THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0739 OF 2021

AC YAFENG CONSTRUCTION COMPANY LTD …… PLAINTIFF

VERSUS

1. **THE LIVING WORLD ASSEMBLY LTD }**
2. **BENJAMIN NEBECHUKWU } ……**
3. **UNITED BANK FOR AFRICA LIMITED }**

DEFENDANTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

By an agreement dated 10th September, 2019 the 1st defendant contracted the plaintiff, M/s AC Yafeng Construction Company Limited, for the construction of "The Living World Assembly Prayer City" comprising a Church building, a Sunday School, and guest block, among other facilities, at Kajjansi in Wakiso District. The project was to commence on 25th October, 2019 and be completed by 24th October, 2022 at the contract price of US $ 11,372,367 (U shs. 41,679,725,055/=). In accordance with that agreement, the plaintiff took out with the 3rd defendant, in the 1st defendant's favour, an advance guarantee dated 27th September, 2019 and a performance guarantee dated 29th November, 2019, the latter of which was in the sum of shs. 4,169,772,511/=. The 1st defendant then made an advance payment of shs. 5,569,772,512 (US $1,519,719.65) and construction works began. By December, 2020 differences had emerged between the plaintiff and the 1st defendant regarding the performance of the contract as a result of which the 1st defendant terminated the contract by a letter dated 23rd December, 2020. On 28th December, 2020 the 1st defendant notified the 3rd defendant of the plaintiff's default and demanded for payment of the sum secured by the performance guarantee. The 3rd defendant in turn on 29th December, 2020 demanded that the plaintiff pays damages in that amount. The plaintiff instead wrote to the 1st defendant on 30th December, 2020 seeking the appointment of an arbitrator, and at the same time filed the current suit challenging the call on the guarantee, and seeking recovery of shs. 4,169,772,511/= being the sum guaranteed under the performance bond,

on grounds that the 1st and 3rd defendants with the aid of the 2nd defendant, colluded in a fraudulent design to cash it.

b. The Preliminary Objections.

When the suit came up for hearing on 1st September, 2022 the 1st and 2nd defendants raised two preliminary objections, contending that; the plaint does not disclose a cause of action against the 2nd defendant, and that this court has no jurisdiction to hear the suit. The 3rd defendant too raised a preliminary objection, contending that the plaint does not disclose a cause of action against the 3rd defendant.

c. Submissions of counsel for the 1st and 2nd defendants.

M/s Kasirye, Byaruhanga and Co. Advocates submitted that in the pleadings of both parties, it is a non-contested fact that the 2nd defendant is a director of the 1st defendant and a Senior Pastor at "The Living World Assembly." Being a private Limited liability Company, the 1st defendant has a corporate existence independent of the 2nd defendant as its director. Although the 2nd defendant signed the agreement between the 1st defendant and the plaintiff, he did not do so in his personal capacity but rather in his representative capacity as director and Senior Pastor, therefore as an agent of the 1st defendant. He did not incur any personal liability on the contract and therefore cannot be sued upon it. The plaintiff neither pleaded nor sought to have the 1st defendant's corporate veil lifted. The principal having been disclosed at the time of signing the contract, the 2nd defendant who signed as agent cannot incur personal liability on the contract. On account of the doctrine of privity, the 2nd defendant cannot incur personal liability on a contract to which he is not a party. Since the contract contains an arbitration clause, this court has no jurisdiction to hear the suit. The parties have already commenced the arbitral process. The suit is misconceived and should be struck out with costs to the defendants.

d. Submissions of counsel for the 3rd defendant;

M/s H & G Advocates submitted that the suit is misconceived to the extent that the plaintiff seeks relief in respect of the expired advance payment guarantee. Payment to the 1st defendant of

the sum of shs. 4,169,772,511/= under the performance guarantee has not occasioned the plaintiff any loss. The plaintiff is not privy to the performance guarantee and therefore cannot found an action on it. The claim that the 3rd defendant is in breach of the Bank of Uganda *Financial Consumer Protection Guidelines, 2011* by not advising the plaintiff of the nature the performance guarantee and its legal effect, is misconceived in so far as the guidelines do not have the force of law or binding effect. The plaintiff seeks remedies against the 3rd defendant based on an alleged breach of its fiduciary duty by paying the amount guaranteed without first establishing the claimed breach of the construction agreement. The same issues were argued unsuccessfully when the plaintiff applied for an interim measure of protection restraining the payment pending arbitration. One of the reasons the applicant was unsuccessful is that the plaintiff did not adduce evidence of fraud or unconscionable conduct involving the 3rd defendant. For that reason, that part of the plaintiff's claim is *res judicata* and cannot be re-litigated by suit. Instituting parallel proceedings over the same subject matter, by way of arbitration and litigation, constitutes an abuse of process.

e. <u>Submissions of counsel for the plaintiff</u>

M/s CR Amanya Advocates and Solicitors on behalf of the plaintiff submitted that although the 2nd defendant signed the contract in a representative capacity, he terminated the contract and made a call on the guarantee fraudulently in his personal capacity. The claim against him therefore is one based on fraud since he acted in his personal capacity without a board resolution. The 2nd defendant is joined as a necessary party to the suit. At the hearing of the suit, the plaintiff shall seek to have the corporate veil lifted in order to hold the 2nd defendant personally liable. By filing a defence to the suit, the defendant waived any objections they may have had to the jurisdiction of the court. The suit is based upon the performance guarantee and not the main construction contract. While the latter contains an arbitration clause, the former does not. The matters submitted to the arbitrator are in respect of the construction contract and not the guarantee. The obligations arising under the guarantee are autonomous, separate and independent of the construction contract. While the proceedings before the arbitrator relate to breach of the construction contract, the suit concerns a fraudulent call on and payment of the guarantee.

As regards the objection by the 3rd defendant, counsel argued that the objection raised requires ascertainment of facts and therefore is misconceived as a preliminary objection. Breach of fiduciary duty and fraud pleaded by the plaintiff establishes a cause of action that will be proved by evidence at the trial. The plaintiff's claim is premised on collusion by the 1st and 3rd defendants to defraud the plaintiff. The objections should be overruled with costs.

f. The decision.

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (see *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*). It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It is thus based on a commonly accepted set of facts as pleaded by both parties. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Preliminary objections relate to points of law, raised at the outset of a case by the defence without going into the merits of the case. In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit or oral evidence. I have found that all objections raised by the defendants in the instant case are based on the assumption that all the relevant facts pleaded by the plaintiff are correct, and do not require ascertainment through affidavit or oral evidence.

i. Whether the defendants waived the objection to litigation in favour of arbitration by filing defences to the suit.

It sometimes occurs that parties to a contract with a valid arbitration provision decide to litigate instead of arbitrate. That situation presents no obvious procedural problem so long as both parties agree to waive the right to arbitrate and then litigate their dispute through to conclusion. A problem does arise, however, if at some stage during the litigation process one of the parties changes its mind about its preferred forum and moves to compel arbitration instead. If one party to a litigation moves to stay the litigation and compel arbitration and the other party objects that the contractual right to arbitrate has been waived, the court should as a preliminary matter,

determine the waiver issue. The basic premise behind this approach is that litigating a claim is inherently inconsistent with arbitrating a claim.

An arbitration provision has to be invoked in a timely manner or the option is lost. It is a well-established principle of contract law that contract rights can be waived. That principle includes the possibility that a party to a contract might waive the right to arbitrate and instead choose to litigate. Waiver of arbitration arises when a party expressly or impliedly takes action that shows or demonstrates that it prefers litigation to arbitration. The waiver of the right to arbitrate may be either expressly stated by a party to a contract, or it may be established by undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary. Section 5 of *The Arbitration and Conciliation Act* provides an indication as to the ideal timing for invoking an arbitration clause. It states that a stay will be granted "if a party so applies after the filing of a statement of defence and both parties having been given a hearing." It should therefore ideally be made after filing a defence and before taking any further step in the proceedings.

Under some circumstances, participation in litigation can constitute a waiver of the right to arbitrate. If a party to a suit intends to invoke a right to arbitrate, this must be done early on in the proceedings so resources are not needlessly deployed. For example in *Rankin v. Allstate Ins. Co., 336 F.3d 8* it was found that by waiting until after discovery had closed and the long-scheduled trial date had almost arrived, the defendant unduly delayed in invoking the arbitration clause in that case. The Court found that there was prejudice inherent in wasted trial preparation when an arbitration demand is made, and effectively granted, after many months of delay and only six weeks before a long-scheduled trial. The defendant was found to have forfeited its right to arbitration and it was thus ordered that the disputes should be tried in court.

In order to determine if there has been a waiver of the right to arbitrate, the Court will consider; (i) whether the party's actions are inconsistent with the right to arbitrate; (ii) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a suit before the party notified the opposing party of an intent to arbitrate; (iii) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before

seeking a stay; (iv) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (v) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (vi) whether the delay affected, misled, or prejudiced the opposing party. The essential question is whether, based on the circumstances, the alleged defaulting party has acted inconsistently with the right to arbitrate. The amount of time that passes and the expenses incurred by the opposing party before a party moves to enforce his or her contractual right to arbitration are factors in determining whether the opposing party has suffered prejudice. Where it is clear that a party has forgone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party.

A court may find a waiver of an arbitration clause when one party engages in litigation of substantial issues going to the merits. Pre-trial acts such as avoiding discovery and making motions to stay court proceedings are not inconsistent with a party's right to arbitrate. However, when a party seeking arbitration has engaged in discovery methods not available in arbitration or has engaged in other intervening steps going to the merits of the case, that party will be found to have waived the right to arbitrate. Parties should not be allowed to invoke arbitration clauses at a late date after they have deliberately taken action to participate in costly and extended litigation. To allow this would undermine the purpose of arbitration, which is to promote the efficient and inexpensive resolution of disputes. I have not found any facts that show that the defendants have engaged in litigation of substantial issues going to the merits, so as to disentitle them from raising the preliminary objection. Therefore, the plaintiff’s contention to the contrary is rejected.

ii. Whether the plaint discloses a cause of action against the 2nd and 3rd defendants.

A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8E.P 116* and *Read v. Brown 22 QBD 31*). The pleadings must disclose that; the plaintiff enjoyed a

right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E.A 514*). Whether or not a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it (see *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*). Order 7 rule 11 (a) of *The Civil Procedure Rules*, requires rejection of a plaint where it does not disclose a cause of action.

The plaintiff's claim against the 1st and 3rd defendants is based upon an alleged fraudulent calling on a demand performance bank guarantee. The plaintiff's claim is that the two defendants colluded in a fraudulent design to cash the performance guarantee. Calling up of a bank guarantee is a serious matter, with the potential to irreparably damage the contractor's reputation as a competent service provider, which might be taken advantage of in future projects by the contractor's competitors. Calling of a guarantee tends to erode the confidence banks have in the contractor's systems and project management. It tarnishes the business image of a contractor, especially where such contractor has built its business on meeting its contractual obligations, meaning completing its obligations without the need for security ever being called upon. Irreparable damage will be done to its reputation as: (a) its clients may question its ability to meet its contractual obligations; (b) its prospects of future successful tenders will be diminished; and competitors will take advantage to the contractor's detriment. The fraud exception rule to the independence principle hence allows the contractor or a court to disrupt the payment of a demand guarantee when fraud is involved.

A bank guarantee has a tripartite structure comprising of the bank, the beneficiary and the principal. The principal and the beneficiary first enter into contract between themselves imposing certain obligations upon the principal, which is known as the underlying contract. The second contract is made between the bank and the beneficiary to indemnify the beneficiary with a sum of money if the principal fails to perform his obligations which the bank will later collect from the principal. This second contract is the bank guarantee in its most basic form. When faced with a call on a demand performance guarantee, it is common for a contractor to either pay the sum demanded by the beneficiary to avoid a call or apply to the court for an injunction to restrain that call. This is typically done in order to safeguard the contractor's reputation in the market and

cash flow in particular. A case of unfair calling arises if the beneficiary draws the demand guarantee and demands payment, although the beneficiary knows or can easily ascertain that the risk covered by the guarantee has not materialised. Therefore, as soon as a contractor learns of the danger that an unfair or fraudulent calling of the guarantee might be made by the beneficiary, the contractor has the right to promptly take emergency measures to prevent it from being paid.

In the circumstances, the contractor has a cause of action against a beneficiary who is alleged to have made an unjustified call on the demand guarantee, in which case relief may be sought, either against the guarantor preventing payment, and / or against the beneficiary, preventing the beneficiary from making a demand on the guarantor. Where payment is made under a fraudulent call, the contractor may maintain a suit for recovery of damages against either or both the guarantor and the beneficiary, depending on whether or not the guarantor was privy to the beneficiay's fraud. To succeed in the claim, the plaintiff will have to prove the 1st defendant's awareness of the lack of right to call on the guarantee and the knowledge of such by the 3rd defendant as guarantor.

The plaintiff's claim against the 2nd defendant is based upon personal complicity in the alleged fraudulent calling on a demand performance bank guarantee. The 2nd defendant is sued in his personal capacity as *alter ego* on account of his exercise of control as director over the 1st defendant corporation, in execution of the alleged fraudulent call. The claim is based on pleaded elements of fraud on basis of which the plaintiff seeks to move court to disregard the corporate veil and to hold the *alter ego* individual liable on the breaches of the corporation where the corporate form is being used to escape personal liability, sanction a fraud, or promote injustice. Piercing the veil of incorporation is the situation where shareholders or directors of companies are made personally liable for the obligations of the company, or treated as one with the company.

Section 20 of *The Companies Act, 1 of 2012* empowers courts to pierce the "corporate shield" or lift the "corporate veil." This will only be done when there is evidence to show that the corporate structure was used purposely to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2)*

[2001] WLR 1177; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647*). This may arise where it is shown that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed "dehors" the company. It is not sufficient to say that because the defendant company is acting through the managing director the veil of the company can, for that reason, be lifted. Ownership and control are not sufficient criteria to remove the corporate veil; control must be coupled with impropriety.There must be a clear pleading supported by evidence of illegality or fraud for the veil to be lifted.

However, for purposes of joining a director or shareholder to the proceedings with a view to seeking the lifting of the corporate veil, the plaintiff needs only to plead facts which show that the director or shareholder joined, wields undue dominion and control over the corporation, such that the corporation is a device or sham used to disguise his wrongs, obscure fraud, or conceal crime. Piercing is done by courts in order to remedy what appears to be fraudulent conduct. In order to remove the corporate veil, it is necessary to both plead and prove the presence of control and impropriety. Corporate personality cannot be used as a cloak or mask for fraud. Where this is pleaded and shown later by evidence to be the case, the veil of the corporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud (see *Salim Jamal and two others v. Uganda Oxygen Ltd and two others [1997] II KALR 38*). In conclusion, I find that the plaint discloses causes of action against all three defendants. Therefore, all objections based on this ground are overruled.

iii. <u>Whether this court's jurisdiction is ousted by a valid submission to arbitration by the parties</u>.

Section 5 (1) of *The Arbitration and Conciliation Act* requires a court before which proceedings are being brought in a matter which is the subject of an arbitration agreement, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, to refer the matter back to the arbitration unless the court finds; - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

Moreover section 9 of the Act provides that except as provided in the Act, no court is to intervene in matters governed by the Act. The unlimited original jurisdiction of the court cannot override this provision (see *Babcon Uganda Ltd v. Mbale Resort Hotel Ltd, C. A. Civil Appeal No. 87 of 2011*).

Arbitration clauses may refer either specific, or general disputes, arising out of a contractual or other legal relationship, to arbitration. Therefore the wording of an arbitration clause is an important factor in determining whether a dispute is to be referred to arbitration or to court proceedings. Assessing the scope of a dispute resolution clause is a question of contractual interpretation: the court will seek to ascertain the intention of the parties as revealed by the agreement. In construing a dispute resolution clause a broad and purposive construction must be followed to avoid a multiplicity of proceedings. An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favour of coverage. Clause 36 (1) of the construction agreement provides as follows;

> 36.1 Always in case of any dispute or difference arises between the 1st applicant and the respondent / defendant as the contractor, during the progress or after completion of works as to the construction of the contract or as to any matter or thing of whatever nature arising thereunder or in connection therewith or rights and liabilities, then the dispute shall be and is hereby referred to the arbitration and final decision of the person to be agreed between the parties or appointed by the Chairman of the local (national) Society o Architects.

It is trite that an arbitration agreement may cover not only “disputes” but also “disagreements” and “differences of opinion.” However, the question whether and which disputes are covered by an arbitration agreement must be determined by interpreting the agreement pursuant to the *in favorem* rule of construction (an arbitration agreement should be construed in good faith and in a way that upholds its validity). The existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties, the requirement of good faith, and the belief that the person who signed the clause had the power to bind the company (see *Premium Nafta Products Ltd (20th Defendant) and others v. Fili Shipping Company Ltd and*

others; Fiona Trust and Holding Corporation v. Privalov [2008] 1 Lloyd's Rep 254; [2007] 4 All ER 951 – The *"Fiona Trust"* case).

The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal (see *Harbour Assurance Co (U.K.) Ltd v. Kansa General International Assurance Co [1993] QB 701 at p. 726B*; *Fiona Trust & Holdings v. Privalov & others [2007] Bus LR 1917 [2008] 1 Lloyd's Rep 254*; *Continental Bank N.A. v. Aeakos Compania Naviera S.A. [1994] 1 WLR 588 at pp. 592F to 593G*; *Deutsche Bank AG v. Sebastian Holdings Inc (No 2) [2011] 2 All ER (Comm) 245* per Thomas LJ at paragraph 41 and *UBS AG v. HSH Nordbank [2009] 1 CLC 934* per Lord Collins at paragraph 84). The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

This type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. This means that a liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation. I find that Clause 36 (1) of the construction agreement is wide enough to cover all disputes and disagreements related to its interpretation and performance. That being the case, the Court would be obliged to refer the matter back to the arbitration unless the court finds; that the arbitration agreement is null and void, inoperative or incapable of being performed.

The term "inoperative" was considered in *Broken Hill City Council v. Unique Urban Built Pty Ltd [2018] NSWSC 825*, where it was defined as "having no field of operation or to be without effect." It covers those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons, including; - where the parties have implicitly or explicitly revoked the agreement to arbitrate; where the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata*); where the award has been set aside or there is a stalemate in the

voting of the arbitrators; or the award has not been rendered within the prescribed time limit; where a settlement was reached before the commencement of arbitration, and so on. I find in the instant case that the clause cannot be faulted on this account.

The phrase "incapable of being performed" was considered in *Lucky-Goldstar International (HK) Ltd v. NG Moo Kee Engineering Ltd [1993] HKCFI 14* and *Bulkbuild Pty Ltd v. Fortuna Well Pty Ltd & Ors [2019] QSC 173* where it was said to relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration." There has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement. It applies to cases in which; - the arbitration cannot be effectively set in motion; the clause is too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate; an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint; the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, and so on. These are situations in which the arbitration agreement is frustrated or becomes incapable of being fulfilled or performed, due to unforeseen contingencies. The grounds for holding that a contract has been frustrated apply to an arbitration clause (see *Yan Jian Uganda Company Ltd v. Siwa Builders and Engineers, H.C. Misc. Application No. 1147 of 2014*).

It seems to me from the above definitions that the focus is on the administration of the arbitration itself rather than on the merits of what was to be referred to arbitration. While "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute, "incapable of being performed" relates to situations where the arbitration cannot effectively be set in motion. Therefore an arbitration agreement may be found to be inoperative or incapable of being performed where the parties have, by virtue of having identified a non-existent appointor, not agreed on an appointment procedure at all; or where the parties agreed a procedure which requires them to agree, but one has failed to act, or both have failed to act as required. There is no evidence to show that the parties have come to this position yet.

The arbitration agreement's nullity, inoperativeness or incapability of being performed are not the only grounds on basis of which the Court may decline to refer the matter to arbitration. Section 5 (1) (b) of *The Arbitration and Conciliation Act* requires the Court to come to the same determination when it finds that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. This may be the case where the matter in dispute is not covered by the arbitration agreement or when in fact there is no submission to arbitration. By virtue of this provision, when faced with parallel court and arbitration proceedings between the same parties under the same arbitration agreement, Courts are directed to avoid parallel proceedings by staying the matter before it and refer the parties to arbitration. Nevertheless, the provision is silent on what courts are directed to do in circumstances when there are parallel court and arbitration proceedings relating to the same facts, law and issues arising under separate agreements.

Where successive agreements are involved in a manner that constitutes them as forming one package and each of the agreements has a dispute resolution clause, it is relevant to take into account the character of the later one and its relationship with the earlier one when determining the scope of the dispute resolution provisions. In a case where the first contract contains an arbitration agreement and a second contract contains a clause referring disputes to the domestic courts, it may be possible to construe these provisions consistently. Where the dispute resolution clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme.

Therefore, where there are multiple contracts between the same parties, each containing a different dispute resolution clause, Courts will apply the presumption in favour of "one-stop" adjudication (*Surrey County Council v. Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015*). If the intention is to effect a clean and complete forum switch, the already existing dispute resolution clause should be superseded expressly using clear and unambiguous wording. Unless they expressly and clearly say otherwise, there is a strong presumption that parties are assumed to have agreed on a single tribunal for the determination of all their disputes, at least when there is only one agreement between them. The same principle ought to apply in a case where the first

contract contains an arbitration agreement and a second related contract is silent on mechanisms for dispute resolution.

Disputes about conflicting dispute resolution mechanisms in different but related contracts are not uncommon. The presumption that parties are assumed to have agreed on a single tribunal for the determination of all their disputes arising out of their legal relationship, is difficult to displace, unless there is an express term stating otherwise. In this regard, the drafting of any later agreement must expressly replace the arbitration clause in the original agreement. If there is an arbitration clause it will not be construed as giving the parties a choice between arbitration and litigation, unless there is very clear language providing for such. Clear and unequivocal language will be required for a party to argue they did not intend their disputes arising from or in connection with the performance guarantee to be submitted to arbitration when including an arbitration clause in their underlying construction contract. The parties must use clear language if they intend particular disputes to be resolved in one forum, and other disputes to be resolved elsewhere.

In a case such as this, assessment of the scope of the dispute resolution clause has to be carried out in light of the transaction, viewed as a whole. It appears from the abovementioned jurisprudence that where there are competing dispute resolution clauses, Court will determine which clause applies where the dispute clearly falls within the scope of only one of those agreements. Where the dispute transcends two or more agreements which have been entered into separately, over a period of time, the court might attribute a claim to a particular agreement even if that results in different forums dealing with different aspects of the relationship. However, where the contracts are “part of one package” the court might consider the “commercial centre of the transaction” in order to determine a single applicable forum. Where parties enter into a complex transaction comprising numerous agreements, it is the dispute resolution clause at the commercial centre of the transaction which they must have intended to govern such disputes.

A dispute resolution clause, like any other contractual provision, has to be construed against the relevant factual background or “factual matrix” known to the parties at the time of contracting. Absent conflicting provisions on dispute resolution, a dispute resolution clause contained in one

agreement might, in the circumstances, be broad enough in scope to cover disputes arising in relation to another contract within the same overall framework or in connection with the transaction as a whole. In some cases, it may be unknown at the time of entering into a contract who may be engaged by a party as a guarantor. In such cases the head contract should provide that the parties to it cannot enter into any collateral contract that does not contain an identical arbitration clause and procedure.

In this case the relevant factual background is that at the time the plaintiff took out the performance guarantee with the 3rd defendant, both parties were aware of the existence of the construction contract. What is not proved though is that the 3rd defendant had knowledge that it contained the dispute resolution clause, although the construction contract formed part of the same overarching structure. Assuming that the 3rd defendant had such knowledge, parties with that knowledge would have anticipated the potential for a "clash" and taken steps to avoid any overlap by providing for a dispute resolution clause in the demand performance guarantee confining the scope to disputes relating directly to the performance guarantee in which it would be found. Unfortunately in this case, the performance guarantee neither makes reference to the dispute resolution mechanism in the construction contract nor provides one for its purposes.

In *Surrey County Council v. Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015*, the court was persuaded to find the dispute resolution clause contained in one agreement to be broad enough in scope to cover disputes arising in relation to another contract within the same overall framework or in connection with the transaction as a whole, firstly because the later agreement reflected the parties' continuing relationship. The earlier agreement was found to be the master document and the later one its servant. It was therefore more likely that parties would have intended to retain the dispute resolution procedure fixed by the earlier agreement. Secondly, the court was inclined to follow the usual practice of giving a broad construction to arbitration clauses, and thereby find that the arbitration clause in the earlier agreement was of sufficient breadth to encompass disputes over the later agreement.

Thirdly, from the commercial point of view, it was obviously sensible that all disputes arising under the earlier agreement and the later one should be determined in the same forum. The

presumption had particular potency in the context of a principal agreement and a related later agreement between the same parties, since the issues in question often related to both agreements. In the Court's view, a rational businessman would intend that all aspects of a dispute should be resolved in a single forum. The parties evidently recognised the advantages of arbitration when entering into the earlier agreement and there was no suggestion by the claimant that that these advantages would be dissipated in a dispute concerning the related later agreement. Fourthly, considering that the claimant's ultimate aim was to demonstrate that in light of its full satisfaction of its obligations under the earlier agreement, it would be a surprising outcome to hold that the centre of gravity of the disputes lay in the later agreement.

To the contrary, where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to dispute resolution, and especially where there are different parties involved in some of the agreements and not others, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette to mean that disputes relating to them should be settled in the same forum (see *Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767*). In circumstances of that nature, each dispute resolution clause is interpreted as relating only to the contract in which it is found.

For example in *Amtrust Europe Ltd v. Trust Risk Group SpA [2016] 1 All ER (Comm) 325*, The underlying question was whether the contractual arrangements between the parties consisting of a single composite and overarching agreement, a "Framework Agreement" which provided for any disputes under that agreement to be finally settled by arbitration with the seat of arbitration in Milan, to which an earlier agreement, a Terms of Business Agreement appended to it as a Schedule, was subordinate, or whether the Framework Agreement and the Terms of Business Agreement (ToBA) which included a jurisdiction clause providing that disputes should be determined in the English courts, were two freestanding contracts. The claimant applied for an anti-arbitration injunction restraining the Italian proceedings. It argued that the dispute being heard in Milan was subject to the exclusive jurisdiction of the English court. The Court held that where, as in that case, the overall contractual arrangements contained two or more differently expressed choices of jurisdiction and / or law in respect of different agreements, the correct approach was not to start with the "one stop shop" presumption, but instead to apply a careful

and commercially-minded construction of the contracts. Upon detailed analysis of the agreements at stake, the Court decided in effect that the later agreement was *lex specialis* vis-a-vis the overall business agreement between parties and hence that choice of law and choice of court of the later agreement prevailed.

Similarly in *Deutsche Bank AG v. Tongkah Harbour Public Co Ltd; Deutsche Bank AG v. Tungkum Ltd [2011] EWHC 2251; [2012] 1 All ER (Comm) 194*, a suit against a company was stayed under the Arbitration Act 1996 s.9 where the same matter had been referred to arbitration, but a suit against the company's parent on a guarantee was not stayed since there was no arbitration agreement and the claimant bank was entitled to enforce the guarantee, if it could make good its claim, regardless of the claim against the principal debtor. The Court found that both claims were based on the same events of default. Whereas in the suit the bank claimed the outstanding loan amount, in the arbitration it claimed the early termination amount. Those were different claims, but they arose out of the same breach of the same contractual arrangements. They were aspects of the same matter. Under the relevant provisions the party had the option to refer the matter to the court or to arbitration. Having referred it to arbitration, the statutory stay applied as regards the court proceedings, and it made no difference that the claim in the arbitration was restricted to a claim for the early termination amount under the export contract. It followed that the court proceedings were stayed.

However as regards the suit by the bank based on the guarantee, the result was different because there was no arbitration agreement. The Court found that a claim under a guarantee might raise similar or even the same issues as the claim against the principal debtor, but the covenant to pay was given by a different party, in the instant case the bank. The Court held;

> A claim under a guarantee may raise similar or even the same issues as the claim against the principal debtor, but the covenant to pay is given by a different party, here the parent company. Deutsche Bank is entitled to enforce the Guarantee if it can make good its claim, regardless of the claim against the principal debtor. The fact that there may be (as the defendants say) substantial overlap between the claims does not affect this conclusion. In the language of the case law, it is possible and commercially rational to allow the claim to proceed even though this may result in a degree of fragmentation in the resolution of the overall dispute

In the same vein, the plaintiff in this case as contractor is entitled, by suit, to question the circumstances surrounding the enforcement the performance guarantee if it can make good its claim, regardless of the fact that there it has at the same time, a claim against the employer that is the subject of an ongoing arbitration. The fact that there might be substantial overlap between the claims does not affect that conclusion. It is possible and commercially rational to allow the claim to proceed even though that might result in a degree of fragmentation in the resolution of the overall dispute. In situations like this, it is not uncommon for various combinations of parties to commence multiple dispute resolution proceedings involving the same or similar facts, issues and law under the various contracts applicable to the project. A party may as well commence a related suit when it is too late to join a party to the ongoing arbitration, either practically or because the parties agreed that consolidations, interventions or joinders must take place within a certain time of the first dispute arising, which has already expired.

Parallel proceedings arise when two or more disputes involving the same or overlapping parties, contractual agreements or issues in dispute are adjudicated in more than one forum. They arise through one or a combination of the following factors: multiple actors, multiple legal sources for the same claims, or multiple forums to resolve the disputes. Parallel proceedings are often inevitable on projects in which several interrelated agreements are signed between different parties and are exacerbated when the parties are unable to join a third party to an arbitration. This is because a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Although the Courts acknowledge the desirability of efficiency and consistency of results, they also emphasise that in arbitration, party choice, privacy and confidentiality are relevant and important. While the facts, issues, and law that give rise to the disputes may be the same, the dispute resolution procedures will often be incompatible, which could prevent the issues between the various parties from being heard in the same forum.

Each of the agreements in these chains of contracts may have different arbitration clauses, or some may have arbitration clauses while others do not. In certain such circumstances, consolidation of these parallel proceedings into a single arbitration proceeding may be possible. While in some contract the parties' consent to arbitration may have been based on significantly

different arbitral procedures, in other contracts for the same project, the parties may not have consented to refer their disputes to arbitration at all, but rather to litigate their disputes. In those situations, consolidation of the disputes into a single forum typically requires the consent of all the parties to all the related contracts, which can be difficult to obtain in multi-party, multi-contract transactions. Failure to obtain the consent of all parties may result in an inability to consolidate parallel proceedings.

Although courts generally favour arbitration, they will not compel the arbitration of claims that are outside the scope of the parties' agreement. Causes of action against different parties cannot be bifurcated in a single arbitration and an arbitration agreement will only bind the parties which have entered into the same. Where a suit is commenced regarding matters which lie outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question that section 5 (1) (b) of *The Arbitration and Conciliation Act* will be invoked since such is not within the scope of "the matters agreed to be referred to arbitration." The phrase "the matters agreed" requires that the entire subject matter of the suit and the parties involved therein should be subject to arbitration agreement.

The very fundament of the arbitration process is the consent of the parties to arbitrate and this is done by way of a clause in the agreement or a separate submission to arbitration. As a matter of principle, arbitration agreements bind only those who contract into them. The scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them. Unless the non-signatory's intention to be bound by the arbitration agreement can be established, such non-signatory cannot be referred to arbitration (see *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited and others, (2019) 7 SCC 62*).

However, an arbitration clause may be assigned, taken over, transferred or simply become binding as a third party involves itself deeply enough in the contractual relationship, including assignment, novation and statutory provisions or where there is a clear intention of the parties to bind both, the signatory as well as the non-signatory parties (see *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and others., (2013) 1 SCC 641*). For example in contracts

of guarantee, the guarantor "acquires" the arbitration clause only if he or she assumes joint liability with the debtor, which is not the case here.

Demand guarantees contain an undertaking to pay on demand, an absence of clauses excluding or limiting the equitable defences normally available to a guarantor, the guarantor is a primary obligor and not merely acting as the surety, payment is triggered by a demand and the obligation to pay is stated to be immediate, and the obligation to pay was unaffected by any dispute in the underlying contract. Article 5 (a) of *The Uniform Rules of Demand Guarantee* (URDG); ICC Publication No. 758, expressly provides that the obligations of a guarantor are independent of any issues in the underlying contract. It states as follows;

> A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary

Article 12 of the URDG limits the liability of the guarantor to only the terms contained in the agreement, hence further alienating and protecting the guarantor bank from liabilities emanating from other agreements entered into by the other parties to the contract of which it may or may not even be aware. Under the URDG, demand guarantees are clearly completely independent of any underlying relationship between the applicant and the beneficiary, and subject to only the terms contained in it, thereby limiting the liabilities and rights of the guarantor bank to only matters it voluntarily commits itself to.

I find that in this case the construction agreement and the performance guarantee, although interrelated and form "part of one package" in so far as the transaction has its centre of gravity in the construction agreement, the latter is autonomous, most especially since it involves a party not privy to the construction agreement. In these circumstances, it cannot be readily presumed that the parties, acting commercially and rationally, intended that disputes of this nature i.e. disputes about the alleged fraudulent call on the performance guarantee, should fall within the scope of the dispute resolution clause contained in the construction agreement. This is because at its core,

arbitration is a private and consensual means of dispute resolution. It is private because arbitration operates outside the public court system and is funded by the parties alone. It is consensual because all aspects of an arbitration must be personally agreed by the parties. This means that consensual arbitration is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes.

Interpreting Clause 36 (1) of the construction agreement, a clause designed for resolving disputes relating to the interpretation, enforcement and breach of the construction agreement between the plaintiff and the 1st defendant, as extending to alleged fraudulent calls on the performance guarantee executed between the plaintiff and the 3rd defendant, would in fact bring about the unattractive result of not only compelling the arbitration of a claim that is outside the scope of the parties' agreement, but also binding to arbitration a party who never contracted into the agreement to submit to arbitration. Such an inherently unattractive conclusion should be one which the Court should be extremely reluctant to reach.

The Court though is alive to the unfortunate, but inevitable, outcome that whereas the plaintiff is entitled to claim against the 1st defendant only in arbitration, it is only able to pursue its claim against the 2nd and 3rd defendant, and conversely the 3rd defendant is only able to pursue its claim for indemnity against the plaintiff, by litigation. This indeed necessitates a multiplicity of proceedings in respect of related issues regarding liability for breach of the construction agreement and the performance guarantee, with the risk of inconsistent findings and duplication in costs; the exact mischief rational businessmen are assumed to be desirous of avoiding. That the same or similar claims would fall to be resolved in different fora in relation to different agreements within the framework is an unfortunate, but inevitable, outcome.

Although parallel proceedings may result in inconsistent findings of fact or law, and thus inconsistent findings on liability and damages, the possibility of such an outcome in the instant case is very remote. This is because while in the arbitral proceedings what is to be determined is which of the parties, i.e. the plaintiff on the one hand and the 1st defendant on the other, is in breach of the construction agreement, in the suit the issues at stake involve the determination of whether or not; (a) the plaintiff has made out a case of fraud in the documents or the underlying

transaction; (b) whether the 1st defendant could not honestly have believed in the validity of its demand under the guarantee; (c) whether the 3rd defendant knew of the fraud at the time the 1st defendant sought payment under the guarantee.

Similarly, although parallel proceedings create the need for the same parties, or at least a party involved in more than one dispute, to expend time and resources to arbitrate or litigate the same or related disputes in different forums, in which case the party involved in multiple related disputes is likely to spend significantly more time and incur significantly higher legal fees to resolve these disputes, particularly in construction projects with voluminous document production and complex and technical factual issues, in the instant case this risk is unavoidable since the 3rd defendant cannot be compelled to submit to arbitration.

Finally, in order to avoid the risk of double recovery in the parallel proceedings, in cases where damages are granted concurrently by two or more tribunals or courts, the practice is that the amount of damages granted by the second deciding court or arbitral tribunal takes this fact into consideration when assessing the final damages. If the risk of double recovery in the parallel proceedings is very high, there are a number of techniques that can be used to mitigate the risks of parallel proceedings, including staying the suit until a parallel arbitral proceeding can be completed, the findings of which are necessary to the sit. A party should consider whether it wishes to apply for a temporary stay of the suit until a final award has been issued in the arbitral proceeding. Such stays are particularly advisable if the outcome in the suit depends in whole or in part on the outcome of the arbitration, such as could be the case if the related contracts included indemnity (where relief in one contract is dependent on a party being granted certain relief in another contract). I find in the instant case that not all the parties before court are bound by a valid and operative arbitration clause, and that the plaintiff's claim in this suit is outside the scope of the parties' submissions to arbitration. For the foregoing reasons this objection too is overruled.

iv. Whether the suit is barred by the doctrine of *res judicata*.

For *res judicata* to apply, the decision must be shown to have been final on the merits in an earlier suit, i.e. after full contest or after affording fair opportunity to the parties to prove their respective cases. It will not be *res judicata* where it is a decision on an interlocutory application since the principle of *res judicata* does not apply to the findings on which such orders are based. Such decisions are not on an issue arising in the suit itself but are really on matters collateral to the suit which have to be decided before the suit itself can be proceeded with. As an interlocutory application does not encroach upon the merits of the controversy between parties, an order pursuant to such applications cannot be regarded as a matter affecting the trial of the suit. The decision in situations of that nature does not lead to the determination of any issue in the suit. Until and unless the issue is decided on merits, the plea of *res judicata* has no application.

However, where there has been in fact a fair contest on a question in dispute between the parties and the Court has given a final decision on that question, the result will be different. When a question of fact or a question of law has been decided between two parties in one suit, or proceedings, and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or that no appeal lies from such a decision, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. If a similar application is made for similar relief on the basis of same facts after the earlier application has been disposed of, the court would be justified in rejecting the application as an abuse of process of the court. But when there are changed circumstances the court is perfectly justified in entertaining a second application.

The earlier application on basis of which the argument of *res judicata* is advanced in the instant case, concerned an application for interim measures of protection pending arbitration. When disposing of that application, the Court made several findings necessary exclusively for that application, and not touching on the merits of the arbitration, nor the current suit. The Court found that Banks are in no way concerned with or bound by the contract on which the guarantee is based, even if any reference whatsoever to it is included in the guarantee. Consequently, the undertaking of a bank to honour the guarantee is not subject to claims or defences by the applicant resulting from its relationships with the beneficiary.

The Court found further that in view of the documentary nature of demand guarantees, a guarantor / issuer is not required to look beyond the documents. Where no fraud is apparent on the face of the documents, it does not amount to bad faith for an issuer / guarantor to pay the beneficiary, even if confronted by the contractor's claim that there is fraud. In such an instance, the law may not impose on the issuer [or guarantor] the burden of deciding within a short time which of the two parties is telling the truth. The issuer / guarantor is not under a duty to inquire into whether there is tainted presentation or whether the underlying contract was fraudulent or whether the documents are a forgery. In the absence of dishonesty, for instance some collusion between the issuer / guarantor and the beneficiary, such a payment under the demand guarantee will not be in bad faith.

While the principle of autonomy tries to protect rights of the beneficiary by separating the underlying contract from the guarantee by requiring Bank to pay first and argue later, in case of any problems in fulfilment of underlying contract, the principle of strict compliance protects the rights of the contractor by requiring beneficiary to provide genuine documents which comply with terms of the guarantee. To succeed in an application for a temporary injunction restraining the guarantor from payment under a demand guarantee, the contractor must prove obvious fraud by the beneficiary to the knowledge of the bank (see *William Sebuliba Kayongo and another v. Barclays Bank of Uganda Ltd, H.C. Misc. Application No. 325 of 2008* and *Sztejn v. Henry Schroder Banking Corporation 31 NYS 2d 631 (1941*).

The bank is required to check whether the documents provided in a demand by the beneficiary strictly comply with the terms and conditions of the guarantee and if they do comply, the bank is obligated to pay the beneficiary. The issuer / guarantor is compelled to pay where a compliant demand for payment is made in terms of a demand guarantee and there is little or weak evidence of fraud (see *Alternative Power Solution Ltd v. Central Electricity Board & Anor (Mauritius) [2014] UKPC 31* and *Discount Records Ltd. v. Barclays Bank Ltd [1975] 1 Llyod's Law Reports 444 at 447*).

The test at the interlocutory stage can properly be described as whether it is seriously arguable that, on the material available, the only realistic inference is that the beneficiary could not

honestly have believed in the validity of its demands on the guarantee and that the bank was aware of that fact (see *United Trading Corporation SA and Murray Clayton Ltd v. Allied Arab Bank Ltd [1985] 2 Lloyd's Law Reports 554*). If any one of the following conditions are manifest and clear, the guarantor/issuer, acting in good faith, has a right to withhold payment, i.e.; - (i) any document is not genuine or has been falsified; (ii) no payment is due on the basis asserted in the demand and the supporting documents; or (iii) judging by the type and purpose of the undertaking, the demand has no conceivable basis. An injunction is granted where it is established that for the purpose of drawing on the guarantee, the beneficiary fraudulently presented to the bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue (*United City Merchants (Investment) Limited v. Royal Bank of Canada [1979] 1 Lloyd's Law Reports 267; Banco Santander Sa v. Bayfern Ltd and others [1999] EWHC 284 (Comm)* and *ThemehelpLtd. v. West [1995] 4 All E.R. 215*).

Even if the applicant proves one of the limited exceptions, this may not be sufficient for the courts to grant an injunction restraining payment, as the courts will also consider (as with all interim injunction applications) whether the balance of convenience favours granting the injunction. Courts have invariably found that the balance of convenience favours not granting the injunction. The basis for this decision appears to be the autonomy principle: if the injunction is granted, a bank's obligations under a credit may no longer be perceived as irrevocable, and the bank's market reputation may suffer if it fails to honour its obligations under a letter of credit. By contrast, if the injunction is not granted, the buyer will be still able to claim damages for its losses under the contract, even if the chances of making a recovery where the seller has been party to a fraud may be slim.

The test for the fraud exemption is not quite the same at the trial stage. The reason behind this is that fraud is a complicated issue; there cannot be a general standard to address fraud of every kind at the interlocutory level and at the conclusion of the trial. Unlike at the interlocutory stage, during the trial the decision about existence of fraud cannot be made without examination of the performance conditions and validity of the underlying contract. Fraud may be established by evidence showing; (a) the contingency or risk against which the undertaking was designed to

secure the beneficiary has undoubtedly not materialised; (b) the underlying obligation of the contractor / applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking; (c) the underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary; (d) fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary; (e) in the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates. The bank's payment has no effect on the contractor's interest and the possibility to claim damages from bank in case of bank's wrong payment to the beneficiary (see *Discount Records Ltd v. Barclays Bank Ltd [1975] 1 Llyod's Law Reports 444*).

Due to the heightened burden of proof required at the hearing of the application at the interlocutory stage or for interim measures of protection, an allegation of fraud does not constitute sufficient grounds in support of an application seeking an injunction. Courts will only restrain payment under a demand guarantee if the fraud and the bank's knowledge of the fraud are "very clearly established." This requires the applicant to establish that it was seriously arguable that, on the material available, that the only realistic inference was that the party claiming under the credit was guilty of fraud. When this court dismissed the application for interim measures of protection, it came to the conclusion that it was not seriously arguable that, on the material available, the only realistic inference was that the beneficiary could not honestly have believed in the validity of its demand on the guarantee and that the bank was aware of that fact. By the nature of that application, being one to which the 3rd defendant was not a party, it is was unlikely that it would contain the evidence required resolving this issue at trial where the 3rd defendant is a party.

The principle of *res judicata* applies at the interlocutory stage of a proceeding if similar prayers are being made at a subsequent stage of a proceeding when admittedly such prayer has been rejected by the Court upon consideration of the materials on record. An application for an injunction or interim measures of protection is only an enabling application which is filed simply to help the Court or the arbitrator respectively, preserve the rights of the parties pending the

adducing of more detailed facts at a later stage for appreciating their respective cases with greater clarity. An order passed in such circumstances cannot take away the substantial right of the parties to litigate in a more robust manner, some of the issues canvased only for purposes of granting or rejecting the injunction or interim measures of protection sought, and the same will not operate as *res judicata* at a later stage. This objection too is misconceived. For all the foregoing reasons, all the preliminary objections are overruled with costs to the plaintiff.

Delivered electronically this 27th day of December, 2022 ……**Stephen Mubiru**……..

Stephen Mubiru
Judge,
27th December, 2022.