Neutral Citation Number: [2014] EWHC 451 (Comm)

Case No: 2012-192

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 26/02/2014

Before:

MR JUSTICE HAMBLEN

- -

Between:

BDMS LIMITED	**Claimant**
- and -	
RAFAEL ADVANCED DEFENCE SYSTEMS	**Defendant**

- -
- -

Lawrence Power for the **Claimant**
James Shirley (instructed by **Wragge & Co**) for the **Defendant**

Hearing dates: Friday 7 February 2014

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Judgment

Mr Justice Hamblen :

Introduction

1. By an Application Notice dated 20 May 2013 the Defendant seeks an order that the court has no jurisdiction and that the Claim Form and Particulars of Claim are dismissed and/or set aside and/or permanently stayed.

2. As set out in the Application Notice, the grounds for seeking these orders are that the agreement out of which the dispute arises contains an arbitration clause and that a mandatory stay should be granted pursuant to s.9 of the Arbitration Act 1996.

3. If this application does not succeed the Defendant seeks to reserve the right to contend that the proceedings should be set aside on other jurisdictional grounds which it says only became apparent on Friday 31 January 2014 when the Claimant served the 2nd Witness Statement of Grahame Birchall.

General Background

4. The Claimant is a limited company incorporated in England. The Defendant is a limited company incorporated in Israel and is wholly owned by the government of Israel.

5. In broad terms, the dispute concerns sums allegedly due to the Claimant from the Defendant by way of 'success fees' under (or on essentially the same terms as) a consultancy agreement No. Co. Ag/02/13 ("the Agreement"), which was executed by representatives of the Defendant on 8 October 2002, 17 October 2002, and 22 October 2002.

6. Clause 7 of the Agreement specifies arbitration as the agreed method of dispute resolution. Clause 7 ("the arbitration agreement") provides:

> "7. Dispute Resolution and Applicable Law
>
> 7.1 All disputes and differences between the parties arising out of or under this Agreement shall be referred to the decision of a single arbitrator.
>
> 7.2 The arbitration shall take place under the rules of the International Chamber of Commerce. The place of arbitration shall be London and the official language shall be English.
>
> 7.3 The arbitrator shall be nominated by the President of the London Chamber of Commerce. The arbitrator shall be a jurist who specialises in the field of international marketing and whose decision shall be final and binding upon the parties. The arbitrators shall issue a written decision with his reason therefore. [*sic*]"

7. Pursuant to the arbitration agreement the arbitration was to take place under the ICC Rules ("the Rules"). Of particular relevance to the present application is Article 30 of the Rules which provides:

> "Article 30 – Advance to Cover the Costs of the Arbitration
>
> 1. After receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up.
>
> 2. As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties…
>
> 3. The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. Any provisional advance paid on the basis of Article 30(1) will be considered as a partial payment thereof. However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other fail to pay its share.
>
> 4. When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims or counterclaims at a later date in another proceeding."

The arbitration proceedings

8. On 28 April 2011 the Claimant filed a Request for Arbitration with the ICC in relation to its dispute with the Defendant. The Defendant filed its Answer to Request for Arbitration on 17 June 2011.

9. On 20 October 2011 Mr Paul Hannon was appointed as the sole arbitrator ("the Tribunal") by the ICC, in accordance with the Rules and the arbitration agreement.

10. On 3 November 2011 the ICC wrote to the parties fixing the advance on costs at US$27,000 and inviting the Claimant to pay US$1,500 (the balance of its share of the advance on costs after giving credit for payment of the provisional advance envisaged by Article 30(1) of the Rules) and the Defendant US$13,500.

11. The Defendant's solicitors Wragge & Co had expressed concerns about the Claimant's ability to meet any adverse costs order. On 7 November 2011 Wragge & Co wrote to the Claimant's legal representative, Lawrence Power ("LP") stating: "as you will have seen from our letter to the arbitrator of 2 November 2011, our client intends to make an application that BDMS be ordered to provide security for Rafael's costs. In light of the ICC's request that Rafael contribute USD$13,500 to the advance on costs, we write to put you on notice that, until adequate security has been put in place, Rafael does not propose to pay the advance on costs." This was a clear statement that the Defendant did not intend to pay the advance on costs until adequate security for costs was in place. This was to remain the Defendant's position throughout.

12. On 29 November 2011 Wragge & Co wrote to LP stating: "in the interests of saving time and costs and in getting on with the determination of the critical preliminary issues above, Rafael is prepared to defer making a formal application for security for its costs until after the preliminary issues have been determined." It was then reiterated that the Defendant would not pay its share of the advance on costs unless security for costs was provided:

> "…if the Claimant does not provide security voluntarily (in tranches as suggested in our letter of 12 September 2011), then the Respondent will not pay any portion of the ICC's advance on costs. If the Claimant truly wants to take this matter forward without securing the Respondent's costs, it will have to meet whatever demands the ICC makes as to payment of the balance of the advance on costs."

13. On 1 December 2011 the parties attended a meeting together with the Tribunal for the purpose of discussing the terms of reference for the arbitration. Terms were agreed and both parties signed a Terms of Reference document ("the TOR"), dated 1 December 2011. The TOR provided, *inter alia,* by Clause VI (11) that an issue to be determined by the arbitration is "payment of the advance on costs."

14. On 21 December 2011 procedural directions were made by the Tribunal providing for a preliminary hearing on 19 March 2012. Under paragraph 7, a matter to be dealt with was "any issues relating to the non-payment to the ICC of an advance on costs."

15. On 28 December 2011 the ICC wrote to the parties acknowledging the Claimant's payment of its outstanding share of the advance on costs and renewing its invitation to the Defendant to pay the balance of its share of the advance on costs (US$13,500) within 15 days from receipt of the letter.

16. On 17 January 2012 the Defendant made an application to the Tribunal for an order of security for costs against the Claimant, requesting that the application be heard at the hearing on 19 March 2012.

17. On 18 January 2012 the ICC wrote to the parties in relation to the Defendant's failure to pay its share of the advance on costs and inviting the Claimant to

substitute for the Defendant in paying its share of the advance (i.e. US$13,500) by 1 February 2013.

18. On 25 January 2012 LP wrote to Wragge & Co in relation to the Defendant's failure to pay the advance on costs and requesting the Defendant "for the final time" to "remedy this breach and pay its share of the advance on costs".

19. On 27 January 2012 Wragge & Co replied stating that the Defendant's "position on this issue has been clearly set out in previous correspondence and in its security for costs application" and that its position "remained unchanged". It thereby reaffirmed its position that it would not pay its share of the advance on costs unless and until security for costs was provided.

20. On 1 February 2012 the Claimant issued an application for permission to serve proceedings on the Defendant in Israel.

21. On 2 February 2012 Gloster J gave permission to serve the Claim Form and Particulars of Claim on the Defendant out of the jurisdiction.

22. Also on 2 February 2012 the ICC wrote to the parties granting the Claimant until 17 February 2012, to substitute the balance of the Defendant's share of the advance on costs and stating that:

> "Unless we receive payment of the above amount within the time limit granted, the Secretary General may, pursuant to Article 30(4) of the Rules, invite the Sole Arbitrator to suspend his work and to grant the parties a further and final time limit of not less than 15 day to make payment, failing which the claims would be considered withdrawn without prejudice to their reintroduction at a later date in another proceeding."

23. It was thereby made clear that unless the Defendant's share of the advance costs was paid the consequence would be likely to be withdrawal of the claim.

24. On 7 February 2012 the Claimant's Claim Form and Particulars of Claim were issued.

25. On 10 February 2012 LP wrote to Wragge & Co purporting to accept the Defendant's failure to pay its share of the advance on costs as a repudiatory breach of the Rules and clause 7 of the arbitration agreement and stating that the Claimant would now pursue its claim in the High Court.

26. On 14 February 2012 Wragge & Co replied rejecting the Claimant's position, stating that the Defendant would be resisting any attempt to commence proceedings in the High Court, requesting that the Claimant withdraw its allegations of repudiatory breach or withdraw its claims in the arbitration proceedings and stating that, until such time, the Defendant would continue to comply with the timetable and would be filing submissions later that day. It again reaffirmed the Defendant's position in relation to payment of its share of the advance on costs, stating that:

> "Our client's position on payment of the advance on costs in view of BDMS's inability and unwillingness to meet any adverse costs award against it has been well rehearsed in correspondence and in a formal application for Security for Costs, dated 17 January 2012. We do not therefore intend to repeat that material here."

27. On 16 February 2012 the ICC wrote to the parties stating that:

> "We also refer the parties to our letter dated 2 February 2012 and remind the parties that the balance of the advance on costs is due by 17 February 2012. If the payment is not made within this time limit, the Secretariat will invite the Secretary General to apply Article 30(4) of the Rules and grant the parties a further and final time limit of not less that 15 days to make payment, failing which the claims would be considered withdrawn, without prejudice to their reintroduction at a later date in another proceeding."

28. On 22 February 2012 the ICC wrote again granting the parties a final time limit of 15 days to pay the balance of the advance on costs and stating that:

> "Accordingly, pursuant to Article 30(4) of the Rules, and after consultation with the Sole Arbitrator, I hereby grant the parties a final time limit of 15 days from the day following the date of receipt of this letter to pay the balance of the advance on costs (i.e. US$ 13,500), failing which the claims shall be considered withdrawn, without prejudice to their reintroduction at a later date in another proceeding.
>
> Should a party wish to object to this measure, it must make a request within the granted time limit for the matter to be examined by the Court.
>
> Finally, we inform you that the Sole Arbitrator has been invited to suspend his work."

29. On 7 March 2012 Wragge & Co. wrote to LP and the ICC requesting that the ICC determine its security for costs application in light of the Claimant's purported termination of the arbitration proceedings.

30. On 13 March 2012 LP wrote to the ICC and Wragge & Co. referring to Article 30(4) of the ICC Rules, stating that the claim was now withdrawn by operation of Article 30(4) and that the Tribunal no longer had jurisdiction to make any determination of the Defendant's security for costs application and requesting that, in light of the withdrawn claim, the court refund the remainder of the advance on costs to the Claimant.

31. On 14 March 2012 the ICC gave formal notice of the Claimant's voluntary cessation and withdrawal of the claim and stated that, as no objection to the application of Article 30(4) has been received and no payment received from the parties, the claims were considered withdrawn as of 9 March 2012.

The parties' contentions

32. The Claimant submitted that under Article 30 payment of the advance on costs is a condition precedent for the arbitration taking place. If payment is not received by the ICC, then pursuant to Article 30(4), the proceedings will be withdrawn unless a request to object is received.

33. The Claimant paid its share of the advance on costs in full. The Defendant, however, never paid any part of its share and that led first to the possibility of and then to the actual withdrawal of the arbitration proceedings.

34. The Claimant contended that this was a repudiatory breach of the arbitration agreement because:

(1) The purpose of clause 7 of the arbitration agreement was to ensure that arbitration could resolve the dispute. The Defendant's behaviour, in causing the withdrawal of the arbitral proceedings, prevented that purpose.

(2) The Defendant's refusal to comply with Article 30 of the ICC Rules paralysed the arbitration proceedings and caused their withdrawal. This was sufficiently fundamental to constitute a repudiatory breach of the arbitration agreement.

35. The Claimant further contended that that repudiatory breach rendered the arbitration agreement "inoperative" for the purposes of section 9(4) of the Arbitration Act 1996 thereby enabling the Claimant to bring its claim in the High Court.

36. Section 9 of the Arbitration Act 1996 provides that:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

37. The burden of proof is on the Claimant as the party resisting the stay to show that the arbitration clause was "null and void, inoperative or incapable of being performed" – see *Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky* [2013] 2 Lloyd's Rep. 242 at [74]. The standard of proof is the usual civil standard of the balance of probabilities - *Ibid.* at [77-78].

38. The Defendant contended that there was no breach, still less repudiatory breach, of the arbitration agreement, that the arbitration agreement is accordingly not "inoperative" and that a mandatory stay should therefore be granted under s.9 of the Arbitration Act 1996.

39. The essential issue between the parties is therefore whether there was a repudiatory breach of the arbitration agreement and whether it was "inoperative" within the meaning of s.9. I propose to address the issues raised under the following headings:

(1) Whether there was a breach of the arbitration agreement.
(2) Whether the breach was repudiatory.
(3) Whether the arbitration agreement was "inoperative".
(4) Whether a stay is to be granted under s.9.

(1) Whether there was a breach of the arbitration agreement

40. There appears to be some difference in view, as reflected in ICC arbitration decisions and commentaries thereon, as to whether the requirement that an advance on costs be paid under Article 30(3) gives rise to a contractual obligation owed to the other party or merely to a procedural obligation owed to the ICC Court. On the former view a substantive claim arises and an interim award may be sought on that basis. On the latter view, the issue is one of procedure rather than substance and recourse is by way of interim measures.

41. In this connection I was referred to *Derains and Schwartz*: A Guide to the ICC Rules of Arbitration (2nd ed.) at p332-3 and 342-349; *Buhler and Webster*: Handbook of ICC Arbitration (2nd ed) at p434-440; and The ASA Bulletin 2/2006 at p290-301 (M.Buhler).

42. The two views are summarized in the *ASA Bulletin* at p292-3 as follows:

> "According to this so-called contractual approach, both the legal basis of the claim and the arbitral tribunal's competence are based on two elements: (i) that Article 30(3) ICC Rules (or a similar provision in other arbitral rules) gives rise to reciprocal contractual obligation between the parties to pay the advance of costs because this contractual term was made part of the arbitration agreement by reference to the relevant rules; and (ii) that a dispute with respect to this obligation falls within the scope of the arbitration agreement between the parties. The contractual approach has been followed by what seems to be the majority of arbitral and court decisions on the subject and has been endorsed by most authors. The proponents of this approach consider the non-payment of the advance on costs a breach of a contractual obligation giving rise to a substantive claim. W.L. Craig. W.W. Park and J. Paulsson stated in this respect:
>
> > 'All of the conditions for an interim award seem fulfilled; immediate harm has been done on the non-defaulting party, the breach of the contractual obligation raises simple issues, the amount of damages [is] known and the claim is for a liquidated amount.'

> Starting from the view that the matter in dispute is one of substance on which the arbitral tribunal is called upon to render a definitive decision, the contractual approach accordingly calls for an arbitral decision in the form of a partial award.
>
> There is, however, another way to look at this problem. According to the so called interim measure approach, the issue is one of procedure rather than substance. The advocates of this approach emphasise that any decision by an arbitral tribunal ordering a party to pay an advance on costs is a procedural decision of administrative nature and is therefore not subject to review by state courts. In the ICC system, there is a further argument which supports this position: the ICC Rules make the administration of all financial aspects, including in particular the advance on costs, the exclusive responsibility of the ICC Court of Arbitration ('ICC Court'). The arbitral tribunal, in contrast is only competent to decide which of the parties shall bear the costs of the arbitration (including the fees of the arbitrators as determined by the ICC Court) and in what proportion. Accordingly, it is argued that the agreement to submit a dispute to ICC arbitration also entrusted all questions regarding the advance on costs to the ICC Court. Similarly, it is argued that Article 30(3) ICC Rules only aims to define the relationships between the parties and the ICC Court, not the reciprocal relationships between the parties. The proponents of the provisional measure approach therefore deny that an arbitral tribunal is competent to render a decision on substantive law and accordingly, to render a partial award against the defaulting party. Even the proponents of this view agree that arbitral tribunal are entitled to order the defaulting party to pay the advance, however, only by way of an interim measure of protection, and provided that the applicant is able to establish convincing grounds which make such protection indispensable. It is argued that the tribunal's competence to give such interim measure is inherent in its power to decide the final allocation of the costs of arbitration."

43. It would therefore appear that the majority of arbitral and court decisions favour the contractual approach, as do the majority of commentators. In my judgment, as a matter of English law that approach is consistent with the contractual agreement to arbitrate under the Rules and the mandatory terms in which Article 30(3) is expressed – "shall be payable". In the present case it was expressly agreed that the arbitration "shall take place under the rules of the International Chamber of Commerce" and thereby that the parties would, as a matter of contract, comply with mandatory requirements imposed on the parties under the Rules. The contractual approach is also consistent with the only common law court decision to which I was referred, namely the Alberta Court of Appeal decision in *Resin Systems Inc. v Industrial Service & Machine Inc* [2008] ABCA 104, considered further below, which emphasised the breach of a mandatory rule by the "defaulting party". I accordingly conclude that a failure to pay the advance required under Article 30(3) does involve a breach of the arbitration agreement.

44. It is to be noted that whichever approach is correct it appears to be well recognized that the arbitral tribunal can order the defaulting party to pay the advance, either by means of an interim award or interim measure. Further the unpaid portion of the advance owed by the defaulting party may be paid by posting a bank guarantee pursuant to Appendix III Article 1.6 of the Rules.

(2) Whether the breach was repudiatory

45. Under English law, for a breach to be repudiatory it must be shown that the party in breach:

(1) has clearly and unequivocally evinced an intention not to perform its obligations under the arbitration agreement in some essential respect: see *Chitty on Contracts*, (31st Ed) at para. 24-018; or

(2) has committed a breach of the arbitration agreement which went to the root of the contract: see *Chitty* at para. 24-041.

46. The Claimant placed particular reliance on the *Resin* decision. In that case the ICC had required each party to make a payment of advance costs of $87,500. The respondent, ISM, refused to pay its share on various grounds. The claimant, Resin, was not prepared to pay ISM's share, the claim was deemed withdrawn and court proceedings were issued. A stay of proceedings was sought under the Canadian equivalent of s.9 (which similarly reflects the New York Convention). The court refused the stay, finding that the refusal to pay rendered the arbitration unworkable and thereby inoperative. Its analysis was as follows:

> "13. ISM argues that the arbitration is not inoperative because Resin can elect to pay the whole of the advance costs and cause the arbitration to proceed.
>
> 14. However, ISM is not entitled to rely upon its own breach of the Arbitration Rules which provide that the advance costs shall be payable in equal shares by each of the parties. Resin is not obliged to pay the costs of ISM and is entitled, under the Rules, to allow the claims made in the arbitration to be deemed withdrawn.
>
> 15. ISM's contention that it is absolved from making payment of its share of advance costs, because Resin's claim exceeds the contractual limits, is without merit. If the arbitration had continued, it would have been an issue therein as to whether the contractual limits on liability and damages are binding. Whether Resin will succeed is open to question; however, there is nothing that precludes it asserting a claim exceeding the contractual limits.
>
> 16. The relevant Articles within the Schedules to the Act contemplate the reference to arbitration at the request of one of the parties. In our view, it is implicit that the party making the request is prepared to proceed with the arbitration in accordance with the arbitration rules to which that party has agreed. We question whether the request can be regarded as bona fide if

> the party making it is insistent on flaunting a mandatory rule requiring payment of its share of the advance costs. In any event, the refusal to pay the costs makes the arbitration unworkable, and thereby inoperative, as there is no obligation on the other party to fund the defaulting party's share. Non payment in these circumstances results in the claims in the arbitration as being considered to be withdrawn.
>
> 17. In *Paczy v Haendler*, [1981], Lloyd's L.R 302 (C.A.), the claimant argued the reverse situation, namely that the respondent should post all costs because the claimant could not pay its share, and that if the respondent did not do so the claimant could proceed in court. Brightman L.J. described the claimant's argument as a "fantastic assertion" (at 309). In this case, we characterise ISM's request that Resin be denied access to the courts because it does not chose to pay ISM's share of arbitration costs, which ISM refuses to pay in breach of the arbitration rules, as audacious."

47. Although the *Resin* decision was founded on the conclusion that the arbitration agreement was inoperative and did not consider the issue of repudiatory breach, its reasoning is relevant to that issue. If, as the court found, ISM's refusal to pay made the arbitration unworkable then if that refusal was a breach of contract it may well have been repudiatory. A breach of contract which renders a contract unworkable is a breach which may well go to the root of the contract and therefore be repudiatory.

48. I was referred to three articles which have considered the *Resin* decision: *Eamon and Holub, "See you in court! Respondents' failure to pay the advance on arbitration costs"* (2009) Int. ALR 168; *James E. Redmond, Party's refusal to pay advance on costs rendered arbitration agreement 'inoperative'*, pp. 38-39 of the IBA Legal Practice Division Arbitration Newsletter for March 2009; *Jonnette Watson Hamilton, International Commercial Arbitration: Too Costly Private Justice?* The University of Calgary Faculty of Law Blog on Developments in Alberta Law.

49. The *Eamon and Holub* article was supportive of the *Resin* decision. It concluded that:

> "The refusal by a party respondent to pay its share of advance costs, where this places the arbitration in jeopardy of termination, should give rise to an option in the non-defaulting party claimant to proceed with a suit in the appropriate domestic court on the ground that the arbitration agreement has been rendered inoperative. Claimants should not be compelled to post a defaulting party's share of an advance deposit, unless the applicable rules or arbitration agreement clearly require it to do so.
>
> The *Resin* court rightly concluded that a respondent who thumbs its nose at its obligations under arbitration will not be entitled to paralyse the arbitral process, force the innocent party, who wishes to avoid that state of limbo, to pay amounts which the respondent promised to pay, or create delay and uncertainty through litigation over the effect of non-payment.

> The *Resin* remedy, if embraced, should encourage compliance with international arbitration obligations and discourage dilatory tactics, and in doing so, provide a greater measure of certainty and predictability to the issue of the forum in which to pursue dispute resolution."

50. The other two articles were more critical of the *Resin* decision and suggested that the ability of the other party to pay the defaulting party's share of the advance on costs means that the arbitration is not inoperative. In the *Redmond* article it was stated that:

> "Although the procedures that were open to *Resin* to get its claim determined by arbitration might be characterised as 'inconvenient', it appears questionable that the arbitration agreement could be properly described as inoperative or incapable of being performed. Under the ICC Rules, steps remained open to resolve the problem of the advance on costs. Resin could have paid ISM's share of the advance. ISM or possibly Resin, also could have objected to the ICC Court concerning the directions of the Secretary General as to the amount of the advance."

51. The Claimant also placed reliance on the French Cour de Cassation decision in *Societé TRH Graphic v Offset Aubin* (Cour de Cassation, 19 November 1991, 1992 REV.ARB 462) and *Petrochilos, Procedural Law in International Arbitration*, (2004).

52. In the *TRH Graphic* decision the Cour de Cassation accepted jurisdiction where the claimant had declined to substitute payment for the defaulting respondent and instead sued on the merits. This was because the defaulting respondent had not, at any time, supplied any explanation of its default in payment and had no right to claim the exclusivity of arbitral jurisdiction as it had "paralysed the arbitration" by its own dilatory attitude.

53. *Petrochilos,* whilst discussing possible remedies for an innocent party whose opponent defaults on his obligation to pay the advance on costs states at p.127: "at all events, the claimant should always be able to resort to the courts to have the arbitration agreement terminated for fault, hardship, etc".

54. Whilst issues of repudiation are necessarily fact dependent, I accept that these citations provide support for the view that a refusal or failure to pay advance costs may in an appropriate case be repudiatory.

55. I accept much of the Claimant's case on this issue. I accept that there was a clear and unequivocal refusal by the Defendant to pay its share of costs. I also accept that this was a continuing breach so that there is no question of affirmation. I also accept that a stage was reached where it was clear that the continued failure to pay the advance share of costs was going to lead to withdrawal of the claim.

56. When the Defendant initially failed and then refused to pay its share of advance costs there were a number of possibilities. One possibility was that its security for costs application would be heard before there was any

possibility of withdrawal. If it had been so heard and the Tribunal had ruled in the Defendant's favour and security had been provided the Defendant had made it clear that the advance would be paid. Another possibility was that the issue of the advance on costs would be dealt with as part of the preliminary issue hearing, as indeed the Tribunal had ordered. That might have had the consequence that there was to be no question of withdrawal until that had occurred. Another possibility was that the Claimant would itself pay the Defendant's share. A yet further possibility was that the Claimant would object against withdrawal to the ICC Court. However, as time went on it became increasingly clear that none of these possibilities was going to transpire and that the consequence of continued non-payment was going to be withdrawal of the claim. In those circumstances the Defendant's breach was potentially repudiatory.

57. In my judgment, however, the breach was not repudiatory in this case. My reasons for so concluding are as follows:

(1) This is not a case in which the Defendant was refusing to participate in the arbitration. It was in fact actively participating in the arbitration, as illustrated by its involvement in the settling of the TOR and in exchanges as to the scope of the preliminary issue hearing. Its refusal to "play by the rules" was limited to the issue of payment of its advance share on costs, a matter which was due to be addressed at the forthcoming preliminary issue hearing. Further, the refusal was not absolute, but was a refusal to pay unless security for costs was provided.

(2) That breach did not deprive the Claimant of its right to arbitrate. It was at all times open to the Claimant to proceed with the arbitration by posting a bank guarantee for the Defendant's share and then seeking an interim award or interim measure order that the advance be paid by the Defendant. On any view it could have sought such an order in a final award. It could also have objected against withdrawal to the ICC Court pursuant to Rule 30(4).

(3) Although it is correct to state that the Claimant had no obligation either to pay the Defendant's share of advance costs or to object to withdrawal, the Rules provide means whereby the arbitration could be proceeded with and the withdrawal of the claim avoided. The Rules contemplate, address and provide machinery for dealing with this situation.

(4) For a breach to go to the root of the contract it is generally necessary to show that the innocent party has been deprived of substantially the whole benefit of the contract. It is difficult to see how the Claimant is "deprived" of that benefit when he has the means, expressly afforded to him by the Rules, to prevent that occurring and to seek recourse.

(5) It has to be proved that the arbitration agreement was repudiated, not merely the arbitration reference. Even if a claim is deemed withdrawn as a result of default in payment of the advance on costs, there is no restriction on the same claim being brought to arbitration again at a future time (Article 30(4)). Future arbitration of the same claim is expressly contemplated so that irrevocable consequences as to arbitrability do not necessarily attach to the consequences of a failure to pay the advance on costs.

(6) In summary, for the reasons set out in (2) to (5) above I am not satisfied that the refusal and/or failure of the Defendant to pay its advance share of costs in this case was repudiatory in circumstances where it did not form part of a wider pattern of repudiatory conduct, as it did not for the reasons set out in (1) above.

58. For all these reasons I am not satisfied that there was in this case a refusal to perform the arbitration agreement in an essential respect or a breach which went to the root of the contract. The breach has not therefore been shown to be repudiatory.

(3) Whether the arbitration agreement was "inoperative"

59. There is a possible further argument available to the Claimant that even if there had been no accepted repudiation the arbitration agreement had been rendered unworkable and thereby inoperative. Support for that conclusion is to be found in the *Resin* decision and I am prepared to assume, without deciding, that an arbitration agreement may be inoperative even though it has not ceased to have legal effect. Nevertheless, my reasons for finding that the breach did not go to the root of the contract are equally reasons for finding that the arbitration agreement was not made unworkable and thereby inoperative in this case.

(4) Whether a stay is to be granted under s.9

60. The Defendant contended that the time to assess whether the arbitration agreement is inoperative is when proceedings were commenced (7 February 2012) and that at that stage there was no repudiatory breach and/or acceptance thereof. Reliance was placed on what was said by Jacob J in the *Traube v Perelman* case at p9-10, adopted by *Merkin on Arbitration* (Looseleaf), Service Issue 65, 2013, para. 8.33. In that case Jacob J stated as follows:

> "A question arises as to whether subsection (4) of section 9 applies to the date of the application for a stay or the date when the proceedings were commenced or some other date, e.g. the date when the application is heard. Without full argument on the point, it seems to me more likely than not that the true meaning is that one looks at the date of commencement of the proceedings. Although the language says "shall grant a stay unless satisfied the arbitration is null and void, inoperative, or incapable of being performed", it would be a very odd thing if an agreement null and void,

> inoperative, or incapable of being performed at the date of commencement of the proceeding could somehow come alive afterwards so thereupon an automatic stay would operate. It could happen at any point in the proceedings. I think that the correct time to look at the question is at the date of commencement of the proceedings. At the commencement of theses proceedings the Beth Din had closed their file."

61. I accept that that may be the correct approach in the case being considered by Jacob J which involved an arbitration agreement which was inoperative at the time of commencement of proceedings but which might become operative thereafter. However, I do not consider that the case purports to or does lay down an inflexible rule. In particular, I do not consider that such an approach is likely to be appropriate in a case where an arbitration agreement has become finally and irrevocably inoperative. In such a case there is no operative arbitration agreement in relation to which a stay can be granted. In my judgment if that is established on the evidence before the court then the court can and should give effect to the conclusion it has reached, regardless of what may have been the position at the time of commencement of the proceedings.

62. The Defendant submitted that this would lead to difficulties because the situation could change over time, that it is necessary to have a fixed point in time to consider the issue and that the appropriate time is commencement of proceedings. However, the situation can only change if it is sufficient to establish that the agreement is inoperative for the time being, as opposed to being irrecovably so. Where the issue is whether or not it is irrevocably inoperative, as will be the case, for example, where it is alleged that it has ceased to have legal effect, then there is no room for change. Either that is established, or it is not, and it would be artificial and unsatisfactory to impose a cut off point in relation to the evidence admissible for that purpose.

63. Had I concluded that the arbitration agreement had been repudiated I would accordingly have refused a stay even if there had been no repudiatory breach and/or acceptance thereof at the date of the commencement of the proceedings.

Conclusion

64. For the reasons outlined above I am not satisfied that the arbitration agreement is inoperative and the Defendant is accordingly entitled to a stay under s.9.

65. In those circumstances there is no need to address the Defendant's stated intention to challenge jurisdiction on other grounds. However, it is right to observe that on the evidence currently before the court there appears to be real doubt as to whether the Claim Form was valid when it was served. If not, the Claimant would need to make its own application to seek to extend its validity and to show that this had been done "promptly" in accordance with CPR 7.6(3) (c).