

**IN THE SEYCHELLES COURT OF APPEAL**

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**Reportable**

[2021] SCCA 28     20 July 2021  
SCA 56/2018 and SCA 63/2018  
Appeal from CC 29/2014

In the matter between

**DF PROJECT PROPERTIES (PROPRIETARY) LTD**

*(rep. by Basil Hoareau)*

**Appellant**

and

**FREGATE ISLAND PRIVATE LIMITED**

*(rep. by Divino Sabino and Conrad Lablache SC)*

**Respondent**

**Neutral Citation:** *DF Project Properties (Proprietary) Ltd v Fregate Island Private Limited*  
(SCA 56/2018 and SCA 63/2018 Appeal from CC 29/2014) [2021] SCCA 28  
(20 July 2021)

**Before:** Fernando PCA, Twomey, JA and André JA

**Summary:** enforcement of foreign judgment, section 227 of the Seychelles Code of Civil Procedure, conditions to be fulfilled for enforcement of foreign judgment

**Heard:** 24 June 2021

**Delivered:** 20 July 2021

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**JUDGMENT**

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**TWOMEY JA**

**Introduction**

[1] In the case of *Ablyazov v Outen & Ors*,<sup>1</sup> this court stated:

*“With respect to assuming competence, courts of unlimited jurisdictions have invoked their inherent jurisdiction functions to assume competence to recognise orders made by foreign courts to the extent that the assets may be traced in their own jurisdictions, irrespective of whether there exist a formal law between democratic nations to co-operate and collaborate in judicial matters within the limits of their territorial jurisdictions presumably as a modern application of *lex mercatoria*.”*

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<sup>1</sup> (SCA 56/2011 & 08/2013) [2015] SCCA 23 (28 August 2015).

[2] The above statement recognises the fact that in general, the recognition, enforcement and execution of foreign judgments although governed by domestic law are subject to the principles of comity, conflicts of laws and reciprocity. In Seychelles, the provisions of section 11 of the Courts Act recognises the extraterritorial jurisdiction of the Supreme Court, namely:

*“The jurisdiction of the Supreme Court in all its functions shall extend throughout Seychelles:  
Provided that this section shall not be construed as diminishing any jurisdiction of the Supreme Court relating to persons being, or to matters arising, outside Seychelles.”*(emphasis added)

[3] In addition, a foreign judgment can be registered and executed under the Foreign Judgments (Reciprocal Enforcement) Act (FJREA) if there is reciprocity between Seychelles and the foreign jurisdiction; the Reciprocal Enforcement of British Judgments Act (REBJA) if the foreign judgment is a British judgment; and under section 227 of the Seychelles Code of Civil Procedure (SCCP) for judgments from a country with whom Seychelles has no treaty or formal agreement.

[4] The appeal before this court concerns the execution in Seychelles of three Orders of the German Dusseldorf Higher Regional Court, specifically a First Court Order declaring a German arbitration award enforceable, a Second Order declaring the Cost Order concerning the First Order proceedings enforceable, and a Third Order declaring the Costs in relation to the arbitration award enforceable.

[5] For the first time in this jurisdiction, the enforcement of such Orders was sought not under the statutory and established procedures as set out above but rather through the application of Article 125 (1) of the Constitution,<sup>2</sup> sections 4-6, 11 and 17 of the Courts

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<sup>2</sup> Section 125 of the Constitution provides in relevant part “ (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have -  
(a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;  
(b) original jurisdiction in civil and criminal matters;  
(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and  
(d) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.

Act<sup>3</sup>; and the decisions in *Finesse v Banane*<sup>4</sup> and *Ablyazov v Outen & Ors*<sup>5</sup> which established that the Supreme Court of Seychelles has the same powers as the High Court of England and Wales and therefore that if the High Court of England would have jurisdiction to enforce the German Orders, applying the provisions cited above, so would the Supreme Court of Seychelles. In the circumstances, it was submitted that the Supreme Court should follow Rules 200(2) and 190 of the English Rules on the Conflicts of Laws<sup>6</sup> in the enforcement of a foreign order.

### **Background to the present appeal and cross-appeal**

[6] DF Project Properties (Proprietary) Ltd (hereinafter DF) entered into a written agreement with Fregate Island Private Limited (hereinafter Fregate) to build a 5-star holiday resort on Fregate Island, Seychelles. The Agreement provided that if any dispute arose from or with the agreement, the same would be resolved by arbitration rules (of the *Wirtschaftsvereinigung Bauindustrie e. V. North Rhine Westphalia*) in Germany.

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<sup>3</sup> Section 4 provides: “The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England.”

Section 5 provides: “The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.”

Section 6 provides: “The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.”

Section 11 provides: “The jurisdiction of the Supreme Court in all its functions shall extend throughout Seychelles: Provided that this section shall not be construed as diminishing any jurisdiction of the Supreme Court relating to persons being, or to matters arising, outside Seychelles.”

Section 17 provides: “In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”

<sup>4</sup> (1981) SLR 103.

<sup>5</sup> Above, fn 1.

<sup>6</sup> “Rule 200. – . . . (2) If a party obtains a foreign judgment by which a foreign arbitration award is made enforceable, the party may enforce the judgment in England in accordance with Rule 190, 191, 192 or 193.”

“Rule 190. – Subject to the Exceptions hereinafter mentioned, a foreign judgment in personam which is not impeachable under any of Rules 186 to 189 may be enforced by an action or counterclaim for the amount due under it if the judgment is

(1) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty);

(2) final and conclusive, but not otherwise

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.”

- [7] A dispute arose and was arbitrated in Germany and the Arbitral Tribunal issued an award in favour of DF on 9 July 2009 for US\$ 1,941,669.13 plus interest together with two-thirds of the costs incurred in the arbitration proceedings.
- [8] Fregate appealed to the Dusseldorf Higher Regional Court to revoke the award of the Arbitration Tribunal but later withdrew the application for revocation. After obtaining the three German Court Orders, DF unsuccessfully sought their enforcement and execution in the Supreme Court of Seychelles.
- [9] It must be noted with regret, that the execution of the judgment in a commercial case begun in 2014 took more than four years to complete in the Supreme Court and it has taken another three years for the appeal to be heard in this court. I take this opportunity on behalf of the Court to apologise to the parties for this inordinate delay which caused personal hardship to both sides as is reflected in the transcribed proceedings (that is provisional seizure of moveable assets including sea vessels, attachment of funds in bank accounts of a going concern impacting on its day to day business).
- [10] The Supreme Court ultimately decided that section 227 of the SCCP concerning the enforcement of foreign judgments as qualified by the case of *Privatbanken Aktieselkab v Bantele*<sup>7</sup> was only applicable to a judgment of a foreign court, and “not an enforcement order, under an arbitral award” (paragraph 82 of the judgment of the court *a quo*).
- [11] Accordingly, it found that *Privatbanken* was reserved to the facts as presented in that case and, therefore, not applicable to the present situation.
- [12] The Court also found that Rule 200 (2) of the English Private International Law Rules is common law based; and that the applicability of the said Rule in Seychelles has neither been excluded by statute nor is it contrary to the Constitution. The Court found that the Rule is therefore applicable in Seychelles under section 4 of the Courts Act which vests powers of the High Court of England in the Supreme Court of Seychelles in addition to its other powers as conferred by the Constitution and other legislation.

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<sup>7</sup> (1978) SLR 226.

- [13] At the hearing both Dr Michael Dimanski, the expert witness for DF and Professor Stefan Leupertz, the expert witness for the Fregate, stated that the First and the Third German Court Orders were enforcement orders. Both experts explained that in Germany in order to enforce an arbitral award one must go before the Higher Regional Court to obtain the declaration/order of enforcement and that this is a mandatory procedure.
- [14] Dr Dimanski was of the view that the First and the Third Orders (enforcement of the award and enforcement of the cost arbitration award) superseded the award and the decision of the Arbitration Tribunal. He stated that a party who wished to enforce the award would need to rely on the German Court Orders, not upon the award (pages 117-119 of Volume III of the Court of Appeal case bundles; paras 30-38 of the Supreme Court judgment).
- [15] Professor Leupertz was of the view that the Orders were not judgments on merits and did not supersede the award. He stated that the Orders were enforceable only in Germany and were not subject to enforceability abroad. He further stated that the award did not merge with the Court Order and Germany does not permit a double *exequatur* of an arbitration award in cases where a foreign court has already confirmed the foreign arbitral award (paras 49-59 of the Supreme Court judgment).
- [16] DF in the present case sought to enforce in Seychelles, not the German arbitration award but rather, the three Orders of the Higher Regional Court as foreign judgments as contained in its prayer in the Complaint dated 31 July 2014, namely by the Court “declaring the [...] foreign judgments of the Regional High Court of Dusseldorf enforceable and executory in the Republic of Seychelles according to the Law of Seychelles...”
- [17] The Court preferred the testimony and legal opinion of Professor Leupertz citing his reasons in paragraph 2.2.2 of the Legal Opinion:

*“[104] . . . As stated in D4 the declaration of enforceability by the state court contains no further independent decision on the merits and does not therefore replace the arbitration award in a way that could allow an exequatur in Seychelles. Professor Leupertz also explained that an application before the Regional High Court to enforce an arbitration award is not an appeal. . .”*

[18] Ultimately, the Court agreed that the English Rules on the Conflicts of Laws should apply. However, it held that certain conditions under the rules were not satisfied, namely that, (relying on *Nouvion v Freeman*<sup>8</sup>) it was not satisfied that the Orders were final and conclusive judgments in terms of Rules 200 and 190 and were not binding on the rights and liabilities of the parties settling the existence of the debt to become *res judicata* between them.

### **The grounds of appeal and cross-appeal**

[19] DF has appealed the decision of the Supreme Court on the following grounds:

- (1) *The learned trial judge erred in law in failing to properly apply Rule 200(2) of the English rules of private international law in relation to the order of the Regional Court of Dusseldorf (the High Court) delivered on 8 May 2010 (the First Court Order) and the order of the High Court delivered on 11 November 2010 (the Third Court Order).*
- (2) *The learned trial judge erred in law and on the evidence in relying on the evidence and the written legal opinion – exhibited as P4 – of Professor Leupertz in determining that the First Court Order and the Third Court Order were not foreign judgments within the meaning and context of Rule 200(2) of the Rules.*
- (3) *The learned trial judge erred in law in holding the First and Third Court Orders were not final and conclusive judgments within the meaning of Rules (200 (2) and 190.*
- (4) *The decision of the learned trial judge that the First Court Order and the Third Court Orders are not judgments within the natural meaning and context of Rule 200(2) of the rules is unreasonable and cannot be supported by the evidence.*
- (5) *The learned trial judge erred in law in holding that the order – delivered by the High Court on 20 August 2010 – was not a foreign judgment under section 227 of the Seychelles Code of Civil Procedure.*

[20] Fregate has cross-appealed on the following grounds:

- (1) *The judge ought to have determined the enforceability of the orders of the Regional High Court of Dusseldorf, Germany (collectively the “German Court Orders”) on the basis of section 227 of the Seychelles Code of Civil Procedure rather than the English private international law rules.*

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<sup>8</sup> (1889) 15 App Cas 1.

- (2) *The judge erred in her finding that the English private international rules applied to this case in both procedural and substantive respects.*
- (3) *Given her finding that the First and Third German Orders were not exequaturs (ie enforcement orders) the learned judge ought to have concluded, on that basis alone that those German court orders did not satisfy the requirements for enforceability in Seychelles.*
- (4) *The learned judge did not appreciate that the appellant was bound by the admission of its counsel in the proceedings of 27 May 2015 that it would not be relying on the arbitral awards in this case. That being so, the learned judge erred in her finding that the existence of the arbitral awards was established on a balance of probabilities and in applying the English private international law rules (to the extent they apply at all ) to such findings.*
- (5) *Given the uncontroverted evidence that the appellant, an overseas company, contravened section 309 of the Companies Act 1972 and other mandatory requirements in performing disputed agreements underlying the German court orders and consequently evaded taxes after revenue, the learned judge ought to have concluded that all the German court orders were against the fundamental rules of public policy and thus unenforceable in Seychelles.*

[21] The issues raised in the grounds of the appeal and cross-appeal boil down to the following:

- (1) *Whether the Supreme Court erred in relying on the Constitution and the Courts Act to enforce a foreign arbitral award/judgment in Seychelles?*
- (2) *Whether the German Court Orders were enforceable in Seychelles?*

[22] Before I turn to the issues raised in this appeal, the following has to be stated with respect to private international law and conflicts of law issues in this jurisdiction: Early Seychelles jurisprudence concluded that French rules of private international law are to be followed in Seychelles: *Rose v Mondon*<sup>9</sup>; *Morgan v Morgan*<sup>10</sup>; *Pillay v Pillay*<sup>11</sup>; *Pillay v Pillay*<sup>12</sup>.

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<sup>9</sup> (1964) SLR 134.

<sup>10</sup> (1972) SLR 79.

<sup>11</sup> (1973) SLR 307.

<sup>12</sup> (1978) SLR 217.

[23] A more modern approach was adopted in the case of *Intelvision Network Ltd v Intelvision Ltd Civil Appeal*.<sup>13</sup> The Court of Appeal noted:

[15] *Rose decided that the judgment of the Court of Appeal of Seychelles in Augustin v Bailey (1962) MR 115 had conclusively laid down the rules of private international law to be followed in Seychelles. In Augustin, the Court of Appeal of Seychelles in Mauritius stated:*

*“Since the rules of private international law in any country must necessarily have their foundations in the internal laws of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French so that, subject to any exceptions which may arise through litigation we must be guided by the French Rules of private international laws.”*

[16] *In 1975, we enacted our own Civil Code and although it is substantially based on the Code Civil of France, logically it is our Code and the Seychellois jurisprudence emanating from it that must now guide us on the question of private international law. In this sense, the Appellants are correct to say that it is Seychellois law that should apply when deciding on the proper law of the contract in this case.*

[24] It is thus clear that it is Seychellois law that applies to determine the proper law to apply in private international law matters and whether foreign judgments should be executed to bind an individual or his property.

[25] Further, in the present case in deciding how to resolve the legal dispute between the parties by reference to the laws of Germany, (the *lex causae*) it must be noted that although the *lex fori* govern procedural matters, with regard to remedies in particular, as pointed out by George Panagopoulos<sup>14</sup> inasmuch as they form part of the substance of the claim since they affect “the existence, extent or enforceability of the rights or duties of the parties ...[they] should be characterised as substantive”. Panagopoulos further notes that remedies are not rules governing the mode of conduct of the court's proceedings and thus should not be seen as issues of procedure.<sup>15</sup> The execution of a judgment is therefore

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<sup>13</sup> SCA 31/2014, appeal from Supreme Court decision 17/2013, [2015] SCCA 31.

<sup>14</sup> George Panagopoulos, “Substance and Procedure in Private International Law”, *Journal of Private International Law*, 2005, 77-78.

<sup>15</sup> *Ibid.*



not a matter of procedure but a matter of substance. I will return to this issue later in the judgment.

**The first issue: whether the Supreme Court erred in relying on the Constitution and the Courts Act to enforce a foreign arbitral award/judgment in Seychelles?**

[26] Fregate submitted both in the court below and this court that the Appellant's claim was based on section 227 of the SCCP and that it is, therefore, French jurisprudence that should determine the issue of jurisdiction. In French law, “the request for the *exequatur* of a foreign judgment who in turn granted the *exaquatur* to another foreign judgment rendered in a third-state would be inadmissible; it is the original judgment that should be scrutinised by the French *exequatur* judge.”<sup>16</sup> Fregate further submitted that the Supreme Court does not have jurisdiction to declare enforceable or executory the German judgments as these were not delivered as a result of a hearing on the merits of the dispute between the parties. The German court orders were merely declaring executory the arbitration Orders and that the maxim *exequatur sur exequatur ne vaut* would apply with respect to Seychelles’ courts executing the German court orders.

[27] DF has submitted on the other hand that the Supreme Court of Seychelles has jurisdiction to render enforceable or executory the German orders on the basis of the constitutional and legal provisions of the Courts Act as mentioned above, that the Supreme Court of Seychelles has the same powers as the High Court of England and since the High Court of England would have jurisdiction to enforce the judgment so would Seychelles. DF then relied on Rule 200 of the English Rules of Conflict of Laws and the authority of *International Alltex Corporation v Lawler Creations Limited*<sup>17</sup> (an Irish High Court case, which Counsel for DF and the Supreme Court both mistakenly referred to as a case of the High Court of England) for the proposition that courts can grant the option to enforce a foreign judgment instead of the award since the two are on the same footing.

[28] I am unable to follow the reasoning of DF as adopted by the Supreme Court with regard to why Rule 200 of the English Rules of Conflict of Laws should apply. To my mind, the provisions of section 17 of the Courts Act would preclude the application of the English Rules. The provisions of section 17 bear repeating:

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<sup>16</sup> H. Batiffol et P. Lagarde, *Drot international privé* vol II, 7 edn, 1983, n° 723, p 575.

<sup>17</sup> [1965] IR 264.

*“In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”* (emphasis added)

[29] Our laws are not silent on the matter of enforcement of foreign judgments. When FJREA and REBJA have no application as in this case, it is section 227 of the SCCP that applies. Section 227 as interpreted in *Privatbanken*,<sup>18</sup> *Green v Green*,<sup>19</sup> *Baldini & Ano v State Assurance Company of Seychelles (SACOS)*,<sup>20</sup> is to the effect that foreign judgments can only be enforced in Seychelles if they are declared executory by the Supreme Court of Seychelles unless an act or a treaty provides otherwise. The conditions for a foreign judgment to be declared executory are also specified by *Privatbanken*.

[30] The foreign judgment in *Privatbanken* was a decision on the merits of the dispute, while the German Orders in the present case do not go into the merits of the arbitration dispute. The Supreme Court decided on this basis alone that *Privatbanken* did not apply to the present situation given this distinction.

[31] I respectfully disagree with this view simply because judgments in this jurisdiction and generally refer to both judgments and orders. My view is strengthened by the provisions of section 227 and other provisions of our law concerning the enforcement of judgments. Section 227 provides that :

*“Foreign judgments and deeds drawn up in foreign countries can only be enforced in the cases provided for by articles 2123 and 2128 of the Civil Code and agreeably with the provisions of the aforesaid articles.”*

Further, the word judgment is not defined in the SCCP but “judgment creditor” and “judgment debtor” are both defined as a party to a cause or matter in whose favour or against whom, respectively, “a judgment or order of the court has been given”. Similarly, both FJREA and REBJA, in specifically providing for the recognition of foreign judgments define judgment as “any judgment or order given or made by a court in any civil proceedings”.

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<sup>18</sup> Above, fn 6.

<sup>19</sup> (1973) SLR 295.

<sup>20</sup> (CS 5/2011) [2018] SCSC 864 (26 September 2018).

- [32] The Supreme Court’s distinction between judgment and order is even more surprising given that this Court in *Ablyazov*,<sup>21</sup> a case which concerned not the enforcement of a foreign judgment but rather a receivership order, made it clear that section 227 and the principles in *Privatbanken*<sup>22</sup> were equally applicable to court orders. Similarly, the Court of Appeal upheld the Supreme Court’s finding on much the same point in a case concerning the enforcement of an arbitration order in the case of *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited*.<sup>23</sup> *Vijay* was in respect of an enforcement order under REBJA which had similar provisions to section 227 and designed to achieve similar results. The Court of Appeal held that that the provisions of REBJA relating to “judgement” were meant to be interpreted broadly to include any judgment made in civil proceedings or any judgment for payment or similar Order.
- [33] The Supreme Court in the present case also appears to have been swayed by the expert testimony of Professor Leupertz that the German Orders were only enforceable and did not merge with the Court Order as Germany does not permit a double *exequatur* of an arbitration award in cases where a foreign court has already confirmed the foreign arbitral award. What must be remembered is that Professor Leupertz and for that matter, Dr Dimansky and Professor Jarrosson (as cited by Fregate in their closing submissions) were experts in German and or French law but not Seychellois law. The enforcement of foreign orders in Seychelles is not a subject that is within their expertise.
- [34] As explained in *Vijay*, *exequatur sur exequatur ne vaut* does not apply within the context of the present case. The doctrine is procedural as it prohibits ‘the enforcement of a judgment for enforcement’. The issue before this court is different – it is solely about the enforcement of a foreign judgment.
- [35] I am therefore of the view with respect to the first issue, that is, whether the Supreme Court erred in relying on the Constitution and the Courts Act to enforce a foreign arbitral award/judgment in Seychelles, that it did indeed. Seychelles has legislated for the enforcement of awards and judgments and therefore section 4 of the Courts Act has no

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<sup>21</sup> SCA 56/2011 & 08/2013) [2015] SCCA 23 (28 August 2015).

<sup>22</sup> Above, fn 7.

<sup>23</sup> (SCA28/2020) SCCA 22 (02 October 2020).

application to the present case. Nor, it must be said that French jurisprudence has any bearing on this matter either. We have our own legislation and jurisprudence in this respect as I have pointed out above.

[36] All the grounds of appeal regarding this issue, to make enforceable the German Orders under section 4, therefore, fail in their entirety. However, the fifth ground of appeal in relation to whether the learned trial judge erred in law in holding that the order – delivered by the High Court on 20 August 2010 – was not a foreign judgment under section 227 of the Seychelles Code of Civil Procedure succeeds. Similarly, the first two grounds of the cross-appeal concerning the same issue succeed.

### **The second issue: whether the German Court Orders were enforceable in Seychelles?**

[37] Having found that section 227 of the SCCP and the conditions of *Privatbanken* apply to foreign court orders, it is now necessary to determine whether these were fulfilled in the present case to render the three German Orders enforceable in Seychelles.

[38] The conditions for a foreign judgment to be declared executory under *Privatbanken* are that :

*“(1) The foreign judgment must be capable of execution in the country where it was delivered;*

*(2) The foreign Court must have had jurisdiction to deal with the matter submitted to it;*

*(3) The foreign Court must have applied the correct law (“la loi compétente”) to the case in accordance with the rules of the Seychelles private international law;*

*(4) The rights of the defence must have been respected;*

*(5) The foreign judgment must not be contrary to any fundamental rules of public policy; and*

*(6) There must be absence of fraud.”*

### **Condition 1 – execution in Germany**

[39] In respect of the first condition, it is not disputed that the German orders are capable of execution in Germany. Their execution did not take place as presumably, Fregate has no assets against which the court orders could be executed in Germany.

## Condition 2 – Jurisdiction of the foreign court to deal with the issue

[40] As for the second condition, that the foreign court must have had jurisdiction to deal with the matter submitted to it, is noted that Sauzier J in *Privabanken* held that,

*“... the trial Court must have jurisdiction in the international sense and also local jurisdiction. The first must be determined in the light of Seychelles’ private international law whereas the second in the light of the law of the country of the trial Court”.*

[41] With regard to Seychelles’ private international law Sauzier J further held:

*“As far as the jurisdiction of the Supreme Court of Seychelles is concerned, it is now almost entirely governed by English law or by law based on English law. Since the rules of private international law must necessarily have their foundation in the internal law, therefore those rules dealing with the jurisdiction of foreign courts in the international sense must be based substantially on the provisions of our law regarding the jurisdiction of Seychelles Courts, more particularly the jurisdiction of the Supreme Court of Seychelles. In this respect therefore we should be guided by English rules of private international law...”*

[42] Sauzier J went on to hold that the criterion for the jurisdiction of the foreign court in terms of our law under the rules of private international law is either “residence or presence in, or submission or agreement to submit to the foreign jurisdiction”. In the present case, both parties submitted to the arbitration in Germany. Furthermore, the agreement between the parties was subject to the substantive law of the Federal Republic of Germany.

[43] Both expert witnesses, Doctor Dimanski and Professor Leupertz stated that for the German award to be enforceable, a party must apply to the German Court for a declaration of enforceability. As pointed out by Professor Leupertz in his Legal Opinion:

*“[A]wards cannot be enforced in Germany without further legitimation regardless of their binding effect.. [and] the executory title required for the enforcement of the arbitration award is the enforcement decision of the Higher Regional Court, not the award itself. . .”*

[44] In my view, therefore, this is sufficient to establish the jurisdiction of German courts in the international and the local sense. Therefore, the Higher Regional Court of Dusseldorf had jurisdiction to decide on the enforceability of the German Arbitration Award and Costs.

### **Condition 3 – the application of the correct law by the foreign court**

[45] In respect of the third condition, namely that the foreign Court must have applied the correct law (“la loi compétente”) to the case in accordance with the rules of Seychelles private international law, Sauzier J in *Privatbanken* pointed out that this rule has been asserted by the French decision of *Munzer c. dame Jacoby-Munzer*.<sup>24</sup> The decision reversed the earlier jurisprudence that a foreign judgment has to be revised on merits and laid down new rules relating to the enforcement of foreign judgments. Thomas E. Carbonneau<sup>25</sup> highlights the conditions set out by the *Munzer* decision and the restriction which prohibits the judge from reviewing the foreign judgment’s merits in much the same terms as *Privatbanken*.

[46] Carbonneau clarified the third condition, stating that the *Munzer* decision:

*“demands that the merits of the foreign litigation have been decided according to the law designated as the governing law by the choice of law rules under French private international law”*.<sup>26</sup>

He further pointed out that:

*“such requirement will result in the denial of an exequatur to those foreign judgments in which the foreign choice of law rules designate a law other than the one required by French rules as the law governing the merits of the litigation”*.

Carbonneau stated that there were two developments in the jurisprudence that reduced the potential inequities that would exist in the case of the literal application of the requirement:

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<sup>24</sup> La Semaine Juridique [1964] J.C.P. II No. 13590, Jurisprudence (Cass. civ. I) 7 Jan. 1964).

<sup>25</sup> Thomas E. Carbonneau, “The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (Code Civil) as Obstacles to the Enforcement of Foreign Judgments in France”, 2 Hastings Int’l & Comp. L. Rev. (1979) 3073,11.

<sup>26</sup> Ibid, 327.

*“First, the notion of equivalence has been applied to cases in which the foreign tribunal applied a different law than that designated by French choice of law rules. Accordingly, the exequatur judge may render a foreign judgment enforceable despite the "erroneous" selection of the governing law by a foreign court, provided the outcome of the decision conforms to the result that would have been reached under the law designated by French choices of law rules.*

*Second, since the pouvoir de revision of the exequatur judge has been eliminated, the severity with which this choice of law requirement was applied has been lessened considerably. In fact, it will be applied only in a case presenting a blatant misconstruction of the substance of the governing law<sup>27</sup>” (emphasis added)*

[47] In *Privatbanken*, Sauzier J had to consider the findings of the German court on the applicable law (Danish or West German). He held that:

*“the principles which I have to apply are to be found in the rules of French private international law as was pointed out in the case of *Austin v Bailey* (1962) MR 113”*

The court concluded that no evidence was brought before the German court that Danish law was dissimilar to West German law on issues decided by that court and according to Seychelles’ rules of evidence and that therefore

*“unless there is proof to the contrary, foreign law is to be presumed to be the same as the law of the forum”.*

In the circumstances, it was held that the German court applied the correct law (German law) and the condition was satisfied.

[48] In *Dhanjee v Dhanjee*,<sup>28</sup> the Court also analysed the requirement of the application of the correct law in accordance with the rules of Seychelles’ private international law. *Dhanjee* involved a foreign judgment related to the custody of a minor child and the Court considered the principles in the *Austin v Bailey*<sup>29</sup> and *Pillay v Pillay*<sup>30</sup> that French rules of private international law should apply. It was held that the Matrimonial Causes Act 1992 (Seychelles) is based on the UK statute and this constituted an exception to the *Austin v*

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<sup>27</sup> Batiffol & P. Lagarde, *Droit International Prive* Pt. III, ch. III (16th ed. 1976), at § 726.

<sup>28</sup> (CS 65/2000) [2000] SCSC 9 (03 July 2000).

<sup>29</sup> (1962) MR 113.

<sup>30</sup> Above, fn 11.

Bailey principle which arises through certain different statutory enactments. *Dhanjee* held that the Seychelles' court was guided by the English rules of private international law:

*"The issue before the court concerned the custody of the minor child. In Pillay v Pillay (1973) MR 179 and (1973) SLR 307, the Court of Civil Appeal approved of the following passage from Austin v Bailey (1962) MR 113:*

*Since the rule of private international law of any country must necessarily have their foundation in the internal law of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French, so that subject to any exception which may arise through certain different statutory enactments and treaty obligations, we must be guided by the French rules of private international law...*

*The Matrimonial Causes Act 1992 (Seychelles) is based on the Matrimonial Causes Act 1973 of the United Kingdom and the Domicile and Matrimonial Proceedings Act 1973. This constitutes "an exception which arises through certain different statutory enactments" and we are guided by the English rules of private international law. In the United Kingdom, the personal and proprietary relationship between members of a family are governed by the law of the domicile - vide: Conflict of Laws (J.C. Morris 1988) page 14. In the case of a minor child the domicile is that of dependency. Section 4(1) and (2) of the Domicile and Matrimonial Proceedings Act (1973) (UK) provide that the domicile of a dependent child whose parents are alive but living apart shall be that of the mother - vide: Conflict of Laws, supra, page 29. Accordingly, the law of domicile applied by the foreign court was "la loi compétente".*

In the present case, the Court in Seychelles need not go into merits of the German Court Orders but needs to consider whether the German Court applied the correct law to the case in accordance with the rules of Seychelles' private international law. The law governing the contract between the parties was German Law with a German Arbitration Clause. The German Court applied German Law to the enforceability of the German arbitration award in accordance with the procedure described by Professor Leupertz in paragraph 2.1.1 of his legal opinion. The law applied is therefore the correct law.



#### **Condition 4 – respect for the rights of the defence**

[49] With respect to whether the rights of the defence have been respected, this point is not disputed by the parties and requires no further comment.

#### **Condition 5 – the foreign judgment must not be contrary to any fundamental rules of public policy**

[50] The fifth condition that the foreign judgment must not be contrary to any fundamental rules of public policy has been the subject of much discussion. Fregate submitted that the German Orders should not be enforced in Seychelles as they are contrary to rules of public policy. Several contraventions of the law were claimed in the Supreme Court: Orders were made without a full-scale hearing; Orders relate to matters prescribed under Seychellois law (enforcement of foreign arbitral award); and that the Appellant Company, being an overseas company contravened section 309 of the Companies Act 1972<sup>31</sup> (and consequently evaded paying taxes). In their grounds of Cross-Appeal, Fregate expressly refers to only the last contravention. It is this aspect of illegality that concerns this Court.

[51] DF provided extensive submissions on the issue of public policy. With regards to the contravention of section 309 (2)(a) and (c), DF submitted that Fregate failed to prove on the balance of probabilities that DF was conducting business in Seychelles as, in brief, the two contracts Fregate claims DF entered into are the main contract with Fregate and the Addendum to it and do not constitute two contracts as envisaged by section 309 of the Companies Act; that the workers were not the employees of DF; and materials were not purchased by DF (paragraphs 4.37(xviii) – (xxviii) of Appellant’s Written Submissions).

[52] DF also submitted that what is sought to be executed is not the contract between the parties but rather the judgement of the German court which in effect has superseded the

<sup>31</sup> Section 309 of the Companies Act:

(2) An overseas company shall be considered as carrying on business in Seychelles if it

(a) enters into two or more contracts with persons resident there, or with companies formed or incorporated there, being contracts which (i) are entered into in connection with the business or objects which the overseas company carries on or pursues; and (ii) by their express or implied terms are to be wholly or substantially performed in Seychelles, or may be so performed at the option of any party thereto; or

...

(c) owns, possesses or uses assets situate in Seychelles for the purpose of carrying on or pursuing its business or objects, if it obtains or seeks to obtain from those assets directly or indirectly, any revenue, profit or gain, whether realised in Seychelles or not; . . .

contract and even if this Court would not have enforced the contract it was duty-bound to enforce the foreign judgment. It relied for this proposition on the case of *Nordske Atlas Insurance Co. Ltd*<sup>32</sup> emphasising that it is German contract law that applies, the law freely chosen by the parties to govern their Agreement.

[53] DF also submitted, relying on *East India Trading Co. Inc v Carmel Exporters and Importers LD*,<sup>33</sup> that a foreign judgment is considered different to the original cause of action and so it was immaterial that a ground of public policy would have rendered the contract void in Seychelles.

[54] DF further relied on the principle of equitable estoppel to preclude the application of public policy to vitiate the Agreement between the parties. It submitted that Fregate ought to have raised the issue either before the Arbitration Tribunal or in the High Court of Dusseldorf.

[55] The Supreme Court made no finding on this issue although it was pleaded, ventilated in the trial and evidence adduced in relation to it. The issue is raised as one of Fregate's grounds of appeal and must be addressed by this Court.

[56] I have looked at the Agreement submitted by the parties and I am satisfied that it comprises more than one agreement as they relate to different matters with different considerations although arising from a first Agreement. The conveniently called "Addendum to Main Contract" provides for "certain further matters" which include inter alia additional villas, swimming pools, and furniture.<sup>34</sup> Of interest to this issue is the inclusion of a clause that labour, gainful occupation permits and materials are to be invoiced by DF to Fregate. The fact that DF employed persons to work in Seychelles is also apparent as a clause provides that these workers must be "unobtrusive, neatly attired" etc. How this fact escaped the scrutiny of the government is concerning. In any case, it is clear that the government was not paid taxes by a business concern that had not been exempted from the payment of taxes, social security and other benefits under Seychellois laws. While both parties to the Agreement benefitted from this illegal

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<sup>32</sup> [1927] 43 T.L.R., 28 LIL Rep. 104, 43 T.L.R. 541.

<sup>33</sup> [1952] 2 Q.B 439.

<sup>34</sup> See clause 2 of the Pramambe to the Addendum to Main contract as outlined in Exhibit D2.

conduct, and it is being relied on by Fregate as a defence to DF's claim, the fact remains that the contracts were contrary to fundamental rules of public policy.

[57] Why should Fregate benefit from this illegality? I must confess that this matter has given me much anxious thought. With regard to England, the case of *Mirza v Patel*<sup>35</sup> put paid to the notion of *ex turpi causa* (the illegality doctrine or the illegality defence) in its traditional application to defeat a civil claim. In considering the maxim, the court in *Mirza* explained the policy reasons behind it first, a person should not be allowed to profit from his own wrongdoing. And secondly, the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand. The court referred to the Canadian case of *Hall v Hebert*<sup>36</sup> which established that the doctrine rests on the principle that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. On this basis, the Supreme Court in *Mirza* established a three-stage test to determine whether the public interest would be harmed in that way, by considering first, the underlying purpose of the prohibition which had been contravened and whether that purpose would be enhanced by the denial of the claim, secondly, any other relevant public policy on which the denial of the claim may have an impact, and thirdly, whether denial of the claim would be a proportionate response to the illegality. On the evidence in *Mirza*, it found that the claimant's deposit of money used to place bets on a bank's share prices with the benefit of insider information should be returned to him. Lord Sumption<sup>37</sup> concluded that there is no inconsistency in the law in permitting a party to an illegal arrangement to recover any sum paid under it, so long as restitution is possible as the order for restitution simply returns the parties to the position in which they would and should have been, had no such illegal arrangement been made.

[58] While *Mirza* specifically concerned unjust enrichment, it is agreed that the case applies to private law in general. However, its application to arbitration law is more problematic. It must be noted first that under the English Arbitration Act,<sup>38</sup> an English court will not give effect to a foreign judgment given in breach of English public policy considerations.

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<sup>35</sup> [2016] UKSC 42.

<sup>36</sup> [1993] 3 RCS 159.

<sup>37</sup> At para 250, 253.

<sup>38</sup> Section 103, Arbitration Act 1996.

*Mirza* came after the case of *Les Laboratoires Servier v Apotex Inc*<sup>39</sup> in which the Supreme Court had ruled that the infringement of a foreign patent did not constitute relevant or sufficient turpitude for the purpose of the illegality defence. *Les Laboratoires* concerned foreign illegality and it is uncertain whether *Mirza* qualified the finding in that case.

[59] Where does that leave us in terms of its application to this jurisdiction or with respect to Seychellois law on turpitude in the enforcement of foreign judgments? Well, although common law maxims may apply to our law of procedure, it is the substantive law of Seychelles that apply to the law of contract or to remedies based on a contract in Seychelles. While I accept the submission of DF that this court is not charged with examining the merits of the case, our laws concerning the enforcement of foreign judgments enjoin the Court to make sure that any foreign judgment sought to be enforced is not contrary to any fundamental rules of public policy. The foreign judgment and its execution in this jurisdiction cannot be divorced. The corollary is that this Court cannot endorse the enforcement of a decision on a contract which had as one of its ‘causes’ the avoidance of the payment of taxes and other dues in Seychelles.

[60] In this respect, note is taken of our own Civil Code which stipulates that there are four conditions for a valid contract including “that it should not be against the law or against public policy.”<sup>40</sup> Further, Article 1134 of the Civil Code provides

*“Agreements lawfully concluded shall have the force of law for those who have entered into them.*

*They shall not be revoked except by mutual consent or for causes which the law authorise.*

*They shall be performed in good faith.”*

Most importantly, Article 6 of the Civil Code provides:

*“It shall be forbidden to exclude the rules of public policy by private agreement. Rules of public policy need not be expressly stated.*

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<sup>39</sup> [2014] UKSC 55.

<sup>40</sup> Article 1108, Civil Code of Seychelles.

[61] In defining the concept of “public policy”, Sauzier J in *Jacobs and anor v Devoud*<sup>41</sup> stated that where the *cause* in the contract is against the law or against public policy, the obligation is invalid under article 1108. In *Monthy v Buron*,<sup>42</sup> this Court expressed the view that the concept of public policy denotes a principle of what is for the public good or in the public interest. In *Jean Claude Lecoq v Mahe Charters Limited*,<sup>43</sup> I expressed the view that it is settled jurisprudence that an agreement, whose object is contrary to law or public policy, would be invalid and its breaches would not be justiciable (relying on *Avalon (Proprietary) Limited & Ors v Berlouis*<sup>44</sup>; *La Gigolette Ltd v Durup*<sup>45</sup>; *Maesching v Colling*<sup>46</sup>; and *Marcelon v Lawrence*<sup>47</sup>).

[62] Our law is categorical in relation to breaches of public policy; it does not provide for a balancing test to be carried out to examine the underlying purpose of the prohibition which had been contravened and whether that purpose would be enhanced by the denial of the claim or whether the denial of the claim would be a proportionate response to the illegality.

### **Decision**

[63] The fifth condition under section 227 of the SCCP as laid down in the case of *Privatbanken* has not been met. The fifth ground of the cross-appeal therefore succeeds.

[64] In the circumstances, DF’s appeal is dismissed. Given the particular circumstances of this case, I make no order as to costs.

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<sup>41</sup> (1978) SLR 164.

<sup>42</sup> (SCA 06/2013) [2015] SCCA 15 (17 April 2015).

<sup>43</sup> (Civil Appeal SCA 11/2017) [2019] SCCA 22 (23 August 2019).

<sup>44</sup> (SCA 25/2002) [2003] SCCA 4 (05 December 2003).

<sup>45</sup> (1978) SLR 101.

<sup>46</sup> 25 November 2005) SCA, Civil Slide 11 of 2005 (unreported).

<sup>47</sup> (1990) SLR 210.

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Dr. Mathilda Twomey JA

**FERNANDO, PRESIDENT**

1. I agree with the conclusion of Justice Twomey that the appeal should be dismissed but wish to make the following pronouncements. I adopt the facts pertaining to the background to this case as stated by Justice Twomey in her judgment.
2. At the hearing before us Counsel representing the Appellant and the Respondent agreed (pages 99-100 of the proceedings at the sitting of 24 June 2021) that the Issues to be determined by this Court on the basis of the Notice of Appeal and Cross-Appeal are as follows:
  - i. Is enforceability of the German Court Orders determined on the basis of Rule 200(2) of the English Rules of Private International Law brought in through section 4 of the Courts Act or section 227 of Seychelles Code of Civil Procedure (SCCP)?
  - ii. Could the German Court Orders be considered as judgments or mere enforcement orders?
  - iii. Could the Appellant maintain this action against the Respondent since it was not registered as an overseas company under section 309 of the Companies Act?
3. Learned Counsel for the Appellant at the hearing before us placed reliance on and confined his arguments to section 4 of the Courts Act to import the principles of English Rules of Private International Law in relation to the enforceability of the First and Third Orders. He did not place reliance on section 227 of the SCCP despite being questioned by Court in that regard. Neither did he

pursue his ground of appeal in relation to the Second Order. It was the position of the Respondent at the hearing, that although the principles of English Rules of Private International Law, could be made applicable under section 227 of the SCCP, in the instant case it could not, as the necessary pre-conditions for enforceability of a foreign judgment in Seychelles in accordance with section 227 of the SCCP were not satisfied. I am of the view that if we hold that section 4 of the Courts Act has no application to the First and Third Orders that would amount to the dismissal of the appeal, since the Respondent in cross appealing has moved for the dismissal of the Appellant's appeal.

4. I wish to state at the outset that the plaint filed in this case before the Trial Court was defective and thus should have been struck out at the outset. There is no reference in the plaint to the contents of the Arbitration Award, from which the Court Orders emanate nor the Regulations of the Rules of Arbitration of the Wirtschaftsvereinigung Bauindustrie eV. Noth-Rhine Westphalia, have been annexed to the plaint in accordance with **section 74 of the Seychelles Code of Civil Procedure**. Section 74 states: *“If the plaintiff sues upon a document other than a document transcribed in the Mortgage Office of Seychelles, he shall annex a copy thereof to the plaint. If he relies on any other documents (whether in possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing.”* (emphasis by me) The proceedings of 27<sup>th</sup> May 2015 clearly show that the Arbitration award was not produced and the Appellant was not going to rely on it. The Appellant's Counsel had in his Written Submissions filed before this Court quoted from the Court Record where he had said: “If I do not rely on documents, I do not need to produce it”, in reference to the arbitration award. The application to the Dusseldorf Court has not been annexed to the plaint in accordance with section 74 of the SCCP. It is not clear from the plaint how three separate Court Orders came to be made on different dates in connection with the Arbitration Award.

5. The Dusseldorf Court Orders do not state that the said orders are enforceable and executory in the Seychelles and there is nothing to indicate that in the application filed by the Appellant before the Dusseldorf Court there was any reference to the Seychelles. The averment at paragraphs 8.1.1 and 8.1.2 of the plaint indicate that it was possible for the Respondent to pay the claims in Germany. There is no specific averment that the Respondent had no assets in Germany. There is no specific averment that the Dusseldorf Court had the jurisdiction to make the orders enforceable in Seychelles, although it had jurisdiction to do so in Germany and to make the orders it made as averred at paragraph 8.2 of the plaint. This in my view was a circumstance constituting the cause of action and a material fact necessary to sustain the action.
6. Although in the prayer seeking relief, it is stated that the Dusseldorf Court Orders are enforceable and executory in the Seychelles according to the law of Seychelles, there is no averment in the plaint, to the Seychelles law under which they are enforceable and how they become enforceable.
7. The mere fact that there was an agreement, a breach of that agreement and an award declared enforceable by the Regional High Court of Dusseldorf; without specifying where the said orders could be enforced and under which law they could be enforced, do not satisfy the mandatory requirements of **section 71 (d) of the Seychelles Code of Civil Procedure** as to what a plaint must contain, namely: “...a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;...”. I am of the view that the plaint should have been struck out at the very outset, on the ground that it discloses no reasonable cause of action under **section 92 of the Seychelles Code of Civil Procedure**. Section 92 states: “The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just.”



8. I am of the view that in cases of this nature where a foreign order, is sought to be enforced outside the existing specific statutory provisions under which foreign judgments may be enforced in Seychelles, namely the Foreign Judgments (Reciprocal) Enforcements Act [hereinafter referred to as FJREA], or the Reciprocal Enforcement of British Judgments Act [hereinafter referred to as REBJA]; it was incumbent on the Appellant to have averred in the plaint the provisions of the English law it was seeking to rely upon, to base its action. In a case of this nature, it becomes an essential part of the circumstances constituting the cause of action necessary to sustain the action and is germane to the decision the Court has to make.
9. There is no reference in the plaint to Rule 200(2), what the English law on the matter is, and where it can be found. For that matter Rule 200(2) had been referred to by the Appellant only at the stage of written submissions before the Trial Court and that by reference to a book by Dicey and Morris on The Conflict of Laws, Tenth edition [1980], of which this Court is not obliged to take judicial notice. It is also not clear when this rule came into existence. At **paragraph 18/84 of the Supreme Court Practice 1979** it is stated that: “*Where foreign law is pleaded in support of, or as a defence to, an action, certain particulars should be given. Foreign law must be adequately pleaded...*” It was held by this Court in the case of **La Serenissima V Boldrini [2000-2001] p 225 at p 234-235** that “The judge should have applied the established principle of the law of Seychelles that foreign law must be pleaded and proved by evidence and that unless there is proof to the contrary, foreign law is presumed to be the same as the law of the country concerned (see **Green v Green (1973) SLR 295 at p 300** and **Privatabaken Aktieselshab v Bantlee (1978) SLR 226 at p 239**). The principles which guide courts in this jurisdiction, in this regard, are the same as in England, a clear statement of which is contained in **Halsbury’s laws of England (4th ed, vol 8 (1) para 1093**, thus – Subject to certain exceptions, foreign law is a question of fact which must be especially pleaded by the party relying upon it, and must be proved to the court. The English court cannot

generally take judicial notice of foreign law, and it presumes that this is the same as English law unless the contrary is proved. Thus, the onus of proof of foreign law lies on the party relying on it...The English court will not, in general, make its own researches into foreign law. Foreign law must be proved by properly qualified witnesses.”

10. Proof of German law by witnesses, as was in this case, not sufficient for it was English law that was sought to be made applicable by the Appellant, under section 4 of the Courts Act. There was no proof of Rule 200(2) of the English Rules of Private International Law, save by reference to a book by Dicey and Morris on The Conflict of Laws, Tenth edition [1980] as stated earlier. In relation to references to textbooks in trials before the court, **Phipson on Evidence 14<sup>th</sup> Edition paragraph 32-16** states: “An expert may refer to textbooks to refresh his memory, or to correct or confirm his opinion: e.g. a doctor to medical treatises, a valuer to price lists, a foreign lawyer to codes, text-writers and reports. Such books are not evidence per se. (**Concha v Murieta (1889) 40 Ch.D 543**), though if he describe particular passages as accurately representing his views, they may be read as part of his own testimony. (**Nelson v Bridport, 8 Beav. 527**). However, the judge may not form an opinion based upon a part of the book not referred to. (**Collier v Simpson (1831) 5.C. & P. 73**). Still less may counsel read out particular passages as part of his address. (**R. v Crouch, 1 Cox 94; R v Taylor, 13 Cox 77**). It was held in **The Sussex Peerage, 1 C. & F. 85,114**; and **R. V Governor of Brixton Prison, exp. Shutter [1960] 2 QB 89** that foreign law, must be proved as a fact by skilled witnesses, and not, by the production of the books in which it is contained, for the court is not competent to interpret such authorities. See **Phipson on Evidence 14<sup>th</sup> Edition 32-46**. At **paragraph 10-69 of Archbold 2012** it is stated “*The law of a foreign country must be proved by the testimony of witnesses of competent skill; and foreign written law cannot be proved by the production of the written law itself, or of an authenticated copy, but must be proved by some skilled witness who describes the law*”.

11. The subject matter of this case as argued by the Appellant, is to enforce in the Seychelles orders made by a Regional High Court of Germany. This necessarily raises the question of Sovereignty of Seychelles. **Article 1 of the Constitution of the Republic of Seychelles** specifically states: “*Seychelles is a sovereign democratic Republic.*” Sovereignty necessarily implies not being subject to or dependant to another power of a State. The judicial power of Seychelles, derived from the people of Seychelles, is vested in the Judiciary consisting of the Court of Appeal of Seychelles, the Supreme Court of Seychelles, and such other subordinate courts or tribunals established pursuant to article 137 of the Constitution.
  
12. The Appellant in this case has made an attempt to enforce the orders of the German High Court by placing reliance on Rule 200(2) of the English Rules of Private International Law brought in through section 4 of the Courts Act and read with article 125(d) of the Constitution.
  
13. **Article 125 of the Constitution** makes reference to the establishment and jurisdiction of the Supreme Court of Seychelles thus:

*“125. (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have -*

*(a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;*

*(b) original jurisdiction in civil and criminal matters;*

*(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as*

*may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and*

*(d) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.*

14. **Section 4 of the Courts Act, 1964** states:

*“General jurisdiction*

*4. The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England.”*

Section 4 cannot be read in isolation but along with **sections 5, 6, 7, 8, 9, 10, 11 and 17 of the Courts Act.**

*Jurisdiction in civil matter*

*5. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, **and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised** by the High Court of Justice in England.*

*Equitable powers*

6. *The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.*

Admiralty jurisdiction

7. (1) *The Supreme Court shall have the Admiralty jurisdiction of the High Court of Justice in England as stated in section 1 of the Administration of Justice Act, 1956 of the United Kingdom Parliament (hereinafter in this section called “the Act”).*

(2) *Subject to subsection (3), the Act shall have force and effect in Seychelles.*

(3) *The Chief Justice may make rules modifying and adapting the Act to such an extent as may appear to him to be necessary to allow the Act to have effect in Seychelles.*

Jurisdiction in disciplinary matters

8. *The Supreme Court shall continue to have, and is hereby invested with full jurisdiction to hear and determine all cases of breach of duty or misconduct committed by any barrister or advocate, attorney, notary, land surveyor or other ministerial officer and in such cases to suspend any such person provisionally or permanently from practicing within Seychelles.*

Jurisdiction in criminal matters

9. *The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction, to hear, try, determine, pass sentence and make orders in all prosecutions for offences of whatever nature and in exercising such criminal jurisdiction the Supreme Court shall have and exercise all the powers and shall enjoy all the privileges vested in the High Court of Justice in England.*

Appellate jurisdiction

10. (1) *The Supreme Court shall have power to hear and decide appeals from all other courts and shall exercise general powers of supervision over such courts and may at any time call for and inspect their records.*

(2) *The Supreme Court shall also have power to hear and decide appeals from any other bodies and persons as provided by any law now in force or to be enacted.*

Extent of jurisdiction of the Supreme Court

11. *The jurisdiction of the Supreme Court in all its functions shall extend throughout Seychelles:*

*Provided that this section shall not be construed as diminishing any jurisdiction of the Supreme Court relating to persons being, or to matters arising, outside Seychelles.*

Practice and procedure of the High Court of Justice of England when to apply

17. *In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”*

13. I am of the view that sections 5, 6, 7, 8, 9 and 10 of the Courts Act which make reference to the types of civil, criminal, appellate, admiralty, equitable and disciplinary jurisdiction, that could be exercised by the Supreme Court, explains and qualifies section 4. It is difficult to conceive that section 4 is an open door to bring in any type of jurisdiction that is possessed and exercised by the High Court of Justice in England. This would create uncertainty as to what laws a citizen may be subject to at any given point and would be in conflict with **article 85 of the Constitution** which states that “*The legislative power of Seychelles is vested in the National Assembly.*” Thus, in my view it is not possible for the Supreme Court of Seychelles to exercise, through section 4 of the Courts Act, the jurisdiction of the High Court of Justice in England in relation to English

Rules of Private International Law in the enforcement of foreign judgments. It is also clear that section 5 of the Courts Act has no application to the instant case in view of the subject matter of this case. The instant case commenced with a plaint and is essentially a civil matter. It does not fall under section 5 which deals with jurisdiction in civil matters and which is restricted to wills, interdiction, guardianship of minors, adoption, insolvency, bankruptcy and matrimonial causes. If the Legislature so wished it would have provided for enforcement of foreign judgments and arbitral awards in the Courts Act, as it has done in relation to admiralty jurisdiction at section 7. At section 7, it has given the Supreme Court the Admiralty jurisdiction of the High Court of Justice in England as stated in section 1 of the Administration of Justice Act, 1956 of the United Kingdom.

14. The reference in section 4 of the Courts Act, is to powers, authorities and jurisdiction 'possessed and exercised' by the High Court of Justice by virtue of it being a superior court and not any powers, authorities or jurisdiction to deal with matters given to the High Court of Justice of England by various Statutes or Rules. It is a reference to the inherent jurisdiction of the High Court and the procedural laws of the High Court and not the substantive law. This is made clear by section 12 which provides that in civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.
  
15. In the case of **Ocean Conversion V Attorney General of Virgin Islands (BVI HC V2008/0192)**, the court examining section 7 of the West Indies Associated States Supreme Court (Virgin Islands) Act, a provision similar to section 4 of the Courts Act, stated that such provision was not a reference to specific powers conferred on the High Court under particular statutes. The Court felt that such powers were not vested in the High Court but were made available by legislation to the High court for that purpose.

16. In **Panacom International Inc. v Sunset Investment Ltd. and Another (1994) 47 WIR 139**, the Court of Appeal of the Eastern Caribbean had in considering the scope of section 11 of the Supreme Court Act of Saint Vincent and the Grenadines, which is similar to section 4 of the Courts Act, made two crucial points: Firstly, it held that section 11 relates solely to the manner of the exercise of a pre-existing jurisdiction and was intrinsically a procedural provision, and secondly, the words “law” and “practice” were “evidently intended to be references to procedural (as distinct from) substantive law”.
17. In the case of **Veda Doyle V Agnes Deane of Eastern Caribbean HCVAP 2011/020** the Eastern Caribbean Court of Appeal deciding on an issue as to whether the Judgment Act 1838 of England, could be imported into the law of the Grenadines in the absence of a local law, relied on legislative intention to conclude, that what was not intended was the importation of English law generally to fill in a lacuna, however desirable filling the gap may seem. To emphasize the point, the Learned Judge in that case said that such a construction would leave much to be desired in any sovereign State and would create uncertainty as to what laws a citizen may be subject to at any given point without regards to its own parliament which is constitutionally mandated to enact laws for the State as it may deem necessary for the State’s good governance. The Court however determined that what was intended to be imported by section 11 of the Supreme Court Act of Saint Vincent and the Grenadines was the procedural law administered in the High Court of Justice in England and not English statute nor English procedural law which is adjectival and purely ancillary to English substantive law.
18. The Seychelles Supreme Court has previously addressed the scope of section 4 of the Courts Act and the applicability of English law in Seychelles. In **Sultan Gemma Finesse V Marie Leopold Banane [1981] SLR 103**, Judge Sauzier, held that section 4 (formerly section 3A) of the Courts Act, vests in the Supreme Court powers, authority and jurisdiction of the High Court of Justice of England and that these include both the inherent powers and jurisdiction and powers under statutory laws of England, provided that they predate 22 June 1976.



Having found these English statutes applicable, Judge Sauzier applied the provisions of the Matrimonial Procedure and Property Act 1970 of the United Kingdom in the Seychelles. In so doing, Judge Sauzier chose not to follow the Mauritian Supreme Court case of **Koo Poo Sang v Koo Poo Seng 1957 MR 104**, which held that section 15 of the Mauritian Courts Ordinance (CAP 150), which is nearly in the same terms as that of section 4 of the Act, did not give to the Supreme Court of Mauritius the jurisdiction which the High Court in England had under section 18(1) of the Matrimonial Causes Act 1950. The Learned Judge in the Koo Poo Seng's case based himself on the Mauritian Supreme Court precedents of **Michel v Colonial Government 1896 MR 54** and **B v Attorney General 1914 MR 94**. These two cases being authorities for the principle that section 15 of the Mauritian Courts Ordinance vested the Supreme Court of Mauritius with only inherent powers of the High Court of England and not jurisdiction granted by statutes.

19. I wish not to follow in its entirety the Supreme Court decision in *Finesse V Banane*, decided soon after Seychelles ceasing to be a British Colony, having been one, for almost 176 years and 12 years prior to the Third Republican Constitution of Seychelles. This is to the extent that section 4 of the Courts Act only vested in the Supreme Court powers, authority and jurisdiction of the High Court of Justice of England which included only the inherent powers and procedural laws of England and not the jurisdiction and powers under statutory laws of England and that too, provided that they predate 22 June 1976.
20. In interpreting section 4 of the Courts Act we have to consider **articles 1 and 2 of the Civil Code of Seychelles Act** which states: "Law is a solemn and public expression of legislative will. Laws are promulgated in accordance with the Constitutional provisions in force in Seychelles." and "All laws shall be published and take effect in the manner laid down in such Constitutional provisions as are applicable from time to time".
21. In the case of **Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited – Civil Appeal SCA 15 & 18/2017, decided on 13th December 2017** this Court said: "*the reference to English jurisprudence should*

not be misconstrued as a license to graft or introduce new laws to the legislation(s) already in place in the Seychelles. To do so would amount to a violation of the separation of powers between the National Assembly and the Judiciary, and -- in some cases -- of the Executive. Article 85 of the Constitution clearly indicates that legislative power is vested in the National Assembly; this power cannot be delegated to a foreign legislative making body. Sub-article 125(1) (d) was therefore meant to cover a new jurisdiction, not one already existing in sub-article 125 (1) (a) to (c); and it was meant to **cover a new jurisdiction which had its basis in domestic law, not a foreign statute.** With the advent of the 1993 Constitution of Seychelles, our reference point should be articles of the Constitution. The Supreme Court had jurisdiction expressly conferred by the Constitution. The court was sitting as the Supreme Court in its original civil jurisdiction under article 125 (1) (b) of the Constitution and was deciding a case based on a Plaintiff. We note that there is an ever increasing tendency on the part of courts in the Seychelles to be very quick in resorting to the power, authority and jurisdiction of the English High Court in attempts to do justice in a case by using the reception provisions of the Courts Act. Such practice though is doubtful when the law is unambiguously clear as in this case. In our view, Article 125(1)(d) grants to the Supreme Court jurisdictions other than civil, criminal, constitutional and supervisory jurisdiction over other bodies, as those are already provided in sub article 125(1)(a) to (c). This interpretation is more in line with Article 1 of the Constitution and the legislative supremacy of our National Assembly to enact laws, pursuant to Article 85 of the Constitution, and an ever-increasing amount of foreign case laws that limit the extra-territorial application of colonial reception laws. It is to be noted, however, that Article 125(1) of the Constitution would not take away the power of the Supreme Court to seek inspiration from the common law of the United Kingdom as an aid to interpretation of statutes inspired by the common law or that from the rules, practice and precedents of the English High Court, which in the case of common law would not be of a binding nature. It would also not take away the inherent powers of the Supreme Court as received by the High Court.” (emphasis added)

22. Another important issue that has to be necessarily addressed in this case is can we overlook and ignore the specific provisions of our Foreign Judgments (Reciprocal Enforcement) Act (FJRE); dealing specifically with the enforcement of foreign judgments; in making an attempt to place reliance on the English Rules of Private International Law to enforce foreign judgments, under section 4 of the Courts Act. The simple question to be asked is whether the people of Seychelles from whom the judicial power of Seychelles is derived intended German High Court judgments to be enforced here without reciprocity. The entire basis of FJRE is one of reciprocity. The Courts Act being a general statute cannot override the FJRE, which is the specific statute dealing with enforcement of foreign judgments. This necessitates a perusal of the relevant provisions of the **Foreign Judgments (Reciprocal Enforcement) Act, 1961.**

23. *"PART I - REGISTRATION OF FOREIGN JUDGMENTS*

*Power to extend Part I to foreign countries giving reciprocal treatment*

3. (1) *The President, if he is satisfied that, **in the event of the benefits** conferred by this part **being extended** to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the Supreme Court, may by order published in the Gazette direct*

*(a) that this part shall extend to that foreign country; and*

*(b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this Act.*

*(2) Any judgment of a superior court of a foreign country to which this part extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this part applies, if*

*(a) it is final and conclusive as between the parties thereto; and*

*(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and*

*(c) it is given after the coming into operation of the order directing that this part shall extend to that foreign country.*

*(3) ...*

*(4 ) The President may by a subsequent order published in the Gazette vary or revoke any order previously made under this section.*

*Power to make foreign judgments unenforceable in Seychelles if no reciprocity*

*12. (1) If it appears to the President that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the Supreme Court substantially less favourable than that accorded by the Supreme Court to judgments of the superior courts of that country, the President may by order published in the Gazette apply this section to that country.*

*(2) Except in so far as the President may by order published in the Gazette under this section otherwise direct, no proceedings shall be entertained in any court in Seychelles for the recovery of any sum alleged to be payable under a judgment given in a court of a country to which this section applies.*

*(3) The President may by a subsequent order published in the Gazette revoke any order previously made under this section.*” (emphasis by me)

*"judgment" in FJREA has been defined as a “judgment or order given or made by a court in any civil proceedings, for the payment of a sum of money in respect of compensation or damages to an injured party;*

24. It will be contrary to our sovereignty as a Nation, contradictory of the Constitution, a usurpation of the functions of the National Assembly and the

President and an insult to the people of Seychelles and to our Judiciary, if an order of the Regional High Court of Germany based on an Arbitration Award were to be enforced here without any reciprocity in relation to judgments of our Supreme Court been enforced in Germany. Reciprocity should be the sine qua non for registration of foreign judgments under the FJREA and REBJA. Section 3 (1) of the FJREA referred to above states, that substantial reciprocity of treatment shall be assured as respects the enforcement in that foreign country of judgments given in the Supreme Court of Seychelles before a judgment of that foreign country is registered in the Seychelles. At the moment the FJREA has been extended to only judgments of the Supreme Court of Australia and Kenya. It is clear from sections 3(4) and 12 of the FJREA referred to above, that the President may revoke an earlier order granting registration of foreign judgments if there is no reciprocity. Further it is clear that under section 3(2) of the FJREA, it is only an original judgment given by a superior court of that foreign country that can be registered in the Seychelles and not a judgment of such a court given on appeal from a court which is not a superior court. In the instant case what is sought to be enforced are Orders of the Regional High Court of Germany based on an arbitration award.

25. For the reasons stated above I have no hesitation in dismissing the appeal of the Appellant.
26. What is left to be determined is whether the First, Second and Third Orders could be enforced under section 227 of the Seychelles Code of Civil Procedure (SCCP). It was the position of the Respondent at the hearing, that although the principles of English Rules of Private International Law, could be made applicable under section 227 of the SCCP, in the instant case it could not, as the necessary pre-conditions for enforceability of a foreign judgment in Seychelles in accordance with section 227 of the SCCP were not satisfied. In this regard I wish to reiterate what I have said earlier about the defective plaint, and the failure to prove the principles of English Rules of Private International Law in accordance with the law. It is subject to that; I shall examine the Respondent's submissions.

27. There must be a judgment to be enforced if section 227 of the SCCP is to apply. There is in my view a difference between a ‘judgment’ or ‘award’ rendered after a trial or proceedings held between parties to a suit and merely making of an order to ‘enforce’ an arbitration award. A judgment according to **Black’s Law Dictionary** is “*the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and sub- mitted to its determination.*” It is clear that the First, Second and Third Orders sought to be enforced certainly do not meet the said requirement as there is nothing to indicate that they arose from a determination litigated upon the respective rights and claims of the parties to an action or suit or the merits of the Arbitral Award, but only an examination as to the procedural correctness of that award.
28. Even judgments to be made enforceable under section 227 of the SCCP must satisfy the test of reciprocity and should not affect the sovereignty of Seychelles as stated earlier.
29. I agree with the Justice Twomey that since the Appellant was not registered as an overseas company under section 309 of the Companies Act, the German Court Orders were unenforceable in Seychelles as they were against the fundamental rules of public policy.
30. For the reasons stated above I hold that that the Orders of the German High Court cannot be enforced in the Seychelles.
31. I dismiss the appeal but do not make any order as to costs.

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Fernando, President

**ANDRE JA**

I agree that the appeal should be dismissed and I endorse the views of the President, having scrutinized both judgments.

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Andre JA

Signed, dated and delivered at Ile du Port on 20 July 2021.