IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012CD 01080

BETWEEN	**CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED**	**CLAIMANT/RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT/APPLICANT**
AND	**THE GOVERNMENT OF JAMAICA**	**2ND DEFENDANT/ APPLICANT**
AND	**THE MINISTRY OF HEALTH**	**3RD DEFENDANT/ APPLICANT**

Arbitration agreement – Place of arbitration Bahamas – whether "place" means "seat" of arbitration – jurisdiction of Jamaican Court to review arbitral award.

J Samuels-Brown Q.C. and Tamika Jordan instructed by J. Samuels Brown for the Claimant

Miss Althea Jarrett instructed by the Director of State Proceedings for the Defendant

HEARD: 27th September 2013 and 21st February 2014

CORAM: THE HON. MR. JUSTICE DAVID BATTS

1. In its Notice of Application for Court Orders dated 1st June 2012, the Defendant applied to strike out the Claimant's Fixed Date Claim Form. The bases of the Application are 3 in number:

   i. The agreed seat of Arbitration under the terms of Reference is Nassau Bahamas;
   ii. Jamaica is not the appropriate forum to challenge the awards;
   iii. The Supreme Court has no jurisdiction to hear and determine the Claim.

2. The Fixed Date Claim was filed on the 24th of February 2012 and seeks an order from this Court to set aside the award made by the arbitrator Richard Fernyhough Q.C. That arbitral award was made in the Bahamas.

3. The terms of the arbitration agreement and the terms of reference giving rise to the award are not in dispute. The terms relevant to this Application to strike out the Fixed Date Claim Form are as follows:

> Clause 67.3 of the Conditions of Contract Part I:
> "Any dispute in respect of which:
>
> a. The decision, if any, of the Engineer has not become final and binding pursuant to sub-clause 67.1; and
> b. Amicable settlement has not been reached within the period stated in sub-clause 67.2
>
> Shall be finally settled, unless otherwise specified in the contract under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.
>
> Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or agreements put before the Engineer for the purpose of obtaining his said decision pursuant to sub-clause 67.1. No such decision shall disqualify the arbitrator/s on any matter whatsoever relevant to the dispute.
>
> Arbitration may be commenced prior to or after completion of the work, provided that the obligations of the Employer, the Engineer and the contractor shall not be altered by reason of the arbitration being conducted during the progress of the works."
>
> Paragraph 51 Part II Conditions:
> "As an alternative to the Rules of Conciliation and Arbitration of the International Chambers of Commerce and with the agreement of both parties to the dispute, the Arbitration may be conducted in a manner set out and in accordance with the Arbitration Act of Jamaica."

It is common ground between the parties that the governing law of the contract was expressly stated to be the law of Jamaica.

4. The Terms of Reference agreed upon to govern the Arbitration provided among other things:

> "vi. The Place of Arbitration
>
> a. The parties have agreed that the place of arbitration is Nassau Bahamas.
> b. Further and without prejudice to Articles 14 and 25 of the ICC Rules, the award or awards and all procedural decisions of the Tribunal will be deemed conclusively to be made in Nassau.
> c. In recognition of the convenience which the foregoing offers to the Tribunal and the parties, it is agreed that neither party will seek to rely upon any agreement to the effect or with the possible result that any award or awards and/or procedural decisions shall be of limited validity or invalid by reason of their having been in fact made other than in Nassau.
> d. The Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate.
>
> vii. The Applicable Substantive Law
>
> a. The governing law of the contract is Jamaica
> b. The parties have not agreed to give the Arbitral Tribunal the powers of an amiable compositor or to decide ex aequo et bono (see Article 17(3) of the ICC Rules)
> c. The parties have agreed that the time for making an award shall be determined in accordance with the ICC Rules.
>
> By submitting the dispute to arbitration under the ICC rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

5. It is against the backdrop of these provisions that the Defendant urges this Court to strike out the Claim. In summary, the Defendant contends that the total effect of the terms agreed is that the Bahamas was made the "seat" of the Arbitration. The legal effect of doing so is to exclude the jurisdiction of the Courts of Jamaica with regard to the procedural aspects of the arbitration including any question of whether the Arbitral award may or should be set aside.

6. The Claimant opposed this Application on a number of grounds. I will reference these seriatim.

7. In the first place learned Queens Counsel for the Claimant submitted that neither the agreement nor the terms of reference use the well established phrase or term of art "seat of the arbitration." The agreement merely speaks to place and this indicates geographic place. The agreement and Terms of Reference also refer to the laws of Jamaica and the Jamaican Arbitration Act. This indicates an intent to give the Courts of Jamaica jurisdiction. Secondly Counsel submitted that the Courts lean against excluding jurisdiction and should therefore not force a construction which has that result unless the words are clear. Thirdly Counsel submitted that the facts and circumstances of this case makes Jamaica the forum conveniens. In matters such as this the same indicia as in private international law applies. That is, the jurisdiction with closest connection. The dispute arose in Jamaica, concerned construction activity in Jamaica and both parties to it were Jamaican, one of course being the Government of Jamaica. Indeed some parts of the hearing took place in Jamaica. Several authorities were relied upon, interestingly many of which were also relied on by the Defendant. The decisions cited were: *Claim HCV 2428/2004 Attorney General of Jamaica v Construction Developers Associates Ltd.* [24 February 2006]; *The Eleftheria; Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v. Owner of Ship or Vessel Eleftheria* [1969] 2 All ER 641; *Unterweser Reederei G.m.b.H. v. Zapata Off-Shore Company, the Chaparral* [1968] Vol 2. Lloyd's Law Reports 158, at 162-163; *Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others* [2012] EWCA Civ 638*; Union of India v. McDonald Doulas* [1993] 2 Lloyds Law Reports commencing at page 48 at page 50. *C v D* [2007] EWCA Civ 1282; *Dubai Islamic Bank PJSC v. Paymantech Merchant Services Inc* [2001] 1 All ER (Comm) 514; *Naveira Amazonica Peruana SA v. Compania Internacional De Seguros Del Peru* [1988] Vol. 1 Lloyds Law Reports 116. The Claimant also relied on the Arbitration (Recognition and Enforcement) Act as well as the Arbitration Act.

8. After careful consideration I have come to the conclusion that this Fixed Date Claim has to be dismissed. It is too late in the day to challenge, and the

Claimant's Counsel, to her credit, did not seek to do so, the well established principle that parties can agree upon "the seat" of the arbitration. Further when they do so, it is presumed to mean that that is the forum for laws arbitri in the sense that procedural issues and legal challenges would be subject to the laws and jurisdiction of the Court of that locality (see; *Naveira Amazonica Peruana SA v. Compania Internacional De Seguros Del Peru* [1988] Vol. 1 Lloyds Law Reports 116; *Union of India v. McDonald Doulas* [1993] 2 Lloyds Law Reports (commencing at page 48). The law applicable to the contract or matter in dispute need therefore not be the same as the law applicable to procedural aspects of the arbitration. The rationale for this is clear and I respectfully rely upon and adopt the words of Saville, J. in *Union of India v. McDonald Doulas* [1993] 2 Lloyds Law Reports 48 at page 50:

> "If the parties do not make an express choice of procedural law to govern their arbitration, then the Court will consider whether they have made an implicit choice. In this circumstance, the fact that the parties have agreed to a place for the arbitration is a very strong pointer that implicitly they must have chosen the laws of that place to govern the procedures of the arbitration. The reason for this is essentially one of common sense. By choosing a country in which to arbitrate, the parties have ex hypothesi, created a close connection between the arbitration and that country and it is reasonable to assume from their choice that they attached some importance to the relevant laws of that country. That is, those laws which would be relevant to arbitration conducted in that country."

9. This being the general principle, it is significant that the parties agreed that the place of the arbitration should be the Bahamas. At the same time they agreed that arbitral hearings might be held elsewhere than in Bahamas. I agree with the Defendant's Counsel's submission that this demonstrates that the designation of a "place" for arbitration must be of some greater significance than a geographic location otherwise only one Clause was necessary stating the arbitration could be held anywhere that the arbitrators in their discretion determined for the time being.

10. Paragraph 51 Part II of the Conditions Supports the Defendant's position. It makes it clear that it is the International Arbitral Rules which apply. The Jamaican Arbitration Act can only be used as an alternative if both parties agree. There has been no such agreement alleged or proved.

11. It seems to me therefore that on a true construction of the relevant terms of the agreement and terms of Reference to the arbitration, the parties have agreed that the Bahamas is to be the "seat" of the arbitration, as that term has come to be understood. As such it is the law and procedure of the Bahamas which apply and it is to be the Courts of Bahamas that the parties should have recourse to determine procedural or other issues related to the conduct or decision of the arbitrator.

12. This being my conclusion as to the construction and meaning of the terms and conditions of the Agreement and Terms of Reference, the other submissions of the Claimant's Counsel become moot. Nevertheless I wish to say a word about the decision of the Honourable Mr. Justice Rattray in *Attorney General of Jamaica v Construction Developers Associates Ltd.* Claim HCV 2428/2004 [24 February 2006].

13. That case concerned the same parties to this matter and the same contract and arbitration agreement. Interestingly both parties tried to use the case to their advantage in different ways. Before Justice Rattray an Application was made,(prior to arbitration but after the contractual dispute arose), by the Attorney General of Jamaica who then argued that the International Arbitral Rules did not apply and that the arbitration should take place in Jamaica and be subject to Jamaican Arbitration Rules and Practice. Construction Developers Associates (the present Claimant) opposed the Application successfully before Rattray J.

14. Mrs. Jacqueline Samuels-Brown Q.C. urged this Court to say that as the Crown acknowledged the jurisdiction of Jamaica's Court to indicate where the arbitration should be held they could not now be heard to deny the jurisdiction of the same

Court to say if the arbitrator's decision was flawed. However the primary issue to be determined by the Honourable Mr. Justice Rattray was whether a purported amendment to Article 51 of the Construction Contract was indeed part of the agreement. The Court found that the amendment did not take effect. Further that even if it had taken effect it did not exclude the jurisdiction of the ICC and ICA. In the words of Rattray J:

> "I find on a literal construction of this clause, that its wording speaks to the manner in which the arbitral proceedings are to be conducted, that is in accordance with the provisions of the Arbitration Act of Jamaica, rather than any jurisdictional considerations."

15. I hold that the Defendant was entitled to approach the Courts of Jamaica to determine the applicable terms of the contract and whether it was the International Rules for arbitration or Jamaican Rules which applied. That determination was made and there was no appeal and the matter proceeded to arbitration. The Crown is therefore not now estopped or otherwise precluded from objecting to this court's exercise of jurisdiction to challenge the arbitration.

16. The irony was not lost that before Rattray J the present Claimants applied to strike out the Crown's Application on the basis that the Court had no jurisdiction. Rattray J did not find it necessary to consider that application in light of his dismissal of the Claim on its merits. It also did not escape the attention of Counsel for the Defendant before me, that Counsel for Construction Developers Associates Ltd had urged Justice Rattray that the arbitration was intended to be seated in the Bahamas,

> "Furthermore, the fact that an arbitration may be subject to the Arbitration Act does not mean that it must be seated in Jamaica. The purpose of the Act is to uphold and give effect to the written arbitration agreement the parties have made. Hence the terms and effect of sections 2, 3 and 5 of the Act. The first enquiry the Court would make is what written agreement have the parties made for the arbitration of their disputes. Should the agreement provide for arbitration in

> Jamaica, it would be seated there." (Exhibit DP2 to the Affidavit of Deidre Pinnock filed 23rd September 2013).

17. I am further fortified in the decision at which I have arrived when regard is had to the letter of reference to the ICC by the present Claimant's then Counsel, dated 20th April 2004 Exhibit GAY5 to the Affidavit of Grace Allen Young filed on 25th September 2013. In that letter Counsel advanced a rational for the agreement, as I have found, of Bahamas as the seat of the arbitration,

> "In accordance with normal practices and expectation, the arbitration should be placed in a neutral location. This is especially important in this case, in which the intended Respondent is the Jamaica Government, and any supervisory jurisdiction would fall to be exercised by the Courts of Jamaica, were the disputes to be arbitrated there. The Claimant would propose that the place of arbitration should be the Bahamas a Common Law Jurisdiction which would be convenient for the parties and the arbitral tribunal. Previous ICC arbitrations have taken place there without difficulty."

18. This document also demonstrates that the Claimant was fully cognisant of the effect of designating a seat of arbitration. It is for this reason that this Court was not moved by the plea of hardship contained in the Affidavits filed on behalf of the Claimant. As a commercial entity properly advised it no doubt was cognisant of the costs involved in litigating disputes or procedural issues in the Bahamas. It also should have advised itself of the alleged difficulty in having Jamaican Counsel appear in those Courts on its behalf. In any event, the difficulties outlined are not insurmountable.

19. For the reasons stated in this judgment therefore, I will exercise power under Rule 26.3 of the Civil Procedure Rules 2002 and strike out the Fixed Date Claim Form filed in this matter. Costs will go to the Defendant to be taxed if not agreed.

1st February 2014.

David Batts
Puisne Judge
21st February 2014