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Litigation 2022

Mauritius: Law & Practice
and
Mauritius: Trends & Developments

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MAURITIUS

Law and Practice

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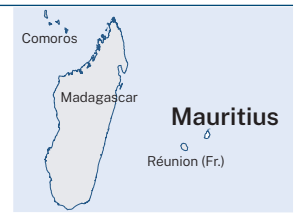

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1. GENERAL

1.1 General Characteristics of the Legal System

Mauritius has a hybrid legal system, reflecting its past colonisation by both France and Great Britain. The main areas of private law are based on a civilian model and contained in French-inspired codes that were enacted in the early nineteenth century (Civil Code and Commercial Code). At the same time, a French-inspired Code of Civil Procedure had also been enacted. The substantive criminal law was also originally based on a Criminal Code enacted by the French administration – it is still in existence and in force today, although it has been amended over the years.

As the island lived under British rule and after its independence in 1968, it adopted a Westminster-style of passing legislation; in that respect, several statutes of English inspiration have been enacted, eg, the Companies Act. As a general rule, matters of evidence and criminal procedure also follow English rules. It is commonplace for judges and magistrates to refer to both English and French sources of law, in the appropriate contexts, when applying Mauritian law to a case.

Trials are conducted in an adversarial manner. Submissions at first instance are made orally but it is not uncommon, and as a matter of discretion of the trial judge or magistrate, to require written submissions after evidence has been adduced. In appeals before the Supreme Court, applications made under the Supreme Court (International Arbitration Claims) Rules 2013 and appeals before the Judicial Committee of the Privy Council, skeleton arguments are required to be filed in advance of the hearings and are supplemented by oral submissions.

1.2 Court System

Section 76 of the Constitution provides that there shall be a Supreme Court for Mauritius having unlimited jurisdiction to hear any civil or criminal proceedings under any law other than a disciplinary law and such jurisdiction and powers as may be conferred upon it by the Constitution or any other law. The Supreme Court consists of the Chief Justice, the senior puisne judge and puisne judges.

The Supreme Court also exercises appellate jurisdiction over the lower courts.

Supreme Court Divisions and Lower Courts

The Supreme Court includes several divisions, namely:

- the Court of Civil Appeal;
- the Court of Criminal Appeal;
- the Bankruptcy Division;
- the Commercial Division;
- the Family Division;
- the Financial Crimes Division; and
- the Land Division.

The lower courts are the District Courts (located in various districts of Mauritius), the Intermediate Courts (located in the capital Port-Louis) and the Industrial Court. The criminal jurisdictions of District Courts and the Intermediate Court depends on the seriousness or nature of the offences committed, whereas the civil jurisdiction of those Courts depends on the amount in dispute: in civil cases, a District Court has jurisdiction over disputes of up to MUR250,000 and the Intermediate Court has jurisdiction over disputes of up to MUR2 million. The Intermediate Court has also a financial crimes division which hears and determines financial crime offences. The Industrial Court hears industrial disputes under specified enactments and there is no monetary limit for the amount that can be claimed before it.

A District Court has jurisdiction in any civil action, where the sum claimed or matter in dispute does not exceed MUR100,000, to hear and determine

the action in accordance with a small claims' procedure set out in Part IIA of the District and Intermediate Courts (Civil Jurisdiction) Act.

Several statutes also make provision for the setting up of tribunals or commissions to deal with specialised areas of law. The provisions of the statutes can provide for a right of appeal or judicial review before the Supreme Court.

The Court of Civil Appeal and the Court of Criminal Appeal hear appeals from a decision of a Supreme Court judge in the exercise of the latter's original civil or criminal jurisdiction (as appropriate).

Appeals from a decision delivered by two or more judges can only be heard by the Judicial Committee of the Privy Council sitting in London.

1.3 Court Filings and Proceedings

Court proceedings, their records and judgments are generally public. Certain proceedings are held in private such as those before judges in chambers and, where the court so orders, applications under the Supreme Court (International Arbitration Claims) Rules 2013. Section 161A of the Courts Act empowers a judge or magistrate, where he considers it necessary or expedient to exclude from proceedings (except the announcement of the decision) any person other than the parties to the trial and their legal representatives:

- in circumstances where publicity would prejudice the interests of justice or of public morality;
- in order to safeguard the welfare of persons under the age of 18;
- in order to protect the privacy of persons concerned in the proceedings; or
- in the interests of defence, public safety or public order.

1.4 Legal Representation in Court

A legal representative must be qualified as a barrister or attorney under the Law Practitioners Act. Barristers have unlimited rights of audience whereas attorneys have rights of audience before District Courts, a judge in chambers, the Master's Court and the Bankruptcy Division of the Supreme Court. In a specific case, a foreign barrister may have a right of audience subject to obtaining permission from the Chief Justice.

2. LITIGATION FUNDING

2.1 Third-Party Litigation Funding

Mauritian law is silent on third-party funding and there is no applicable restriction on such funding.

2.2 Third-Party Funding: Lawsuits

This is not applicable in Mauritius.

2.3 Third-Party Funding for Plaintiff and Defendant

This is not applicable in Mauritius.

2.4 Minimum and Maximum Amounts of Third-Party Funding

This is not applicable in Mauritius.

2.5 Types of Costs Considered under Third-Party Funding

This is not applicable in Mauritius.

2.6 Contingency Fees

Contingency fees are permitted for either barristers or attorneys. In the case of attorneys, their Code of Ethics provides that it must be reasonable and the practice is for it to be 10% of the amount recovered. In the case of barristers, this cap of 10% is formally recorded in their Code of Ethics.

2.7 Time Limit for Obtaining Third-Party Funding

This is not applicable in Mauritius.

3. INITIATING A LAWSUIT

3.1 Rules on Pre-action Conduct

As a matter of procedure, there is no obligatory or recommended pre-action protocol that needs to be followed and non-compliance with which could have cost consequences.

As a matter of substantive law, a plaintiff cannot sue a defendant for breach of contract unless the plaintiff has prior to such action requested the defendant to perform the contract. Exceptions to that are where the contract has dispensed with such prior notice or where the contractual obligation had to be performed within a time limit which has lapsed.

For certain applications, eg, judicial review, actions are not possible if all other remedies have not been exhausted (eg, appeals before an executive body or tribunal).

Before a case is entered against a foreign defendant, leave of the judge in chambers to enter the action and serve it on that party must be obtained prior to the case being entered.

In suits against public officers in the execution of their public duty, persons engaged or employed in the performance of any public duty or persons acting in aid of public officers/persons employed or engaged in the performance of any public duty, no civil action, suit or proceeding shall be instituted unless one month's previous written notice of the action, suit, proceeding and the of the subject matter of the complaint has been given to the defendant.

3.2 Statutes of Limitations

The general rule for personal actions is ten years from when the plaintiff has an actionable claim against the defendant, although certain statutes provide for shorter prescription periods.

The prescription period for actions in rem is 30 years.

Under Section 4 of the Public Officers Protection Act, every civil or criminal action, suit, or proceeding, by a person, other than the State, for any fact, act or omission against public officers or persons engaged in the performance of any public duty or persons assisting such persons shall, under pain of nullity, be instituted within two years from the date of the fact, act, or omission which has given rise to the action, suit, or other proceeding.

Applications for judicial review of an executive decision must be made promptly and in any event within three months of the decision being challenged. The real requirement is one of promptness and an application may be set aside even if made within the three-month limit.

3.3 Jurisdictional Requirements for a Defendant

Any defendant with Mauritian nationality is amenable to the jurisdiction of the Mauritian courts, even in respect of obligations incurred outside Mauritius.

In respect of a foreign defendant, the Supreme Court will allow initiation and service of proceedings against it if one of the conditions in the Courts (Civil Procedure) Act are met, namely:

- the whole subject matter of the action is immovable property situate within Mauritius;
- an act, deed, will, contract, obligation or liability affecting immovable property situate

within Mauritius, is sought to be construed, rectified, set aside, or enforced in the action;
- relief is sought against a person ordinarily resident within Mauritius;
- the action is founded on a breach or alleged breach within Mauritius of a contract wherever made, which ought to be performed within Mauritius;
- an injunction is sought as to anything to be done within Mauritius or a nuisance within Mauritius is sought to be prevented or removed, whether damages are or are not sought;
- any person out of Mauritius is a necessary or proper party to an action properly brought against some other person duly served within Mauritius; or
- any action, relief, dispute, third party claim in which a corporation holding a global business licence, an authorised company, a collective investment scheme or a protected cell company is one of the parties.

If an action concerns a contract containing a jurisdiction clause in favour of another jurisdiction, the Mauritian court may decline jurisdiction unless the choice of jurisdiction is against the public policy of Mauritius.

If the action concerns a dispute which is covered by the scope of an arbitration clause, the Mauritian court will decline jurisdiction if the defendant raises the objection before filing a defence on the merits (in the case of a domestic arbitration). In the case of an international arbitration, the defendant must (again, before filing a defence on the merits) ask that the case to be referred to a panel of three designated judges of the Supreme Court to decide whether the parties should be referred to arbitration or whether, on a prima facie basis, there is a very strong probability that the arbitration clause is null and void, inoperative or incapable of being performed.

3.4 Initial Complaint

Before the Supreme Court, the originating document is a plaint with summons. In the lower courts, the originating document is called a "proecipe" (which serves the same purpose as a plaint with summons).

Before a judge in chambers, the originating document is also called a proecipe but it is a simpler document setting out the prayers sought by the applicant. The proecipe must be supported by affidavit evidence.

Certain procedures which require urgency (eg, judicial review) or which are made under specific enactments (eg, the Companies Act or the Insolvency Act) are initiated by way of motion paper supported by affidavit evidence. In judicial review applications, the application must also be accompanied by a statement setting out the grounds of review.

The general rule is that originating documents and other pleadings can be amended before the hearing if the amendment does not cause prejudice to other parties and the latter get an opportunity to respond to the amendments. This follows the principle that the purpose of pleadings is to identify the real issues in controversy which the trial court must determine.

A judge will unlikely exercise discretion to allow amendments made after witnesses have started to depone or those made to circumvent a valid objection in law which another party has raised.

3.5 Rules of Service

When service is effected in Mauritius, it has to be effected by a private usher retained by the plaintiff or by a court usher. The usher's return is conclusive evidence that service has been effected (if successful). If service is unsuccessful, the court will order that fresh service be attempted and if there are still unsuccessful attempts, the

court may order that the defendant be informed of the case by way of substituted service in several forms which may include publication in newspapers. For service on a company, good service is effected by leaving the documents at its registered office, by delivering them with one of its directors, by delivering them with an employee at the head office or principal place of business, or in accordance with a prior agreement with the company.

When ordering that service may be effected on a foreign party in accordance with the provisions of the Courts (Civil Procedure) Act, the Supreme Court will order that such service be effected in accordance with the laws of the country where service is being effected. It is the plaintiff who bears the responsibility of arranging service on a foreign party, including arranging for the evidence of service to be properly legalised before it can be relied upon before the Mauritian Court.

3.6 Failure to Respond

If a defendant does not respond to a lawsuit, the court orders the case to be heard in the absence of the defendant but would also order that, before the hearing, the defendant is served with a "notice of trial".

At the hearing, the continued absence of the defendant does not mean that judgment is automatically given in favour of the plaintiff. It is still incumbent on the plaintiff to prove its case on the balance of probabilities and call one or more witnesses to give evidence and produce documents in support of its case. A default judgment will only be delivered if the court is satisfied that the plaintiff has indeed established its case according to the required standard of proof.

3.7 Representative or Collective Actions

Class actions are not permitted in Mauritius. All persons who seek a remedy from the court need to be individually named as parties, although they may select one of them to be the representative of the others during the case (eg, for the purpose of attendance in court and/or giving evidence).

3.8 Requirements for Cost Estimate

There is no requirement to provide clients with a cost estimate at the outset. The obligation of law practitioners is to charge, as a matter of ethics, what is fair and reasonable and the fee arrangement must be fully disclosed to the client.

4. PRE-TRIAL PROCEEDINGS

4.1 Interim Applications/Motions

It is possible, before a trial or substantive hearing of a claim, for a party to apply to a judge in chambers or to magistrate to obtain interim relief pending the determination of the main case. Such reliefs are not limited to case management issues and are generally granted to preserve a status quo ante and, in cases where injunctive relief is sought, damages must not be an adequate remedy.

It is also possible, before the case is ready to be heard on its substantive merits (ie, before it is "in shape"), to obtain procedural directions (either at a hearing or by way of court circular) either from the trial judge (in the case of cases before the Commercial or Family Divisions of the Supreme Court), the trial magistrate (in cases before the District Courts or Intermediate Court), the Master and Registrar (in cases before other divisions of the Supreme Court) and the Chief Justice (in cases entered by way of motion).

A trial judge also has a discretion to order case management directions ahead of or during a trial.

4.2 Early Judgment Applications

The courts do not deliver early judgment on some issues only and prefer to deal with all the issues in one go.

The court may allow certain points to be raised at the outset (called "in limine litis") which can be heard and determined without evidence (ie, on the face of the plaint or other originating document) or after production of a limited amount of evidence. The defendant must, generally, at the time of filing the plea in limine, also file a plea on the substantive merits of the case and the trial judge/magistrate may then hold a hearing to hear arguments as on the plea in limine.

Objections as to the jurisdiction of the court must be taken before any defence on the merits is advanced and it is permissible for a defendant to raise such an objection even without putting in a defence on the merits. The court proceeds to hear the objection on jurisdiction and a limited amount of evidence may be adduced (usually, it is the contract which contains an arbitration clause or a choice of court clause). Similarly, applications for security for costs are dealt with in limine.

4.3 Dispositive Motions

Dispositive motions that are commonly made are the following:

- that the subject matter of a plaint is time-barred;
- that an appeal has been lodged and/or served outside delay;
- that the court does not have jurisdiction, eg, because of the existence of an arbitration clause of valid choice of court clause;
- there is a more appropriate forum (forum conveniens) to try the case, eg, having regard to factors such as the location of parties and witnesses, the law which has to be applied to the obligations in issue and whether a foreign court has already accepted jurisdiction to hear the case;
- that the case is closely connected with pending litigation before another competent jurisdiction outside Mauritius (litis pendens);
- that the subject matter of the case is res judicata, ie, raising the same cause of action between the same parties in a previously decided case;
- a motion to strike out certain paragraphs of pleadings on the grounds that they are unnecessary, made vexatiously or made with unnecessary prolixity;
- a motion to strike out a pleading on the ground that it does not disclose a reasonable cause of action or defence;
- a motion to dismiss a case on the ground that it constitutes and abuse of process of the court; and
- a motion by one party to the case to be put out of cause on the ground that it is not a necessary and proper party to the case.

4.4 Requirements for Interested Parties to Join a Lawsuit

If a non-party wishes to intervene in proceedings, they can apply to a judge and show cause that he has an interest in or is a necessary party to the case.

A defendant to a case, before filing a defence to the plaintiff's claim, may file a third-party procedure against a non-party requesting that the latter takes up its defence and indemnifies it. The third-party procedure can itself be a contested procedure.

On application by one of the parties to an existing case, the court has a discretion to order that the name of a party who should not have been joined in action to be struck out and for a party who should have been added to be joined as a party and served with the proceedings.

4.5 Applications for Security for Defendant's Costs

If the plaintiff is a foreign party, the case does not involve a commercial matter and the plaintiff does not own immovable property in Mauritius, the court will order the plaintiff to furnish security for costs as a matter of course. The defendant may support the amount claimed as security by way of affidavit evidence and the amount can be contested by the plaintiff – ultimately the amount of security will be in the discretion of the trial judge who will balance the need to provide security against the objective of not stifling a plaintiff to pursue its claim.

In other cases, the court also retains a discretion to order security for costs (whether the plaintiff is Mauritian or foreign), eg, if the plaintiff is shown to be impecunious.

4.6 Costs of Interim Applications/ Motions

A judge dealing with costs of interim applications/motions will usually order the costs to be the costs in the main proceedings.

4.7 Application/Motion Timeframe

The usual timeframe to deal with a motion may vary be within a few days and up to 12 months, depending on whether the motion is contested, requires evidence to be exchanged by way of affidavits and submissions to be heard. A party may request that a motion is dealt with on an urgent basis and it will be within the discretion of the judge whether to accede to such request.

5. DISCOVERY

5.1 Discovery and Civil Cases

A party to a case may apply for particulars of a plaint or defence and for inspection of documents on which the other party intends to rely in the case.

In addition, in any cause or matter, the court may, on the application of either party or on its own motion, inspect a movable or immovable property or make a visit to the locus.

5.2 Discovery and Third Parties

The court may, especially where fraud is alleged, make a Norwich Pharmacal order against a non-party where:

- a wrong has been carried out or arguably carried out by an ultimate wrongdoer;
- there is a need for an order to enable an action to be brought against the ultimate wrongdoer; and
- the person against whom the order is sought must:
  - (a) be mixed up in so as to have facilitated the wrongdoing; and
  - (b) be likely to be able to provide the information necessary to enable the wrongdoer to be sued.

5.3 Discovery in this Jurisdiction

See **5.1 Discovery and Civil Cases**.

5.4 Alternatives to Discovery Mechanisms

Each party who intends to rely on documents in support of its claim or defence must communicate those documents to the other parties prior to the trial at the stage of exchanges of pleadings. Each document then has to be produced by witnesses called by the party in court.

5.5 Legal Privilege

Both legal advice privilege and litigation privilege are recognised in Mauritian law and with regard to the standing of an in-house counsel under the Law Practitioners Act, the privilege may be restricted to advice provided to counsel's employer.

There are not many cases which have considered all the nuances surrounding legal professional privilege. It is likely that Mauritian courts may opt to follow the principles set out in English case law.

5.6 Rules Disallowing Disclosure of a Document

Disclosure may be refused as an exception to the general rule where a matter is protected by a statute as confidential or official secret. Disclosure may still be made in circumstances made permissible by the statute or by order of the Judge.

6. INJUNCTIVE RELIEF

6.1 Circumstances of Injunctive Relief

A judge of the Supreme Court has a broad power to issue injunctions, subject to the power of the Supreme Court to vary or discharge that order. The judge may issue a number of types of injunctions including prohibitory injunctions, mandatory injunctions, Mareva injunctions, Anton Piller orders and anti-suit injunctions. Given that those types of orders are equitable remedies, Mauritian courts tend to follow English law principles governing such orders.

Common Interim Remedies

The most common types of interim remedies granted are prohibitory orders, provisional attachment orders and Mareva injunctions aimed at preserving a status quo ante and/or to preserve assets pending the determination of a main case.

Prohibitory orders

Prohibitory orders are usually granted where:

- there is a serious issue to be tried;
- damages would not be an adequate remedy; and
- the balance of convenience lies in favour of granting the interim injunction.

Mareva orders

Mareva orders are granted where:

- the applicant has a good arguable claim;
- there is a real risk of dissipation of assets by the respondent; and
- it is just and convenient to grant the order.

Provisional attachments

Provisional attachment orders may be granted where the applicant demonstrates that it has a claim which is certain in principle and they must be followed by applications to validate the attachment at which point the latter may be contested by the debtor and/or garnishees.

Interim injunctions

The applicant for an interim injunction has to comply with certain undertakings, namely:

- to make a full and frank disclosure of material facts at the time of making the application;
- to enter a main case; and
- to give an undertaking in damages should it later turn out that the injunction was wrongly granted.

A judge in chambers may discharge an interim injunction if one or more of the above undertakings are not complied with.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

When an application for interim injunction is made, the file is allocated to a judge in chambers who would examine the papers to decide whether such an order should be granted pending a returnable date when the respondent can appear before them. The decision of whether to grant the interim order is usually given within one or two days of the application.

In certain very exceptional cases (not usually concerning commercial cases but mainly those relating to restraint of publication in the press or those concerning personal liberty), an applicant's attorney may contact the Chief Justice or the Senior Puisne Judge for a judge to be available outside normal hours.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

Injunctive relief can be obtained on an ex parte basis.

6.4 Liability for Damages for the Applicant

An applicant may be held liable for damages suffered by a respondent if the injunction is later discharged. There is no reported case where an applicant has been found to be so liable.

In appropriate cases, the judge in chambers has a discretion to order that an undertaking in damages be fortified by means of a cash deposit in court or a bank guarantee.

6.5 Respondent's Worldwide Assets and Injunctive Relief

A judge in chambers has the power to order a worldwide freezing order. In practice, it is more common for the judge to freeze assets which are located in Mauritius and judges are reluctant to issue worldwide freezing orders.

6.6 Third Parties and Injunctive Relief

It is possible for injunctive relief to be granted against third parties.

6.7 Consequences of a Respondent's Non-compliance

A respondent who fails to comply with the terms of an injunction may be held to be in contempt of court and either ordered to pay a fine or (in very exceptional cases) be sentenced to imprisonment. In court proceedings, the trial judge would also have a discretion not to allow the respondent to be heard until it has purged the contempt of court.

7. TRIALS AND HEARINGS

7.1 Trial Proceedings

Civil trials in Mauritius take place in an adversarial format. Each party calls its own witnesses to give evidence and produce documents in support of its case, with counsel for the other parties being able to cross-examine those witnesses. After a party has called all its witnesses, it closes its case and when all parties have closed their cases, their respective counsel make oral submissions on the facts and the law and the judge reserves THEIR judgment. In certain complex cases, the judge may also request that oral submissions be supplemented by written submissions.

Hearings of cases entered before judges in chambers or those entered by way of motion and affidavit, the judge will consider the evidence as set out in affidavits and the submissions (written and/or oral) of counsel. There is no live examination of witnesses on the contents of their affidavits unless a motion is made to that effect and the judge grants the motion in exceptional circumstances.

7.2 Case Management Hearings

Case management is left to the discretion of the trial judge.

7.3 Jury Trials in Civil Cases

There are no jury trials in civil cases in Mauritius.

7.4 Rules that Govern Admission of Evidence

In civil and commercial matters, the court may be quite flexible on the admissibility of evidence but there are certain principles to bear in mind:

- contractual obligations worth more than MUR5,000 need to be supported by a written document and parole evidence is not admissible;
- in any claim to rent or indemnity for the occupation of immovable property, oral evidence shall, when a lease is denied and is not completely established by writing, be admissible to prove or disprove the occupation and the amount or payment of the indemnity, and the party suing shall be entitled to the indemnity although it may result from the oral evidence given that the occupation existed under a lease; and
- the Courts Act, in Sections 181 to 181E, makes provision (subject to conditions) for the admissibility of the following items:
  (a) copies or print made from microfilms;
  (b) out-of-court statements;
  (c) documents being or forming part of records compiled by a person acting under a duty; and
  (d) statements produced by computers.

Regarding contractual obligations worth more than MUR5,000, if no writing exists, the party seeking to prove such obligation may adduce other forms of written evidence as "beginnings of proof in writing" and which from which one could reasonably infer the existence of the obligation. In cases where even beginnings of proof are not available, a party may call the other party or a representative of the other party to examine the latter on personal answers; the answers are recorded by the court and any admission in there can be used as proof of the existence of an obligation.

In relation to an out-of-court statement, a document being or forming part of a compiled record or a statement produced by a computer, it may be proved by the production of that document or by the production of a copy thereof, or the material part thereof, authenticated in such manner as the court thinks fit.

7.5 Expert Testimony

On issues which require expert evidence, each party will call its own expert witnesses. The report of each expert witness is typically tendered before the trial. The court will not itself seek expert testimony. It is open to the parties to agree to file joint expert reports in the proceedings.

7.6 Extent to Which Hearings Are Open to the Public

Access to hearings is allowed to members of the public and transcripts and minutes of proceedings can be consulted at the registry of the court dealing with the case. Records and minutes of cases before judges in chambers are not available to the public whilst records and transcripts of cases before the commercial division are not easily accessible without justification.

7.7 Level of Intervention by a Judge

The judge acts as an arbiter to ensure that rules of evidence and procedure are being followed and that neither counsel embarks in irrelevant lines of questioning. A judge may sometimes ask clarification questions of a witness but would be cautious about the extent of doing so in order to avoid a later argument that a party has not had a fair hearing.

After hearing the evidence and considering submissions of counsel, the judge would typically reserve judgment. In straightforward matters, the judge may deliver a ruling from the bench. It is not the usual practice of Mauritian Courts for the judge to give a ruling on the bench and provide reasons at a later date.

7.8 General Timeframes for Proceedings

The typical duration of trials in commercial disputes is one to two years from commencement.

8. SETTLEMENT

8.1 Court Approval

Court approval is not required to settle a lawsuit.

Parties often choose that the settlement agreement that they have reached be read out in court and made a judgment of the court. Such agreements are usually read by counsel in court and the parties who are present in court ratify it; if the parties are not present, judges and magistrates may allow counsel or attorneys to inform the court that an agreement has been reached and the agreement is recorded without the parties formally ratifying it. The agreement then has the same effects as a judgment with the consequences that:

- any breach of the agreement would be a contempt of court; and
- if there is a breach of the agreement, the innocent party can proceed directly to execution of the agreement against the assets of the defaulting party without needing to initiate fresh proceedings for breach of contract.

There is also a mediation division of the Supreme Court where any agreement reached between the parties must be set down in writing and signed by the parties and the mediation judge for them to be valid.

8.2 Settlement of Lawsuits and Confidentiality

The parties can elect that the agreement remain confidential and agreements reached before a mediation judge are confidential. A carve-out from the confidentiality obligation is usually included/exists to allow disclosure to a trial court which may have to deal with a breach of agreement or contempt of court complaint.

8.3 Enforcement of Settlement Agreements

If a settlement agreement is not made a judgment of the court, the innocent party would need to initiate a fresh action against the defaulting party for breach of contract.

If the settlement agreement was made a judgment of the court, it can be enforced using the usual execution methods against the assets of the judgment debtor and/or the judgment creditor may initiate contempt of court proceedings against the judgment debtor.

8.4 Setting Aside Settlement Agreements

Being a contract, the settlement agreement can be set aside on the same grounds as any other contract, namely:

- physical or economic duress;
- intentional misrepresentation (which may include intentional concealment of material acts); or
- mistake.

A party may then initiate court action within five years to set aside the agreement. In cases of duress, the five-year time-limit begins where the duress has ceased and in cases of misrepresentation it begins where the misrepresentation became known.

If the settlement agreement is reached by way of a “transaction” under the Civil Code, there are special provisions for such agreements to be set aside

9. DAMAGES AND JUDGMENT

9.1 Awards Available to the Successful Litigant

The awards or remedies that are usually available to a successful litigant are as follows:

- payment of a sum of money or damages;
- interest on the judgment debt;
- declarations of the existence of certain facts;
- prohibitory injunctions;
- mandatory injunctions;
- specific performance; and
- costs.

9.2 Rules Regarding Damages

There are no punitive damages provided for in Mauritian law. The courts would seek to provide full compensation (*réparation intégrale*) to a plaintiff for prejudice suffered – in breach of contract claims, the measure of damages is foreseeable loss unless the breach is intentional or grossly negligent, in which case the measure is all the damages that are a direct and certain consequence of the breach. In tort cases, the plaintiff is entitled to recover damages representing the direct and certain consequences of the tort.

9.3 Pre- and Post-Judgment Interest

In cases involving the payment of a sum of money, interest may according to the provisions of the Civil Code run as from the date on which a request to pay was served on the defendant. The trial judge retains a discretion whether pre-judgment interest should include the length of the trial depending on the conduct of the plaintiff (in particular whether the latter has been diligent in pursuing its case). It is not uncommon for the trial judge to award interest to the winning party as from the date of judgment only.

In cases before the Industrial Court, the court may award interest as from the date of dismissal.

In cases of road accidents or accidents at work, the court may award interest as from the date the action was started unless there are good reasons to order interest as from the date when the pleadings were closed.

9.4 Enforcement Mechanisms of a Domestic Judgment

The typical mechanisms are as follows:

- execution by way of warrant to levy;
- execution by way of writ of execution;
- attachment (eg, of receivables or bank accounts);
- seizure and sale of immovable properties in accordance with the provisions of the Sale of Immovable Property Act; and/or
- filing for the bankruptcy or winding up of a judgment debtor.

In respect of Intermediate Court judgments, movable properties must be seized and sold before immovable properties are sold.

9.5 Enforcement of a Judgment from a Foreign Country

An application is made to the Supreme Court by way of motion and supporting affidavit. The evidence has to show that the conditions for exequatur of the foreign judgment are met, namely:

- the foreign judgment is still valid and capable of execution in the country where it was delivered;
- the foreign judgment must not be contrary to any principle affecting public order (meaning international, rather than domestic, public order);
- the defendant must have been regularly summoned to attend the proceedings in which the foreign judgment was delivered; and
- the court which delivered the judgment must have had jurisdiction to deal with the matter submitted to it.

Once the Mauritian Supreme Court has granted the exequatur, the foreign judgment can then be enforced in Mauritius in the same way as a domestic judgment.

10. APPEAL

10.1 Levels of Appeal or Review to a Litigation

Mechanisms of review include:

- in civil cases, appeals from a judge of the Supreme Court are heard by the Court of Civil Appeal;
- appeals from the Bankruptcy Division of the Supreme Court, the master and registrar, the Intermediate Court, the Industrial Court, a Magistrate or any other court or body established under any other enactment are heard by the Supreme Court exercising its appellate jurisdiction; and
- appeals from a decision of two or more judges of the Supreme Court lie to the Judicial Committee of the Privy Council. If such appeals are possible, leave to appeal has to be obtained and not all cases are appealable before the Judicial Committee.

10.2 Rules Concerning Appeals of Judgments

Appeals before the Supreme Court in its appellate jurisdiction or the Court of Civil Appeal are not conditional on leave being granted, ie, they are as of right. However, no appeal shall lie, except by leave of the judge:

- from an order as to costs only;
- from an order made by consent of the parties; or
- from an interlocutory judgment or order.

An appeal to the Judicial Committee of the Privy Council lies as of right:

- against final decisions in civil and criminal proceedings on questions of interpretation of the Constitution;
- against final decisions in civil cases where the matter in dispute is of at least MUR10,000 or the appeal involves a claim to or a question respecting property or a right of the value of MUR1,000 upwards;
- against final decisions in constitutional relief cases;
- against decisions of a bench of three designated judges in applications made under the International Arbitration Act or the Convention for the Recognition and Enforcement of Foreign Arbitral Awards Act; or
- in such other cases as may be prescribed by Parliament, but not where there is a right of appeal from the Supreme Court to the Court of Civil Appeal or Court of Criminal Appeal.

In other cases, an appeal to the Judicial Committee of the Privy Council lies with leave of the court (either from the Supreme Court or, if the latter refuses leave, special leave of the Privy Council):

- where, in the opinion of the court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee;
- against final decisions in any civil proceedings; or
- in such other cases as may be prescribed by Parliament, but not where there is a right of appeal from the Supreme Court to the Court of Civil Appeal or Court of Criminal Appeal.

10.3 Procedure for Taking an Appeal

Supreme Court Appeals

An appeal from a judgment of a Judge of the Supreme Court must be lodged with the registry of the court and served on the respondent(s) within 21 days of the date of the judgment

appealed from, unless the appellant can show good cause why it was not possible to comply with the 21-day period (in which case an extension of time must be applied for before the expiry of the 21-day period) or a statute provides otherwise. A respondent who wishes to resist an appeal shall file with the Registry of the Supreme Court and serve on the appellant a notice to resist appeal not later than two months after being served with the appeal.

District and Civil Court Appeals

Appeals against a judgment of a District Court, Intermediate Court or Industrial Court must be notified to the clerk of that court within 21 days of date of the judgment and the appellant has a further fortnight of giving recognisance for the costs of the appeal to file the appeal with the Registry of the Supreme Court and serve it on the respondent(s).

An appeal before the Court of Civil Appeal shall operate as a stay of execution or of proceedings under the judgment or order appealed from. In appeals before the Supreme Court in its appellate jurisdiction, a stay is not automatic and must be sought from the appellate court.

Judicial Committee Appeals

In relation to appeals to the Judicial Committee of the Privy Council, leave to appeal must first be applied from the Supreme Court. Conditional leave is first applied for and if the conditions (mainly to provide security for costs and sending the reference to the Judicial Committee) are complied with, then final leave is applied for. Once final leave is obtained, the procedure before the Judicial Committee applies.

Applications for conditional leave and final leave are made by way of motion or petition supported by affidavit evidence; the motion or petition must be made within 21 days of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of its intended application. The court, when considering the leave application, has the discretion as to whether to order a stay of execution of the judgment appealed from.

10.4 Issues Considered by the Appeal Court at an Appeal

The appellate court will not conduct a re-hearing of the first instance decision and hear witnesses anew. The appellate court would typically review the transcript of proceedings, the evidence adduced and consider written and oral submissions of counsel with the aim of deciding whether the lower court has committed errors of law. The appellate court will not typically overturn findings of fact unless they are perverse, in the sense that no reasonable judge or magistrate could have made such findings based on the evidence on record.

New pleadings of fact cannot be taken on appeal. It is possible to argue points of law which were not raised before the lower court.

10.5 Court-Imposed Conditions on Granting an Appeal

Appeals before the Supreme Court in the exercise of its appellate jurisdiction of lower courts or before the Court of Civil Appeal are subject to the furnishing of an amount of about MUR25,000 as security for costs.

Appeals before the Judicial Committee of the Privy Council are subject to the furnishing of MUR150,000 as security for costs.

10.6 Powers of the Appellate Court after an Appeal Hearing

An appellate court may:

- dismiss the appeal if none of the grounds of appeal are meritorious;

- quash the lower court judgment if one or more grounds of appeal are well taken, and itself draw any inferences of fact and give any judgment and make any order which ought to have been made, and make such further order as the case may require;
- quash the lower court judgment if one or more grounds of appeal are well taken and, if it thinks fit, order that the judgment or order that the judgment or order appealed from be set aside, and that a new trial be had (often before a differently constituted bench) - a new trial may be ordered on any question without interfering with the finding or decision upon any other question; and
- make such order as to the whole or any part of the costs of appeal or in the court below as seems just.

11. COSTS

11.1 Responsibility for Paying the Costs of Litigation

During the litigation, each party bears its ongoing costs.

The general rule is that the losing party pays the winning party's costs. In certain circumstances, the court may consider that the justice of the case requires that no order be made as to costs, eg, where the winning party has not conducted its case diligently or where both a claim and a counterclaim have succeeded or where parties have reached an amicable settlement early in the proceedings – this is a matter left to the discretion for the judge. The court may also order:

- a party to pay amounts determined by the judge for unreasonable conduct (eg, repeated applications for extension of time); and/or
- a legal representative to pay wasted costs orders in cases of improper, unreasonable or negligent act or omission.

Costs would include counsel and attorney costs of the winning party, court filing costs, costs of attendance of witnesses and costs of ancillary pre-trial applications. Most of those items are subject to very low prescribed amounts set out in the relevant court rules such as the Legal Fees and Costs Rules 2000 and the Supreme Court (Electronic Filing of Documents) Rules 2012, therefore, in practice, the costs recovered are far from the actual legal expenses of the winning party. The exception to that are applications made in international arbitration matters, whereby the Supreme Court (International Arbitration Claims) Rules 2013 may allow a winning party to recover close to its real costs on a standard basis or indemnity basis.

The quantum of costs is taxed by the Master and Registrar, who would apply the relevant court rules and may also award to the winning party reasonable out-of-pocket expenses to the winning party such as the travel and accommodation costs of witnesses from overseas. The rulings of the master and registrar are rarely challenged as the amount of costs award, especially in commercial disputes, is fairly low although there may be some debate about the quantum of out-of-pocket expenses awarded (ie, whether they are reasonable or not).

11.2 Factors Considered when Awarding Costs

The court generally awards costs to the winning party. The quantum is then taxed by the master and registrar who awards the very low amounts prescribed in the relevant court rules and reasonable out-of-pocket expenses.

11.3 Interest Awarded on Costs

Interest is not usually awarded on costs.

12. ALTERNATIVE DISPUTE RESOLUTION (ADR)

12.1 Views of ADR within the Country

Commercial parties are becoming more aware of the existing of alternative dispute resolution (ADR) mechanisms and are increasingly willing to try mediation and arbitration instead of litigating in courts. The main reasons are that ADR procedures are less time-consuming and can also be less costly. In the case of mediation, business relationships can also be maintained or mended.

12.2 ADR within the Legal System

Parties are, at any point in time, free to decide to mediate their disputes. There is, however, no compulsion to do so and no sanction for refusing to mediate.

The Supreme Court (Mediation) Rules 2010 and the Intermediate Court (Mediation) Rules 2019 provide a framework whereby parties can seek that their dispute be referred to mediation before a mediation judge or a mediation magistrate and to make binding and executory any agreement reached by the parties before the mediation judge or magistrate. Without compulsion, any party to a civil suit, action, cause, or matter which is pending before the Supreme Court or the Intermediate may apply (with reasons) to the Chief Justice or to the President of the Civil Division of the Intermediate Court for the action to be referred for mediation.

The Industrial Court Act also empowers a magistrate of that Court to offer guidance and advice, and to use his best endeavours to secure a settlement between parties of an existing or likely dispute. Where a settlement is reached, it is signed by the magistrate and by the parties, and it has the same effect as a judgment of the court.

Arbitration Agreements

When the subject matter of a dispute is subject to an arbitration agreement:

- in the case of a domestic arbitration, the court seized with the dispute will decline jurisdiction if defendant objects to the jurisdiction of the court (but before having filed any defence on the merits of the case); and
- in the case of an international arbitration, the court seized will on application of the defendant (before having filed a defence on the merits) refer the case to a panel of three designated judges under the International Arbitration Act. The designated judges will refer the parties to the arbitration unless the plaintiff shows on a prima facie basis that the is a very strong probability that the arbitration clause is null and void, inoperative or incapable of being performed.

A proclamation is awaited of an amendment to the Courts Act to grant powers of mediation to magistrates of the Intermediate Court.

Adjudication of construction disputes is yet to be provided in legislation but there is nothing preventing contracting parties to tailor-make their own dispute resolution procedure contractually to provide for resolution by adjudication or expert determination. Expert determinations are not uncommon in valuation disputes.

12.3 ADR Institutions

Institutions offering and promoting ADR such as the Mauritius Chamber of Commerce and Industry Arbitration Centre (MARC) and the Mauritius International Arbitration Centre (MIAC) are well organised and equipped with modern and internationally-oriented rules and adequate physical infrastructure.

13. ARBITRATION

13.1 Laws Regarding the Conduct of Arbitration

Domestic arbitrations are governed by the Code of Civil Procedure.

International arbitrations are governed by the International Arbitration Act (based on the Model Law on International Commercial Arbitrations), the Convention for the Recognition and Enforcement of Foreign Arbitral Awards Act (which transposes the New York Convention in Mauritian law) and the Supreme Court (International Arbitration Claims) Rules 2013 (which contains procedural rules for applications before the Supreme Court relating to international arbitration matters).

13.2 Subject Matters Not Referred to Arbitration

It is commonly thought that matters relating to:

- bankruptcy and winding up;
- taxation;
- the capacity of persons;
- inheritance and succession;
- divorce;
- custody of children; and
- criminal proceedings are not arbitrable.

13.3 Circumstances to Challenge an Arbitral Award

An award in a domestic arbitration may be challenged on one of the following grounds:

- by way of appeal on law or facts if the parties had not renounced their right of appeal in the arbitration agreement;
- by the attorney-general if they consider that the enforcement of the award is against the public interest;
- where was no arbitration agreement or the arbitration agreement was null or no longer in force;
- if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
- if the arbitrator has decided the dispute otherwise than in accordance with the reference to them;
- the principles of a fair hearing have not been respected;
- the award fails to contain the contentions of the parties, their grounds in support of the contentions and reasons for the award;
- the award fails to mention the names of the arbitrators and the date of the award;
- the award is not signed by all the arbitrators or, if a minority of them refuses to sign, fails to mention that fact; and/or
- the arbitrator has violated a rule of public order.

An award in an international arbitration may be challenged on one of the following grounds.

- The party making the application furnishes proof that:
  - (a) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law; or
  - (b) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or
  - (c) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of submission to arbitration; or
  - (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties of, failing such agreement, was not in accordance with the International Arbitration Act.
- The court finds that:

(a) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law;
(b) the award is in conflict with the public policy of Mauritius;
(c) the making of the award was induced or affected by fraud or corruption; or
(d) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

In respect of a domestic arbitration award, an application for exequatur of the award is made before the judge in chambers. Once the exequatur is granted, execution measures (such as seizures, attachment or winding up) can be taken in order to enforce the award.

In respect of a foreign arbitration award, an application is made before the Chief Justice for provisional registration of the award. The application and provisional order must then be served on the respondent and the latter shall have 14 days from service (or such longer period as the Chief Justice may order if the respondent has to be served outside the jurisdiction) to apply to set aside the provisional registration on one or more grounds set out in the New York Convention.

If the respondent fails to make an application to set aside the provisional registration or is unsuccessful in such an application, the award may be enforced.

14. OUTLOOK AND COVID-19

14.1 Proposals for Dispute Resolution Reform

Further to the amendments brought to the Courts Act in 2020 for the formalisation of a couple of divisions and the creation new divisions of the Supreme Court, the Courts Act was again amended this year, to allow the prosecution and the defence appearing before the financial crimes division of the Supreme Court or the financial crimes division of the Intermediate Court, to agree that an alleged fact or other evidence is not contested.

In addition, the Chief Justice may, after consultation with the rules committee and the judges, make rules with respect to the following matters:

- for the electronic filing of documents and electronic service of process;
- for the practice and procedure for mediation before any magistrate, judge or court;
- for the adjournment of matters;
- for alternate dispute resolutions before any magistrate, judge or court;
- time limits for judgment;
- for the management of cases, including pre-trial case management;
- for the award of any other costs in any proceedings; and
- generally, for any other matter essential to the proper administration of justice.

14.2 Impact of COVID-19

The COVID-19 Act 2020 amended 56 existing primary enactments whilst the new Quarantine Act 2020 repeals and replaces the former Quarantine Act which had been in force since 1954.

Several amendments brought about by the COVID-19 Act 2020 refer to events which would have taken place during or shortly after

the "COVID-19 period", the latter expression being defined in the Interpretation and General Clauses Act the period starting 23 March 2020 and ending on 1 June 2020 or on such later date as the Prime Minister may prescribe by way of regulations made under that Act.

However, at the expiry of the initial "COVID-19 period", no other regulation has yet been prescribed by the Prime Minister to extend delays of suspend the operation of limitation periods. Therefore, the current statutory delays apply.

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Trends and Developments

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Mauritian Courts Tighten the Possibility of Challenging Arbitral Awards on Public Policy Grounds

Introduction

Mauritius continues to be a pro-arbitration jurisdiction. This year, two decisions have been handed down which clearly show that the Mauritian courts will not easily uphold challenges to arbitral awards. The first is the decision of the Judicial Committee of the Privy Council (JCPC) to restore an arbitral award in the case of Betamax Ltd v/s State Trading Corporation [2021] UKPC 14. The second is the case of Essar Steel Limited v ArcelorMittal USA 2021 SCJ 249, the Supreme Court of Mauritius (the "Supreme Court") was required to decide an application to stay the enforcement of an International Chamber of Commerce arbitral award. This article will give an overview of these two cases.

The Betamax Judgment

On 14 June 2021, the JCPC delivered its judgment in the case of Betamax v/s State Trading Corporation. The JCPC reversed the decision of the Supreme Court and restored an arbitral award which had found the trading arm of Mauritius to be liable for USD115.3 million plus interest and costs.

History

The dispute arose following the singing of a contract of affreightment (COA) between Betamax Ltd ("Betamax") and the State Trading Corporation (STC) in 2009. In the various cases that ensued, the regime of the Public Procurement Act 2006 (the "PP Act") and the Public Procurement Regulations 2008 (as amended in 2009, the "PP Regulations") was central. If the PP Act applied to the COA, that contract would have then required the approval of the Central Procurement Board (CPB). STC contended that this was the case, while Betamax argued that the COA was exempted from the PP Act by the PP Regulations.

In 2015, STC signified its intention to cease using freight services from Betamax under the COA. Betamax thereafter served a notice of termination of the COA and filed a notice of arbitration under the COA claiming damages of over USD150 million for breach of contract. Following arbitration hearings in a Mauritius-seated arbitration administered under the SIAC Rules, the arbitrator delivered his award holding that STC was liable to Betamax for USD115.3 million plus interests and costs (the "Award").

STC applied to the Supreme Court to set aside the Award, on the grounds that the dispute was not arbitrable, that the arbitration agreement was not valid and that the Award was contrary to the public policy of Mauritius.

The Supreme Court upheld the argument that the Award contravened public policy, on the basis that the COA was illegal because it was entered into without obtaining CPB approval under the PP Act. The Supreme Court, in so ruling, considered the PP Act to be part of the fundamental legal order of Mauritius and the PP Regulations could not be interpreted in such a way as to exempt the COA from its application.

Betamax appealed the Supreme Court judgment before the JCPC.

Decision of the JCPC

The issues which the JCPC had to determine were:

- (1) Was the Supreme Court entitled to review the arbitrator's decision that the COA was not subject to the provisions of the PP Act and PP Regulations?
- (2) If in the affirmative, was the COA illegal as a result of being entered into in breach of the PP Act and PP Regulations?
- (3) If the COA was illegal, was the Award giving effect to the COA in conflict with the public policy of Mauritius?

Issue (1)

The JCPC observed that the issue in the appeal was the scope of Section 39(2)(b)(ii) (the ground on contravention to public policy) of the International Arbitration Act (IAA) in relation to a decision of an arbitral tribunal which decided that a contract was not illegal on the basis of its interpretation of legislative provisions and regulations that were applicable to a contract. The JCPC also agreed with the Supreme Court that the nature and extent of the public policy of Mauritius was a matter to be decided by the Supreme Court itself.

The JCPC concluded however that the Supreme Court was wrong in interfering with the arbitrator's decision. It based its conclusion on two main arguments:

- that the determination of the legality of the COA turned on questions of interpretation of the PP Act and the PP Regulations which did not give rise to any issue of public policy; and
- that the purport of section 39(2)(b)(ii) of the IAA would be significantly expanded if the Supreme Court's intervention was upheld. Such an expansion was not in line with the spirit of the IAA, which was intended to uphold the finality of an arbitral tribunal's decisions on the law and facts.

The JCPC disapproved the Supreme Court's reliance on the English decision of Soleimany v Soleimany [1999] QB 785, given that the latter related to an arbitral tribunal making an award about a contract which it concluded was illegal, and on the Singapore decision of AJU v AJT [2011] 4 SLR 73, given that the Singapore Court of Appeal's dictum about the scope of the court's intervention went further than what was required in that case and was inconsistent with the rest of that judgment as a whole.

Issues (2) and (3)

On Issue (2), the JCPC's interpretation exercise led it to conclude, unlike the Supreme Court, that the COA was exempt from the PP Act. Issue (3) thereby did not need to be decided.

Overall conclusion

The Betamax judgment suggests that even when the subject matter of an arbitration concerns the legality of a contract under legislation having a public law element, it will be very difficult to overturn the conclusion of the arbitral tribunal on the legality of the contract under that legislation on grounds of public policy.

The Essar Steel Judgment

History

The Supreme Court had to consider whether to refuse to recognise an ICC award delivered in the USA on the grounds that the arbitration debtor had been deprived of an opportunity to present its case.

Essar Steel Limited (ESL), a company incorporated in Mauritius, was the holding company of Essar Steel Minnesota LLC (ESML). ESL and ESML entered into an agreement with Arcelormittal USA LLC (AMUSA) for the supply by ESML and purchase by AMUSA of iron ore pellets over

a ten year-year period (the "Agreement"). AMUSA terminated the contract for anticipatory and repudiatory breach by ESML. Thereafter, ESML entered into bankruptcy proceedings in the USA and AMUSA initiated arbitration proceedings against ESL pursuant to the ICC Rules of Arbitration and with a seat of Minnesota, ESL being the guarantor of ESML's obligations under the Agreement.

An arbitral tribunal appointed by the ICC International Court of Arbitration ultimately awarded damages of over USD1.3 billion, with costs and interest, in favour of AMUSA. AMUSA subsequently obtained a provisional order for the recognition and enforcement of the award from the Supreme Court (the "Provisional Order").

ESL's application

ESL applied to set aside the Provisional Order and stay enforcement of the award on the following grounds:

- under Article V(1)(b) of the New York Convention, that ESL was unable to present its case; and
- under Article V(2)(b) of the New York Convention, that recognition or enforcement of the award would be contrary to the public policy of Mauritius.

It was ESL's contention that it was unfairly treated by the arbitral tribunal as a result of which it was unable to prepare its defence and to properly present its case. During the arbitral proceedings, ESL had informed the tribunal that it would not be able to participate in the arbitration or assist the tribunal further. As a result, it did not participate in the evidentiary hearings that preceded the issue of the award.

In a nutshell, ESL argued that:

- given the complexity of the dispute, the six-month timeframe imposed by the arbitration clause in the Agreement (from execution of the terms of reference to completion of the evidentiary hearings) was unrealistic, inappropriate and unreasonable;
- the arbitration clause was meant to deal with disputes over delivery of iron-ore pellets rather than disputes relating to the entire performance of contract;
- the ESL was unable to access documents from ESML since the latter was undergoing bankruptcy proceedings and was not a party to the proceedings; in addition, the volume of documents provided by AMUSA required several weeks before a meaningful defence could be prepared and ESL did not have access to any current or former employee of ESML; and
- the ESL could not review any of the documents provided by AMUSA because of the terms of a confidentiality order issued by the tribunal during the proceedings in respect of "highly confidential" information.

ESL contended that the above were serious fundamental procedural defects and that since it was unable to present its case, this also amounted to a contravention of the public policy of Mauritius.

The Supreme Court's determination

The Supreme Court rejected ESL's challenge and considered that it had failed to make a persuasive case under either ground.

In assessing the first ground, the court held that:

- ESL had more than six months to collect evidence in order to defend itself, as the request for arbitration was issued nearly 14 months before the start of evidentiary hearings;

- the fact that ESML's former CEO (and ESL's representative in the arbitration proceedings) believed that documents had been deleted from his laptop undermined ESL's contention that it could not access documents due to an allegedly inappropriate timeline;
- ESL did not consult the documents which were provided to it by AMUSA. Moreover, ESL could have applied for arbitral subpoenas and availed itself of the tribunal to obtain documents;
- owing to the nature of its activities and the generality of the arbitration clause, ESL should have been aware of the complexity of the contract and could not therefore invoke the non-applicability of the arbitration clause in order to avoid compliance with the six-month timeframe from execution of the terms of reference to completion of evidentiary hearings;
- Article 22(3) of the ICC Rules grants the tribunal discretion to determine its own process and accordingly, it was not improper for the arbitration tribunal to impose the confidentiality order in relation to price-sensitive information; and
- ESL did not avail itself of the mechanism under clause 10 of the confidentiality order to seek a declaration from the tribunal which could have allowed its lawyer to discuss any confidential information.

Regarding the public policy ground, the Supreme Court found that ESL was unable to show that there was any breach of the "most basic notions of morality and justice" by the way in which the arbitral proceedings were conducted. ESL therefore failed to establish a contravention to the public policy of Mauritius.

The Supreme Court confirmed that a very limited notion of public policy should apply to the recognition of foreign arbitral awards, meaning that this ground will be require a very high threshold to be satisfied before the Supreme Court would consider intervening to refuse recognition of an award.

The two above decisions show that the Supreme Court continues to stiffen the challenge of arbitral awards on public policy grounds.

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