

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA NO. 187 OF 2018

INDEPENDENT STATE OF PAPUA NEW GUINEA
Appellant

AND
INDEPENDENT TIMBERS & STEVEDORING LIMITED
Respondent

Waigani: Gavara-Nanu, Shepherd & Thompson JJ

2019: 24th April

2020: 20th February

ARBITRATION – interpretation of clause containing agreement to arbitrate – effect of arbitration clause where nominated arbitral institution is defunct - PNG Commercial Disputes Centre not in existence at time of unilateral referral of dispute to arbitrator under aegis of Singapore International Arbitration Centre – referral to arbitration contrary to contractual provision giving jurisdiction to National Court to determine separate dispute where arbitration clause is inoperative and unenforceable

Cases Cited:

Fly River Provincial Government v Pioneer Health Services Ltd (2003) SC705

Counsel:

Mr E.Andersen and Ms S. Kirriwom, for the Appellant
Mr D.H. Katter and Mr P.A. Lowing, for the Respondent

JUDGMENT

20th February, 2020

1. **BY THE COURT:** This is an appeal against the whole of the judgment of the primary judge delivered at Waigani on 19 October 2018 in National Court

proceeding OS No. 824 of 2015. The primary judge refused to grant the relief sought in the originating summons and dismissed the proceeding, with costs awarded against the State. The practical effect of the judgment was that arbitral proceedings commenced in accordance with procedures of the Singapore International Arbitration Centre by Independent Timbers & Stevedoring Limited (**ITSL**) against the State in reliance on an arbitration clause contained in a partially executed road project agreement were allowed to continue.

2. The appeal lies without leave pursuant to Sections 4(2)(a)(b) and 14(1)(a)(b) of the *Supreme Court Act* in that it raises questions of law or of mixed fact and law and is an appeal from a judgment delivered after a substantive hearing.

Background Facts

3. The State, the Fly River Provincial Government (**FRPG**), ITSL and various other parties were named in a project agreement dated 23 May 2011 in connection with the development by ITSL of the Gre-Drimgas-Duara-WoiWoi Falls Road in the North Fly Electorate, Western Province (**Project Agreement**). This proposed connecting road was intended to form part of the larger road network known as the Trans-Papua Highway approved by National Parliament on 9 June 1994. The Project Agreement involved logging and community infrastructure including roads, bridges, community centres, production facilities, health stations and schools in a remote part of the North Fly Electorate.

4. The Project Agreement was only partially executed. It was signed on behalf of the State by then Governor General His Excellency Sir Michael Ogio, GCMG, KStJ acting with and in accordance with the advice of the National Executive Council, under common seal by ITSL, by the managing director of the PNG Agency for International Development and under common seal by three local landowner companies, namely North East West Investment Ltd, Kebogas Investment Ltd and Tosigiba Timber Group Ltd. However, for reasons not explained at trial, the Project Agreement was not executed by the FRPG or by another named signatory, the Provincial Administrator for the Department of Western Province, even though James Hukin, then Deputy Governor for the Fly River Provincial Government, was present at the signing ceremony of the Project Agreement on 23 May 2011.

5. The Project Agreement required ITSL to construct the subject road at no cost to the State or the local landowners, in return for which the State agreed to issue all necessary permits for ITSL to harvest and sell timber. The permits that the State was obligated to provide under the Project Agreement included an FCA Roadline Permit and an FCA Agriculture Permit which were intended to enable ITSL to harvest timber to recoup its costs associated with its construction of the subject road, without which ITSL's undertakings under the Project Agreement were said to be financially unviable.

6. ITSL contends that it complied with all of its obligations under the Project

Agreement. ITSL applied for and obtained environmental permits, obtained approvals of road and bridge design and secured Department of Agriculture and Livestock's approval of the Agriculture Plan for agriculture and reforestation. This occurred over a 5-year period, at the end of which it had to apply for the FCA Agriculture Permit at least four times but had been rejected each time. Then in October 2014 the State rejected ITSL's application for an FCA Agriculture Permit for the fifth time, citing ITSL's alleged failure, among others, to begin construction pursuant to the FCA Roadline Permit, which covered harvesting of timber only within the road corridor. ITSL countered that the Project Agreement called for timber harvesting not only within the road corridor but also adjacent to each kilometre of road length. ITSL maintained that it was not economically feasible for it to mobilize a large scale operation supported by timber sales from felling timber either side of a centreline of a road which is only 40 meters wide, versus thousands of cubic metres along the adjacent corridors which should have been allowed by issuance of the FCA Agriculture Permit. The absence of the FCA Agriculture Permit held up the entire Project which could not progress further. After 5 years the Project came to a halt in 2016.

7. ITSL asserts that the State breached the Project Agreement and that it is entitled to specific performance, alternatively damages which it claims have accrued into billions of kina. The State strenuously denies that the Project Agreement ever came into force because it was never executed by the FRPG and that even if the Project Agreement is valid and enforceable against the State by ITSL then the State has not breached any of its contractual obligations to ITSL.

8. ITSL's claim against the State relies on its assertion that there is a binding contract between the ITSL and the State. ITSL alleges the State has breached the Project Agreement by not giving all necessary approvals, in particular the FCA Agriculture Permit. In pursuing its claim, ITSL also relies on clause 27 of the Project Agreement, which includes a submission to arbitration of project disputes arising between the parties. ITSL contends that clause 27 of the Project Agreement is in itself an agreement to arbitrate which requires the commencement and prosecution of ITSL's claim against the State to proceed by way of *ad hoc* arbitration, not litigation.

9. Relying on its interpretation of the arbitration clause, ITSL unilaterally caused a Notice of Arbitration to be sent to the Singapore International Arbitration Centre, thereby instituting arbitration proceedings between ITSL, the State and FRPG in respect of ITSL's claim that the State had breached the Project Agreement.

National Court proceedings

10. On 22 December 2015 the State filed OS No. 824 of 2015 in the National Court at Waigani seeking orders for a permanent stay of the arbitration proceedings and judicial declarations that the arbitration clause in the Project Agreement is

inoperative and unenforceable and that ITSL was not entitled to commence and prosecute arbitration proceedings against the State under clause 27 of the Project Agreement. The National Court was called upon to consider whether clause 27 of the Project Agreement (**Arbitration Clause**) amounted to a submission by the parties of project disputes to *ad hoc* arbitration rather than litigation.

11. The primary judge delivered the National Court's decision on the State's application in OS No. 824 of 2015 on 19 October 2018. The decision effectively held two things:

- that the State, by the conduct of its officers, recognized and proceeded on the basis that the Project Agreement was valid and binding and that the State is accordingly bound by the Project Agreement even though the FRPG did not execute that Agreement
- that the relief sought by the State in its originating summons relates to a "dispute" within the meaning of clause 27.1 of the Project Agreement and that the dispute between the State and ITSL must be submitted for settlement by arbitration under clause 27 because the parties, by virtue of clause 26.2 of the Project Agreement, agreed to submit to arbitration and thereby agreed that the National Court does not have jurisdiction to determine claims for relief such as those of the State as were set out in its originating summons.

12. This appeal by the State is against the whole of the primary judge's decision.

Grounds of Appeal

13. The State has pleaded 9 grounds in its appeal. The subject matter of those grounds can be grouped as follows:

- (1) Jurisdiction of the National Court – Ground 1
- (2) The agreement to arbitrate – Grounds 4, 6, 7, 8 and 9
- (3) The PNG Commercial Disputes Centre – Grounds 1(i)(b) 1(iii)(b), and 4
- (4) The competence of the arbitrator to determine jurisdiction – Grounds 1(ii)-(v)
- (5) The non-execution of the road project agreement by the FRPG – Grounds 2, 3 and 5
- (6) Conditions precedent – Ground 6

(7) Inoperative and enforceability – Ground 7

(8) Restraint as to arbitration – Ground 9

14. The issue of whether or not the Project Agreement was valid and enforceable when it had not been signed by the FRPG and another signatory was not directly before the National Court. The only matters raised in the originating summons concerned whether or not the Arbitration Clause in the Project Agreement was valid and enforceable.

15. The validity or otherwise of the Project Agreement raised separate issues which were in dispute between the parties, which the Respondent wished to resolve by arbitration, and which the Appellant wished to resolve by referring that dispute to the National Court for determination.

16. It was therefore only necessary for the National Court to determine the matters set out in the originating summons, as to the validity of the Arbitration Clause. If the Arbitration Clause was found to be valid, then the separate dispute regarding the validity and enforceability of the Project Agreement would be determined by arbitration. If the Arbitration Clause was found to be not valid, the separate dispute would remain to be determined by referral to the National Court.

The Arbitration Clause

17. The only provisions in the Project Agreement to submit disputes to arbitration under the administration of the Papua New Guinea Commercial Dispute Centre (PNGCDC) are contained in clause 27.

18. Clause 27.2 is headed “Submission to the Papua New Guinea Commercial Dispute Centre”. The clause goes on to provide that the parties to the Project Agreement can submit any dispute between them to the PNGCDC for settlement by arbitration pursuant to the UNCITRAL Arbitration Rules administered by the PNGCDC.

19. Clause 27.3 is headed “PNGCDC Arbitration”. It provides that the appointing authority shall be the Chairman of the PNGCDC, that if the parties cannot agree on a single arbitrator then the arbitrator shall be appointed by the Chairman of the PNGCDC, that the PNGCDC and the arbitrator shall use the Singapore International Arbitration Centre procedures where not inconsistent with the PNGCDC rules or the UNCITRAL arbitration rules and that the place of the arbitration shall be Port Moresby or such other place as the parties may agree.

20. An arbitrator could only be appointed under the procedures of the Singapore

International Arbitration Centre if he or she had been appointed by the Chairman of the PNGCDC pursuant to clause 27.3 of the Project Agreement in circumstances where the parties had failed to agree on the identity of the arbitrator to be appointed.

21. Clause 27.4 is headed “Award” and provides, *inter alia*, that an award in arbitral proceedings pursuant to the PNGCDC arbitration shall be binding on the parties and judgment on it may be entered in any court having jurisdiction for that purpose.

22. It is not in contention that the parties were in fact unable to submit their separate dispute to the PNGCDC for settlement by arbitration, because the PNGCDC no longer existed at the time their separate dispute surfaced. It follows that their separate dispute was therefore not referable to arbitration under clause 27.

23. Ordinarily, if such a clause becomes inoperable or incapable of being applied and leaves a gap in the contract, the Court would be required to determine how to proceed, in order to fill the gap and to give business efficacy to the parties’ express intention to have a procedure in their contract for resolving disputes. Where there are sufficient details in the contract to ascertain the intention of the parties, there can be no uncertainty as to the contract terms, and the Court must uphold the agreement of the parties and not destroy it. If there is uncertainty as to any terms, the Court can supply any reasonable terms missing from the contract, or strike out meaningless words or clauses in a contract. The Court would consider whether any terms may need to be implied, or if a clause or clauses may need to be severed, in order to give effect to the intention of the parties as expressed in the contract: see *Fly River Provincial Government v Pioneer Health Services Ltd* (2003) SC705.

24. However this is unnecessary in this case. The Project Agreement has already expressly provided for what is to happen if there is a dispute which is not referable to arbitration under clause 27, so there is no uncertainty or gap to be filled.

25. Clause 26.2 provides that the parties to the Project Agreement submit to the non-exclusive jurisdiction of the PNG National Court for “determination of any matter arising out of this Agreement or the Project which is not a Dispute referable to arbitration under Clause 27 ...”.

26. The plain and ordinary meaning of these words is clear, and they give business efficacy to the Project Agreement. If the first chosen method of dispute resolution by reference to arbitration under clause 27 is not available, the parties must follow the other method for dispute resolution which is provided by clause 26.2.

27. Any dispute which is not a dispute referable to arbitration under clause 27, is a dispute which must be submitted to the jurisdiction of the PNG National Court under clause 26.

28. Accordingly, ITSL had no contractual power to unilaterally refer the dispute to arbitration using the procedures of the Singapore International Arbitration Centre. ITSL was instead contractually required under clause 26.2 of the Project Agreement to submit the separate dispute for determination by the National Court. In the particular circumstances of this case, clause 26.2 came into effect rather than the Arbitration Clause in clause 27, because the PNGCDC was defunct and no longer existed at the time of the purported referral by ITSL to arbitration of the separate dispute it had with the State regarding the validity and enforceability of the Project Agreement.

29. As the dispute was not unilaterally referable to arbitration under the inoperative and unenforceable Arbitration Clause, there was no question of whether an arbitrator acting in accordance with the procedures of the Singapore International Arbitration Centre had power to determine his own competency.

30. The learned primary judge erred in failing to find that the dispute was not referable to arbitration under clause 27 and that therefore the dispute had to be determined by the National Court under clause 26.

31. The initial dispute between the parties is an alleged breach of contract by the State, for which ITSL claims damages. The State has denied any breach on the basis *inter alia* that the Project Agreement is not valid or enforceable as it was only partially executed by some, not all, of the parties to it.

32. The issue of allowing a contract with a Provincial Government to be enforceable notwithstanding non-compliance with statutorily prescribed requirements has been considered by our Courts. In *Fly River Provincial Government v Pioneer Health Services Ltd* (supra) the Supreme Court said the requirements under the *Public Finances (Management) Act* are to “enable transparency in all public contracts and to safeguard against corruption and enable securing fair contracts with public institutions and or bodies for the best service at a competitive or best price”. However the Court went on to find that although the contract in that instance was illegal and therefore unenforceable, since it had been part-performed and the appellant had received goods and services from the respondent, then in equity the respondent was entitled to pursue a claim for recovery of the costs and expenses it had incurred, by way of restitution.

33. Nonetheless, the validity or otherwise of the Project Agreement in this case was not an issue which was before this Court. It is a matter for the parties to refer the issue to the National Court for determination.

Conclusion

34. We reiterate that the separate dispute between the parties in this Appeal concerning the enforceability or otherwise of the Project Agreement did not form part of the originating summons filed by the Appellant in OS No. 824 of 2015. The issues raised by that separate dispute are not before this Court for the reason that they were not before the Court below. Our finding in this Appeal is that it is the arbitration agreement contained in clause 27 which is inoperative and unenforceable.

Order of the Court

The Court orders that:

1. The Appeal is upheld.
2. The decision of the National Court given on 19 October 2018 in proceeding OS No. 824 of 2015 is set aside.
3. A Declaration is made that the arbitration agreement contained in clause 27 of the Gre-Drigmas-Daura-WoiWoi Falls Road Project Agreement (“the Project Agreement”) between the Appellant and the Respondent is inoperative and unenforceable.
4. A Declaration is made that the Respondent is not entitled to continue to prosecute arbitration proceedings against the Appellant under Clause 27 of the Project Agreement.
5. The Respondent is restrained from taking any further steps in, or for the purpose of, the arbitration that has been commenced by the Respondent against the Appellant and that arbitration process is to be terminated by the Respondent forthwith, the Respondent to pay the Appellant’s reasonable costs of the arbitration to date, such costs to be taxed if not agreed.
6. A Declaration is made that pursuant to clause 26.2 of the Project Agreement the Appellant and the Respondent have agreed to submit to the non-exclusive jurisdiction of the National Court of Papua New Guinea the determination of any dispute arising out of or in connection with the Project Agreement.
7. The Respondent shall pay the Appellant’s costs of this appeal and the

costs of National Court proceeding OS No. 824 of 2015, such costs to be taxed if not agreed.

Dentons PNG: *Lawyers for the Appellants*

Leahy Lewin Lowing Sullivan Lawyers: *Lawyers for the Respondent*