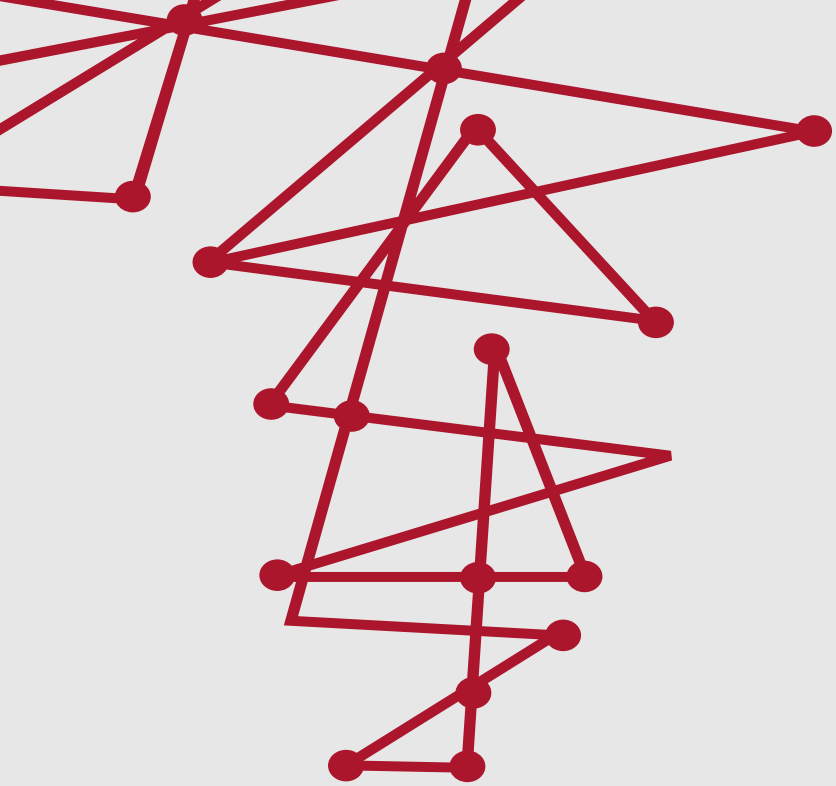
BLC Robert & Associates

WHY MAURITIUS?

A NATIONAL COURT IN SUPPORT OF INTERNATIONAL ARBITRATION

Mushtaq Namdarkhan
Manisha Meetarbhan
Yohann Rajahbalee

LCIA MIAC
ARBITRATION CENTRE



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LIST OF ABBREVIATIONS

Amending Act	The International Arbitration (Miscellaneous Provisions) Act 2013.
Amended Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted by UNCITRAL in 1985, as amended in 2006.
Arbitral Tribunal	A sole arbitrator or a panel of arbitrators.
Bankruptcy Court	Bankruptcy Division of the Supreme Court of Mauritius.
Commercial Court	Commercial Division of the Supreme Court of Mauritius.
Designated Judges	The Judges designated as such by the Chief Justice pursuant to section 43 of the IAA to constitute the panel of 3 judges of the Supreme Court to hear any matter in relation to international arbitration.
Foreign Arbitral Awards Act	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (as amended in 2013).
IAA	International Arbitration Act as amended by the International Arbitration (Miscellaneous Provisions) Act 2013.
IA Rules	The Supreme Court (International Arbitration Claims) Rules 2013.
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
Supreme Court	The Supreme Court of Mauritius constituted by a panel of 3 Designated Judges under section 42 of the IAA.

AVANT PROPOS

These short notes have no academic pretentions. They do nothing more than narrate – "report" would be too pompous a word - some of the judgments of the Supreme Court of Mauritius in matters of international arbitration since the promulgation of the International Arbitration Act in 2009. They provide some background to the cases under examination and add certain comments to facilitate and ease the reading.

These notes are rather an expression of celebration. They are the brainwave of three young barristers of the Firm. They conceived, designed and wrote those notes. It is a testimony to the hopes and faith that our young barristers in Mauritius have in this new discipline of law which is opening up in their starting professional career. Our Mauritius Bar is teeming with such youthful energy and our Young Bar is growing up to see the world in a grain of sand.

These notes also celebrate the incredible pragmatism and sagacity of our Mauritian Judiciary. The judgments recounted here demonstrate their immediate embrace of arbitration as an effective mechanism for dispute resolution and their unreserved support to international arbitration. Over two centuries, Mauritian judges have been grappling with a mixed system of law on an island that takes such a Promethean task for granted. From the faltering notes of *Trikona*[1] to the maturity and poise of *Cruz City*[2] these short notes show the road along international arbitration that the Mauritian Judiciary has travelled over such a short time.

Alongside it, the Mauritian legal profession.

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[1] Trikona Advisers Limited v Sachsenfords Asset Management GMBH [2011] SCJ 440A. See page 19

[2] Cruz City 1 Mauritius Holdings v Unitech Limited & Anor [2014] SCJ 100. See page 87

Lastly these notes celebrate the merger of BLC Chambers with Etude Robert. The merger brings together one of the oldest and most respected legal practices on the Island, and one of the most innovative set of commercial lawyers, giving to the combined team an enormous litigation capability and depth. Etude Robert was founded in 1857 and bears the mark of four generations of incontestably distinguished attorneys. It brings a tradition of excellence to the table. BLC has been the first to assert that the business community deserves specialist commercial lawyers and that proper legal services cannot be delivered in the area of commercial law without a solid organisation structure ensuring continuity and sustainability.

As the legal profession takes benefit from the 2008 amendment to the Law Practitioners Act allowing legal services to move into corporate legal structures, the international community of arbitration lawyers will find the quality support they require in Mauritius to conduct their arbitration cases in this emerging Arbitration Centre.

Iqbal Rajahbalee
Senior Counsel

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INTRODUCTION

The ever increasing development of Mauritius as a centre for international arbitration began in earnest in 2008 with the enactment of the International Arbitration Act 2008, which sets out the law applicable to international arbitration in Mauritius. It is based on the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985, as amended in 2006. It brings into play international arbitration principles, in an entirely new body of rules, completely separate from those governing domestic arbitration, and which are applied and developed in keeping up with the international principles and practices underlying the Amended Model Law.

Gathering steam from its early years, the legislation was amended in 2013 by the International Arbitration (Miscellaneous Provisions) Act 2013 with a view to updating certain provisions of the law, providing clarification in certain areas, streamlining certain procedures, and taking innovative steps to position the Mauritius law at the cutting edge of international arbitration practices. Concurrently, the Supreme Court (International Arbitration Claims) Rules 2013 were adopted in June 2013, providing for a detailed and clear set of procedures, drafted with the purpose of being practical and readily usable for both Mauritian and foreign practitioners.

The 2013 legislative review culminating with the Amending Act and its attending Rules rounded up the international arbitration

legislative framework in a comprehensive array of enactments spanning the whole area from interim measures in support of international arbitration, determining issues of jurisdictional competence, to enforcement of foreign arbitral awards. From beginning to end, the rules and procedures under the Mauritius regime are clear, certain and predictable, whether the juridical seat of the arbitration is in Mauritius or elsewhere, irrespective of citizenship or nationality.

The Mauritius legislation on international arbitration creates the conditions for a harmonious co-existence between the two main legal mechanisms for dispute settlement: it opens up wide scope for arbitration and circumscribes with clarity the supportive role of the national courts.

That much has been gracefully achieved by the Mauritius legislature in setting the stage for the accelerated development of a Mauritius International Arbitration Centre. Professionals and practitioners fret with excitement.

How will the Judiciary in Mauritius perform as it takes the stage? The notes that follow tell the story. They recount in succinct terms the salient judgments of the Mauritius Supreme Court on international arbitration since the enactment of the legislation. The Reader is left to make his or her own judgment.

The Judgments of the Supreme Court that are examined in these notes are classified for the sake of convenience under four main headings. These headings are typically the recurrent themes heard in national courts in cases regarding international arbitration:

1) Scope of the International Arbitration Act;

2) Kompetenz-Kompetenz Principle;

3) Interim Measures; and

4) Recognition and Enforcement of Foreign Arbitral Awards.

Needless to say, the legal principles discussed in the Supreme Court judgments do not necessarily fit under one single heading as they deal with a number of issues raised by counsel during the hearing. But the purpose of these notes is not to roll out extensively all the issues canvassed, nor to make extensive analysis, but rather to bring into the spotlight the approach of the Mauritius Judiciary to international arbitration.

SCOPE OF THE INTERNATIONAL ARBITRATION ACT

Trikona Advisers Limited v Sachsenfords Asset Management GMBH [2011] SCJ 440A[3]

Background Presentation

Trikona was the very first case to come before the Supreme Court after the promulgation of the IAA in January 2009. Against the backdrop of very strained relationship between shareholders in a multi-jurisdictional real estate investment structure, arbitration proceedings were initiated in Singapore while proceedings in winding up had started in Mauritius. The case has all the exciting ingredients of an international commercial matter, piqued by forensic strategies of parties. It started with an application to prevent the holding of a board meeting which was to approve a resolution to put the company in winding up. It was followed by a claim for damages and a subsequent petition by a shareholder to wind up the company and appoint a provisional liquidator. The Judge of the Bankruptcy Court referred the matter to a special bench of the Supreme Court under section 5 of the IAA.

Section 42 of the IAA creates the specific jurisdiction of the Supreme Court to hear any application or referral under the IAA and any matter arising out of an arbitration subject the IAA before the Supreme Court. In exercising this jurisdiction under the IAA, the Supreme Court is, since the passing of the Amending Act in 2013, constituted of 3 of the 6 Designated

[3] The reporting of the case on the Supreme Court website shows in the heading the Supreme Court of Mauritius sitting in its Appellate Jurisdiction. That presumably is a typing error. Clearly it was sitting as the Supreme Court specially constituted by a panel of 3 Judges to hear a referral under section 5 of the IAA.

Judges nominated by the Chief Justice to serve as such under the IAA and under the Foreign Arbitral Awards Act. Prior to the Amending Act, the Supreme Court under the IAA was constituted of a panel of 3 Judges.

The initial arguments in the case addressed principally the effect of the referral and focused on the relative merits of the grounds for winding up to assert whether the winding up proceedings should be stayed or not pending the outcome of the arbitration proceedings in Singapore. The Supreme Court was led to consider its jurisdiction under the IAA with regard to the referral from the Judge of the Bankruptcy Court, and consequently the scope of the Act. It turned its attention to section 5 of the IAA under which the referral was made.

Section 5 of the IAA is borrowed from Article 8 of the UNCITRAL Model Law, and the subsection (1) reads as follows:

(1) 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 that party so requests not later than when submitting his first statement on the substance of the dispute.

Following a transfer under section 5(1), the extent of the examination that the adjudicating Court will undertake is provided under subsection (2):

(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.

Accordingly if the Supreme Court determines that the arbitration agreement is null and void, inoperative or incapable of being performed, it will transfer the matter back to the referring court in accordance with section 5(3).

Section 5(4) further states that:

(4) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and one or more awards may be made, while the issue is pending before any Court.

As it turned out, the Supreme Court did not have to resort to subsection (2) and (4) since the parties had already been engaged in

arbitration. For the same reason, it did not find any issue with the validity of the arbitration agreement, which was not challenged. But still the Supreme Court remitted the matter back to the Judge of the Bankruptcy Court because it came to the conclusion that the arbitration agreement in the Trikona case did not come within the scope of the IAA, and was outside the purview of the 3-Judge panel.

The judgment in Trikona brought about the clarification on the scope of the IAA in the Amending Act 2013. A Part 1A has been added to make unambiguous provisions on the scope of application of the IAA. Further the new IA Rules introduces in Rule 13 clear procedures in respect of "Section 5 Claims" which parties should endeavour to follow.

The Facts and Issues

Sachsenfonds Asset Management Company GMBH ("**SAMC**"), based in Germany, is the promoter of two investment funds, Immobilien I and Immobilien II, for investing in real property in India. TSF Advisers Mauritius Ltd ("**TSF**") was appointed as investment adviser ot the two investment funds. TSF was the holder of a Category 1 Global Business Licence issued by the Mauritius Financial Services Commission under the Financial Services Act. TSF also entered into Port Folio Management Agreements (PMA) with Immobilien I and Immobilien II and into Outsourcing Agreements (OA) with TAL.
TSF was held in equal shares by SAMC and Trikona Advisers

Ltd ("**TAL**"), a company based in Cayman Islands. Those two shareholders, TAL and SAMC, entered into a Shareholders' Agreement which included an arbitration agreement providing for arbitration in Singapore under the SIAC rules with juridical seat in Singapore.

Following differences between SAMC and TAL, TSF terminated the PMAs and the OAs apparently through the unlawful intervention of the nominees of SAMC on the board of TSF. Thereupon, SAMC called a Board meeting for a voluntary winding up of the company on the ground of alleged insolvency. Three court cases sprung up.

TAL applied to the Judge of the Commercial Court to seek injunctive relief to prevent the Board meeting which was scheduled for 15 January 2010 from taking place. Immobilien I and Immobilien II furthermore started proceedings against TAL, TSF and a number of persons claiming damages arising out of a series of omissions, breaches, defaults, misrepresentations, deceit, concealment and harmful conduct ("manoeuvres dolosives"). SAMC applied by way of petition before the Bankruptcy Court for the winding up of TSF and the appointment of a provisional liquidator.

The Judge of the Bankruptcy Court took the view that the facts and circumstances of the cases called for a determination of the Supreme Court, pursuant to section 5 of the IAA. It is not clear whether he was prompted by the existence of the arbitration clause

in the agreements between the parties. Referral to the Supreme Court meant in the circumstances, to all intents and purposes, to the special jurisdiction of the Supreme Court pursuant to section 42 of the IAA.

The Supreme Court felt that it had to consider and determine the referral and its effect on the suits pending before the Bankruptcy Court and other Mauritian Courts. It first heard arguments of Counsel on the substantive issues regarding the effect of the referral under section 5 of the IAA, before it dawned upon the Court that the one fundamental question that was begging attention, was the very applicability of the IAA.

Effect of the Referral on the Pending Cases

Counsel for TAL submitted that the referral to the jurisdiction of the Supreme Court by the Judge of the Bankruptcy Court who was hearing the two cases (the winding up petition and the application for the appointment of a provisional liquidator) puts automatically on hold those two cases in favour of the arbitration proceedings which incidentally were taking place in Singapore under the auspices of the Singapore International Arbitration Centre. He argued that the disputes underlying those two Mauritian cases were the very ones before the Arbitral Tribunal in Singapore, and that section 5(4) of IAA would demand that the winding up application and the appointment of liquidator should be referred

for determination to the Arbitral Tribunal. To give an aura of "*ordre public*" to those applications and therefore maintaining the jurisdiction of the national Courts would defeat the purpose of the IAA and frustrate both the sovereign will of the Mauritius Parliament and the expectations of the international commercial community. He felt that the issues in the winding up matter fell squarely within the dispute resolution clause where the arbitrator has been given competence, and for that reason the applications for winding up and appointment of liquidator should be left to the Arbitral Tribunal and not to the Bankruptcy Court.

TAL Counsel pressed for the transfer of the Mauritius cases, which include the winding up application, to the Singapore Arbitral Tribunal, instead of a stay of action, though he expressed the view that the Court had power to stay winding up orders[4]. He emphasised the nature of the powers of the 3-Judge panel with regard to arbitration making reference to certain foreign judgments[5].

In reply, Counsel for SAMC submitted that, while the arbitration proceedings in Singapore could proceed unimpeded, so should both cases before the Bankruptcy Court. He pointed out that the issues before the Tribunal are not the same as in the application for winding up and the appointment of the liquidator. He denied that the existence of an arbitration clause or the commencement of proceedings in arbitration operate as an automatic stay of the

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[4] He quoted: *Gaya Sugar Mills Ltd, Re,* [1950] 20 Com Cases 151, 154-156 (Pat); 1955 (3) BLJR 79; *Rainbow Insurance Co Ltd v Financial Services Commission & Anor* [2010] SCJ 351.

[5] *Bremer Vulkan SChiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] 2 WLR 141 (no inherent power in the courts to supervise the conduct of arbitrators); *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 2 WLR 262, [1993] AC 334 (scope and power of courts to grant interim relief in matter related to arbitration); *Taylor & Anor v Lawrence* [2002] EWCA Civ 90 (objectivity in approach).

cases before the Mauritian Courts. Relying on the strength of the grounds for winding up, he argued that SAMC had a statutory right under the laws of Mauritius, particularly the Insolvency Act, "to present a winding up petition … and the arbitration clause in the agreement did not restrict or exclude (SAMC) from exercising this right", quoting the Singaporean decision in *Four Pillars Enterprises Co. Ltd v. Beiersdorf Aktiengesellschaft* [1999] SECA 11. The laws on insolvency were mandatory and "supersede the otherwise applicable provisions of the relevant arbitration law"[6].

SAMC Counsel further pressed that the issue was not one of competing jurisdictions: winding up is exclusively within the jurisdiction of the Courts and beyond an arbitrator's competence[7]. Hence SAMC counsel concluded that the arbitration proceedings in Singapore and the winding up proceedings in Mauritius could run in parallel, and there was no reason to stay the Mauritius proceedings[8].

Applicability of the IAA

In the heat of the debates on the prevalence or otherwise of national laws of insolvency over private arbitration agreements, the Supreme Court called the attention of Counsel to a down-to-earth question: Does the IAA (prior to the amendments of 2013) find its application to the facts of the case?
This question sent back to section 3 of the IAA (as originally enacted),

[6] Mistelis and Lew in Pervasive Problems, paragraphs 18 – 20, in International Arbitration, Kluwer Law.

[7] *Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170; *Haryana Telecom Ltd v Sterlite Industries (India) Ltd* AIR [1999] SC 2354.

[8] *Re Jade Union Investment Ltd* [2003] HCCW 400/2003.

which deals with the application of the IAA. From an elaborate reading of the section, the 3-Judge panel concluded that it provides for a number of elements referred to as: (1) a *commencement test*, (2) a *parties test*, (3) an *international arbitration test* and, where applicable, (4) a *Global Business Licence ("**GBL**") company test*[9].

The Court found no difficulty in concluding that the *commencement test* was satisfied under the then section 3(1)(b) which stated that the IAA applies to arbitrations initiated on or after its commencement under an arbitration agreement whenever made. In the present case, the arbitration was initiated in May 2010, whereas the IAA came into force in January 2009.

The referral also passed the *parties test* in that the parties to the arbitration agreement had, at the time of the conclusion of that agreement, their place of business in different States, as described in the then section 3(2)(b)(i)[10].

The Court heard arguments on the *GBL company test and international arbitration test*.

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[9] Section 3 of the original IAA has been drastically recast by the Amending Act in 2013. The "commencement test" is now in a distinct section 3 under the heading "Temporal application"; the "parties test" and the "international arbitration test" is now captured under the definition of "international arbitration" in section 2 of the IAA; and the "Global Business Licence company test" has been reworded in a separate section 3D of the IAA.

[10] This section is now encompassed in the Interpretation section (section 2) of the IAA which provides that international arbitration includes *"any arbitration where the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business of different States"*

It was argued that under the former section 3(6)[11], the IAA will apply to a GBL company in two ways:

(a) optionally where the shareholders may determine that any dispute concerning the constitution of the company or relating to the company shall be referred to arbitration under the IAA; and

(b) mandatorily, where notwithstanding any agreement to the contrary, the juridical seat of any arbitration under this subsection shall be Mauritius.

To the extent that the then section 3(6)(b) was a mandatory provision with respect to a GBL company, the question which arose was whether there had been compliance with that subsection when a GBL company had chosen a juridical seat other than that imposed by the IAA. The Agreement containing the arbitration clause was dated 29 April 2008 and the IAA came into force on 1 January 2009. Accordingly, it would be oppressive, if with respect to the choice of their juridical seat of arbitration, one were to impose upon the two parties such a post-contractual compliance. There could not be a retrospective application of this section in the absence of any express provision to that effect.

The case however failed under the *international arbitration test* under former section 3(1)(c)(i), which the Judges interpreted as specifically providing that the IAA applied solely to international

[11] Now section 3D of the IAA

arbitrations as defined in its then subsection 2[12]. Relying solely on sub-paragraph (i) of section 3(1)(c), the Court remarked that one condition that the legislator had imposed was that the juridical seat of the arbitration should be Mauritius. The Court noted that in the present case, the juridical seat provided in the dispute resolution clause was Singapore. For that reason, the Court found[13] that since the case did not fall within the scope of the IAA, section 5 could not be invoked for a transfer of dispute to arbitration to a foreign seat.

In concluding its analysis in respect to the applicability of the IAA, the Court stated that since the case failed under the *International Arbitration* test and the then section 3(6) was not applicable, section 5 of the IAA could not, therefore, be invoked for a transfer of dispute to arbitration to a foreign seat.

Special Features of the IAA

The 3-Judge panel took the opportunity to highlight the special features of the new legislation. They observed that the IAA "addresses the negative impact of the doctrine of competence-competence by an imaginative device of up-front court determination. As such, it opts for an early intervention by the Courts on whether the dispute shall be determined before the courts or the arbitrator. Power to make that early intervention is conferred upon 3 Judges of the Supreme Court. By restricting the

[12] Now section 3A of the IAA

[13] The Court did not make any distinction between the sub-paragraph (i) which is meant to have general application and the exception laid down in sub-paragraph (ii) which sets out the few exceptions like applications for Interim Measures or for determination of threshold issues. It is arguable that the referral being under section 5 of IAA, it does not require that the juridical seat of the arbitration to be in Mauritius.

scope of such early judicial intervention, it enables the arbitrator to decide all issues within his remit so long as the fundamental questions of rule of law is not compromised. The 3-Judge Court acts as such as a screening mechanism. It decides on a *prima facie* basis whether there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed. The result is that there operates an automatic transfer to the arbitrator with a minimum of intervention by the court by a generous screening mechanism".

The philosophy of the new Mauritian international arbitration regime was equally commented:

> "The objective is to ensure that any international dispute is given a quick and economical dispatch by the system of placing party autonomy in the agreement as the priority subject to the fundamental parameters of the law. Litigation and arbitration, therefore, do not fight for turf but play on the part reserved for each. It is with this end in view that a special court is established under section 42 comprising 3 Judges of the Supreme Court and its scope and jurisdiction is delimited and circumscribed in section 5 of the Act".

Jurisdiction of the 3 Judge Court

The Judges drew attention to the fact that the statutory jurisdiction of the specially created Court is limited to deciding a "contention." Such contention should arise between the parties to an action before a Court. They noted that in the present case there was no direct contention that arose between the parties as such. This Court was seized by a reference by the Judge of the Bankruptcy Court *proprio motu*[14]. However the parties had already submitted to arbitration. The contention, therefore, was prompted by the Bankruptcy Court, following an appeal against a decision of an interlocutory nature. The special bench of the Supreme Court under section 5 was called only to determine a contention between the parties: namely, as to which route needs to be taken - the litigation route or the arbitration route - with a clear criterion laid down for determination. No power was vested by the legislator in a Court to refer a matter proprio motu where the parties had no inter-partes contention. Only live contentions should come before this special jurisdiction of the Supreme Court. Parties were in the circumstances before the Arbitrator. By that fact alone, the jurisdiction of this Court had been taken away.

The Supreme Court found that it was crucial to make the following observation with respect to the exercise of the special jurisdiction of the Supreme Court under section 42 of the IAA. Any Court

[14] On its own initiative

should "automatically transfer the action to the Supreme Court" pursuant to section 5(1) 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 on the substance of the dispute.

Decision

The Court held that it could not intervene on the referral, as the matter referred did not fall under the definition of international arbitration under the IAA, which applies solely to international arbitration whose juridical seat is in Mauritius[15]. A mandatory juridical seat in Mauritius could not be attributed to the agreement as it predates the coming into force of the IAA, the parties having agreed to Singapore being the juridical seat. The Court observed obiter that only a "contention" between partie s could be referred under section 5 of the IAA.

The Court therefore declined to intervene in this matter and left it to the Bankruptcy Court to decide the outcome of a matter with which it has been seized under the Insolvency Act.

[15] See footnote 13 above.

A Final Note

It is to be noted that this matter was heard before the enactment of the Amending Act which considerably restructure the numbering of section 3 of the IAA to make it more in line with the Amended Model Law, with a distinction being clearly drawn between preliminary provisions and provisions defining the scope of the IAA. The changes are purely structural, which do not affect the meaning or effect of the relevant provisions.

The new section 43 of the IAA (as amended by the Amending Act) also put in place a system of 6 Designated Judges to hear all international arbitration matters in Mauritius, thus ensuring that all applications under the IAA or the Foreign Arbitral Awards Act are heard by specialist Judges.

KOMPETENZ-KOMPETENZ

KOMPETENZ-KOMPETENZ PRINCIPLE

Section 20(1) of the IAA confirms the power of the Arbitral Tribunal to decide on its own jurisdiction (the doctrine of kompetenz-kompetenz) by providing that *"an arbitral tribunal may rule on its own jurisdiction, including on an objection with respect to the existence or validity of the arbitration agreement"*. What the IAA does not say is that the national court should automatically turn down any challenge to the existence or validity of an arbitration agreement. Then the testy question arises as to the circumstances in which the Supreme Court would be justified in making its own determination without referral to the Arbitral Tribunal. The two cases of *Mall of Mont Choisy and UBS AG* examined below shed some light on the issue with some subtle nuances.

An arbitration clause, which forms part of a contract, is to be treated as an agreement independent of the other terms of the contract. In the event that an Arbitral Tribunal decides that the contract is null and void, the arbitration clause contained in the contract may remain valid[16].

Unless the Arbitral Tribunal considers the delay justified[17], a plea challenging the jurisdiction of the Arbitral Tribunal should be raised no later than in the submission of the statement of defence[18] and a plea that the Arbitral Tribunal is exceeding the scope of its authority should be raised as soon as the issue arises during the arbitral proceedings[19].

[16] Section 20(2) of the IAA

[17] Section 20(5) of the IAA

[18] Section 20(3)(a)

[19] Section 20(4)

It is to be noted that a party should not be precluded from raising a plea challenging the jurisdiction of the Arbitral Tribunal by the fact that such party had appointed, or participated in the appointment of an arbitrator[20].

Section 20(7) of the IAA provides that where the Arbitral Tribunal rules on a plea challenging its jurisdiction as a preliminary question, any party may, within 30 days after having received notice of that ruling, request the Supreme Court to decide the matter.

Furthermore section 42(1) of the IAA provides that for the purpose of such an application, the Court shall be constituted by a panel of 3 Designated Judges. The role of the Supreme Court, upon a request under section 20(7), is therefore to determine the question of jurisdiction. Although it may take into account the ruling of the Arbitral Tribunal and express its agreement or disagreement with any views expressed therein, it is not sitting on appeal as such against the said ruling, such that the normal appellate perspective focussing on errors and misdirection on the part of the Arbitral Tribunal is not in point.

Kompetenz-kompetenz is a threshold issue very much relevant to applications before the Designated Judges under section 5 of the IAA.

[20] Section 20(3)(b)

Mall of Mont Choisy Ltd vs Pick 'N' Pay Retailers Proprietary Limited & Ors [2015] SCJ 10

Background Presentation

By way of plaint with summons, Mall of Mont Choisy Limited (the Plaintiff) sued the three defendant companies before the Commercial Court for alleged breach of contract.

Mont Choisy Mall Limited and Pick 'N Pay Retailers (Proprietary) Limited (Defendant No.1) entered into an agreement to develop and lease (**"ADL"**) a supermarket in a shopping centre in the north of Mauritius. After the signature of the ADL, the promoters caused the Plaintiff to be incorporated and the latter took over the commitments of Mont Choisy Mall Limited. It was not disputed that the Plaintiff would be deemed a party to the ADL and to be in effect the lessor. The ADL provided for the signature of a lease between the parties and that until such signature, the ADL would serve as a recordal of the salient terms of the lease agreement. It also provided that the lease agreement would be used as the document forming the basis of recording of the agreement reached between the lessor and lessee in terms of letting of the supermarket. The lease agreement would govern the relationship between the parties from the commencement date and would be signed once the supermarket started trading. The ADL further provided that the ADL and any matter connected thereto would in all respects

be governed by the laws of Mauritius and the Courts of Mauritius would have exclusive jurisdiction. There was no arbitration clause in the ADL.

Later on, in an email with the heading "Mont Choisy Lease Agreement", Defendant No. 1 attached a draft lease agreement for the perusal of the Plaintiff and requested that the lease agreement be duly signed by all parties swiftly in order for Red Apple Retail Company Limited (Defendant No.2) to obtain a trading licence. The Plaintiff contented that whilst the draft lease agreement was still under consideration, it was urged to sign the draft for the sole purpose of assisting the Defendant no. 2 to obtain its trading licence. Accordingly, in a further contention of the Plaintiff, the lease agreement containing the arbitration clause, which was signed by only one of its directors and was undated, was not a formal lease agreement. Hence the stand of the Plaintiff was that the parties were not bound by a valid arbitration clause.

Referral under section 5 of the IAA

It was contended by the Defendant companies that the Plaintiff was bound by the arbitration clause. They therefore moved the Commercial Court for the case to be referred to the Designated Judges of the Supreme Court pursuant to section 5(1) of the IAA. In fact, relying on that arbitration clause, the Defendant companies seized the Permanent Commercial Arbitration Court

of the Mauritius Chamber of Commerce and put in a claim for damages against Plaintiff. The motion for referral was granted by the Commercial Court after the Plaintiff informed the Court that it had no objection to the motion for the sake of celerity.

Before examining the section 5 claim, the three Designated Judges of the Supreme Court made observations in respect to the non-compliance of the parties with Rule 13(1) and (2) of the IA Rules:

(1) Where a party to an action before a referring Court contends that the action is the subject of an arbitration agreement, it shall make an application ("a Section 5 claim") to that effect to that Court, supported by written evidence in the form of one or more affidavits or witness statements, together with any supporting documents.

(2) Where the application complies with paragraph (1) and section 5(1) of the [IAA], the referring Court shall immediately stay its proceedings and notify the Chief Justice who shall promptly constitute the adjudicating Court.

The objective behind the procedural rules is clear: to bring by way of affidavits and witness statements all relevant and material facts and points in law concerning the application before the referring Court and also to set out the case of the applying party for the benefit of the adjudicating Court.

The application in the circumstances did not contain any affidavit in support. To remedy this omission and the parties having no objection, the Court requested that affidavit evidence together with supporting documents be put in so as to enable the Court to properly adjudicate on the matter. The Court however made ample emphasis that the procedure set out in Rule 13(1) and (2) must be adhered to, failing which such application may not be entertained.

Validity of the arbitration clause

It follows from section 5(2) that on an application for referral to arbitration, the Court will grant the application where the parties have entered into an arbitration agreement, the validity and applicability of which are not challenged. Where a party objects to the referral and challenges the validity and applicability of an arbitration agreement, the question arises as to the test that the Court should apply in deciding the issue.

The Court proceeded to an analysis of the relevant case law and textbook writers which revealed the existence of two opposing schools of thought as regards how the Court should approach such question and the degree of scrutiny it should exercise. The Court referred to the Supreme Court of Canada which sets out and examines the two schools of thought in the case of *Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin [(2007) 2 SCR 801*[21]*]*.

[21] At paragraphs 68 to 88

The first school, it is said, *"favours an interventionist judicial approach to questions relating to the jurisdiction of arbitrators"*. Since the Court has the power to review the Arbitrator's decision regarding his or her jurisdiction, the argument goes that to avoid duplication of proceedings, the question of validity or applicability of the arbitration agreement should be within the jurisdiction of the Court to decide once and for all.

On the other hand *"the other school of thought gives precedence to the arbitration process. It is concerned with preventing delaying tactics and is associated with the principle commonly known as the 'kompetenz-kompetenz' principle. According to it, arbitrators should be allowed to exercise their power to rule first on their own jurisdiction".* The Supreme Court of Canada noted on this question that *"despite the lack of consensus in the international community, the prima facie analysis test is gaining acceptance and has the support of many authors"*, i.e a non-interventionist judicial approach which is deemed to be favoured in most jurisdictions.

Section 5(2) states unequivocally that the Court should examine the arbitration agreement on a *prima facie* basis. It is therefore clear that the legislator has opted for a non-interventionist approach on the part of the national court. An extensive reading of the *Travaux Préparatoires*[22] to the IAA comforted the Court with that approach.

[22] In particular paragraphs 39, 40(c), 40(d), 41, 42 and 43

> “In deciding whether it should rule on the existence or validity of an arbitration agreement, the Court must be satisfied that “there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed”.

It was felt that the “very strong probability” test is a very high one indeed, and that it would generally only be satisfied if the challenge to the arbitrator’s jurisdiction is basely solely on a question of law. The Court quoted in approval the case of *Dell Computers* (supra) which states that:

“If the challenge requires the production and review of factual evidence, the Court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the Court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence on record. Before departing from the general rule of referral, the Court must be satisfied that the challenge to the arbitrator’s jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.”

As an application under section 5 is supported by affidavit evidence and is determined by the adjudicating Court on the strength of the

affidavit evidence, such affidavit evidence may prove inadequate to decide a real issue of validity and/or applicability of an arbitration agreement. The Court took the view that in such cases involving a factual issue as to the validity of an arbitration agreement, the issue should be decided by the Arbitrator whose decision is subject to review by the national Court.

Decision

It was therefore held that, as the challenge was based on factual issues, the Arbitral Tribunal should be the one determining whether in the circumstances the parties were bound by the arbitration clause. On that basis the matter was referred to the Arbitral Tribunal and the proceedings before the Commercial Court were stayed.

UBS AG vs Mauritius Commercial Bank [2016] SCJ 43

Background information

In an action entered by the Mauritius Commercial Bank (the Respondent) against the UBS AG (the Applicant) before the Commercial Court, the Applicant made a Section 5 claim for stay of Court proceedings in favour of arbitration, contending that the action entered by the Respondent was the subject of an arbitration agreement. Consequently, pursuant to section 5(1) of the IAA,

the Commercial Court made an order to transfer the matter to the Supreme Court before a bench of three Designated Judges to determine whether the parties should be referred to arbitration[23].

The Applicant contended that the Respondent's action before the Commercial Court was the subject of an arbitration agreement contained in a Facility Agreement and should therefore be referred to arbitration.

The Respondent's case was that the dispute was not under the Facility Agreement but is in respect of an undertaking given by the applicant in a Side Letter, which was "outside of", and distinct from the Facility Agreement and the arbitration clause in the Facility Agreement did not extend to the dispute between the parties under the Side Letter. The other ground of the Respondent was to the effect that the arbitration clause under the Facility Agreement was "inoperative", and "manifestly inapplicable".

The prima facie issue

The degree of examination allowed to the Court is a *prima facie* one only, where the Court will act on the affidavits or witness statements placed before it. The principle is that the Court must refer the matter to arbitration, that is, it must give the Arbitrator the opportunity to decide the jurisdictional issue first, unless the party who is objecting to the matter being referred to arbitration

[23] See Mauritius Commercial Bank vs UBS AG (2015 SCJ 307)

discharges the burden, which has been placed squarely on him, by showing that there is a very strong probability of the arbitration agreement being null and void, inoperative or incapable of being performed, in which case the Court will then have to proceed to finally determine whether the arbitration agreement is in fact so. The burden put in this way means that the hurdle has been set high since the objecting party has to satisfy, on a *prima facie* basis, the very high threshold imposed by the "very strong probability" standard.

As previously remarked in the *Mall of Mont Choisy* decision (supra), the "very strong probability" test is an onerous one. The Court in *Mall of Mont Choisy* however indicated, while referring to the Canadian case of *Dell Computers*, that the test may be satisfied when the challenge to the Arbitrator's jurisdiction is based "solely on a question of law".

This point was taken by the Applicant, which stated that the Respondent had raised issues of fact or mixed issues of fact and law and therefore, following the approach in *Mall of Mont Choisy*, the Supreme Court was not the proper forum as the Respondent's challenge was not based solely on a question of law.

The Court however emphasised that the test provided by *Dell Computers* is not provided by Mauritian Law. The "very strong probability" test is specifically provided under section 5(2) of the

IAA, which is different from the Dell Computers test and which the Court must apply when dealing with Section 5 claims.

It was thus held that a party could, in a variety of scenarios, rely on the facts and the law to argue that the arbitration agreement is null and void, inoperative or incapable of being performed. The *prima facie "very strong probability"* test under section 5 (2) has to be satisfied irrespective of whether the party's opposition to referral is based purely on a question of law or whether it is based on factual evidence or a mixture of law and fact, as Mauritian Law does not make any such distinction.

The issue of nullity, inoperativeness or incapability of being performed

The Court took the view that in light of the heavy burden placed on a party to satisfy the initial stage on a *prima facie* basis, only in very rare cases will the Court have to finally decide the issue whether the arbitration agreement is actually null and void, inoperative or incapable of being performed.

Indeed if at that final stage the Court reaches the conclusion that the arbitration agreement is in fact null and void, inoperative or incapable of being performed, it will then not refer the matter to arbitration and will return the action to the competent Court to be proceeded with[24], after discharging the stay order it had made under Rule 13(2). If on the other hand, the Court decides that the

[24] As per section 5(3) of the Act

arbitration agreement is not null and void, inoperative or incapable of being performed, it will, just as where the respondent has not discharged the *prima facie* burden at the first stage, refer the parties to arbitration.

Moreover the Court had to consider whether "manifestly inapplicable" and "inoperative" bear the same meaning with regard to referral to arbitration. Section 5(2) has retained the phrase "null and void, inoperative or incapable of being performed" from Article 8 of the *Model Law*, which also appears in Article II (3) of the New York Convention. However, under these texts, the condition of "applicability" of the arbitration agreement to the subject matter of the action is one of the conditions that has to be satisfied for referral to arbitration. While considering the general trend in the Model Law jurisdictions[25], the Court took the view that the phrase "null and void, inoperative or incapable of being performed" would not encompass "inapplicability" of the arbitration agreement to the dispute.

The Court stated that a clause is "inoperative" when it is so rendered either by inherent or acquired procedural defect such that the clause itself cannot operate or take effect. It does not have the same meaning as where a clause is "inapplicable", that is "not relevant or appropriate" to the action because the dispute does not come within the ambit of the clause. Similarly, a clause is "incapable of being performed" when there is a failing or deficiency in itself

[25] Such as *Jean Charbonneau v. Les Industries A.C. Davie Inc, 14 March 1989 (Clout Case 66)* where under the arbitration clause one of the parties to the dispute had to act as arbitrator, the arbitration clause were deemed to be "inoperative"; or *Bayerisches Oberstes Landesgericht*, Germany, 4 Z SchH 13/99, 28 February 2000 (Clout Case 557) where the Court found it was impossible to determine the competent tribunal and declared the arbitration proceedings inadmissible.

that prevents it from being executed. There tends to be some overlapping between the ground that the clause is "incapable of being performed" and the ground that it is "inoperative", but the Court took the view that they do not mean that the clause is "inapplicable" to the action. The Court considered that it would be inappropriate to stretch the meaning of these widely adopted terms in this sense. The Court therefore held that the term "null and void, inoperative or incapable of being performed" in section 5 (2) did not cover an arbitration agreement which was "inapplicable" to the dispute, subject matter of the action.

The issue of examining whether the action is subject to an arbitration agreement

With regards to the question whether the cause of action was subject to an arbitration agreement, the Court pointed out that it was not specifically provided under section 5 (2) of the IAA how, if at all, the adjudicating Court should approach such issue.

The Court took the view that it could not have been the intention of the legislator within the scheme of the IAA that once the Applicant has contended under section 5 (1) that the action is the subject of an arbitration agreement, the Court will invariably, in all circumstances, have to refer the parties to arbitration. For instance, and despite the Court's interpretation of section 5(2) of the IAA, the Designated Judges considered that where it is shown on a *prima*

facie basis that there is a very strong probability of the arbitration agreement being inapplicable to the dispute in question, the Court would proceed to the final determination as to whether the arbitration agreement is applicable or not.

The Court therefore held that where a respondent challenged an applicant's contention that the action is the subject of an arbitration agreement, the Court would not proceed to examine the challenge unless the respondent showed, on a *prima facie* basis, from the material placed before the Court at the initial stage, that there is a very strong probability of the arbitration agreement being inapplicable to the dispute in question, subject matter of the action.

Decision

The first contention of the Respondent was that the arbitration clause found in the Facility Agreement was "manifestly inapplicable" to the dispute to which the action related. To that, the Court found that the Respondent had not shown on a *prima facie* basis that there is a very strong probability of the arbitration agreement being inapplicable to the dispute.

Regarding the Respondent's second contention that the arbitration agreement cannot be extended to the Side Letter, the Court held that such issue would, in the circumstances, be best left to the

arbitrator, whose decision would be subject to review by the curial court of Singapore as the seat of the arbitration was Singapore.

The Court further found that the Respondent had not shown on a *prima facie* basis under section 5(2) of the IAA that there was a very strong probability of the arbitration agreement being null and void, whether for lack of consent or otherwise. It had also not been shown either on a *prima facie* basis that there was a very strong probability of the arbitration agreement being inoperative or incapable of being performed.

Having reached the above conclusions, the Court referred the parties to arbitration pursuant to section 5(2) of the IAA.

Liberalis Limited and Anor v Golf Development International Holdings Ltd and Others [2013] SCJ 211

Background information

This was an application made under section 20(7) of the IAA for an order setting aside the ruling of an Arbitrator and declaring the arbitration agreement null and void.

The Applicants and the Respondents executed a *"compromis"*[26] and referred to arbitration certain disputes in relation to an Integrated Resorts Scheme ("**IRS**") real-estate project. The Applicant later

[26] Terms of reference

gave notice to the Arbitrator of a motion that in effect challenged his jurisdiction.

After hearing evidence adduced in relation to the motion and considering the respective submissions, the arbitrator held that the arbitration agreement was not null and void and that the arbitration proceedings should be continued. He subsequently granted a motion to stay proceedings before him pending the Court application.

The contention of the Applicants was in essence to the effect that the Respondent No.1 was under a provisional order of liquidation and as such it had no capacity to enter into an arbitration agreement. Furthermore, to the extent that such state of affairs had not been revealed to the Applicant, the latter's consent to the arbitration agreement had been vitiated.

Respondents Nos. 1 and 2 resisted the Court application whereas the Respondent No. 3 supported it.

Validity of the arbitration agreement

The testimony of the expert witness on South African law (which was the applicable law in the circumstances) was crucial in determining whether the defect in the representation of the Respondent No.1 at the time of the signature of the arbitration agreement was cured

when its provisional liquidation was discharged and the agreement was subsequently ratified by a resolution of its board of directors on 16 October 2012.

The expert witness testified that when a provisional liquidation was discharged, it was as if the liquidation never happened; the company which was no longer in provisional liquidation was entitled to ratify any decision by anybody on behalf of the company while it was in provisional liquidation; the resolution of the board of directors of the Respondent No. 1 on 16 October 2012 ratified the acts done by its representatives during the provisional liquidation, hence validating those acts; and under the laws of South Africa, the arbitration agreement was valid and binding following the ratification by the board resolution.

In light of the evidence of the expert witness on the South African insolvency law, the Court held that the arbitration agreement was lawfully ratified by the resolution of the board of directors.

Another contention of Counsel for the Applicants was that the Applicants' consent to the arbitration agreement had been vitiated by *"dol"*[27]. However, the Court considered that in light of the clear findings of fact of the arbitrator believing the testimony of the Respondent No.1's representative and accepting his explanations for not disclosing at the relevant time that the Respondent No.1 was under provisional liquidation, the contention of Counsel for the Applicants could not hold. Indeed in an appeal, it is a well-established principle that findings of fact

[27] The concept of "dol" is broadly the equivalent of fraudulent misrepresentation.

are not lightly interfered with. Accordingly the Court considered that this principle should apply *"a fortiori"* in an application like this one.

Decision

The Court maintained the ruling of the arbitrator that the arbitration agreement was not null and void and set aside the application.

Commercial SA v Assuranceforeningen SKULD (Gjensidig) [2011] SCJ 350

Background information

Assuranceforeningen SKULD (Gjensidig) (the "**Respondent**") made at first instance an ex parte application for a "saisie conservatoire"[28] of a shipping vessel flying the Panamanian flag, berthed at Port Louis harbour in Mauritius.

Commercial SA (the "**Applicant**") thereafter made this application challenging the jurisdiction of the Mauritian Court (including the Honourable Judge sitting in Chambers, as it was the case there) and for the release of the seized vessel.

What was paradoxical in the circumstances was that the line of argument on which the application was based would, from the outset, preclude the Honourable Judge sitting in Chambers from exercising jurisdiction.

[28] A French law notion akin to a freezing order under the English law.

The parties' case

It was essentially the Applicant's contention that the Judge in Chambers in Mauritius did not have jurisdiction on the basis that the contractual relations between the Applicant and the Respondent were governed by Statutes and Rules containing an arbitration clause, which clause stated that any disputes should be decided by arbitration in Norway.

It was furthermore argued that all parties involved in the matter were foreign companies with no connection with Mauritius and the vessel was sailing under the Panamanian flag, therefore the Judge in Chambers had no authority to issue the "saisie conservatoire".

On the other hand, the Respondent contended that the basis of its application for the "saisie conservatoire" of the vessel was the failure by the Applicant to respond to the reminders sent by the Respondent to settle the debts. As such, the arbitration clause did not find its application in the circumstances as the precondition for the clause to be invoked had not been established.

The issue of jurisdiction

The submission of the Applicant that the Judge in Chambers did not have jurisdiction to issue a "saisie conservatoire" was rejected on the basis that the object of the "saisie conservatoire" was found to be within the territorial jurisdiction of a Judge exercising jurisdiction by virtue of the laws of Mauritius.

The Judge in Chambers remarked that a "saisie conservatoire" is in effect merely a conservatory measure designed to preserve an asset pending a determination of an eventual claim between the parties. The Judge in Chambers was not being called to adjudicate upon the merits of the case, which would eventually be decided before the proper forum. Therefore whether there was a dispute or not between the parties, and whether that dispute ought to be referred to arbitration or not, is irrelevant for the purpose of an application for a "saisie conservatoire".

Lastly, the fact that the companies involved were foreign companies, that the contract was entered into abroad under foreign law and that the ship was flying a foreign flag did not impede the exercise of the Judge in Chamber's jurisdiction.

Decision

The preliminary objections with regards to the jurisdiction were therefore set aside and the case fixed to be heard on its merits.

This case provides a useful reminder that the presence of an arbitration clause does not necessarily eviscerate all powers of the national court or a judge. The jurisdiction of the learned Judge was grounded on the very presence of the ship in Port Louis harbour. Strikingly, the interim measure provision of section 23 of IAA was not raised in argument before the Judge in Chambers, nor was referral to the Judges under section 43 of IAA canvassed.

INTERIM MEASURES

INTERIM MEASURES

Section 21 of the IAA gives the Arbitral Tribunal the power to order interim measures and to issue a variety of orders to modify, suspend or terminate an interim measure.

Section 22 of the IAA also provides for the recognition and enforcement of interim measures by application to the Supreme Court, regardless of the country in which the interim measure was issued.

Further, pursuant to section 6 of the IAA, a party to an arbitration agreement may, either before or during arbitral proceedings, request from the Supreme Court or a court in a foreign state, an interim measure of protection in support of arbitration.

An application under section 6 will be determined in accordance with section 23 of the IAA which deals with the power of the Supreme Court to issue interim measures. Unless the parties agree otherwise, the Supreme Court will exercise its power to issue an interim measure to the extent that section 23 of the IAA permits, that is, in accordance with subsections (2A) to (6). The Supreme Court would act only as provided by section 23(5), that is, only if or to the extent that the Arbitral Tribunal had no power or was unable for the time being to act effectively.

Where there is urgency, section 23(3) of the IAA permits the Court, on an ex parte application of a party or proposed party to the arbitral proceedings, to make such order as it thinks necessary. Pursuant to section 23(4), where there is no urgency, the Court will only act where the Applicant has given notice to the other parties and to the Arbitral Tribunal, and with the permission of the Arbitral Tribunal or the written agreement of the other parties.

In order to facilitate the urgent hearing of interim measures application in international arbitration, the IA Rules provides that such application should be heard by a single Judge in Chambers (who is a Designated Judge) in the first instance and then made returnable before a panel of 3 Designated Judges[29].

Barnwell Enterprises Ltd & Ors v ECP Africa FII Investments LCC [2013] SCJ 327

Background information

The matter came before the Supreme Court for the Respondent and Co-Respondent to show cause why an interim order preventing the Respondent from enforcing or exercising any rights under a Share Pledge Agreement and/or a Notice of Enforcement should not be made interlocutory, enlarged, discharged or otherwise dealt with, pending the final determination of the arbitration proceedings before the London Court of International Arbitration.

[29] Rule 14 of the IAA Rules

Scope of intervention of the Supreme Court

It was the Applicant's case that the Respondent was going against an undertaking it had given before the Arbitral Tribunal, thus defeating the very *raison d'être* of the arbitral proceedings and accordingly there was sufficient risk and urgency to protect the integrity of the arbitration proceedings.

However, one of the grounds raised by the Respondent to move for the discharge of the interim order was that the Arbitral Tribunal had already rejected an application for Interim and conservatory measures made by the Applicant to prevent the Respondent from exercising its rights under the Share Pledge Agreement.

It was obvious from the evidence adduced by both parties that the Arbitral Tribunal had been fully seized on the issues that arose in the application before the Supreme Court. The Court stressed that it could only act if or to the extent that the Arbitral Tribunal has no power or is unable for the time being to act effectively. Yet the Court was not faced with a situation where the Arbitral Tribunal had not been constituted or for some reason or other was not able to act effectively, or did not have the power of a Judge or Court to issue certain specific orders.

On that basis, the Court concurred with the Respondent's submission that by the Applicants' own actions, the Arbitral Tribunal had already

been seized with the issues arising in the application before the Supreme Court. However the Court took the view that there was a new event, namely the service of the Notice of Enforcement on the Applicants, which the Applicants had not brought to the attention of the Arbitral Tribunal.

The Court, having regard to section 23(5) of the IAA, therefore held that the interim measure granted should be maintained until such time as necessary, in view of the new event of the service of the Enforcement Notice, to allow the Applicants to go to the Arbitral Tribunal itself to seek the interim measure they had requested before this Court.

Decision

The Court accordingly ordered on 26th July 2013 that the interim order be maintained until the 3rd of August 2013, after which date the interim order would automatically lapse, so that the Applicants would have sufficient time to seek redress before the Arbitral Tribunal.

Massilia Limited v Golf Development International Holdings Limited & Ors [2014] SCJ 188

Background information

The Arbitrator stayed arbitration proceedings, while a first application as regards the validity of the arbitration agreement was still pending before the Supreme Court. Before the Court had made its

determination, the Arbitrator ordered the Applicant, Massilia Limited, not to charge, sell and dispose of (specified) portions of land, pending determination of the dispute in the arbitral proceedings or by the Supreme Court.

The present application was made for the above interim measures decided by the arbitrator to be set aside and for the proceedings, held before the Arbitrator in connection with the interim measures, to be declared null and void. The issue was whether the Arbitrator, having ordered a stay of arbitral proceedings, was competent to have subsequently entertained an application for interim measures and to have granted an order preventing the Applicant from charging, selling and disposing of portions of land.

Concurrent jurisdiction

The Applicant argued that the application for interim measure granted by the Arbitrator should have been made to the Supreme Court and not to the Arbitrator.

On this point, the Applicant referred to section 6 of the IAA which states that *"it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the Supreme Court an interim measure of protection"*. The Applicant made further references to section 23(1) (a) which provides that the Supreme Court shall have the same power of issuing an interim

measure in relation to arbitration proceedings as a Judge in Chambers has in relation to Court proceedings in Mauritius.

After making a close examination of the relevant sections of the IAA on the respective jurisdiction of the Court and of the Arbitral Tribunal on the matter of interim measures, the Court found that the Arbitral Tribunal should be the preferred forum to deal with the question of interim measures. In that respect, the Court found apt to quote the following observation from *Pervasive Problems in International Arbitration*, by Loukas Mistelis and Julian Law, QC:

> "The main problem is related to the selection of forum to obtain provisional measures: an arbitral tribunal or a court? In today's world, court assistance to arbitration is still necessary for enhancing effectiveness of arbitration and better distribution of justice. Nonetheless, the arbitral tribunal should be the 'natural forum' for acquiring final as well as provisional remedies. This view supported by most national laws, arbitration rules, and scholarly opinions essentially arises from contracting parties' choice of arbitration as a dispute resolution mechanism."[30]

Section 23(5) of the IAA had all its importance in the light of the present matter as it provides that the Court shall act only if

[30] At paragraph 9-2

or to the extent that the Arbitral Tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. The rationale underlying section 23(5) of the IAA is that the parties having chosen arbitration to resolve their disputes should seek as far as possible interim measures of protection of their rights before the Arbitral Tribunal.

Application of the principle of "functus officio" in arbitral proceedings

Counsel for Respondent No.3 and Respondent No.4 joined in in the submission made on behalf of the Applicant that the arbitrator, having stayed the proceedings pending the determination of the application to the Court on the issue of jurisdiction, was *functus officio* i.e. his authority had lapsed.

Counsel for Respondent No.1 and Respondent No.2 cited the judgment of the High Court of England and Wales in *Five Oceans Salvage Limited v. Wenzhou Timber Group Company* [2011 EWHC 3282], which relied upon the following passages in *Mustill and Boyd's The Law and Practice of Arbitration in England 2nd Edition:*

"When an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be 'functus officio'. This at least,

is the general rule, although it needs qualification in two respects. First, if the award is merely an interim award, the arbitrator still has authority to deal with the matters left over, although he is 'functus officio' as regards matters dealt with in the award. Second, if the award is remitted to the arbitrator by the Court for reconsideration, he has authority to deal with the matters on which the award had been remitted and to make a fresh award."[31]

The Supreme Court concurred: if the arbitrator has made an interim award, he still has authority to deal with matters not covered by the interim award. In this case, it was clear that the Arbitrator had deferred to the jurisdiction of the Supreme Court to decide on the validity of the arbitration agreement and stayed the proceedings. However, when the application for interim measures was raised, it became a live issue again and the arbitrator had jurisdiction to determine it.

Decision

The application was set aside. This case indeed provided ample support to the argument that parties to arbitral proceedings should opt for the Arbitral Tribunal as the preferred forum to deal with the question of interim measures.

[31] At pp 404-405

Amana Middle East Holdings Limited & Anor v Al Ghurair Abdul Aziz Abdullah & Ors [2015] SCJ 401

Background information

Following an ex-parte application made by the Applicants pursuant to section 23 of the IAA an interim order was granted in the following terms:

1) Respondent No. 1 was prohibited and restrained from taking any step or doing or omitting any act or implementing any course of action in relation to Respondents Nos. 5 to 11 pursuant to the power of attorney (the "**POA**") purportedly given to him at the shareholders' meeting of Respondent No.2 held on 25 September 2014;

2) Respondents Nos. 5,6,7,8,9,10 and 11 (the Mauritian subsidiaries) were restrained and prohibited from doing or omitting any course of action in compliance with any exercise of the purported power of attorney given to Respondent No. 1 at the shareholders' meeting of Respondent No.2 held on 25 September 2014.

The interim order was to be in force pending any order which may be made by the Arbitral Tribunal set up for the determination of dispute commenced by Applicants against Respondents Nos. 2 and 3 under the auspices of the Dubai International Arbitration Centre.

Pursuant to section 42(1A) of the IAA, the order was made returnable before the Supreme Court and the Respondents ordered to show cause why the interim order should not be converted into an interlocutory injunction.

The Dispute

The arbitration proceedings in Dubai were contemplated pursuant to an arbitration clause in the memorandum of association of Respondent No.2, a UAE incorporated joint venture company. The dispute which arose among the parties (namely shareholders of Respondent No.2) and which had been referred by the Applicants (being the minority shareholders) to arbitration concerned powers given under a power of attorney by a resolution passed in favour of Respondent No.1 at a shareholders' meeting of Respondent No.2.

It was argued that the resolutions were secured at an alleged lower voting threshold than should lawfully have applied and in defiance of the protest of the Applicants. Under the POA, Respondent No.1 was given wide ranging powers, which would have the effect of usurping all the powers of not only the directors but also the shareholders according to the Applicants. Such powers were also to extend to the subsidiaries companies of Respondent No.2 including the Mauritian subsidiaries. The Applicants submitted that such scope of powers could disrupt, deconstruct and pull down the structures of Respondent No.2 and also of the Mauritian subsidiaries, thereby

harming their interests. Furthermore, the powers, if resorted to, would also destroy the objective of the arbitration proceedings initiated before the Dubai International Centre (the "**DIAC**").

Counsel for Respondent Nos. 1 and 3 submitted that the fear of abuse of the POA was misconceived to the extent that the Mauritian subsidiaries were governed by their boards of directors. It was furthermore contended that there were sufficient safeguards under the Mauritian Companies Act against a usurpation of the powers of the directors.

Significance of Section 23

Section 23 of the IAA deals with the powers of the Supreme Court to issue interim measures. As the Applicant contended section 23 grants to the Court a substantive jurisdiction of supervision in matters of international arbitration, which jurisdiction is not akin to the jurisdiction of the Supreme Court in applications for injunctive relief under section 73 of the Courts Act.

Indeed, whilst section 23(1)(a) is a recall of the powers of the Court to grant injunctive relief in equity and under section 73 of the Courts Act. However, subsection (b) specifically enjoins the Court to have regard to the specific features of international arbitration.

Decision

Having regard to the extensive powers granted under the POA and the dispute that has arisen among the parties, the Court held that the Applicants were justified in apprehending that potential harm may be caused to their interests. In terms of section 23 of the IAA, the matter was one of urgency and had to be attended to pending the effective setting up of the Arbitral Tribunal.

Accordingly, the interim order was made interlocutory, pending a decision by the Arbitral Tribunal.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Mauritius is a signatory to the New York Convention, which it acceded to in 1996. This was subject to a reservation of reciprocity, meaning that Mauritius would only enforce arbitral awards of other countries that also ratified the New York Convention.

The Foreign Arbitral Awards Act incorporates the New York Convention into the domestic law of Mauritius. It provides that the Supreme Court will hear an application under the Foreign Arbitral Awards Act with a right of appeal to the UK Judicial Committee of the Privy Council[32]. Foreign and international arbitral awards governed by the IAA are enforced according to the terms of the Foreign Arbitral Awards Act (as provided by section 40 of the IAA). The reservation of reciprocity initially filed by Mauritius was removed, extending the enforcement of foreign arbitral awards made even in states that are non-signatories to the New York Convention.

Any party wishing to enforce a foreign arbitral award may do so by way of application to the Supreme Court under section 4 of the Foreign Arbitral Awards Act. Any other party wishing to resist an application for enforcement may rely on the grounds set out in Article V of the New York Convention, as reproduced in full in the Schedule (Section 2) of the Foreign Arbitral Awards Act.

[32] Section 42(2) of IAA

The procedural regime applicable for the recognition and enforcement of foreign arbitral awards is governed by Rule 15 of the IA Rules.

The cases examined here show a tantalising interplay between the Foreign Arbitral Awards Act and the IAA against the fading background of the *Code de Procédure Civile*.

Macsteel International Far East Limited v Desbro International Limited [2012] SCJ 26

Background information

This was an application under section 4 of the Foreign Arbitral Awards Act for the recognition and enforcement of a foreign arbitral award delivered by the ICC International Court of Arbitration on 16 December 2010.

At the hearing for the application, the Respondent took the following preliminary objections:

a) "the provisions of the International Arbitration Act and the consequential amendments made by that Act to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act do not apply to the arbitral award";

b) "the 'Court' as constituted under section 42 of the International Arbitration Act has no jurisdiction to entertain the present application which does not concern any matter arising out of an arbitration which was or is subject to that Act"; and

c) "the arbitration referred to in the present application was initiated before the commencement of the International Arbitration Act."

Proper forum

The law governing the recognition and enforcement of foreign arbitral awards was then to be found both in the Mauritian *Code de Procédure Civile*[33] and in the Foreign Arbitral Awards Act which came into force on 15 March 2004. Both enactments vested jurisdiction to hear an application for the recognition and enforcement of a foreign arbitral award in the Supreme Court.

Pursuant to article 1028-2 of the *Code de Procédure Civile*, a foreign award could only be enforced in Mauritius by a decision of the Supreme Court. Furthermore the Supreme Court derived its jurisdiction from the combined effect of sections 2 and 4 of the Foreign Arbitral Awards Act which initially provided that the Supreme Court shall have jurisdiction to entertain any application made under any provision of the Foreign Arbitral Awards Act. However, upon its coming into operation on 1 January 2009, the IAA amended section 2 of the Foreign Arbitral Awards Act

[33] Articles 1028 to 1028-11

and provided that the Supreme Court should be constituted by a panel of 3 Judges.

Consequently, following that amendment, an application for the recognition and enforcement of a foreign arbitral award, which was previously heard by a single judge of the Supreme Court (or more as could be designated by the Chief Justice depending presumably on the complexity of the application and the magnitude of the interests at stake), would as from 01 January 2009 be heard by the Supreme Court constituted by a panel of 3 Judges[34].

This application was made on 21 February 2011 and heard by the Supreme Court constituted by 3 Judges on 03 November 2011, hence after the amendment brought to section 2 of the Foreign Arbitral Awards Act. In the circumstances, the Supreme Court took the view that it was properly constituted to entertain the present application. The Supreme Court acknowledged that the arbitration was initiated following a request made on 24 January 2007 by the Applicant, being before the Foreign Arbitral Awards Act was amended on 01 January 2009, but rejected the contention that as a result the Supreme Court was not properly constituted in the circumstances. The Court stressed that the application was made under the Foreign Arbitral Awards Act and not under the International Arbitration Act, which provides in its section

[34] Section 42 of the International Arbitration Act 2008 (as originally enacted)

3 that its provisions apply only to arbitrations initiated after its commencement. That provision however had no bearing on the Foreign Arbitral Awards Act inasmuch as the reference in section 2 of the Foreign Arbitral Awards Act to section 42 of the IAA was "merely a drafting device".

Decision

The Court held that it is a settled principle that, in the absence of any provision to the contrary, any new law as to procedure has immediate effect and applies to all cases pending before the court irrespective of the date of lodging. The preliminary objections of the Respondent were overruled.

It is to be noted that at the time of the application, the recognition and enforcement of foreign arbitral awards were governed by both the Mauritian *Code de Procédure Civile* and the Foreign Arbitral Awards Act. However, by the enactment of the Amending Act in 2013, the Mauritian *Code de Procédure Civile* no longer applies to international arbitration, but only to domestic arbitration. The only legislation applicable to the recognition and the enforcement of foreign awards is to date the Foreign Arbitral Awards Act supported by the procedure set out in the IA Rules ... without overlooking the "drafting device" in section 42 of the IAA.

Rostruct (Africa) Ltd v Geosond Holding AG [2015] SCJ 307

Background information

This was an application made before three Designated Judges of the Supreme Court pursuant to Rule 15(7) of the IA Rules for the setting aside of certain provisions of a provisional order issued on 27 May 2014 and making executory in Mauritius an award of the Arbitral Tribunal of the Swiss Chambers' Arbitration Institution in Arbitration.

Application for security for costs

As part of the hearing of the application, the Applicant contended that the Respondent, being a foreign company not owning any asset in Mauritius, could not proceed with the present application unless it furnished security for costs and damages.

Rule 28 of the IA Rules provides that "a defendant to any arbitration claim may apply for security for his costs of the proceedings"[35] and that such application must be supported by written evidence either by way of affidavit or in the form of one or more witness statements accompanied by supporting documents[36]. Moreover, "arbitration claim" is defined under Rule 2 of the IA Rules as "any motion to the Supreme Court seeking relief under the IAA or the Foreign Arbitral Awards Act".

[35] Rule 28(1)

[36] Rule 28(2)

To the extent that the Applicant was the Defendant in the enforcement claim and that the present application was incidental to a motion seeking relief under the Foreign Arbitral Awards Act (and was therefore an "arbitration claim" under Rule 2), the Court concluded that Rule 28 of the IA Rules was applicable.

Accordingly the application for security for costs, albeit incidental to the application of setting aside the provisional order, should be dealt as a separate and preliminary issue, and should be supported by written evidence either by way of affidavit or in the form of witness statements. In the absence of a proper application for security for costs in the manner prescribed in Rule 28(2) of the IA Rules, the Court decided against entertaining the motion for security of costs.

Application for the setting aside

With regards to the application for the setting aside of the provisional order, Counsel for Applicant submitted that the application was grounded solely on Article V(2)(a) of the New York Convention which provides that recognition and enforcement of an award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.

To that effect, the Applicant argued in essence that the Supreme Court did not have jurisdiction and that the appropriate forum for the execution would be in another jurisdiction (that being South Africa).

After hearing both parties, the Court found that the application and the documents in support failed to establish how the subject matter of the dispute between the parties, which led to the making of the award by the Swiss Arbitral Tribunal, was not capable of being settled by arbitration under Mauritian Law.

Decision

The application for security for costs was not supported by evidence in accordance with Rule 28(2) of IA Rules and was therefore set aside.

The dispute, subject matter of the arbitral award in Switzerland, was not shown to be incapable of being settled by arbitration under Mauritian laws so that the objection under Article V (2) (a) of the New York Convention was not sustained.

Paolo Italo Segatto v Geosond Holding Ltd [2015] SCJ 400

Background information

This was a second application made pursuant to Rule 15(7) of the IA Rules to set aside a provisional order and making executory in

Mauritius an award of the Arbitral Tribunal of the Swiss Chambers' Arbitration Institution in Arbitration. The first application has been dealt with above[37].

The application was based essentially on a finding of the Sole Arbitrator that the Applicant was not bound by the arbitration clause contained in a Share Purchase Agreement which was the subject matter of the arbitration. The Sole Arbitrator so concluded because the Applicant was not a party to the Share Purchase Agreement between Rostruct (Africa) Limited ("Rostruct") and the Respondent. Accordingly, in the final award, the Arbitrator declared inadmissible the claims of the Respondent which were directed against the Applicant, being the founding shareholder of Rostruct.

Similarly to *Rostruct (Africa) Ltd v Geosond Holding AG* [2015] SCJ 3007, the Applicant made a motion for security for costs which the Court held to be inadmissible as the procedure set out under Rule 28(2) of the IA Rules was not complied with.

The Applicant's contentions in support of the application to set aside the provisional order were that the subject matter of the Order was not capable of settlement by arbitration in Mauritius as stipulated under section 39(2)(b)(i) of the IAA; and the recognition and enforcement of the Award, and the consequential Order, against the Applicant would be contrary to public policy as envisioned under section 39(2)(b)(ii) of the IAA.

[37] Refer to Rostruct (Africa) Ltd v Geosond Holding AG [2015] SCJ 307

Applicability of the International Arbitration Act 2008

The Supreme Court first observed that the reference to section 39(2)(b)(i) and (ii) of the IAA was misconceived and inappropriate since the provision only applies to applications for the setting aside of an arbitral award made under that act. Here the case concerns an award made in Switzerland.

Indeed, the present matter was in fact an application under Rule 15(7) of the IA Rules for the setting aside of a provisional order making executory in Mauritius a foreign arbitral award. The grounds for refusing the enforcement of a foreign arbitral award - which was the case in the circumstances - are set out under Article V(2) of the New York Convention. The Applicant had therefore failed to establish any of the grounds set out under Article V(2).

It was further contended by Applicant that the provisional order be set aside as the latter was not a party to the Share Purchase Agreement and so to the resulting award. However as submitted by Counsel for Respondent, this was irrelevant to the issue of "arbitrability" embodied in Article V(2)(a) of the New York Convention. The applicant had neither been able to substantiate and establish that the foreign would be contrary to public policy.

Decision

The application for security for costs was set aside because the motion was not in compliance with Rule 28(2) of IA Rules.

The application for setting aside the provisional order was refused because the order was contrary to public order, and it was not shown that any ground for objection under Article V(2) of the New York Convention existed.

Cruz City 1 Mauritius Holdings v Unitech Limited & Anor [2014] SCJ 100

Background information

A single judgment was delivered for two applications made before the Supreme Court for an order recognising and declaring executory in Mauritius foreign awards (the "**Awards**"), issued by the Arbitral Tribunal under the London Court of Arbitration ("**LCIA**").

The applications were brought under the Foreign Arbitral Awards Act, which gave force of law in Mauritius to the New York Convention.

In their respective affidavits, the Respondents contended that

granting enforcement of the Awards would be in breach of:

1) numerous sections of the Constitution of Mauritius ("**Constitutional Issue**");

2) Article V(1)(c) of the New York Convention ("**Jurisdictional Issue**"); and

3) Article V(2)(b) of the New York Convention ("**Public Policy Issue**").

As a preliminary point, the Court underlines the distinction between an action for the setting aside or annulment of an arbitral award under the IAA, and an action for opposing recognition and enforcement of an arbitral award under the Foreign Arbitral Awards Act, though the grounds in both cases are similar. The IAA applies only to arbitral awards in arbitration proceedings having its juridical seat in Mauritius whereas the Foreign Arbitral Awards Act applies to all arbitral awards wherever Mauritius is the seat of arbitration or not.[38]

Constitutional issue

With regards to the Respondents' submission that recognising and enforcing the Awards would be contrary to section 82 of the Constitution of Mauritius, the Court held that section 82 only

[38] See sections 3A and 39 of the Foreign Arbitral Awards Act and section 40 of the IAA.

pertains to the supervisory jurisdiction of the Supreme Court over subordinate courts and therefore was not of relevance in the circumstances.

Nor did the Court countenance the arguments of the Respondents that enforcing the Awards under the Foreign Arbitral Awards Act would be contrary to sections 1,2, 3, 10 and 76 of the Constitution or would undermine the institutional integrity of the Supreme Court.

For convenience sake, section 1 of the Constitution provides that the Republic of Mauritius is a sovereign democratic State. Section 2 provides that the Constitution is the supreme law of the country and if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void. Section 3 protects the fundamental rights and freedoms of the individual. The Constitution indeed affords protection of those fundamental rights and freedoms, subject to limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. Section 10 (8) of the Constitution further provides that the Courts are established by law, and are empowered to determine the existence or extent of any civil right or obligation of any person who institutes such proceedings before them for determination and that the Courts are to be independent and impartial in adjudicating the matters brought before them. Section 76 of the Constitution confers

unlimited jurisdiction to hear and determine civil or criminal proceedings as provided under the law and as per the jurisdiction conferred upon it by the Constitution or any other law.

Private arbitration is not unconstitutional

The Designated Judges explained that, in contrast to the national courts, arbitration is founded on the common intent and accord of the parties who have entered into an arbitration agreement. One may freely and voluntarily enter into a contract which provides for any dispute on the rights and obligations of the parties to the contract to be resolved by way of international arbitration. In doing so, the parties agree that the Arbitral Tribunal chosen by them should determine the dispute that has arisen between them in respect of a defined legal relationship. The Arbitral Tribunal has the authority to make an award which will be binding on the parties and which can be enforced by the process of the courts. Such an award is different from a decision of the Court. The Court exercises the power conferred upon it by law to decide the case brought before it by a litigant for the determination of his civil rights or obligations. The persons against whom the judgment is given do not have to give their consent. Parties to an arbitration agreement accept this specific regime of arbitration and are fully aware of its implications and consequences. The parties know perfectly, by the agreement that they have chosen to bind themselves, that they would subject themselves to the decision of the Arbitral Tribunal.

The Designated Judges adopted the reasoning of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*[39] and highlighted the distinction between "the significant differences between judicial power and arbitral power".

> "Judicial power is conferred and exercised by law and coercively. … Whereas, in the case of private arbitration, the arbitrator's powers depend on the agreement of the parties, the authorities of the kind governed by the Model Law, is based on the voluntary agreement of the parties."

Therefore, a losing party in an arbitration award cannot, on the basis that the award was not in his favour, be allowed, at that stage, to ask the Court to interfere with the decision of the Arbitral Tribunal on grounds not laid down in the law. Such a request would not be acceptable not only because it would be tantamount to asking the Supreme Court to act against the law, to step outside the jurisdiction conferred on it by law as provided by the Constitution, but it would also be unfair, unjust and inequitable as it would deprive the winning party of the benefit of the award, to which the losing party voluntarily agreed to be bound.

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[39] [2013] HCA 5 (13 March 2013)

The Supreme Court concluded that they were not convinced by the Respondent that enforcing arbitral awards in the instant cases would be in breach of the Constitution.

Enforcing arbitral awards

Furthermore, as to the Supreme Court, it will adjudicate upon the matter brought before it by a party in compliance with the applicable law. In the circumstances, it will apply the Foreign Arbitral Awards Act implementing the New York Convention, unless that law has been declared unconstitutional. When the Supreme Court is asked to recognise and enforce an award, it is being asked to decide on the legal right of the applicant to enforce the award, that is, to enforce that ultimate product of the agreement of the parties which is already binding on them. However, by virtue of the public policy exception provided in the law governing arbitration and enforcement of the award, the Supreme Court has the power to exercise ultimate control over the arbitral process where it is considered to be against the public policy of Mauritius. Moreover, when reviewing an application for recognition of an award, the Court may apply the rules of private international law in finding that it has no jurisdiction in the circumstances. Finally in accordance to section 76 of the Constitution, the Supreme Court will use the power conferred on it by the law and may refuse to recognise and enforce the award after the losing party would have proved the grounds for refusal provided under the Foreign Arbitral Awards

Act. It should also be noted that the Supreme Court may refuse recognition and enforcement on its own motion. On that basis, the Court found that it could not be argued for that matter that the institutional integrity of the Supreme Court was compromised.

Arbitration is no threat to the integrity of the national courts

Contrary to the contention of the Respondents, the Court took the view that the Foreign Arbitral Awards Act helps in preventing delayed justice and supports the finality of international award by only allowing a refusal of enforcement of the awards on serious grounds. Here the Awards were the outcome of the decision of an Arbitral Tribunal, in accordance with the powers given to it by an agreement of the parties of their own volition, having agreed to submit their differences for decision by that tribunal. In these circumstances the Court found that the Respondents could not find fault with the power given to the Supreme Court by the Foreign Arbitral Awards Act to grant (or refuse to grant) recognition or enforcement of the Awards in accordance with the criteria as set out in the New York Convention.

The Court found no merit in the Constitutional challenge, which was rejected.

Jurisdictional issue

Under Article V(1)(c) of the New York Convention, the Supreme Court has the discretion to refuse recognition and enforcement of foreign awards only if the opposing party furnishes proof that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or otherwise contains decisions on matters beyond the scope of the submission to arbitration.

The Respondent firstly submitted that the Arbitral Tribunal exceeded its jurisdiction by adjudicating a dispute which was beyond the arbitration and by passing an award on the basis of a premature claim made by the Applicant.

Under Article V (1) (c) of the New York Convention, the Court has the power to undertake a full review of the Arbitral Tribunal's finding on jurisdiction. It will do so where it considers it appropriate and necessary, bearing in mind the overriding principle that the process of enforcement should be expedient. It was apparent in the circumstances that the jurisdictional objection had already been verified (and dismissed) by the Supervisory Court of the seat of arbitration chosen by the parties themselves. The Court held that it would normally not verify the issue of jurisdiction where it has already been considered and rejected by the Supervisory Court, unless in the presence of exceptional circumstances. Although not deemed necessary, the Court did consider the factual scope of the jurisdictional challenge in the present matter and found no merit in it.

The Respondent secondly submitted under the above ground of jurisdictional challenge that the Arbitral Tribunal wrongly made a global assessment of the costs incurred in the 3 arbitrations conjunctively.

However the Introductory Notes of the Awards show that the parties gave their consent to the way the Awards were drawn in order for the Arbitral Tribunal to present a fully comprehensive account of the interrelated arbitration proceedings. The Court considered that the parties benefitted from the fact that the three arbitrations were heard simultaneously and that they had themselves been content to leave the issue of costs to be decided by the Arbitral Tribunal in the way it was decided since they submitted their costs claims without any attempt to allocate them among the three arbitrations. The Arbitral Tribunal also found that it would have been highly impracticable to segregate the costs. The Court held that Respondents could not argue this point now, since they (the Respondents) did not find any issue with it then.

Accordingly the Court rejected the jurisdictional challenge raised by the Respondents.

Public policy issue

Under Article V(2)(b) of the New York Convention, the Supreme Court has discretion not to enforce an award if it considers that doing so would go against the public policy of Mauritius.

The Respondents firstly argued that the Arbitral Tribunal committed a serious illegality by awarding damages in breach of section 74 of the Indian Contract Act.

The Court referred to the following extract from *Redfern and Hunter on International Arbitration*[40] in defining "public policy" and "international public policy":

"In an attempt at harmonisation, the International Law Association's Committee on International Commercial Arbitration has sought to offer definitions of the concepts of 'public policy', 'international public policy', and 'transnational public policy' and recommends that

> ...the finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances', such exceptional circumstances being the violation of 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 Court considered that the Respondents' argument was misconceived inasmuch as the question which in fact had to be

[40] Fifth edition at paragraph 11.117

determined by the Court was whether the enforcement of the Awards sought would be against the public policy of Mauritius, and not against the public policy of India.

The Court further stated that any party, who wishes to rely on public policy in raising an objection to the recognition and enforcement of a foreign award, must not do so "injudiciously". Indeed that party must 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 Mauritius and 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.

Decision

In light of the above, the objections raised by the Respondents were dismissed.

It is to be noted that this case was the first to be heard by three Designated Judges specially appointed under the Act, which provided clarity to the juridical authority of arbitrators in private arbitration, and to the generally ambiguous meaning of "public policy" in the context of international arbitration.

ENDNOTE

It is manifest from these notes that the Mauritian legal framework is playing an active role amidst a global trend of internalisation of arbitration. The legislation explicitly disconnects the international arbitration law in Mauritius from the domestic arbitration law (and the domestic law in itself) and preconises reference and reliance on international sources relating to the Amended Model Law such as textbooks, articles, doctrinal commentaries or case law reported by UNCITRAL in its CLOUT database. This ensures that the Mauritian international arbitration law keeps in line with international developments and benefits from the experience of numerous jurisdictions which have already enacted the Amended Model Law.

The Mauritian judiciary is further keen to encourage the smooth and efficient progress of international arbitration, as facilitated by the concept of "Designated Judges", specialised in the field of international arbitration and thus safeguarding a coherent development of the jurisprudence.

The aspiration of making Mauritius a major place for international arbitration, to which the IAA and its related legislations are the bedrock, is clearly gaining momentum and recognition. In addition to the already existing MCCI Permanent Court of Arbitration, the establishment of a permanent office in Mauritius of the Permanent Court of Arbitration of The Hague and the launch of the LCIA-MIAC Arbitration Centre, set up in cooperation with the London Court of International Arbitration, exemplify Mauritius' commitment to international arbitration. Such commitment culminates with the host of the biennial Congress of the International Council for Commercial Arbitration (ICCA), which will be held for the first time in the African Continent in May 2016.

ABOUT BLC ROBERT AND ASSOCIATES

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THE LITIGATION TEAM

IQBAL RAJAHBALEE
Senior Counsel

ANDRE ROBERT
Attorney

JASON HAREL
Barrister

RAJIV GUJADHUR
Barrister

MANISHA MEETARBHAN
Barrister

MUSHTAQ NAMDAKHAN
Barrister

SHALINEE JEERAKHUN
Attorney

YOHANN RAJAHBALEE
Barrister

LITIGATION PRACTICE

Our lawyers are actively involved in various forms of dispute resolution. We are regularly called upon at the early stages of dispute situations where we give robust advice to the clients' legal position, the strengths and weaknesses of their cases and the most effective avenues to settle the dispute, whether by mediation, narrowing down of issues in view of expert determination or arbitration of remaining issues, or the service formal legal notices.

When necessary, we represent clients in court litigation, arbitration proceedings or proceedings before regulatory bodies. By way of non-exhaustive example, we appear: before the Commercial Division of the Supreme Court in high-value commercial litigation cases and company law disputes; domestic and international commercial arbitrations; the tax review authority in Mauritius; and the Supreme Court at first instance or on appeal. Because of our depth and capability, we are quick to act in pressing injunction applications for urgent relief or freezing orders, and in making responses to such demands.

Our disputes practice spans across a range of industry sectors including banking, real estate, construction, employment, shareholder disputes, corporate insolvency, insurance, tax and hospitality.

Contacts:

Mr Iqbal Rajahbalee
Iqbal.R@blc.mu

Mr André Robert
Andre.Robert@blc.mu

RECENT MATTERS

- Acting for a major domestic contractor on a Rs 100 Million construction dispute with a property developer.

- Acting for the applicants in the case of Amana Middle East Holdings Limited & Anor v Al Ghurair Abdul Aziz Abdullah & Ors [2015] SCJ 401 before the Designated Judges.

- Successfully acting for a shareholder in defending an application by the minority shareholder for leave to bring derivative actions on behalf of the company against such majority shareholder.

- Acting for the majority shareholder of a mining group in an MCCI arbitration to defend claims of abuse of majority by a minority shareholder.

- Acting for the majority shareholder in pending and anticipated litigation in the Commercial and Bankruptcy Divisions of the Supreme Court to resolve shareholder and boardroom disputes relating to a global business company with a large Pan-African asset base.

- Acting for Deloitte Partners on various high-profile administrations, including making incidental applications to the Bankruptcy Division of the Supreme Court for the extension of statutory timelines.

- Acting for the bondholders on the default of a USD 80 Million bond issue by an Indian-listed company in successfully obtaining freezing orders, attachment orders and executory orders in Mauritius.

- Acted for a well-known hotel against a major insurance company which, in all good faith, agreed to settle 50 % of the claim.

- Acting for Harel Freres, now Terra (a major listed conglomerate in Mauritius), in a Rs 100 million claim brought by New Mauritius Hotels in relation to the fire at Victoria Hotel, allegedly originating from Terra's sugarcanes.

- Appearing for Kross Border, a Trust and Corporate Service Provider, licensed under the Financial Services Act in a matter involving dispute with a shareholder in a Global Business Company with a huge asset base.

- Acting for Harel Freres, now Terra, on long-lasting shareholder disputes within the company, most of which have now been resolved.

- Appearing in a huge claim against the State on alleged liability to maintain order and security.

- Acting for a major insurance company, as insurer of a leading contractor, in claims made against the State and another insurance company in respect of the flash floods which took place in Mauritius on 30 March 2013.

- Acting for Constance Hotels group in judicial review cases against State authorities in respect of large value real estate holdings

- Acting for a major multinational bank on disputes relating to Indian lending transactions in order to be able to sell pledged shares.

- Acted for a contractor in an important arbitration regarding dripping works performed for a para-statal body.

- Acted for in a major arbitration regarding IT works involving a para-statal body.

- Acted in an important ICC arbitration against a Madagascar entity for defects in goods delivered.

- Acted in an arbitration matter in relation to water irrigation charges claimed to a sugar company.

- Appeared in a very hefty claim against a South African bank, for alleged wrongful termination of agreement.

Other Practice Areas Include:

BANKING & FINANCE

We advise and provide support on both domestic and cross-border transactions in numerous areas ranging from acquisition finance, project finance (including infrastructure) to structured or trade finance. Our team is also involved in providing regulatory and compliance advice to banks and financial institutions, helping them from formation to operations and dealings. We regularly intervene on behalf of a wide spectrum of transaction parties which includes local and international banks, DFIs and other financial institutions, corporate lenders, investment funds, project sponsors, operators, borrowers, guarantors, governmental and international organisations.

Our expertise spreads over various sectors and industries, which include energy, real estate, hospitality, infrastructure, private equity, telecommunication and technology.

Contacts:

Ms Valerie Bisasur
Valerie.Bisasur@blc.mu

Jean-Eric Sauzier
Jean-Eric.Sauzier@blc.mu

CAPITAL MARKETS

Our lawyers assist clients on a wide spectrum of capital markets work ranging from equity and debt securities, listed funds, structured products, ETFs and other innovative products in the Mauritian market as well as on dual listings. We frequently engage with regulators and listing authorities at a policy-making level especially in the context of introduction of new product lines given the firm's long-standing recognition in this dynamic field. Our clients include local conglomerates, as well as international players.

We assist on all forms of capital raising i.e. initial public offerings, follow-on offerings, and private placements; listings, on the Official Market and the Development & Enterprise Market of the Stock Exchange of Mauritius Ltd, of securities issued by local as well as international issuers; Securitisation; Takeovers and Mergers; Ongoing reporting, governance, regulatory, compliance and other disclosure requirements.

Contacts:

Ms Bhavna.Ramsurun
Bhavna.Ramsurun@blc.mu

Mr Rajiv Gujadhur
Rajiv.Gujadhur@blc.mu

CORPORATE AND COMMERCIAL

Corporate and Commercial is the core of our practice area. We service a variety of clients ranging from multinational companies, banks, financial institutions, hotels on all aspects of the in the corporate sphere ranging from company formation, advisory work, legal opinions, due diligence, transaction closings and assisting our clients in common matters that turns a company's daily life.

Our expertise, availability and reputation mean that we are the principal advisor to the major players both in the domestic and international market and are able to provide quality of work within a reasonable time.

Contacts:

Mr Jason Harel
Jason.Harel@blc.mu

Ms Christine Korimbocus
Christine.Korimbocus@blc.mu

INSOLVENCY

Our lawyers have extensive experience on both domestic and cross-border restructuring and insolvency matters. In Mauritius, a new Insolvency Act, which overhauled the legal landscape, was proclaimed in 2009.

Since its coming into force, we have advised a range of clients on complex restructurings and insolvencies, notably: secured and unsecured creditors in pre-insolvency scenarios and during insolvency proceedings on how best to protect their interests; administrators and liquidators in collective proceedings on the sale of assets, conducting creditors' meetings, preparing reports to creditors, formulating complex restructuring plans and making ancillary court applications; receivers on various aspects of receiverships; potential acquirers of businesses and assets from insolvency practitioners and directors on their duties in situations of actual or anticipated insolvency.

Contacts:

Mr Mushtaq Namdarkhan
Mushtaq.Namdarkhan@blc.mu

Mr Jean-Eric Sauzier
Jean-Eric.Sauzier@blc.mu

M & A

Our lawyers have a wide range of experience advising on all aspects that in an M&A transaction. We take a team-oriented approach which frequently demands solutions across multiple practice areas of the firm. The team has been involved in both local and cross-border mergers. Our clients range from high net-worth individuals setting up joint ventures, companies listed on the Stock Exchange of Mauritius and multinational companies.

Our services include assisting in mergers (public and private), sales of assets business, sales of securities, equity and quasi equity investments, joint ventures. In addition to providing legal advice, our lawyers have the commercial knowledge to provide a seamless advice to assist our clients to achieve the best deal.

Contacts:

Mr Jason Harel
Jason.Harel@blc.mu

Mr Fayaz Hajee Abdoula
Fayaz.Abdoula@blc.mu

EMPLOYMENT

Employment law is one of the practice areas that the firm is heavily involved in. Our employment lawyers can provide a wide range of services including but not limited to general advice on employment laws in Mauritius, drafting and reviewing contract of employments, leading the whole process leading to the termination of an employee, including negotiation leading to settlement, drafting letter of charges, assistance in disciplinary proceedings and acting as counsel in court cases, if so required. We are also involved in providing employment advice in deals involving restructuring exercise, sales of businesses and mergers and acquisitions. In addition to the providing its services to the local market players, the firm also advised diverse offshore companies employing staffs in Mauritius

Being an area where there are constant discussions, amendments in the primary and subsidiary legislations and case-law, the firm assists with providing regular updates on the amendments in the law that would be relevant to an employer.

Contacts:

Mr Fayaz Hajee Abdoula
Fayaz.Abdoula@blc.mu

Mr Rajiv Gujadhur
Rajiv.Gujadhur@blc.mu

FINANCIAL SERVICES

It is the acclaimed ambition of Mauritius to become an international financial services centre. Our financial services group advises a vast number of funds, private equity houses, managers, insurance companies, fiduciary businesses and financial advisers involved in the sector. We have been the adviser to over 200 funds set up in Mauritius.

Our dedicated team covers the wide spectrum of financial services from fund formation, investment structuring to legal documentation, and from tax advice and regulatory compliance to AML, FATCA and CRS regulations.

Contacts:

Mr Fazil Hossenkhan
Fazil.Hossenkhan@blc.mu

Mr Shan Sonnagee
Shan.Sonnagee@blc.mu

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