

Third South Pacific International Arbitration Conference 17 March 2021

**Presentation by
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International Arbitration Act 2017

Introduction

- Commenced on 4 December 2018
- Act binds the State (*s3*)
- Applies to International Arbitration (IA) commenced prior to or after 4/12/2018.
- Limitation Act 1971 applies to IA proceedings. *s10*

Definition – IA s4(3)

- Place of business of parties in different States.
- Place of arbitration is different from place of business.
- Place where substantial part of obligation is to be performed or where subject matter is closely connected is different from place of business.
- Parties agree subject matter relates to more than one State.

Definition - Arbitration Agreement has been widely defined in s11 of the Act which in summary are in following terms:

- An Agreement by parties to submit all or certain disputes arising;
- Shall be in writing in the form of arbitration clause in the contract or separate agreement;
- Agreement can be in the form of electronic communications or data messages; *s11(4)*
- Can be by way of allegation in Statement of Claim which is not denied; *s11(5)*
- Reference to a document in a contract which had arbitration clause. *s11(6)*

Appointment of Arbitration Tribunal s15

- Parties to determine arbitrators and numbers.
- If parties cannot agree, then:-
 - each party appoints 1 and then 2 Arbitrators appoint 3 Arbitrators.
- If parties fail to take above steps w/i 30 days from due date the party can move Court or any other authority to appoint Arbitrator(s).

Justiciable Impartiality or Independence

- Arbitrator to disclose any doubts as to his/her impartiality/independence.
- Obligation to disclose is from start to finish of Arbitration proceedings.

Challenges: Parties have right to challenge appointment of arbitrators. Arbitrator who is challenged may withdraw from his office as an arbitrator. *s18*

Arbitrators mandate can be terminated by agreement, or withdrawal or by court if Arbitrators is unable to perform or causes undue delay. *s19.*

If arbitrator withdraws, or on revocation of mandate or termination of mandate, substitute arbitrator is to be appointed in terms of the rules. *s20*

Jurisdiction: s22

- Arbitration Tribunal may:-
- Rule on its own jurisdiction
- Rule on validity of arbitration agreement
- Rule on whether tribunal is properly constituted
- Rule on whether matters submitted to arbitrators are in accordance with arbitration agreement.
- Arbitration clause treated as independent of other terms of the contract.
- Decision that says contract is null and void does not invalidate arbitration clause.
- Jurisdiction issue must be raised as soon as matter alleged to be beyond scope of authority is raised.
- Party may challenge tribunals decision on jurisdiction to Court within 30 days of receipt of notice of ruling. No appeal lies from court's decision.
- While court decides jurisdiction issue, arbitration proceedings may continue.

Conduct of Arbitration Proceedings:

- Parties to be treated equally and given full opportunity to present his/her case. *s34.*
- Parties may represent themselves or by person of their choice. *s35*
- Rules of procedures. Parties to agree on failing which arbitral tribunal to make procedures in line with the Act. *s36*
- Place of arbitration is to be agreed to by parties failing which arbitral tribunal to decide having regard to circumstances of the case.
- Arbitral proceedings commences on date of receipt of request to refer dispute to arbitration as received by the Respondent. *s38*
- Language used is that agreed by parties failing with arbitral tribunal to decide. *s39*
- Parties are to file their claim or defence and may amend their claim or defence unless arbitral tribunal considers it inappropriate to allow amendment. *s40*

Hearing and written procedures: Arbitral Tribunal to determine whether to conduct oral hearing or decide dispute on basis of documents and other material. Arbitral Tribunal to hear matters at different stage of proceedings if requested by a party.

- All documents including expert reports and evidential materials should be communicated to all parties. *s41.*
- Default of Party: unless agreed by parties if without showing sufficient cause:-
- Claimant fail to communicate his/her statement of claim arbitral tribunal shall terminate proceedings.
- Respondent fails to communicate his/her defence proceedings shall continue without treating such failure as admission of claim.
- If any party fails to appear at hearing or provide documentary evidence proceeding shall continue and award made on evidence by arbitral tribunal. *s42.*

Confidential: Unless agreed by parties, all documents are matters relating to arbitration shall be confidential. No party shall publish, disclose or communicate any information in relation to arbitration proceedings or awards. *s45(1)*

Exception:

- (a) To protect or pursue a legal right or interest of a party; or
- (b) To challenge or enforce award; or
- (c) Obligated by law to disclose; or
- (d) If ordered by arbitral tribunal after hearing the parties;
- (e) To any advisors of any of the parties. *s45(2)*

Termination of Arbitration Proceedings s50:

- Final Awards *s50(1)*
- Order of arbitral tribunal
- when claimant withdraws claim without objection by respondent
- Parties agree to terminate
- Arbitral Tribunal finds continuation of proceedings to be unnecessary or impossible. *s50(2)*

Stay of Court Proceedings

- Party to Arbitration Agreement must seek stay of proceedings before submitting first statement in Court proceedings. *South Pacific Fertilizers (Fiji) Ltd v Allied Harvest International Pvt Ltd (Singapore)*.
- Arbitration may commence/continue after Court proceeding is instituted.
- Court's decision to refer matter to arbitration is not subject to appeal. *s12(5)*
- However, court's decision not to refer dispute to arbitration is subject to appeal with leave of the Court.
- Death, Bankruptcy or Winding-up of party to arbitration: Subject to provision of any existing law arbitration shall not be discharged. *s13*

Interim Measures: Court has powers to grant interim measures before or during arbitration proceedings. *s14*

Arbitral Tribunal has power to make interim orders in the forms of an interim award or any other form. *s23*.

- Condition to grant of interim measure:- *s24*
- Damages not adequate remedy for harm and harm substantially outweigh harm likely to be suffered by other party.
- There is reasonable possibility of requesting party's success.
- Interim measures can be modified, suspended and terminated. *s27*.
- Party requesting interim measure may be required to provide security. *s28*.
- Parties may be required to disclose any change in circumstance on basis of which interim measure was requested or granted. *s29*.

Enforcement of Interim Measures – can be enforced in the same manner as final award. *s31.*

Grounds of refusing Recognition on Enforcement – Interim measures. *s32.*

- Same grounds for refusing final awards under *s54(1)(a)(i) to (iv)* and *s54(b)*.
- Arbitral Tribunal decision to provide security not complied with.
- Interim measures has been suspended or terminated by arbitral tribunal, court of state in which arbitration takes place or under law of which interim measures was granted.
- Interim measures is incompatible with power conferred upon the Court.

Courts Power: Court has power to make interim orders in exercise of powers in accordance with its procedures in consideration of the specific features of international arbitration. *s33.*

Application for Setting Aside as Exclusive Recourse Against Arbitral Award. s52

- Award may be set aside by Court if:-
 - Party to agreement was under some incapacity; or
 - Agreement was invalid under law it was subject to or if no such indication then under law of Fiji;
 - Party not given proper notice of appointment of arbitrator or arbitration proceeding or was unable to present his/her case.
 - Award deals with dispute not within the scope of submission to arbitration;
 - Composition of tribunal or the procedure not in accordance with the agreement or unless provision of the agreement in conflict with provision of the Act;
 - Subject matter of dispute is not capable of settlement by arbitration under Laws of Fiji;
 - Award is in conflict with public policy of Fiji.

- Application to set aside award is not to be made after 3 months from receipt of award or determination of application to correct award or interpret a point in the award. *s52(3)*.
- Court may suspend setting aside proceeding to give an opportunity to tribunal to take action to eliminate grounds for setting aside. *s.52(4)*.

Recognition and Enforcement s53

- - Award shall be recognised as binding and enforced upon application to Court irrespective of in which country it was made. (This is subject to s54).
- - If award not in official language of Fiji then translation is to be supplied.

Grounds for Refusing Recognition or Enforcement s54

- * At the request of the party against whom it is made if party furnishes proof that:-
- party to agreement was under some incapacity; or
- Agreement was invalid under law it was subject to or if no such indication then under law of Fiji;
- Party not given proper notice of appointment of arbitration or arbitration proceeding or was unable to present his/her case.
- Award deals with dispute not within the scope of submission to arbitration.
- (v) award is not yet binding or has been set aside or suspended by a Court of the country in which or under the law of which that award was made or
- Court finds that:-
- (i) subject matter of dispute is not capable of settlement by arbitration;
- (ii) would be against public policy of Fiji.

Public Policy

- Interim measure or Award is contrary to public policy of Fiji if:-
- (a) making of interim measure or award was induced or affected by fraud or corruption;
- (b) breach of natural justice occurred in making interim measures or award. *s55*

Court Cases

- Since the IAA commenced in 2018, very few cases dealt with IAA.
- Stantec New Zealand Limited v. Fiji Roads Authority: High Court Civil Action No. HBC324 of 2016 (“CA324/16”)
- Fiji Roads Authority v. Stantec New Zealand Limited & Ors: High Court Civil Action No. HBC227/17 (“CA 227/16”)

Brief facts of the case are as follows:-

- On 27 January 2012 Fiji Roads Authority and Santec New Zealand Limited entered into contract for provision of road management services to road conditions in Fiji (the Contract).
- Contract was allegedly terminated.
- Clause 10 of the Agreement in summary form provided for resolution of disputes in following terms:

10.1: CEO's of parties to meet within 20 days (10 days if relate to invoice) of receipt of notice to meet and try to resolve.

10.2: If not resolved under 10.1, then parties to submit to mediation. If parties cannot agree on mediation within 5 days then Chief Justice of Fiji to appoint one.

10.3: If not resolved within 15 business days of commencement of mediation or any extended period then referred to arbitration.

CA324/16

Originating Summons filed seeking following declaration/orders:-

- Clause 10 – continued in effect after termination of the contract;
 - Plaintiff is entitled to submit dispute to mediation;
 - Specific performance of Clause 10.2
 - Costs
-
- Parties filed Application to cross-examine deponents of Affidavits filed on behalf of the parties which was refused by Court and is subject to appeal.

CA227/17

- On 12 September 2017 Defendant filed Application for Stay of Court Proceedings pursuant to s.5 of Arbitration Act 1965 (Fiji). Subsequently Defendant filed Application for Leave to amend 12 September 2017 Application to rely on provisions of IAA.

- Court refused to grant leave for Defendant to amend Application as prayed for and held that the dispute relates to Agreement entered locally and as such governed by Arbitrations Act 1965 (Fiji) and not IAA.
- In Ruling delivered on 1 March 2019 Court noted that there was no dispute between the parties that arbitration clause in the contract continues to bind parties after termination of contract.

- Court observed as follows:
 - Mediation and Arbitration are methods of Alternate Dispute Resolutions;
 - Mediation can take place only with consent of parties;
 - Court has no power to compel parties to refer a matter to arbitration;
 - No application has been filed to refer dispute to arbitration.
-
- Court dismissed the Originating Summons in CA324/16 and Summons in CA227/17.

South Pacific Fertilisers Limited (Fiji) v. Allied Harvest International Pvt. Ltd. (Singapore) High Court Civil Action No. 142/17.

Brief facts are as follows:

- Defendant supplied fertilisers to Plaintiff from Hong Kong;
- Those fertilisers were not being released to Plaintiff – issue payment of invoice (dispute);
- Court granted interim mandatory injunction for release of fertilisers;
- Defendant filed Application for Stay of Proceedings.

Arbitration Clause was in following terms:

- “Arbitration – In the course of execution of this contract, any dispute shall be informed to the other party within 3 days for negotiation and solution. In case not reaching an amicable agreement, such dispute shall be finally settled by Singapore International Arbitration Centre beside chamber of the commercial and industry whose decision will be regarded as final and binding to both parties. The loosing party will pay arbitration charge and other charges.”
- Court referred dispute to arbitration and stayed the Court’s proceedings after considering various provisions of IAA.

In reference to s.12 of IAA it is noted that the Court stated as follows:

- “It would appear that, the mandate given to this court to refer the matter to arbitration only kicks in if, inter alia, the request is made before the requesting party submits his statement to SIAC.
- What if the request was made after the requesting party has submitted his statement to SIAC? The short answer is, in that case, the court is no longer mandated to refer the matter to arbitration. However, the court still has a discretion as to whether or not to refer the matter to arbitration.”

- It appears that Court misinterpreted this section.
- In fact a party who moves court to stay court proceedings and to refer matter to arbitration before that party “submits his or her first statement on the substance of the dispute” in the court proceedings and not in the arbitration proceedings.

Plaintiff applied to SIAC for stay of arbitration proceedings until court proceedings in Fiji was finalised. SIAC refused Plaintiff's stay application on the following grounds:-

- Not proved that Defendant waived right to arbitration or submitted to Fiji Courts;
- Since, no waiver or submission by Defendant – court proceedings is in breach of arbitration clause;
- Fiji proceedings was to seek injunctive relief and not to resolve substantive dispute;
- Stay Application of Fiji proceedings shows lack of submission to Fiji Courts;
- Delay of 1 year 3 months is not a waiver of arbitration agreement.