HEWLETT-PACKARD INTERNATIONAL TRADE BV v HAPPY WORLD LTD

2017 SCJ 324

Record No. 994

THE SUPREME COURT OF MAURITIUS

[Court of Civil Appeal]

In the matter of:-

Hewlett-Packard International Trade BV

Appellant

v

Happy World Ltd

Respondent

JUDGMENT

This is an appeal against an interlocutory judgment of a learned Judge of the Commercial Division of the Supreme Court setting aside the plea *in limine* of the appellant ("the defendant") to the effect that this matter should be referred to arbitration as per the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland. The learned Judge arrived at his decision upon concluding that there was no applicable arbitration clause and that an arbitration clause pertaining to a previous contract between the parties could not be extended to the contract subject matter of the plaint with summons.

There were ten grounds of appeal but with the concurrence of Counsel, arguments were, in the first place, heard solely on ground 6 which averred that the learned Judge was wrong in not allowing evidence (meaning oral evidence) to be adduced by the defendant in support of the plea *in limine* raised. In a judgment dated 13 December 2012, this Court set aside that ground in view of the fact that Counsel on both sides had acquiesced to the production of documents without calling any witness and no motion had been made by Counsel for the defendant to call any witness to testify, resulting in the absence of any ruling on the point.

Ground 6 having failed, there are nine outstanding grounds of appeal which challenge the interlocutory judgment which the learned Judge delivered on the basis of the documents produced by Counsel on both sides.

Additionally, an issue as to the jurisdiction of the learned Judge and of this Court having regard to (i) the International Arbitration Act 2008 and (ii) the *compétence-compétence* principle has now been raised by Counsel for the appellant. And Counsel for the respondent has for his part submitted that the appellant is precluded from challenging the jurisdiction of the learned Judge and of this Court inasmuch as it has in effect submitted itself to the jurisdiction of the lower Court and thereby waived any right it might have had by virtue of an arbitration clause.

The contention of Counsel for the respondent

We consider it appropriate to deal, in the first place, with that contention of Counsel for the respondent.

Articles 168 and 169 of our *Code de Procédure Civile* read as follows:

> *"168. La partie qui aura été appelée devant un tribunal autre que celui qui doit connaître de la contestation, pourra demander son renvoi devant les juges compétents.*
>
> *169. Elle sera tenue de former cette demande préalablement à toutes autres exceptions et défenses"*

In **Seament International SAL v The State Trading Corporation** [1998 MR 21] the learned Judge held, upon referring to French authorities, that the defendant was precluded from raising *l'exception d'incompétence* since that *exception* had to be raised before submitting to the *mise en état.*

She pointed out that our procedure relating to pleadings corresponds to the procedure of the *mise en état* in France.

In **Michael Saw v Beijing Construction Engineering Group Co Ltd** [2014 SCJ 433] the learned Judge (Angoh J.) relied on the Mauritian case law, including **Clanbrassil Co Ltd & Anor v Copex Management Services & Ors** [2012 SCJ 192] and the authorities cited therein. The learned Judge relied in particular on **Seament (*supra)*** and the French authorities cited therein to hold as follows:

> *"Since the defendant has already submitted itself to the jurisdiction of this Court by exchanging particulars and filing its plea on the merits, it cannot take advantage of the arbitration clause and must now be deemed to have accepted the jurisdiction of the present Court*."

Mr M. Sauzier, S.C., Counsel for the appellant, drew our attention to the case of **Clanbrassil Co. Ltd & Anor v Copex Management Services & Ors (supra)** as one where the

learned Judge held that a plea *in limine* cannot be filed without a plea on the merits. In our view, however, this is an incorrect reading of that judgment. In that case, preliminary objections were raised by the second defendant and supported by the two other defendants, whereby the jurisdiction of the Court was challenged. However, Counsel for the plaintiffs objected to the form in which the preliminary objections were couched, contending that a plea *in limine* on its own, unaccompanied by a plea on the merits, was no plea, and that the defendants could not be allowed to argue on such a plea *in limine*. The learned Judge (Hamuth, J.) started his reasoning as follows:

> *"It is well settled that objections to the jurisdiction of the Court ('l'exception d'incompétence') must be raised 'préalablement à toute autre exception et défense' failing which they will be held 'irrecevable' (Vide* ***Airworld Limited v Malaysian Airline System Berhad*** [2012 SCJ 29]*, wherein reference is made to the oft quoted cases of* ***Compagnie Desmem Ltée v United Docks Ltd*** [2008 SCJ 354] ***and Seament International SAL v The State Trading Corporation*** [1998 MR 21]***.)*** *In those cases objection raised or attempted to be raised by defendants to the jurisdiction of the Court after they had already given their plea on the merits were rejected on the reasoning that by giving their plea they had already submitted to the jurisdiction of the Court and were precluded from challenging the same. They were deemed to have renounced their right to refer their dispute to arbitration by thus submitting to the jurisdiction of the Court."*

He then referred to **Encyclopédie Dalloz Procédure, Vo. Exceptions et fins de non-recevoir, note 6 and to Encyclopédie Dalloz Procédure Vo. Arbitrage en Droit Interne note 119** as establishing the principles applied in the above quoted cases and went on to say:

> "*It is clear beyond dispute from the above that challenge to the jurisdiction of this Court will as a rule not be allowed to be raised if it is not done at the first opportunity and if, for example, it is sought to be raised after the plea has been given on the merits. It would appear from the above that it is not objectionable that the plea on the merits is also given, provided the plea in limine as to jurisdiction precedes the plea on the merits.****"* **(emphasis added)**

The last sentence in this quotation is an *obiter dictum* as is apparent from the following passage which follows:

> *"However, the question raised here is whether it is imperative for a defendant over and above its plea in limine to also give its plea on the merits, at the risk of its plea in limine not being considered as a plea, as it is being suggested should be the case by plaintiff's Counsel."*

The learned Judge then referred to the principles relating to the hearing of a plea *in limine* as laid down in **Rama v Vacoas Transport Co. Ltd** [1958 MR 184]**.** And he concluded

that in a challenge to jurisdiction raised by way of plea *in limine*, there is no imperative need for the plea on the merits also to be given before the '*exception d'incompétence*' can be heard and determined.

It is clear that the learned Judge, far from deciding that a plea *in limine* cannot be filed without a plea on the merits, in fact decided that this can be done when the plea *in limine* challenges the jurisdiction of the Court. His statement that a challenge to the jurisdiction of the Court in a plea *in limine* will not be affected if the plea *in limine* "precedes" the plea on the merits, is, as pointed out above, an '*obiter dictum*', which however goes counter to the decisions in **Seament and Michael Saw,** above.

After anxious consideration, we are inclined to agree with the view expressed *obiter* by Hamuth J. that a plea *in limine* challenging jurisdiction which precedes a plea on the merits, albeit on the same document entitled "plea" will result in the *exception d'incompétence* being timely raised. The relevant principle laid down in the French authorities is that the *exception d'incompétence* must be raised "*avant l'échange des conclusions qui aboutit à la mise en état, dite initiale, de l'affaire"* as per **Encyclopédie Dalloz Procédure Vo Exceptions et fins de non-recevoir, note 26**, quoted in **Seament (*supra).***

In our view, the learned Judge in **Seament (*supra)*** correctly stated that our procedure relating to pleadings corresponds to the procedure of the *mise en état* in France, but failed to perceive that the *mise en état* in the Mauritian context would only be complete at the close of pleadings, by which time a plea *in limine* challenging jurisdiction and preceding a plea on the merits on the same document might have been timely raised.

In **Airworld Limited v Malaysia Airline System Berhad** [2012 SCJ 29] the application of the principle led to the conclusion that an arbitration clause invoked in an objection raised some three years after the pleas of the appellants on the merits had been filed, should be deemed to have been renounced. The facts of the present case are however quite different.

In the present case, the plea *in limine* preceded the plea on the merits on the same document dated 29 January 2009. It has been submitted in the additional skeleton arguments of Counsel for the respondent, that this plea *in limine* did not amount to a challenge of the jurisdiction of the Court as it contained no words to that effect. It is true that no express challenge to that effect was contained in the plea *in limine* which averred (1) that the contractual relationship of the parties was subject to the defendant's standard consulting terms which

provided that disputes should be settled by way of arbitration in Geneva, Switzerland and that such arbitration would be governed by the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland; (2) that the plaintiff in instituting proceedings in the Supreme Court of Mauritius had not complied with the defendant's consulting terms and conditions inasmuch as the dispute ought to have been referred to arbitration; and (3) that in the circumstances, the defendant prayed that the plaintiff's plaint with summons be set aside and the plaintiff be ordered to proceed with arbitration proceedings in accordance with the provisions of the defendant's standard consulting terms and conditions.

However, we are of the view that the plea *in limine* necessarily implies a challenge of the jurisdiction of the Court to hear the dispute on the merits inasmuch as the defendant must be considered as having submitted itself to the jurisdiction of the Court solely for the purpose of deciding the plea *in limine* to the effect that it should set aside the plaint (obviously on a conclusion that the arbitration clause applied and the Court had no competence to hear the case on the merits). It is pertinent to point out that no contention was made by the plaintiff that it was futile for the judge to hear the plea *in limine* on the ground that the defendant had already submitted itself to the jurisdiction of the Court.

We accordingly reject the submission of Counsel for the respondent that the appellant should be considered as having waived any right it might have had by virtue of an arbitration clause.

We shall now turn to the two points raised by Counsel for the appellant to contest the jurisdiction of the lower Court and of this Court.

The issue of jurisdiction with regard to the International Arbitration Act 2008

Although this issue has not been raised in the grounds of appeal, there has been no objection, and rightly so, that this issue be entertained, and we have indeed entertained it by virtue of its fundamental nature.

The plaint with summons, alleging a breach of contract, was dated 23 December 2006 and served upon the defendant on 27 April 2007. The International Arbitration Act 2008 ("the Act") was then not yet in force. The Act became operative on 1 January 2009 and was later amended in certain respects by the International Arbitration (Miscellaneous Provisions) Act 2013. The plea *in limine* raised by the defendant was dated 29 January 2009, and was therefore

raised at a time when the Act was already in force. The Act was not invoked either in the plea *in limine* or in the submissions of Counsel for the defendant on that plea, to challenge the jurisdiction of the learned Judge.

However, it is now contended by Mr M. Sauzier, S.C., Counsel for the appellant (the then defendant), that by virtue of section 5 (1) of the Act, the learned Judge had no jurisdiction to hear the case, and should not have heard the plea *in limine* but should have transferred the matter to a panel of three judges as per the Act. It is further contended that this Court could not constitute itself into the panel of three judges contemplated by the Act.

Section 5(1) of the Act, which has not been amended at any time, reads as follows:

> "*Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that the party so requests not later than when submitting his first statement on the substance of the dispute."*

The defendant's first statement on the substance of the dispute was its plea dated 29 January 2009 which also contained the plea *in limine litis.* Counsel for the appellant has submitted that the appellant "duly raised the issue" not later than when submitting its first statement on the substance of the dispute.

The submission of Counsel for the appellant is however not well-founded, in our view. The condition imposed in section 5(1) above for the automatic transfer of the action to the Supreme Court (in view of the parties being referred to arbitration under section 5 (2)) is that the party in question should request the transfer under that section of the Act, and not simply that he should contend that the matter should be dealt with by arbitration. Indeed this was emphasised in **Trikona Advisers Limited v Sachsenfonds Asset Management GMBH** [2011 SCJ 440A] where the appellate Court said in relation to Section 5 (1) of the Act:

> "*We wish to make the following observations with respect to the exercise of the jurisdiction of the 3-Judge Court under Section 42 of the Act. It is incumbent upon any Court to 'automatically transfer the action to the Supreme Court' pursuant to Section 5 (1) only where –*
>
> *(a) there is a contention by a party that the very action which is before the Court is the subject of an arbitration agreement; and*
>
> *(b) the party makes a request when submitting his first statement"*
> **(emphasis added)**

As rightly pointed out by Mr D. Basset, S.C., Counsel for the respondent (who has stepped in in lieu of Mr I. Collendavelloo, S.C., and put in additional skeleton arguments to those initially authored by the latter), although the defendant contended that the claim subject matter of the plaint with summons was to be determined by virtue of an arbitration clause said to apply to the contract in question, no request was made on its behalf to the learned Judge for a referral under section 5 of the Act.

Furthermore, we agree with the submission of Mr D. Basset, S.C., that this Court could not refer the matter for arbitration under the provisions of the Act. Section 42 (1) of the Act provides that for the purposes of any application or transfer to the Supreme Court under this Act or of any matter arising out of an arbitration subject to this Act before the Supreme Court, the Court shall be constituted by a panel of 3 Designated Judges, composed of such Designated Judges as the Chief Justice may determine. We agree with Mr Basset's submission that this Court could not constitute itself into such a panel of Designated Judges, this Court being a Court of appeal whereas the Designated Judges under the Act function as judges of first instance.

In the light of our above conclusions, we reject the point relating to jurisdiction raised by Counsel for the appellant with reference to the provisions of the International Arbitration Act 2008.

The issue of jurisdiction with regard to the *compétence-compétence* principle

Another point relating to jurisdiction has been raised by Counsel for the appellant in his revised skeleton arguments by invoking the *compétence-compétence* principle. Counsel for the appellant initially purported to raise this point under the grounds of appeal but he eventually conceded that it would not fall under any of those grounds. It has however been agreed by Counsel on both sides that the point should be considered outside the grounds of appeal, as a fundamental point of law relating to jurisdiction, on the same basis as the point of jurisdiction raised under the International Arbitration Act. We concur with the common stand of Counsel on both sides on this question, and shall entertain the point accordingly.

The submission of Counsel for the appellant is in effect that, upon an application of the *compétence-compétence* principle, the learned Judge should have refrained from assuming jurisdiction to determine the applicability to the second contract of the arbitration clause pertaining to the first contract. He referred to the "positive effect" of the principle which

gives priority to the arbitrator to determine his own jurisdiction and to the "negative effect" of the principle – as adopted in certain jurisdictions including France and Mauritius – which is to prevent domestic Courts from verifying the validity of the arbitration clause, and therefore the jurisdiction of the arbitration tribunal, before the latter has had a chance of doing so itself. He pointed out that in Mauritius the negative and positive effects of the principle are set out in articles 1016 and 1023, respectively, of the *Code de Procédure Civile* which read as follows:

Article 1016:

> "*Lorsqu'un litige dont un tribunal arbitral est saisi en vertu d'une convention d'arbitrage est porté devant une juridiction de l'État, celle-ci doit se déclarer incompétente.*
>
> *Si le tribunal arbitral n'est pas encore saisi, la juridiction doit également se déclarer incompétente à moins que la convention d'arbitrage ne soit manifestement nulle.*
>
> *Dans les deux cas, la juridiction ne peut relever d'office son incompétence".*

Article 1023:

> *"Si, devant l'arbitre, l'une des parties conteste dans son principe ou son étendue le pouvoir juridictionnel de l'arbitre, il appartient à celui-ci de statuer sur la validité ou les limites de son investiture."*

As in the present case we are in the context of international rather than domestic arbitration - the parties having their places of business in different states, the appellant in the Netherlands and the respondent in Mauritius – Counsel for the appellant has gone on to submit that the principle of *compétence-compétence* has been adopted in the International Arbitration Act 2008. He has referred, in this connection, to sections 5 and 20 of that Act.

We agree with the submission of Counsel for the appellant that the principle of *compétence-compétence* contained in Articles 1016 and 1023 of our *Code de Procédure Civile* is reflected in those articles of the International Arbitration Act. However, our reading of the negative effect of the principle as contained in article 1016 is that it is only when a dispute brought before the Court is one which is governed by a "*convention d'arbitrage"* referring it to a *"tribunal arbitral"* that the Court must decline jurisdiction. In our view, the initial decision as to whether there is an arbitration clause applicable to the dispute remains within the province of the Court. If it finds that a *"tribunal arbitral"* should be *"saisi en vertu d'une convention d'arbitrage"* which is not *"manifestement nulle",* then the Court should declare itself incompetent.

If, on the other hand, if finds that there is no applicable "*convention d'arbitrage*" in virtue of which a *"tribunal arbitral"* should be *"saisi",* then the Court should proceed to hear the case itself.

For the reasons given above, we also reject the point of jurisdiction raised by Counsel for the appellant on the basis of *compétence-compétence.*

The grounds of Appeal

We now turn to the nine outstanding Grounds of appeal. It is helpful, in this connection, to sum up the reasoning which led the learned Judge to reject the plea *in limine litis* raised by the defendant to the effect that the contract between the parties was governed by an arbitration clause such that the learned Judge should decline to entertain the claim. It was common ground that in the contract on which the claim was based, (contract E8HW02 – hereinafter referred to as "the second contract") there was no actual arbitration clause. However, it was the defendant's contention that the arbitration clause pertaining to a previous contract between the parties (contract E8HW01) should be read in the second contract. The learned Judge referred to ***article 1004*** of the ***Code de Procédure Civile*** which provides that "*La Clause compromissoire doit, à peine de nullité, être stipulée par écrit dans la convention principale ou dans un document auquel celle-ci se réfère*". The learned Judge went on to hold that although the second contract was a follow up of the first, it could not be said to be an "*accessoire*" of the first contract. Accordingly, the terms of the first contract could not be imported into the second contract.

Of the nine outstanding grounds of appeal, two (grounds 7 and 10) – have been dropped. We propose to deal with the remaining grounds in the following order. We shall first consider ground 4, which deals with the interpretation of ***Article 1004*** of the ***Code de Procédure Civile***, the starting point in dealing with the issue raised in the plea *in limine*. Thereafter, we shall turn to ground 1, which alleges that the learned Judge failed to take into account certain authorities cited by both parties in reaching his decision. Finally, we shall in turn consider grounds 2, 3, 5, 8 and 9 which all deal with the reasons invoked by the learned Judge in reaching his conclusion that no arbitration clause applied to the contract subject matter of the plaint with summons.

Ground 4

> *"Because the learned Judge was wrong in applying a strict interpretation of Art. 1004 of the Code of Procédure Civile, moreso having regard to the nature of the agreement signed between parties".*

In relation to this ground, we are of the view that the learned Judge made a correct application of ***Article 1004*** of the ***Code de Procédure Civile***. The relevant part of this article provides that "*La clause compromissoire doit, à peine de nullité, être stipulée par écrit dans la convention principale ou dans un document auquel celle-ci se réfere*". In the second contract there was no reference to an arbitration clause or to the H.P. (abbreviation for "Hewlett Packard") consulting terms and conditions such that, had the learned Judge applied a strict interpretation of Article 1004, he would have straightaway held that there was no applicable *clause compromissoire.* However, the learned Judge went further and applied the authorities quoted before him by the appellant to the effect that a *clause compromissoire* will be extended from a *convention principale* to another *convention* where there was a manifestation of the intention of the parties to apply the same *clause compromissoire* to that other *convention.* It was upon that more liberal construction of Article 1004 that the learned Judge reached his conclusion that there was no arbitration clause applicable to the second contract.

The complaint in ground 4 is accordingly unfounded and that ground is devoid of merit.

Ground 1:

> *"Because the learned Judge failed to take into account the other authorities referred to by both parties prior to reaching his decision."*

The criticism contained in this ground does not appear to us to be justified. From a reading of the transcript of the proceedings before the learned Judge, it is apparent that authorities were cited by Counsel for both parties and that there was no dispute about the legal principles. The authorities were to the effect that a *clause compromissoire* would be extended from a *convention principale* to other *conventions* under specific circumstances including the similarity of the contracts and a manifestation of the intention of the parties to apply the same *clause compromissoire* to the successive contracts. The learned Judge clearly referred to these principles in his judgment and applied them in reaching his decision that the *clause compromissoire* applicable to the first contract was not applicable to the second contract. Ground 1 accordingly fails.

Ground 2:

> *"Having found that contract E8HW02 was a follow up of contract E8HW01, the learned Judge misdirected himself in not holding that the intention of the parties was that they be governed by the Appellant's standard terms and conditions which included an arbitral agreement clause".*

As pointed out in the judgment of the learned Judge, it was mentioned in the first contract that "*this proposal is subject to HP standard terms and conditions attached to this proposal as 'Appendix A'."* The HP terms and conditions contained an arbitration clause, but instead of being attached as an appendix, were attached to a subsequent communication between the parties. Be that as it may, it was undisputed that those HP terms and conditions containing the arbitration clause formed part of the first contract. However, as also pointed out by the learned Judge, there was no mention in the second contract that it was subject to those HP terms and conditions. The learned Judge found that whilst the second contract was indisputably a follow up of the first contract, it could not be said that it was an "*accessoire*" of the first contract as the latter was a feasibility study whilst the second contract was a design proposal. The learned Judge furthermore pointed out that a reading of both contracts revealed that their objects and terms were quite different. The learned Judge added: "*If the parties were minded to be governed by what was termed by the defendant as the HP standard terms and conditions, it would have been easy for the defendant to either annex those standard HP terms and conditions or insert under the clause 'Terms and conditions' the words 'Arbitration as per contract E8HW01' […]. If the parties were minded to include an arbitration clause, they could have supplemented the agreement as was done in the first contract, but nothing was done […..]. Furthermore, I am also of the view that the defendant cannot call in aid the 'HP consulting terms and conditions' as found in contract E8HW01 as those terms and conditions are specific to a consultation proposal which no doubt would be different from the second contract which was for the Design Proposal."*

In our view, the above reasoning of the learned Judge contains no misdirection, and shows, on the contrary, that he properly directed himself to the law and to the documents which were before him.

In the book entitled "***L'arbitrage***" (6th edition, 1993), by **Jean Robert**, we read the following:

> *"Par une dérogation apparente à la nécessité d'une stipulation par écrit, et par l'interprétation de la volonté des parties, on peut admettre que, dans une série de contrats connexes, la clause compromissoire insérée dans l'un d'entre eux étende son effet à d'autres contrats."*

The learned author goes on to point out that it is invariably "*la constatation de la volonté des parties qui, selon qu'elle s'est manisfestée, mettra un obstacle au jeu de la connexité.*"

As rightly pointed out by Mr Basset, S.C., in his additional skeleton arguments, it is one thing to transfer a properly written arbitration clause (pursuant to Article 1004) to another contract that is '*connexe*' but a completely different thing to seek to transfer an arbitration clause found in a set of a standard terms and conditions, simply referred to in and attached to one contract, to another contract that does not even include a clear reference to those specific standard terms and conditions.

As also submitted by Counsel for the respondent in the same additional skeleton arguments, the findings of the learned Judge in his judgment show that he embarked on a thorough investigation of the intention of the parties and their conduct throughout, as must be done pursuant to Article 1156 et seq. (*interprétation explicative* – the subjective test) and as complemented by Article 1135 et seq. (*interprétation créatrice* – the objective test) of the Civil Code. The learned Judge's *interprétation de la volonté des parties*, cannot in our view be impeached such that he legitimately concluded that it was not the intention of the parties that the arbitration clause applicable to the first contract would apply to the second contract.

Ground 2 is accordingly also devoid of merit.

Ground 3:

> *"Because the documents produced before the Court clearly show that the intention of both parties was that the contractual agreements between them were subject to the Appellant's terms and conditions which included an arbitral agreement clause."*

The specific contention made under ground 3 is not, in our view, warranted, inasmuch as the documents, consisting essentially in the two contracts and references to their terms and conditions in invoices relating to each of them, show that -

(1) with respect to the first contract the parties had, on several occasions, clearly stated their common intention to be governed by the *clause compromissoire* contained in the H.P. Consulting terms and conditions

attached as an appendix to the first contract and which provide at clause 14 for disputes to be settled by arbitration governed by the Rules of the Chamber of Commerce and Industry of Geneva Switzerland and for the place of arbitration to be Geneva;

(2) that there was no *nexus* between the first and second contract as far as the *clause compromissoire* was concerned;

(3) the conditions agreed under the first contract were consulting terms and conditions applying to consulting work whereas the conditions agreed under the second contract were design terms and conditions.

Ground 3 accordingly fails.

Ground 5:

"Because the Learned Judge was wrong in holding that "…. even if it can be said that the parties had in mind certain Terms and Conditions which had been left blank in contract E8HW02, it could have been completed by an addendum as was done in contract E8HW01"

It is common ground that there was no formal *"addendum"* to the first contract, and that the reference in the passage cited in this ground to the *addendum* in respect of the first contract is in fact a reference to what was informally incorporated into the first contract, following the omission of an appendix referred to in the contract, by a letter dated 30 October 2003 sent on behalf of the plaintiff, and to which were annexed the HP Standard Consulting terms and conditions. There is no dispute that the annexure, which contains terms and conditions including an arbitration clause, formed part of the first contract.

The extract from the learned Judge's judgment quoted in ground 5 above must be read together with the words which follow and complete the extract:

"[…] which was not done but instead there was only an addendum as to the terms of payment dated 19th May 2004 as already highlighted above."

The reasoning of the learned Judge in the extract quoted in ground 5, as duly completed, was that if the parties had intended to subject the second contract to the HP Standard consulting terms and conditions they could have proceeded in the same way as in the first contract: far from doing that, they had recourse, in the second contract, to a formal addendum dated 19th May 2004 which was limited to terms of payment.

We do not find anything intrinsically wrong in the above reasoning where the learned Judge placed reliance on what he considered, in his appreciation of the facts, to be part of the circumstantial evidence that the parties had not intended any arbitration clause to apply to the second contract. Besides, that was only an additional reason put forward by the learned Judge, after giving other cogent reasons, to justify his conclusion as to the common intention of the parties.

We accordingly find no merit in ground 5.

Grounds 8 and 9

Grounds 8 and 9 can be appropriately dealt with together as they both find fault with the assessment of the objects and terms of the two contracts. These two grounds read as follows:

Ground 8:

> *"Because the Learned Judge misdirected himself when assessing the object and terms of contracts E8HW01 and E8HW02".*

Ground 9:

> *"Because the Learned Judge misdirected himself as to the type of work envisaged for the feasibility study and for the design proposal which both entailed consultancy services on the part of the Appellant (then Defendant) when he found that "Furthermore, I am also of the view that the defendant cannot call in aid the 'HP consultancy terms and conditions' as found in contract E8HW01 as those terms and conditions specific to a consultation proposal which no doubt would be different from the second contract which is for the Design Proposal".*

It has been submitted by Counsel for the appellant that, on a proper direction as to the terms and objects of the two contracts, the learned Judge would have concluded that they both concerned "*une opération économique unique qui concourt au même objet"* as the Cour d'Appel de Paris found in respect of two contracts "*l'un dit de location, l'autre de transport à temps et de poussage,*" in **SA Groupe Sablières Modernes (GSM) v SA Groupama Transport et autres**, in a decision of 21 February 2002. In our view, however, the contracts in that case are easily distinguishable from those in the present case. In the French case, the Court reached its conclusion on the basis that both contracts involved "*la mise à disposition des mêmes pousseur et barges pour effectuer le transport des graviers"* and that certain *"modifications contractuelles"* had been *"inscrites dans un objectif commun, la poursuite de relations contractuelles".* In the present case, the two contracts do not, in our view, lend themselves to a similar analysis.

Indeed, as pointed out by the learned Judge, the terms and conditions of the first contract could only be specific to a consultation proposal (a feasibility study) whereas the terms of the second contract would necessarily be specific to a Design Proposal. At page 17 of the "Feasibility study and Business Plan Assessment" of the appellant in relation to the first contract (relating to the respondent's project of a DDRC, i.e. Data and Disaster Recovery Centre) we read under the heading "Overview":

> *"Hewlett Packard has been tasked with the completion of a Feasibility Study and Business Plan Assessment for the establishment of a DDRC centre in Mauritius for Happy World. In light of this requirement, other DDRC centres throughout the world have been investigated. Specific focus has been on Mauritius, South Africa and India in that they are positioned on the SAFE cable […] Potential Clients will be identified as the Marketing Plan is formulated."*

On the other hand, an insight into the nature of the second contract is given at pages 18 and 19 of the Design Proposal of the appellant relating to the second contract, where, under the heading "Overview" we read the following:

> *"HP has created this proposal to Happy World for the purposes of designing solutions to facilitate the requirements of Happy World DDRC. The components to be designed are as follows:*
>
> - *Call Centre*
> - *Electronic Security*
> - *LAN & WAN*
> - *Disaster Recovery*
> - *Business Consulting."*
>
> **(Emphasis added)**

We further read at p. 47 of the defendant's Design Proposal – the page where the proposal was accepted by the plaintiff:

> *"It must be noticed this proposal from HP and the associated terms and conditions shall cover the components of a solution Design to Happy World for the Happy World DDRC to be hosted in the Ebene Cyber City"*
> **(Emphasis added)**

It is apparent from the above that, although both the feasibility study relating to the first contract and the design proposal relating to the second contract might involve consultancy

services, there was a significant difference between the first contract which only involved consultancy in respect of feasibility and the second contract which essentially involved "design".

The learned Judge's reasoning in the extract from his judgment quoted in ground 9 above is in fact supported by the following extract from the "Proprietary Notice" at page iv of the Design Proposal of the appellant relating to the second contract:

> "*This HP document supercedes in all respects any and all other previous or contemporaneous communications, representations or documents (whether oral or written) made by HP to Happy World relating to the subject matter of the document."*

Grounds 8 and 9 are therefore also devoid of merit. All the outstanding grounds of appeal having failed, the appeal is dismissed with costs.

As the learned Judge who ruled on the plea *in limine* litis has retired, the case will have to be heard on the merits by another Judge. Divergent views have been expressed by Counsel on both sides as to whether, in the event that the appeal failed, this Court should remit the case to be dealt with by any Judge of the Supreme Court or by a Judge of the Commercial Division.

The Judge who heard the plea *in limine* was a Judge of the Commercial Division set up in early 2009, and although the plaint was lodged in 2006, the Ag. Master and Registrar, in the course of formal proceedings on 5 March 2009, observed that the case was a "Commercial Court Case" and that the parties would have to liaise with the Commercial Division for the case to be fixed. Thereafter, the matter was called before the Commercial Division on 13 May 2009 and fixed to 1 June 2009 for arguments on the plea *in limine.*

The heading of the learned Judge's interlocutory judgment subject-matter of this appeal and that of the order of the learned Judge granting leave to the appellant to appeal against his interlocutory judgment both read "*In the Supreme Court of Mauritius (Commercial Division)".* Those considerations may be invoked in support of the view of Mr Sauzier, S.C., Counsel for the appellant that the case should be remitted to the Commercial Division.

However, as the Commercial Division is an informal division of the Supreme Court which has been set up administratively and not by legislation, it is the view of Mr Basset S.C., Counsel for the respondent, that any Judge of the Supreme Court could take this case which, in Mr Basset's submission, is a normal action in breach of contract and not a commercial action.

The Commercial Division is indeed an informal division of the Supreme Court and strictly speaking, a Judge not in that division could not refuse to take a case assigned to him even if he were of the view that it is a commercial action that would be more appropriately heard by the commercial division.

In the circumstances, we simply remit the case for hearing on the merits by another Judge and leave it to the discretion of the Chief Justice whether to have the case fixed before a Judge sitting in the Commercial Division or before another Judge. The case shall be fixed by circular.

E. Balancy
Ag. Chief Justice

P. Fekna
Judge

13th September 2017

Judgment delivered by Hon. E. Balancy, Ag. Chief Justice

For Appellant :	**Mr T. Koenig, Senior Attorney** **Mr M. Sauzier, Senior Counsel** **Mr S. Peeroo, of Counsel**
For Respondent :	**Mr A. Robert, Senior Attorney** **Mr D. Basset, Senior Counsel** **Mr J. G. Basset, of Counsel** **Mr K. Namdarkhan, of Counsel**