**IN THE SUPREME COURT OF BERMUDA**
**COMMERCIAL COURT**
**2010: No. 143**

**IN THE MATTER OF THE INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993**

**AND IN THE MATTER OF AN ARBITRATION**

**B E T W E E N:-**

**ALBERT THEORDORE POWERS**
**ANGLO-SUISSE FINANCE LIMITED**

**Applicants**

**and**

**SUSTAINABLE FOREST HOLDINGS LIMITED**
**FISHER CAPITAL PARTNERS LIMITED**

**Respondents**

# RULING

(in Chambers)

Date of Hearing: July 27, 2010

Date of Ruling: August 31, 2010

Mr. John Riihiluoma, Appleby, for the Applicants

Mr. Narinder Hargun, Conyers Dill & Pearman, for the Respondents

**Introductory**

1. By Notice of Originating Motion dated April 29, 2010, the Applicants seek:

> "*an order pursuant to Article 11(4) of the Second Schedule to the Bermuda International Conciliation and Arbitration Act 1993 appointing either David Kessaram, Andrew Martin or Delroy Duncan, or some other fit and proper person, to act as a third arbitrator to the Arbitral tribunal in this matter…*"

2. This application arises out of certain disputes which the parties agreed should be resolved pursuant to a March 18, 2010 ad hoc Arbitration Agreement. The parties each appointed their "party" arbitrators, but a dispute arose between the party arbitrators as to the identity of the third arbitrator. This in turn spawned a third contentious front, namely what mechanism had the parties agreed for appointing the third arbitrator when the two party-appointed arbitrators were unable to agree. It is this issue which falls for determination on the present application.

3. The application turns ultimately on the construction of the Arbitration Agreement, as read with the UNCITRAL Arbitration Rules, which are incorporated into the Agreement. Because the question referred to the Court is obviously of some significance to the parties and no appeal lies against this Court's determination of the issue, I resisted the temptation to deal with this application summarily in the interests of expedition. The crucial question falling for determination is whether or not the contractually agreed mechanism for appointing the third arbitrator has broken down so the Court ought properly to make the appointment in default.

**The Arbitration Agreement**

4. The relevant provisions of the Arbitration Agreement provide as follows:

> "*1.* ***Agreement to Arbitrate****. All disputes between or among any of the Parties arising out of or in connection with the Documents or any of them, including the formation, existence, interpretation, construction, breach, termination or invalidity of any contracts therein set forth, shall be finally settled by ad hoc arbitration in Bermuda in accordance with the Bermuda International Conciliation and Arbitration Act 1993 and the UNCITRAL Arbitration Rules in force at the date of this Agreement (as set out in Schedule 1 to this Agreement). The arbitral tribunal shall consist of three arbitrators, who shall be appointed in accordance with the said Rules.*
>
> *2. Commencement of the Arbitration. The parties agree and acknowledge that:*
>
> *2.1 Arbitration proceedings under this Agreement have been*

*commenced by virtue of the letters dated 30 October 2009 sent on behalf of Powers and Anglo-Suisse respectively by their counsel, Appleby;*

*2.2 Holdings and Fisher responded to the letter dated 30 October 2009 by their counsel, Dorsey & Whitney;*

*2.3 Mr. Jan Woloniecki has been appointed an arbitrator by Powers and Anglo-Suisse; and*

*2.4 Mr. Henri C. Alvarez QC has been appointed as an arbitrator by Holdings and Fisher;*

*And the parties further agree to the appointment of the third arbitrator by the two arbitrators taking place within thirty days of this Agreement.*

*3. Language….*

*5. Applicable Law. The law governing the Documents, including questions concerning the formation, existence, interpretation, construction, breach, termination or invalidity of any contracts therein set forth, shall be the law of Bermuda…*"

5. Articles 6 to 8 of the UNCITRAL Arbitration Rules ("APPOINTMENT OF ARBITRATORS") provide as follows:

"***Article 6***

*1. If a sole arbitrator is to be appointed, either party may propose to the other:*
*(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and*

*(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.*

*2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor,*

*either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.*

3. *The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:*

   *(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;*

   *(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;*

   *(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;*

   *(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.*

4. *In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

"***Article 7***

1. *If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.*

2. *If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:*

*(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or*

*(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.*

*(c)If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.*

***Article 8***

1. *When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.*

2. *Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications."*[1]

[1] This text has been taken from the UNCITRAL website. It is believed to be the same or substantially the same as the text which appears at Schedule I to the Arbitration Agreement. Article 7 (2)(c) appears as Article 7(3) of the Rules in the version reproduced in Caron, Caplan & Pellonpaa , '*The UNCITRAL Arbitration Rules: a Commentary*' (Oxford University Press: 2010), page 179.

**Relevant facts**

6. The relevant facts fall within a narrow compass and are essentially not disputed. The Applicants appointed a Bermudian arbitrator while the Respondent appointed a Canadian. The latter proposed Hong Kong-based candidates for the position of third arbitrator while the former proposed Bermudians. One choice was based on the commercial links of the parties with Hong Kong suggesting the hearing should take place there, combined with the argument that fairness required the chairman to come from a third country. The other choice was based on the seat of the arbitration and the governing law being Bermuda, which it was contended made a Bermudian chairman more logical. No compromise had been reached by the time the present application was made and heard.

**The respective submissions**

7. Mr. Riihiluoma submitted that Article 11(4) of the UNCITRAL Model Law empowered this Court to appoint the third arbitrator because the two party-appointed arbitrators were "*unable to reach an agreement expected of them*" and the Arbitration Agreement did not contain "*other means for securing the appointment*". The construction of the Arbitration Agreement as adopting the long-winded third arbitrator procedure prescribed by the UNCITRAL Rules was not a "*commercially sensible*" construction and should be rejected: *Society of Lloyds-v-Robinson* [1999] 1 W.L.R. 756 at 763 (per Lord Steyn).

8. Alternatively, the Applicant's counsel contended that as a matter of interpretation of the UNCITRAL Rules: (a) Article 7(2) only applied where the party-appointed arbitrator procedure had broken down, or (b) Article 7(2(c) only applied in any event where the parties had agreed upon an appointing authority. Moreover, the parties had not clearly ousted the jurisdiction of the Courts according to the terms of the Arbitration Agreement. It was further submitted that the Applicant's case was generally consistent with my judgment in *Montpelier Reinsurance Ltd.-v—Manufacturers Property & Casualty Limited* [2008] Bda LR 24 and the goal of the Model Law as a whole in promoting efficient dispute resolution.

9. With respect to the suitability of the arbitrators, Mr. Riihiluoma challenged the Respondent's assertion that having more than one member of the Bermuda Bar on the panel would give rise to an appearance of bias. He also submitted that appointing a Bermudian third arbitrator would be more consistent with Article 11(5) than inconsistent.

10. Mr. Hargun submitted in response that the Arbitration Agreement expressly provided "*other means for securing the appointment*", so that the Court's power to appoint in default under article 11(4) of the Model Law was not engaged. In his Outline Submissions, counsel pointed out that honouring the contractually agreed appointment procedure went to the enforceability of any eventual arbitration award:

"12. *The appointment of the third arbitrator by the appropriate body selected by the parties is not only a matter of convenience, but goes to the enforceability of any award rendered by the Tribunal. Article 34(2)(iv) provides that "An arbitral award may be set aside by the court if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law." It follows, therefore, that if the third arbitrator is not appointed by an appointing authority designated by the Secretary-General of the Permanent Court of Arbitration, any award rendered by the arbitration tribunal is liable to be set aside under Article 34(2)(iv) of the Model Law. See the Commentary in Redfern & Hunter on International Arbitration (5th Edition) at ¶s 11.80 – 11.84"*

11. The Secretary-General of the Permanent Court of Arbitration at the Hague was the contractually agreed appointing authority.

12. If the Bermuda Court was to make the appointment, the three members of the Bermuda Bar proposed by the Applicant's arbitrator, Mr. Woloniecki, himself a Bermudian lawyer, were not suitable. The need to avoid having an arbitrator of a third arbitrator with the same nationality as only one of the parties was supported by Article 11(5) of the Model Law and Article 6(4) of the UNCITRAL Rules. More practically, all the witnesses were located in Hong Kong as were the controllers of all the corporate parties, so Hong Kong was a commercially sensible place for the evidential hearings to take place and the chairman to come from.

**Findings: has the contractually-agreed procedure for the appointment of the third arbitrator broken down so as to confer jurisdiction on the Court to make the appointment under Article 11(4) of the UNCITRAL Model Law?**

**Did the parties agree to follow the UNCITRAL Rules with respect to appointing the third arbitrator?**

13. I find that the parties did by the express terms of the Arbitration Agreement agree to follow the UNCITRAL Arbitration Rules attached to the Agreement with respect to the appointment of a third arbitrator in the event that the party-appointed arbitrators were unable to agree.

14. Clause 1 of the Agreement expressly stated as follows: "*The arbitral tribunal shall consist of three arbitrators, who shall be appointed in accordance with the said Rules.*" Clause 2 acknowledged that two arbitrators had been appointed and that "*the parties further agree to the appointment of the third arbitrator by the two arbitrators taking place within thirty days of this Agreement.*" This left one constitution of the tribunal issue outstanding to be dealt with in accordance with the Rules: what

happened if the two party-appointed arbitrators failed to agree on the appointment of the third arbitrator within 30 days. In my judgment the parties clearly agreed that that issue should be dealt with in accordance with the Rules, otherwise the quoted sentence in clause 1 is entirely redundant.

15. There may be circumstances where the meaning to be assigned to a contractual clause following its literal meaning in isolation from its wider contractual context is rejected because such literal meaning is wholly inconsistent with the commercial object and purpose of the clause. Such was the case in *Society of Lloyd's –v- Robinson* [1999] 1 W.L.R. 756 at 763(HL), where Lord Steyn opined as follows:

> "*Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in a way in which the reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.*"

16. I reject the Applicant's suggestion that it is not a commercially sensible construction of the Arbitration Agreement to find that the parties agreed to apply the UNCITRAL Rules to the appointment of the third arbitrator if the party-appointed arbitrators were unable to agree. There is nothing in the Agreement itself to suggest that the parties did not intend to apply the Rules to the sole appointment issue which the Agreement did not explicitly resolve within its own terms. The UNCITRAL Rules are respected international arbitral rules designed for use in the specific sphere of international commercial arbitration. The appointment procedure appears designed to ensure the independence of sole or third arbitrators, even if it may possibly-and not obviously-take longer than an opposed application to the Court.

17. Departing from the natural and ordinary meaning of the words of the Agreement, rather than adhering to such meaning, "*might puzzle a disinterested observer*", to use Lord Steyn's words in *Society of Lloyd's –v- Robinson* [1999] 1 W.L.R. 756 at 763. I accept the Respondent's rational and straightforward construction of the Agreement.

**Does Article 7(2)(c) of the UNCITRAL Arbitration Rules apply to the present case?**

18. While the punctuation of Article 7 is in my judgment flawed, it is clear that Article 7(2)(c) (which ought properly to be Article 7(3)) applies to the present case. Article 7 provides as follows:

"*1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.*

*2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:*

*(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or*

*(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.*

*(c) If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.*"

19. Article 7(1) clearly deals with both the appointment of the party arbitrators and provides for the appointment by those arbitrators of a third arbitrator. These matters were in fact prescribed by the Agreement so this aspect of the Rules has no operation for present purposes. Article 7(2) (a) and (b) (which are divided by "; or") clearly both deal with the situation where one party appoints their arbitrator and the other party fails to appoint its arbitrator. A full stop divides (2)(a) and (b) from (2)(c). Article 2(c) unambiguously deals with the situation where (i) both party-appointed arbitrators have been appointed (by whatever means) and (ii) those two arbitrators have not agreed on the appointment of the third arbitrator: Caron, Caplan & Pellonpaa , '*The UNCITRAL Arbitration Rules: a Commentary*' (Oxford University Press: 2010), page 180.

20. The latter text reproduces a different formatting of Article 7 in which 7(2)(c) in the version attached to the Agreement and found on the UNCITRAL website appears as Article 7(3); this seems more grammatically correct and more easily understood but does not in my judgment alter the plain meaning of the contractually agreed version of the Rule. The Caron, Caplan & Pellonpaa version of Article 7 may well have been

derived from the official UNCITRAL French text of Article 7, which provides as follows:

> "*1. S'il doit être nommé trois arbitres, chaque partie en nomme un. Les deux arbitres ainsi nommés choisissent le troisième qui exerce les fonctions d'arbitre-président du tribunal.*
>
> *2. Si, dans les trente jours de la réception de la notification du nom de l'arbitre désigné par une partie, l'autre partie ne lui a pas notifié le nom de l'arbitre de son choix:*
>
> *a) La première partie peut demander à l'autorité de nomination antérieurement designee par les parties de nommer le deuxième arbitre; ou*
>
> *b) Si aucune autorité de nomination n'a été antérieurement désignéepar les parties ou si l'autorité de nomination désignée antérieurement refuse d'agir ou ne nomme pas l'arbitre dans les trente jours de la réception de la demande d'une partie en ce sens, la première partie peut demander au Secrétaire général de la Cour permanente d'arbitrage de La Haye de désigner l'autorité de nomination. La première partie peut alors demander à l'autorité de nomination ainsi désignée de nommer le deuxième arbitre. Dans l'un et l'autre cas, la nomination de l'arbitre est laissée à l'appréciation de l'autorité de nomination.*
>
> *3. Si, dans les trente jours de la nomination du deuxième arbitre, les deux arbitres ne se sont pas entendus sur le choix de l'arbitre-président, ce dernier est nommé par une autorité de nomination, conformément à la procédure prévue à l'article 6 pour la nomination de l'arbitre unique."*

21. The operative part of rule 7(2)(c) provides that where the party-appointed arbitrators have not agreed on the choice of third arbitrator, the third arbitrator "*shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.*" The following provisions of Article 6 thus come into play as the parties' chosen appointing authority (the two party-appointed arbitrators) have failed to appoint:

> "*2. ... if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.*

3. *The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:*

   *(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;*

   *(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;*

   *(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;*

   *(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.*

4. *In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*"

22. On March 31, 2010, Henri Alvarez QC, the Respondent's arbitrator, initiated email communications with his counterpart Jan Woloniecki about the appointment of the third umpire. As of May 30, 2010, either party has been at liberty to "*request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority*" under Article 6(2). The same provisions apply under Article 6(2) if the position is considered to be one where "*no appointing authority has been agreed by the parties*", as the opening words of Article 6(2) also provide. I prefer the view, however, that the parties have agreed an appointing authority for the third arbitrator but have left it to the Rules to determine the default position where the agreed mechanism breaks down.

23. The appointing authority selected by the Secretary-General is required to make the appointment "*as promptly as possible*" under Article 6(4). The jurisdiction of the Court is not ousted altogether, because it can still be invoked if the Article 6 procedure itself breaks down. Article 11(4) of the Model Law provides as follows:

> "*(4) Where, under an appointment procedure agreed upon by the parties,*
>
> *(a) a party fails to act as required under such procedure, or*
>
> *(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or*
>
> *(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure,* ***unless the agreement on the appointment procedure provides other means for securing the appointment.***"[emphasis added]

24. The parties have agreed that the UNCITRAL Rules shall govern the constitution of the tribunal; the Agreement "*provides other means for securing the appointment*", in the face of the failure of the two arbitrators to agree. In the unlikely event of the procedure prescribed under the UNCITRAL Rules failing, either party could still apply to Court for relief under Article 11(4). The construction of the Arbitration Agreement contended for by Mr. Hargun on behalf of the Respondents does not oust the jurisdiction of the Court at all. The Court's prospective jurisdiction under Article 11(4) only crystallizes when the agreed appointment procedure has broken down, as occurred in the entirely distinguishable case of *Montpelier Reinsurance Ltd.-v—Manufacturers Property & Casualty Limited* [2008] Bda LR 24. In that case the contractually-agreed appointment procedure was held to have clearly broken down.

**Alternative findings: suitability of arbitrators**

25. Having regard to the fact that this decision is not subject to appeal, I see no reason to record the alternative findings which I would have reached had I concluded that this Court was required to make the appointment of the third arbitrator under Article 11(4) of the Model Law.

26. I merely note for the record that I observed in the course of argument that there appeared to be merit to contention that appointing a second member of the Bermudian Bar as the tribunal chairman, as contended for by the Applicant, raised perceptions of a less than impartial tribunal. To the extent that it also seemed reasonable to consider a third arbitrator with experience of Bermudian law, I indicated that similar concerns might not exist if Geoffrey Bell QC, a former judge of this Court, had been nominated. For the avoidance of doubt I should add that the proposal of a Hong Kong-based chairman on costs and logistical grounds also seemed reasonable.

27. It follows from my finding that this Court has no jurisdiction to make the appointment, that the contractually agreed appointing authority has sole authority to

make the appointment in this case in accordance with Article 6 of the UNCITRAL Rules.

**Conclusion**

28. For the above reasons, the application for this Court to appoint the third arbitrator under the Arbitration Agreement is refused. Unless any party applies to be heard as to costs by letter to the Registrar within 21 days, the costs of the present application shall be awarded to the Respondents to be taxed if not agreed on the standard basis.

Dated this 31st day of August, 2010 _____
KAWALEY J