go to arbitration.

[105] For the aforesaid reasons the first named defendant's application to continue to the anti-arbitration injunction must fail and the application to dismiss said injunction must succeed.

[106] Counsel made submissions on the question of the choice of law governing the contract.

[107] Where there is no express choice of law governing the arbitration agreement the court will enquire whether there is an implied choice and if it finds that there is none, the court will then determine which system of law the arbitration agreement has its closest and most real connection.

[108] The express choice of the governing law of the host or main agreement, the contract in this case, is and can be considered as a starting point in assuming that the parties to the contract intended their entire relationship to be governed by the stated law.

[109] The following cases discussed the law as it regard the application of an implied choice of law between the contract and the seat of arbitration:

- (i) Lord Mustill said in **Channel Tunnel Group Ltd v Balfour Beatty Ltd**⁴³ *"that it would be exceptional for the proper law of the arbitration agreement to be different from an express choice of law for the host contract"*.
- (ii) **Sulamerica v EnesaEngelharria**⁴⁴ of the judgment of Moore-Bick LJ said:

"that where the arbitration agreement forms part of the substantive contract an express choice of law to govern that substantive contract is "an important factor to be taken into account" and "likely...to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion".
- (iii) In **C v D**⁴⁵; Longmore LJ said:

"The question then arises whether, if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of the arbitration. It seems to me that ...the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract."
- (iv) In the High Court of Singapore in **BCY v BCZ**⁴⁶ Steven Chong J adopted the decision in **Sulamerica** and stated that:

"The governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point."⁴⁷
- (v) In **Arsanovia v Cruz City 1 Mauritius Holdings**⁴⁸ Andrew Smith J said:

"The governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement, and there is no contrary indication other than choice of a London seat for arbitration."

⁴³[1993] AC 334 at 357-8,

⁴⁴[2012] EWCA (Civ) 638 or [2013] 1 WLR 102, at paragraph [26]

⁴⁵[2007] EWCA (Civ) 1282

⁴⁶[2016] 2 Lloyd's Rep 583

⁴⁷Ibid at para 65

⁴⁸[2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep 235 at paragraph 21

[110] The question to be answered in my view in the case at bar is whether the arbitration between the parties is to be governed by the law of Dominica as submitted by Learned Counsel Lawrence.

[111] It is noted that in the contract there is a specific provision regarding arbitration. It provides:⁴⁹

“Arbitration

Unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) The dispute shall be finally settled under the rules of Arbitration of Arbitration of the International Chamber of Commerce.

(b) That dispute shall be settled by three arbitrators appointed in accordance with these rules ...”

[112] The only reference to the law of the main agreement appears at paragraph 20.6 (c) where it says; *“The arbitration shall be conducted in the Language for communication defined in sub clause 1.4 (Law and Language).”*

[113] For the avoidance of doubt I find it helpful to quote the relevant part of part 1.4 of the contract.

“The contract shall be governed by the law of the Country (or other jurisdiction) stated in the Appendix to tender;

...

The language for communication shall be stated in the appendix to tender. If no language is state there, the language for communication shall be the language in which the Contract (or most) of it is written in.”

⁴⁹ See Paragraph 20.6 (a) & (b) of the Contract

[114] It is noted that in the 'Form of Tender' exhibited at 'ALB 1'⁵⁰ it is stated "*Unless and until a formal agreement is prepared and executed this letter together with your written acceptance thereof shall constitute a binding contract between us. This tender shall be governed by and construed in accordance with the laws of and applicable in the Commonwealth of Dominica*"

[115] The form of tender was in the form of a letter dated the 16th November 2016 and signed by Anthony E Le Blanc who stated that he was the duly authorised Director to sign the tender for and on behalf ACE.

[116] In an undated letter signed "PP for Dr Anthony Haiden" President/CEO of the first named defendant which letter was stamped received on the 16th November 2016 and exhibited as 'ALB2'⁵¹, the first named defendant issued a 'Letter of Award'. There was no reference in this Letter of Award regarding the governing law.

[117] It is therefore safe to say that as it regards the contract the governing law is the law of Dominica.

[118] Now this has to be construed together with the provision of part 20.6 (op cit). The question to be answered is, is the arbitration provision in the contract provided in part 20.6 to be governed by the same system of law of the contract, in the fact of the express provision of 20.6?

[119] Part 20.6 stated the choice of the rules to govern the arbitration that is The Rules of Arbitration of the International Chamber of Commerce. Can this be construed as pointing away from the law governing the contract?

⁵⁰ Exhibited in the first affidavit of Anthony E Le Blanc dated the 13th March 2019 and filed on the 14th March 2019

⁵¹ *ibid*

[120] It is well established law that an arbitration agreement has to have a governing law, the question of what law is one for interpretation of the agreement and the terms will not be implied as a matter of law.

[121] In the case at bar, the following is clear:

- a. That the governing law of the contract is to be the Law of the Commonwealth of Dominica; and
- b. It was expressly agreed that the arbitration would be settled under the rules of the Arbitration of the International Chamber of Commerce. (ICC)

[122] This to the court's mind is a strong pointer towards the arbitration being conducted pursuant to the rules of the ICC. The question then arises is arbitration via the ICC Rules available in Dominica or where can one convene an arbitration that can be conducted and settled under the rules of the ICC.

[123] The ICC rules of arbitration are according the website of the ICC “... *used all around the world to resolve disputes. They define and regulate the management of cases submitted to our international court of arbitration.*”

[124] As for my part, having made a provision in their contract that the arbitration is to be “*international arbitration*,”⁵² the first named defendant cannot now seek to hide behind the laws of Dominica as the contract makes specific provision that arbitration would be settled under the rules of the Arbitration of the International Chamber of Commerce. Going back to the decision of the **Fiona Trust Case**⁵³ “*the construction of the arbitration clause should start from the assumption that the parties as rational businessmen are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal....*”

⁵² See paragraph 20.6 of the Contract

⁵³ Op cit

- [125] We must bear in mind that arbitration can be arrived at in two ways via paragraph 20.6 and 20.8. Paragraph 20.8 makes provision for there to be direct reference to arbitration under clause 20.6 which clause makes provision for settlement by “international arbitration”.
- [126] From the plain language used in the contract it is clear that the parties meant that settlement by arbitration was to be by “*international arbitration*” as opposed to domestic arbitration as Counsel Mr Lawrence wants to submit.
- [127] The parties in my respectful consideration chose to opt for international arbitration and in such circumstances the applicable law would be the “curial law” that is the system of law closest to and which has a real connection with the arbitration agreement.
- [128] It is noted that in the case at bar the parties have made a specific choice which must be taken into consideration. I dare say, if the contract was silent as to the type of arbitration and under what rules the arbitration was to be conducted this court would have been able to agree with Mr Lawrence Learned Counsel on behalf of the first name defendant and say that arbitration is to be governed by the laws of Dominica, this would be in keeping with the decision of the court in **C –v- D**⁵⁴ and the conclusion of Moore-Bick LJ as agreed by the other judges of that court.
- [129] Therefore on the issue of the whether or not ACE can proceed to arbitration before the ICC it is this court’s ruling that this is what was agreed to by the parties to the contract and this is what can be done.
- [130] For the reasons stated above this court’s order is therefore that the anti-arbitration injunction granted herein is dismissed with costs in the sum of \$5,000.00 to the ACE.

⁵⁴ [2007] EWCA 1282, [2008] 1 ALL E R 1001

[131] Let this order be communicated to the arbitrators so that the arbitration proceedings can continue and be concluded as expeditiously as possible.

[132] I wish to commend Counsel for their very helpful submissions in this matter.

M E Birnie Stephenson
High Court Judge

BY THE COURT

REGISTRAR