MADUN GUJADHUR CHAMBERS

THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – A BIRD'S EYE VIEW FROM MAURITIUS

Introduction – The Mauritius Legislative Framework

Until 1996, the enforcement of arbitral awards in Mauritius was governed by the Mauritian *Code de Procédure Civile*. This was a rather old-fashioned regime based on French law and adopted in 1808 and had not been amended to cater for the realities of the modern commercial world. In 1996 Mauritius ratified The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "**New York Convention**". The ratification was subject to the reservation of reciprocity, so that Mauritius would only be bound to enforce awards made in other states which had ratified the New York Convention. This is not an unusual reservation to adopt, but it gives rise to issues over the adequacy of another state's adherence to the New York Convention. It can also be used to place additional formal requirements on enforcement.[1]

The Recognition and Enforcement of Foreign Arbitral Awards Act 2001 – A First Milestone

In 2001 Mauritius adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (the "**2001 Act**"). The 2001 Act had, inter alia, the following effects:

- Section 3(1) gave the force of law to the original text of the New York Convention, which was reproduced in a schedule to the 2001 Act;
- Section 3(2) provided that regard would be had to the Recommendation regarding the interpretation of Article II (2) and Article VII (1) of the New York Convention adopted by UNCITRAL at its Thirty-Ninth session on 7 July 2006[2];
- Section 2 and Section 4 provided that the Supreme Court of Mauritius would hear any application under the 2001 Act – this ensured that it would always be a senior court which would consider these matters; and
- Section 4(3) provided that an appeal would lie, as of right, to the Judicial Committee of the Privy Council against any decision of the Supreme Court under the 2001 Act – this ensured that one stage of appeal would be available, and that the expertise of the English judges would be available to support the development of Mauritian law.

The International Arbitration Act 2008 – Setting the Tone to an Arbitration Seat of Choice

In 2008 Mauritius adopted the International Arbitration Act 2008 (the "**2008 Act**"), which brought a fundamental change to the landscape of international arbitration law in Mauritius. The 2008 Act is primarily focussed on arbitrations seated in Mauritius and other matters relevant to all international arbitrations. The 2008 Act[3] also brought one fundamental change to the law regarding enforcement of foreign arbitral awards, in that the Supreme Court should be constituted to hear applications for enforcement in the form of a three-judge panel, in line with all matters heard under the 2008 Act. In particular, the

[1] For example in India, where the reciprocity reservation is used to justify declining to enforce the New York Convention over awards unless the country where the award was made has been officially recognised in the Gazette *(The Arbitration and Conciliation Act 1996, section 44)*.

[2] This interpretation provides that the list of documents in Article II(2) of the New York Convention, in which an arbitration agreement might appear is not exhaustive, and that Article VII(1)should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

[3] Section 42 of the 2008 Act and section 2 of the 2001 Act.

2008 Act also provided that any arbitration held under the 2008 Act[4] would be subject to the same enforcement regime as for foreign awards.

In addition, it is apposite to note that the provisions of the 2008 Act, which provide that regard should be had to the general principles on which the UNCITRAL Model Law is based, and to international materials relating to the UNCITRAL Model Law, and that no regard should be had to domestic law on arbitration, evidence and procedure, also apply to proceedings relating to enforcement under the New York Convention.

The 2013 Enactments – Fine-tuning the Legislative Framework for an Efficient Seat

In 2013, Mauritius adopted the International Arbitration (Miscellaneous Provisions) Act 2013. This brought some important refinements to the law on enforcement of foreign arbitral awards in Mauritius, including the following:

- The reciprocity reservation was removed from Mauritius' ratification of the New York Convention, so that thenceforth, any foreign arbitral award would be enforced under the New York Convention (new section 3A of the 2001 Act);
- English and French were designated as official languages of Mauritius for the purposes of article IV of the New York Convention, so that awards written in either language could be submitted to the Supreme Court of Mauritius for enforcement, without having to be translated (new section 4A of the 2001 Act); and
- It was clarified that no prescription or limitation period would apply in Mauritius to the enforcement of arbitral awards under the New York Convention (new section 4B of the 2001 Act).

Certain changes were also made by the International Arbitration (Miscellaneous Provisions) Act 2013 to the law generally applicable to international arbitration matters which impact upon enforcement proceedings under the New York Convention, in particular:

- The three-judge panel of the Supreme Court would be drawn from a pool of six Designated Judges, who would be selected to hear all international arbitration matters – this would allow particular training for these judges, and would promote consistency in the development of the case-law; and
- New provisions[5] on confidentiality of court proceedings, which allow the court to hold hearings in private and to prevent disclosure of information about cases, apply equally to enforcement of foreign arbitral awards – this should be particularly welcome by institutional investors and multinational corporates.

Further, in 2013, a new dedicated procedural regime was introduced[6], covering any matters before the Supreme Court of Mauritius under the 2008 Act or the 2001 Act. The regime is designed to be streamlined compared to standard Mauritian court procedure, and to include measures which make it more accessible for international parties, for example:

- Witness statements may be used to give written evidence, and no less weight should be given to them just because they are not sworn – this may help circumvent problems with the international swearing of affidavits;
- Hearings are listed on consecutive days where possible, and having regard to the parties' time estimates – to avoid, so far as possible, adjournments and the need for multiple visits to Mauritius;
- There is a presumption against oral evidence – to ensure that a decision is made proactively on whether oral evidence is needed to resolve the issues;
- A tight timetable is provided for, for the exchange of evidence and submissions, which can be adjusted to suit the case in hand; and
- Costs may be awarded, at the discretion of the court, according to the general principle that the losing party pays the winning party's costs, in an amount according to the costs incurred, subject to tests of reasonableness and proportionality.

[4] This would mean an international arbitration seated in Mauritius, or an arbitration seated in Mauritius which the parties had expressly agreed to hold under the 2008 Act, regardless of whether it was international or not

[5] Sections 42(1B) and 42(1C) of the 2008 Act

[6] In the Supreme Court (International Arbitration Claims) Rules 2013

The Supreme Court (International Arbitration Claims) Rules 2013 also include a specific procedure for applications for enforcement under the New York Convention, under which the application is made without notice, and a provisional enforcement order is made (assuming the application complies with the requirements set out) before service on the respondent, who then has a short time to apply for the provisional order to be set aside before it becomes final.

Cruz City – An Indication of the Pro-Enforcement Attitude of the Supreme Court of Mauritius– A First Milestone

Three aspects of the law on enforcement of foreign awards in Mauritius deserve specific consideration as they have been clarified in recent case-law:

1. The public policy ground for declining to enforce an award (Article V(2)(b))
2. The jurisdictional issue-estoppel effect on enforcement proceedings of challenge decisions of the courts of the seat of issues not taken before the courts of seat.
3. The constitutional issue.

The case of *Cruz City 1 Mauritius Holdings v/s Unitech Limited & Anor ("**Cruz City**")* (2014 SCJ 100) is the first judgment of the Supreme Court of Mauritius which addresses a number of issues relating to the enforcement of a Foreign Arbitral Award under the 2008 Act and under the 2001 Act. A summary of the facts is as follows:

Cruz City, a special purpose vehicle incorporated in Mauritius, and Unitech Limited, an Indian public listed company ("**Unitech**"), together with its subsidiaries, Burley Holdings Limited, a Mauritian incorporated company ("**Burley**") and Arsanovia Limited, a company incorporated in Cyprus ("**Arsanovia**"), entered into a joint venture arrangement in connection with some proposed residential developments in certain slum areas of Mumbai, India.

In connection with such venture, Kerrush Investment Limited ("**Kerrush**") was incorporated in Mauritius with *Cruz City* and Arsanovia as shareholders. Kerrush, *Cruz City* and Arsanovia entered into a shareholders' agreement ("**SHA**") with Burley subscribing to certain obligations under the SHA. *Cruz City*, Burley and Unitech also entered into a keepwell agreement (the "**KWA**"). Both the KWA and the SHA were governed by Indian law and the seat for arbitration was England under LCIA rules.

Disputes arose between the parties and *Cruz City* started separate arbitration proceedings as follows: (i) against Burley and Arsanovia under the SHA, in relation to which an award was made (the "**1st Award**"); and (ii) against Arsanovia together with Burley and Unitech under the KWA, in relation to which an award was also made (the "**2nd Award**"). Arsanovia, together with Burley and Unitech, also started arbitration proceedings under the SHA against *Cruz City*, in relation to which an award was made (the "**3rd Award**").

The three arbitrations were heard simultaneously but were not consolidated. *Cruz City* was successful in all three arbitrations. The Respondent challenged all three awards before the English High Court (the "**Supervisory Court**").

The Supervisory Court set aside the 1st Award and upheld the 2nd Award and the 3rd Award.

Cruz City started enforcement proceedings to enforce the 2nd Award and the 3rd Award in Mauritius.

The Respondents attempted to resist the application for the enforcement by *Cruz City* on three grounds, as follows: (i) the arbitral awards were contrary to public policy; (ii) the arbitrators had exceeded their jurisdiction; and (iii) the 2008 Act has limited the role of the Supreme Court to such an extent that it has effectively undermined the institutional integrity of the Supreme Court.

1. Public Policy Issue

The Respondents contended that, because there had been a patent breach of Indian law, the governing law of the contract in dispute, the award should not be enforced as it was against public policy in India. The Court rejected this argument and held that it was only the public policy of Mauritius that applied and went to say that: "*it is the public policy in the international context that applies, <u>but not</u> the public policy that would apply when challenging a domestic award*".

The Court cited with approval the definition given by the International Law Association's Committee on International Commercial Arbitration on international public policy. The Committee defined international public policy as "*that part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award*".

The finding of the Supreme Court regarding the applicability of international public policy instead of domestic public policy is consistent with the legislators' intent of aligning international arbitration in Mauritius with international standards (Sections 3(9) and 3(10) of the 2008 Act and paragraphs 35 and 36 of the *Travaux Préparatoires* to the 2008 Act).

However, as Mauritius is a relatively new jurisdiction in the field of international arbitration, it is worth giving a thought to the matters which would likely fall within the scope of "*public policy*" and the standards which would apply in determining whether such matters fall foul of the standards thus established.

Public policy has been described as an "unruly horse"[7], "a nebulous concept that changes from State to State"[8].

While it is recognised that international public policy includes mandatory laws of a state, it is also agreed that not all violations of domestic mandatory law will be in breach of international public policy. To the extent that international public policy can be defined, it has been defined as:

"the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought."[9]

"International public policy generally is seen as being the fundamental notions of morality and justice determined by a national government (either a legislature or court) to apply to disputes that have an international element, either from the underlying transaction's nature or from the nationality of the parties, though those disputes still are within that State's jurisdiction."[10]

"…it refers to a particular country's subjective concept of what all civilised nations conceived international policy to be."[11]

This begs the question of how to decide which countries would fall within the definition of the "*civilised nations*", and what the courts of a particular country should include or exclude, from the "*fundamental notions of morality and justice*" that should apply to international disputes. Indeed, not all breaches of domestic mandatory laws amount to a breach of international public policy.

What would it take for a domestic mandatory law to become so fundamental to the enforcing country and its morality as to become international public policy? That this question is still very much up for discussion is demonstrated by certain decisions in Africa:

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S). At 466, E-G Gubbay CJ, said:

"Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

Difficult questions may arise taking account the widely different views on the part of nations in different parts of the world as to what is acceptable conduct. Should decisions in different countries on international public policy differ according to the locally-held views? Is that consistent with the ideal of consistency across nations? It certainly does not encourage international trade in the way the New York Convention was intended.

The Supreme Court of Mauritius in *Cruz City*, most probably being aware of the difficulty in applying the concept of international public policy, has tried to stem the proliferation of objections under Article V(2)(b) of the New York Convention and has held that:

"In our view, a respondent should not raise an objection to the recognition of a foreign award under Article V (2) (b) of the New York Convention injudiciously. Essentially, the respondent has to show with precision and clarity in what way and to what extent enforcement of the award would have an adverse bearing on a particular international public policy of this country. Not only must the nature of the flaw in the arbitration proceedings be unambiguously described but a specific public policy must be identified and established by the party relying on it".

[7] Richardson v Mellish (1824) 2 Bing 229, 252 (Burrough J)

[8] Andrew I Okekeifere, 'Public policy and arbitrability under the UNCITRAL Model Law' (1999) 2(2) International Arbitration Law Review 70, 70

[9] Krombach v Bamberski (C-7/98) [2000] ECR I-1935.

[10] James D. Fry, 'Désordre Public International under the New York Convention: Wither Truly International Public Policy' (2009), Chinese Journal of International Law

[11] Professor Albert Jan van den Berg

Whether, by laying down such requirements, the Supreme Court will manage to stem the tide of spurious objections on the ground of international public policy remains to be seen.

2. Jurisdictional Issue and Estoppel

The Respondents' second objection was in two limbs. The first limb was that the Arbitration Tribunal had exceeded its jurisdiction by adjudicating a dispute which was beyond the arbitration clause embodied in the contract in dispute.

This issue had been unsuccessfully raised in the arbitration proceedings as well as at the level of the Supervisory Court in England.

The Court held that the role of the enforcement court is not to look into the merits of the dispute between the parties. The Court held that

"its task is not to sit on appeal and review the decision of the Tribunal on the merits or to substitute its own decision for that of the Tribunal but to consider whether it will refuse recognition and enforcement under any of the grounds that are relied upon and proved by a respondent under Article V of the New York Convention. In that respect, this Court has the power under the ground provided in Article V (1) (c) to undertake a full review of the Tribunal's findings on jurisdiction. It will indeed do so where it considers it appropriate and necessary, bearing in mind the overriding principle that the process of enforcement should be smooth and expedient. In the present cases it is clear that the jurisdictional objection has already been verified by the Supervisory Court of the seat of arbitration chosen by the parties themselves. We do not hold that we would never re-verify the issue of jurisdiction where it has been considered and rejected by the Supervisory Court, but that we would normally not do so unless in presence of exceptional circumstances".

The second limb of the objection was that the global assessment of the costs by the Arbitration Tribunal, in so far as the Respondents had been victorious in one of the awards, was contrary to LCIA Rules and that, consequently, the Tribunal had dealt with *"a dispute not contemplated by or falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration"*.

The Court, after reviewing the facts – it only did so because *Cruz City* was the first case of its kind under the 2008 Act – found that the objection was "*devoid of merits*".

However, it is interesting to note that the Court further observed that the Respondents had not raised this issue in their challenge before the Supervisory Court. In our view, had the Court not rejected the argument on facts, it would have held that the Respondents, by not raising this issue before the Supervisory Court, would have been estopped from raising such an issue at the enforcement level. The Court said:

"This is yet another reason that would have militated against this Court exercising its discretion to refuse to enforce the award under the New York Convention".

In a situation where a losing party does not appeal to the seat court, but attempts to raise certain issues attacking the correctness of the award at the enforcement level, the Mauritian Court would most likely not exercise its discretion to refuse the enforcement of the award, based on the decision in *Cruz City*.

We are comforted in this view because the Mauritian court in *Cruz City* seems to have approved the dictum of Colman J in *Minimetal Germany GmbH v/s Ferco Steel Ltd* (1999) CLC 647 at page 661 of the judgment.

"In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award."

3.Constitutional Issue

The Respondent contended that the role of the Supreme Court under the 2008 Act is so limited that it has effectively become a 'rubber stamp' in enforcing arbitral award which, therefore, undermines the Court's institutional integrity and is, therefore, against the Constitution of Mauritius. The Supreme Court accepted the reasoning of the Australian High Court in the case of *TCL Air Conditioner (Zhangshan) Co. Ltd v The Judges of the Federal Court of Australia (2013 HCA 5) and rejected the argument.*

The Supreme Court held that it is inherent in the agreement to arbitrate that the parties have agreed to accept the arbitrator's decision, whether right or wrong. Once the arbitrator's decision has been made, the rights of the parties that were in dispute come to an end and are replaced by the arbitrator's decision.

The Supreme Court further said that:

"*Therefore, a losing party in an arbitration award cannot, just because the award was not in his favour, be allowed, at the stage when this Court is called upon to adjudicate whether to enforce or refuse enforcement in accordance with the criteria laid down in the law, to ask the Court to interfere with the decision of the arbitral tribunal on grounds not laid down in the law. Such a request is not acceptable not only because it will be tantamount to asking this Court to act against the law, to step outside the jurisdiction conferred on it by law as provided by the Constitution, but it will also be unfair, unjust and inequitable as it will deprive the winning party of the benefit of the award, to which the losing party voluntarily agreed to be bound, by delaying and protracting matters*".

Conclusion

The *Cruz City* decision (by three out of the six Designated Judges) shows that the approach of the Mauritian Courts is, thus far, in accordance with international best practice, though there may be several more difficult matters to deal with in future.

Looking ahead, Mauritius can expect large numbers of applications to enforce arbitral awards under the 2008 Act to come before the Mauritian courts. Mauritius-incorporated entities are set up by investors from several jurisdictions to conduct business in an equally wide range of jurisdictions, under the Mauritian Global Business Company regime. Such entities often hold significant assets, against which a successful party may seek to enforce an arbitral award.

Increasingly, Mauritian global business companies are incorporating an arbitration clause in their constitution, in line with the guidelines of the Financial Services Commission of Mauritius on '*management and control*'. Any such arbitration would fall within the definition of "international arbitration" under the 2008 Act[12]. Even if the arbitration does not arise directly in relation to the constitution, but out of some related agreements such as a shareholders' agreement, it is likely that any such arbitration would still fall within the definition of "international arbitration" under the 2008 Act and therefore enforcement would be under the New York Convention.

MADUN GUJADHUR CHAMBERS: DISPUTE RESOLUTION PRACTICE

At Madun Gujadhur Chambers, we regularly advise the world's leading investment banks, fund managers, promoters and other premier multinational companies from a Mauritius law perspective. As a predominantly commercial set, we have particular strength in commercial litigation and arbitration. In particular, our lawyers can assist clients with a number of commercial contentious issues, ranging from shareholder disputes to enforcement of security, winding-up/ insolvency, court-sanctioned schemes of arrangement, among others. We also have expertise in advising our clients on complex commercial arbitrations. Led by Moorari Gujadhur, we acted for *Cruz City* on the first successful application for enforcement of a foreign arbitral award under the International Arbitration Act 2008 and The Recognition and Enforcement of Foreign Arbitral Awards Act 2001. We would be delighted to assist you further in relation to the Mauritian law aspects of any dispute which your clients may have.

[12] 2008 Act, section 2(1)

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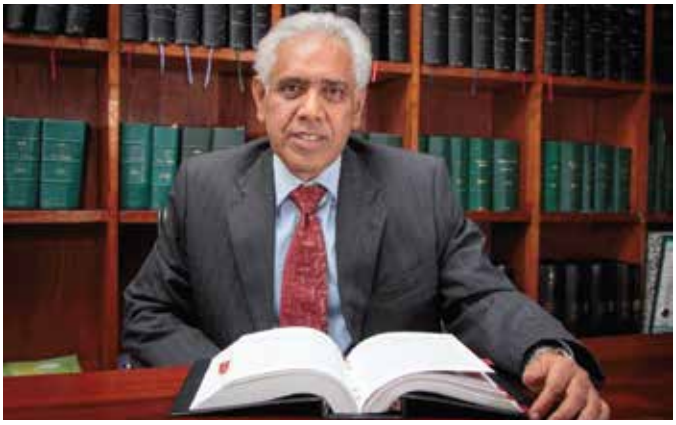

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