IN THE COURT OFAPPEAL OF SEYCHELLES

Reportable
[2024] (3 May 2024)
SCA 22/2023
(Arising in MA 298/2021 Out of MC 31/2021)

In the Matter Between

Complete Energy Solutions Limited — Appellant
(rep. by Ms. Alexandra Benoiton)

And

Vetivert Tech (Pty) Ltd — Respondent
(rep. by Mr. Bernard Georges)

Neutral Citation: *Complete Energy Solutions Limited v Vetivert Tech (Pty) Ltd* (SCA 22/2023) [2024] (Arising in MA 298/2021 Out of MC 31/2021) (3 May 2024)
Before: Andre, Gunesh-Balaghee, De Silva, JJA
Summary: Status of International Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in Seychelles – Monism – Dualism – Ratification – Domestication – Procedure for Enforcement of Arbitral Award – Applicability of Articles 146-150 of the Seychelles Commercial Code
Heard: 17 April 2024
Delivered: 3 May 2024

ORDER

The appeal is dismissed with costs to the Respondent.

JUDGMENT

DE SILVA JA

(S. Andre, K. Gunesh-Balaghee JJA, concurring)

Factual Matrix

1. The Public Utilities Commission of Seychelles ("PUC") and the Abu Dhabi Future Energy Company PJSC called for tenders for the construction of a 5 MW PV Plant. In order to tender, the Appellant and the Respondent entered into a Consortium Agreement in terms of which they would cooperate with the works.

2. However, the main contract was entered only between the Appellant and PUC, the Respondent having agreed with the Appellant to carry out works off contract. As disputes arose between parties, the Respondent referred them for arbitration to the Dubai International Arbitration Centre ("DIAC") pursuant to the Consortium Agreement.

3. The Arbitral Tribunal issued an arbitral award for a sum of US$ 286,970.49 in favour of the Respondent who sought to recover the said amount against the monies held by the PUC on behalf of the Appellant.

4. The Supreme Court made a provisional order attaching the sum awarded in the arbitral award in the hands of the PUC. At the conclusion of the proceedings, the Supreme Court ordered the enforcement of the arbitral award and allowed the validation of the provisional seizure in the hands of the PUC. The Appellant has appealed.

Grounds of Appeal

5. The Appellant raises the following grounds of appeal:
   (a) The learned Trial Judge erred in law in holding that Articles 146 to 150 of the Commercial Code were applicable without further action from the National Assembly following the signing by the Executive.
   (b) The learned Trial Judge erred in law in failing to follow the decision of this Honorable Court of Appeal in line with Article 7 of the Civil Code of Seychelles 2020 in order to

give life to Articles 146-150 of the Commercial Code.

(c) The learned Trial Judge erred in law in determining that leave was not required to enforce a foreign arbitral award.

(d) The learned Trial Judge erred in law in not dismissing the application of the Respondent as the wrong procedure had been followed for the enforcement.

(e) The learned Trial Judge erred in law in allowing the application which was unsupported by an affidavit.

(f) The learned Trial Judge erred in law and on the facts by relying on the arbitration agreement contained in the Consortium Agreement and Arbitral Award that had not been properly certified and/or authenticated and which was not adduced by way of a witness or affidavit evidence.

(g) In the alternative to the above, the learned Trial Judge erred in law in enforcing the arbitral award, contrary to Article 150 of the Commercial Code, in light of being informed that the arbitration was held:

   a. Without proper notice on the Appellant;
   b. Without the Appellant being able to nominate an arbitrator for the committee;
   c. Based on a void and unenforceable Consortium Agreement.

(h) The learned Trial Judge erred in law and on the facts in determining that the LNTP agreement, which contained an arbitration clause before the UAE courts, was unsigned.

Grounds of Appeal (a) and (b)

6. These two grounds are based upon the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in Seychelles.

7. The Appellant submits that the application for the enforcement of the arbitral award was made under Article 148 of the Commercial Code of Seychelles ("Commercial Code") but that Articles 146-150 of the Commercial Code have not been brought into operation after the accession to the New York Convention in 2020. Much reliance was placed upon the decision of this Court in ***Vijay Construction (proprietary) Limited v Eastern European Engineering Limited*** **[(SCA 15 of 2017)(2017) SCCA 41 (12 December 2017)]**.

8. It was the position of the Appellant that Seychelles follows the *dualist* system of treaty making and for any international treaty to become part of the domestic law, there must be a *ratification and domestication* by the National Assembly. It was submitted that although accession to the New York Convention was made by Seychelles in 2020, to date the legislature had not completed the legislative process to make it part of the domestic law of Seychelles.

9. The Supreme Court held that although the New York Convention was not ratified by Seychelles, it was already in force by the time Seychelles agreed to be bound by it, the National Assembly having resolved to accede to it. It was held that accession to the New York Convention by Seychelles in 2020 effectively brought to life the provisions in Articles 146 to 150 of the Commercial Code.

10. In order to better appreciate the contention of the Appellant, an examination of the interface between international law and domestic law is required.

Dualism

11. Positivists such as Oppenheim, Treipel and Strupp examine the interface between domestic law and international law based upon the supremacy of the State. This doctrine, known as *dualism* or *dualist theory*, considers domestic law and international law as operating in distinct spheres regulating distinct subject matter. According to proponents of *dualism*, international law becomes part of the domestic law only to the extent permitted by the State in the exercise of its supreme authority within its domestic jurisdiction. In the event of any inconsistency, domestic law prevails.

12. Rousseau [Droit international public (1953), 10-12; 93 Hague *Recueil* (1958, I), 473-4] and Fitzmaurice [92 Hague *Recueil* (1957, II), 68-94] have sought to provide a modified narrative of *dualism*. They too deny a common sphere for domestic law and international law and acknowledge their superiority within its own sphere. However, there may be instances where a State acts domestically in a manner inconsistent with its international obligations. Here though the State is unaffected within the domestic law sphere, it may become liable in the international arena.

Monism

13. The *monist theory or monism* proceeds on the basis of the supremacy of international law even within the domestic law sphere. According to this doctrine, there is no need for specific incorporation of international law in to domestic law as they fall within a unitary system.

14. There are however some jurists within the *monist* school who have adopted different constructs of this unitary system.

15. Lauterpacht [62 Hague *Recueil* (1937, IV), 129-148] considers the primary function of all law to be the well-being of individuals and proposes the supremacy of international law as the most suitable method of accomplishing this goal. According to him, both domestic and international law must give way to natural law or general principles of law which determines their respective spheres.

16. Kelsen [*General Theory of Law and the State* (Harvard University Press, 1945), 363-80] on the other hand relies on the assumption that law is a constituting order prescribing accepted behavior. Where there has been a breach of such accepted norms sanctions follow. This is equally applicable to domestic and international law. As the relationship between States are regulated by international law, in order to ensure equality of States it follows that international law is superior to domestic law.

Status of International Law in Seychelles

17. In **Roble & Ors v R [(SCA 19 of 2013) [2015] SCCA 24 (28 August 2015)]** this Court held that Seychelles has always applied a *dualist* system in preference to a *monist* system.

18. In ***Vijay Construction (proprietary) Limited*** **(supra. paras. 96-98)**, this Court held that the *monist* system is followed in Seychelles only in matters of Chapter III relating to constitutional enforcement, whereas in other matters the Constitution of the Republic of

Seychelles ("Constitution") has set up a *dualist* system. Similar approach was taken in ***Melissa Duffets v. Bastien Lapourielle*** **[(2017) CA 26/2016]**.

19. Article 64 of the Constitution reads as follows:

> *"(3) The President may execute or cause to be executed treaties, agreements or conventions in the name of the Republic.*
>
> *(4) A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not* ***bind*** *the Republic unless* ***it*** *is* ***ratified by –***
>
> ***[a] an Act; or***
>
> ***[b] a resolution passed by the votes of a majority of the members of the National Assembly.***
>
> *(5) Clause (4) shall not apply where a written law confers upon the President the authority to execute or authorize the execution of any treaty, agreement or convention."* (emphasis added)

20. Clearly, the President possesses the authority to sign or facilitate the signing of any multilateral or bilateral treaty, agreement or convention in respect of international relations. Nevertheless, such treaty, agreement or convention shall not bind the Republic unless it is ratified by an Act or a resolution passed by the votes of a majority of the members of the National Assembly**.** However, where a written law grants the President the power to execute or authorise the execution of a treaty, agreement or convention and in such cases, the instrument becomes binding on Seychelles without requiring the approval of the National Assembly.

21. In general, the Constitution contemplates a two-step process to be followed for any treaty, agreement or convention in respect of international relations to bind the Republic. By *general* I mean situations falling outside Chapter III of the Constitution. I reserve my position on the interface between Chapter III and international law as it does not arise for determination in this matter.

22. In order to bind the Republic of Seychelles, a treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President, must be ratified by an Act or a resolution passed by the votes of a majority of the members of the National Assembly.

23. I am of the view that the word *bind* in Article 64(4) of the Constitution refers to binding the Republic of Seychelles in international law. Let me explicate in some detail.

24. Firstly, the word ***it*** in Article 64(4) of the Constitution, refers to a *treaty, agreement or convention in respect of international relations*. The Republic of Seychelles becomes bound by such *treaty, agreement or convention* when it is *ratified* by an *Act* or a *resolution* passed by the votes of a majority of the members of the National Assembly. In terms of Article 85 of the Constitution, the legislative power of Seychelles is vested in the National Assembly. This power is exercised by passing of Bills which subsequently becomes Acts [Article 86]. Passing of a resolution does not convert it to an Act. Therefore, Article 64(4) of the Constitution is dealing with the procedure to be followed in taking on obligations in international law and not enacting domestic legislation to give effect to international obligations.

25. Secondly, the word *ratification* is a term of art in international law. Article 2(1)(b) of 1969 Vienna Convention on the Law of Treaties (VCLT) defines ratification to imply that a State establishes on the international plane its consent to be bound by a treaty.

26. According to Brownlie [Ian Brownlie, *Principles of Public International Law*, 4th ed., Oxford University Press, 1990, page 607]:

> *"[R]atification involves two distinct procedural acts: the first is the act of the appropriate organ of the state ... and may be called ratification in the constitutional sense; the second is the international procedure which brings a treaty into force by a formal exchange or deposit of the instruments of ratification."*

27. In ***Good v Botswana*** **[Decision, Comm. 313/05 (ACmHPR, 26 May 2010)]** the African Commission explained that:

> *"Ratification is therefore a formal commitment in addition to the signature, normally required by multilateral treaties. This is an action by a state, normally conducted once necessary domestic legislation or executive action has been completed. This can also be the case in a situation whereby the state endorses a preceding signature and signifies its intention to comply with the specific provisions and obligations of the treaty. In the period between signature and ratification, a state is provided with an opportunity to reconsider its obligations under the treaty concerned. After ratification a state is formally bound by the substantive provisions of the treaty. At the AU, ratification is completed by a formal exchange or deposit of the treaty with the Chairperson of the African Union Commission, and in case of the UN, with the Secretary General of the UN."*

28. There is some debate as to what type of treaties require ratification. In so far as the New York Convention is concerned, there can be no doubt since Article VIII (2) of the New York Convention requires ratification.

29. Accordingly, in my view Article 64(4) of the Constitution sets out the procedure by which Seychelles becomes bound in international law to obligations set out in a treaty, agreement or convention in respect of international relations. It does not deal with how such instrument acquires force of law in Seychelles. Nevertheless, where the National Assembly ratifies it by an Act, it is possible that the required domestication is made effective by such Act.

30. *Domestication* is the process of incorporating an international treaty into the domestic legal system of a country. This is essential in *dualist* countries, where international law does not automatically become part of the national law upon ratification. *Domestication* involves legislative action, such as passing an Act by the legislature, to give the treaty force and applicability within the domestic legal framework.

31. According to Brownlie (supra. pp. 48-49), legislation to give effect in domestic law to the provisions in a treaty, agreement or convention may take different forms. An Act may directly enact the provisions of such instrument which will be set out as a schedule to the Act. In the alternative, an Act may employ its own substantive provisions to give effect to such instrument without directly enacting the text.

32. Seychelles appears to have followed two practices of domestication. The first approach is to domesticate some provisions of the treaty, convention or agreement. In such a case, the enabling legislation will specifically state that the relevant provisions *'shall have the force of law in Seychelles'*. For example, the National Assembly followed this approach when it enacted the Privileges and Immunities (Diplomatic, Consular and International Organisations) Act No. 9 of 1980 to domesticate some provisions of treaties such as Vienna Convention on Diplomatic Relations, Vienna Convention on Consular Relations, Convention on the Privileges and Immunities of the Specialized Agencies. This means that at international level, Seychelles is still bound by all the provisions of these treaties (including those which were not domesticated). But at national level, only the domesticated provisions have the force of law.

33. The second approach is to domesticate the whole treaty. For example, section 85(1) of the Merchant Shipping Act provides that *'…the Collisions Convention, the Load Line Convention and the Safety Convention shall have the force of law in Seychelles*.'

Status of New York Convention in Seychelles

34. Articles 146-150 of the Commercial Code reads as follows:

> ***Article 146***
>
> *On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and the arbitral award within the meaning of the said Convention shall be binding. Such Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than Seychelles and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as*

domestic awards in Seychelles.

Article 147

1. *Recognition under the said Convention shall extend to an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.*
2. *The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*
3. *The Supreme Court of Seychelles, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*
4. *At the request of a party to an arbitration agreement, or of any person claiming through or under him, the Court shall make an order to stay any proceedings already commenced before such Court and such other order as it thinks fit in the circumstances, subject to the rules which permit the Court to refuse to enforce an award under the Convention under article 150 of this Code.*

Article 148

Arbitral awards under the said Convention shall be recognised as binding and shall be enforced in accordance with the rules of procedure in force in Seychelles. The conditions or fees or charges on the recognition or enforcement of arbitral awards to which the said Convention applies shall not be more onerous than those required for the recognition or enforcement of domestic arbitral awards.

Article 149

The party seeking to enforce an arbitral award under the Convention must provide:

(a) the duly authenticated original award or a duly certified copy thereof; and

(b) *the original arbitration agreement or a duly certified copy thereof; and*

(c) *where the award or agreement is in a foreign language, a translation thereof carried by an official or by a sworn translator or by a diplomatic or consular agent.*

Article 150

1. Enforcement of an arbitral award shall be refused if the person against whom it is invoked proves:

(a) *that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or*

(b) *that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

(c) *that he was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or*

(d) *(subject to paragraph 3 of this article) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or*

(e) *that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the law of the country where the arbitration took place; or*

(f) *that the award has not yet become binding on the parties, or has been set aside or suspended by an authority duly exercising jurisdiction in the country in which, or under the law of which, it was made.*

2. Enforcement of an arbitral award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

3. An arbitral award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

4. Where an application to set aside or suspend an award has been made to such an authority duly exercising jurisdiction as is mentioned in paragraph 1 (f) of this article, the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

35. The United Kingdom acceded to the New York Convention on 24th September 1975. At that time, Seychelles was a colony of the United Kingdom.

36. Seychelles gained independence in 1976 pursuant to an exchange of Notes between the two Governments. According to the agreement concerning treaty succession reached between parties, all obligations and responsibilities of the Government of the United Kingdom and Northern Ireland as from 29th June 1976 were to be assumed by the Government of Seychelles as applicable to Seychelles.

37. In ***Vijay Construction (Pty) Limited*** (supra. paras. 33-36), this Court having regard to these facts concluded that at the time the Commercial Code was enacted, Seychelles had succeeded to the New York Convention.

38. Nevertheless, Court went on to conclude that the New York Convention is not applicable to Seychelles and accordingly Articles 146-150 of the Commercial Code has no legal effect. This conclusion was based upon the notification made by Seychelles pursuant to Article 8.1 of the VCLT by Note No. 37/79 whereby the British Government was notified that Seychelles did not consider itself bound by treaties which came within the ambit of the Treaty Succession Agreement.

39. The Court held that this repudiation resulted in the non-applicability of Articles 146-150 of the Commercial Code in view of the lack of evidence to indicate that Seychelles acceded to the New York Convention later (para. 41). Court went on to hold (paras. 101 and 102):

"101. ...[t]hrough the conscious and deliberate act of repudiation and renunciation in 1979, the NY Convention ceased to have its domestic application, though the text of the Article 146 and others remained part of our domestic law.

This article needs to have life breathed in into in order to waken it from its slumber. The only way is to follow the dictate of our supreme law.

102. In 1993, the Seychelles enacted its Constitution. In order to give life to the New York Convention in our domestic law, the President would have to execute it and the National Assembly would have to ratify it. Ratification may properly be done in this case by way of a resolution of the National State Assembly, giving the existing provisions of Article 146 of the Commercial Code."

40. There the Court erred in law by failing to grasp the difference between domestication and ratification. Mere ratification does not make a treaty, convention or agreement in respect of international relations part of the law of Seychelles. The legislative power is vested with the National Assembly. Hence, domestication by the National Assembly is required to make the obligations set out in such instrument part of the law of Seychelles. Once domestication is made, as in this case, by an Act of the legislature, notwithstanding the withdrawal from international obligations, the Act continues to be in force. It is not in slumber as the Court opined.

41. The Commercial Code came into existence on 13th January 1977. By virtue of the provisions in Articles 146-150, there can be no doubt that the New York Convention was given force of law in Seychelles. There need not be any debate as to whether this was part of *domestication*, in a domestic sense, or *ratification*, in an international sense. The New York Convention became part of the law of Seychelles on 13th January 1977 by virtue of Articles 146-150 of the Commercial Code. There is no prohibition to a State enacting a domestic law in line with a treaty, agreement or convention notwithstanding it not ratifying to such instrument.

42. According to Clause 2(1) of Schedule 7 of the Constitution, except where it is otherwise inconsistent with the Constitution and subject to paragraph (2), an existing law shall continue in force on and after the date of coming into force of the Constitution. Articles 146-150 of the Commercial Code is not inconsistent with the Constitution and continues to remain in force. It was never in slumber and did not need any act of ratification as contemplated in Article 64(4) of the Constitution to give it life as held in ***Vijay Construction (Pty) Limited*** (supra).

43. In ***Young v Bristol Aeroplane Company Limited*** **[(1944) 1 KB 718]** the Court of Appeal held that the Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.

44. I hold that the conclusion in ***Vijay Construction (Pty) Limited*** (supra) that the New York Convention ceased to have domestic application consequent to its repudiation and requires an act of ratification to give life in the domestic law of Seychelles is *per incuriam* since it failed to appreciate the difference between *ratification* and *domestication* and the legal effect of Clause 2(1) of Schedule 7 of the Constitution, and Articles 146-150 of the Commercial Code. Therefore, it is not of high persuasive value and we are entitled to depart from it in terms of Articles 7(2) and 7(3) of the Civil Code of Seychelles.

45. I hasten to add that generally a judicial decision is binding on all courts lower in the judicial hierarchy other than the court which delivered the precedent decision. Lord Denning in ***Morelle Ltd v. Wakeling*** **[(1955) 2 QB 379]** sought to overcome a judgment of the House of Lords by holding it to be *per incuriam*. Nevertheless, subsequently Lord Diplock in ***Davis v. Jhonson*** **[(1979) AC 264]** disapproved of this approach and restated the principle that the Court of Appeal was bound by the decisions of the House of Lords, even if it considered the decision to be *per incuriam*. This principle is reflected in Article 7(1) of the Civil Code of Seychelles.

46. The same approach is found in India where the Supreme Court in ***South Central Railway Employees Cooperative Credit Society Employees Union v. B. Yashodabi & Ors*** **[(2015) 2 SCC 727, ¶15-17]** held that it was not open to the High Court to hold that the judgment of the Supreme Court was per incuriam. A contrary construction was determined by the Supreme Court to lead to total chaos in the country if there is no finality attached to the orders passed by it.

47. On ground of appeal (b), the Supreme Court did not fail to follow the decision in ***Vijay Construction (Pty) Limited*** (supra) as alleged by the Appellant contrary to Article 7 of the Civil Code of Seychelles 2020. Instead, it applied the decision in ***Vijay Construction***

(Pty) Limited (supra) and held that the accession by Seychelles to the New York Convention on 3rd February 2020 effectively brought to life the provisions of Articles 146-150 of the Commercial Code. The conclusion that Articles 146-150 of the Commercial Code is in force is correct but for the wrong reasons as alluded above.

48. For the reasons alluded to above, the grounds of appeal (a) and (b) fails.

Grounds of Appeal (c) and (d)

49. The Appellant submits that arbitral awards under the New York Convention are enforceable by the same procedure as applicable to domestic awards, that is by leave of a Judge of the Supreme Court. It is submitted that Article 138(2) of the Commercial Code applies and it provides for the registration of an award under an arbitration agreement by leave of a Judge of the Supreme Court. According to the Appellant, the same procedure is applicable to the enforcement of arbitral awards under the New York Convention. Our attention was drawn to Section 227 of the Seychelles Code of Civil Procedure which provides that New York Convention awards *"shall be enforceable in accordance with the provisions of Book I, Title IX"* of the Commercial Code which contains Articles 110-150.

50. The Appellant relied on the decision in ***Omisa Oil Management v Seychelles Petroleum Company Ltd*** **[(2001) SLR 50]**. However, the application of Article 138 of the Commercial Code did not arise for consideration there. Moreover, it was not decided on the basis of the impugned arbitral award being an arbitral award under the New York Convention.

51. Article 148 of the Commercial Code states that arbitral awards under the New York Convention shall be recognised as binding and shall be *enforced* in accordance with the rules of procedure in force in Seychelles. The issue is whether *rules of procedure* therein include Article 138(2) of the Commercial Code.

52. The Respondent submits that to read Article 148 of the Commercial Code in that manner will make Article 139(2) of the Commercial Code also applicable to arbitral awards under the New York Convention. This results in the party against whom the award has been made being given an opportunity to apply to set aside the award.

53. Article 148 of the Commercial Code applies to the *enforcement of an arbitral award* under the New York Convention. Article 139 of the Commercial Code applies to *setting aside* an arbitral award. Clearly these two terms connote two distinct procedures. Enforcement is the process by which a domestic court gives legal effect to an arbitral award as a domestic judgment and enforces it. Setting aside is the process where a domestic Court sets aside an arbitral award and negates its legal validity which is based upon party autonomy. Accordingly, I hold that the words *enforced in accordance with the rules of procedure in force in Seychelles* in Article 148 of the Commercial Code does not cover Article 138 of the Commercial Code.

54. The New York Convention does not deal with the setting aside of an arbitral award. It seeks to provide the framework for the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such award is sought. It was left to the States to provide for the setting aside of such arbitral awards. The jurisdiction to set aside an arbitral award made outside the territory of the State in which the Court is situated is an application of extra territorial jurisdiction. Such jurisdiction should not be lightly inferred in the absence of express provision. In my view, the provisions of the Commercial Code do not do so.

55. In ***Eastern European Engineering Limited v. Vijay Construction (Proprietary) Limited*** **[(2017) SCSC 375, para. 208 (b)]** the Supreme Court held that Articles 110 to 145 of the Commercial Code apply solely to local arbitral awards.

56. The proper procedure for the enforcement of a New York Convention arbitral award is as set out in Article 149 of the Commercial Code which the Respondent followed.

57. For the foregoing reasons, grounds of appeal (c) and (d) fail.

Ground of Appeal (e)

58. According to the Appellant, the rules of procedure to enforce a New York Convention award in Seychelles (i.e. by way of an application for leave of the Supreme Court or a judge) include an obligation under Article 149 of the Commercial Code to supply the duly authenticated original award or duly certified copy thereof and the original arbitration agreement or duly certified copy thereof (plus translation if both documents are made in a language other than that of the country where the enforcement is sought) to make out a prima facie case for leave to enforce. It was submitted that this burden can only be discharged by way of an affidavit from the Respondent. As the Respondent failed to do so, it is submitted that the learned Judge erred in law in allowing the application.

59. As more fully alluded to above, there is no procedural requirement to seek leave of a Judge of the Supreme Court. The applicable rules of procedure are set out in Articles 146-150 of the Commercial Code. There is no specific requirement therein to file an affidavit. In the absence of such provision, it is not in the hands of this Court to impose such a requirement and penalize the Appellant for failure to do so. It is a matter for the legislature to bring clarity to the provisions. We must not step into the domain of the legislature under the thin guise of interpretation.

60. For the foregoing reasons, ground of appeal (e) must fail.

Ground of Appeal (f)

61. The Appellant submits that should we find Article 149 of the Commercial Code and Article IV of the New York Convention are valid and applicable, it was incumbent upon the Respondent to supply a "duly authenticated" original award or a "duly certified" copy thereof as well as the original arbitration agreement or a "duly certified" copy thereof.

62. The Appellant refers to Van Den Berg in the New York Arbitration Convention, 1958, without giving any reference, and claims that generally it is sufficient for authentication of the original award if it is accomplished by a judicial officer, a notary in the country where the award was made or a diplomatic or consular agent of the country in which the enforcement is sought located in the country where the award was made.

63. Article IV of the New York Convention or the *travaux préparatoires* of the provision does not provide a definition of the terms *"authenticated"* and *"certified"*. Nevertheless, they refer to two distinct processes.

64. ***In O Limited (Cyprus) v. M Corp. (formerly A, Inc.) (United States) and others*** **[Supreme Court, Austria, 3 September 2008, 3Ob35/08f, XXXIV Y.B. Com. Arb. 409 (2009)]** it was held that *authentication* means confirmation that the signatures of the arbitrators are authentic and *certification* is the process by which a copy of a document is attested to be a true copy of the original document. This description of the terms *authentication* and *certification* is adopted by many commentators. [See Fouchard Gaillard Goldman on International Commercial Arbitration 970, para. 1675 (E. Gaillard, J. Savage eds., 1999); Albert Jan van den Berg, the New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 251 (1981); Dirk Otto, Article IV, in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 143, 177 (H. Kronke, P. Nacimiento et al. eds., 2010); ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges 72, 74 (P. Sanders ed., 2011); Maxi Scherer, Article IV (Formal Requirements for the Recognition and Enforcement of Arbitral Awards), in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 - Commentary 207, 210 (R. Wolff ed., 2012)].

65. Article IV (1)(a) of the New York Convention, on which Article 149(a) is based upon, does not specify the competent authority that should perform the authentication or certification. According to the **UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)**

[2016 ed., page 111], a proposal made during drafting that the authority competent to authenticate an award should be the consulate of the country where the award is relied upon was not adopted. Thus, the views of Van Den Berg on this point are not supported by the drafting history.

66. According to the **UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)** (supra., pp. 111-112), domestic courts have considered consular representatives, notaries public, the arbitral institution under the rules of which the award was made, members of the arbitral tribunal or its chairperson, as well as attorneys as authorities competent to perform a certification of an award.

67. An examination of the Final Award filed in this application shows that there is a seal stating "Certified True Copy" with the date 08 March 2021 placed towards the bottom of all the pages. Below that there are three signatures two of which are not decipherable. However, the third signature appears to state "N. Al Tawil". The third member of the Tribunal was Dr. Nabil Al Tawil. In addition, there is a seal of international law firm "Bonnard Lawson" with its address, below which the signature of Dr. Firas Adi is found. According to the Final Award, he was the counsel for the Claimant.

68. The New York Convention does not require the arbitration agreement to be authenticated. According to the **UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)** (supra., page 117), during the drafting of Article IV, the Belgian delegate proposed that the arbitration agreement be authenticated as well. This was opposed by the French delegate who considered that the production of the arbitration agreement should not be subject to excessive requirements, particularly in light of the fact that many arbitrations were based on arbitral clauses agreed to in an exchange of correspondence. The final text of Article IV (1)(b) does not include an authentication requirement. The requirement of authentication was included for the arbitral award. That requirement was intentionally left out for the arbitration agreement. Hence in interpreting the requirement of the need to

tender the *original or duly certified copy* of the arbitration agreement, this legislative history must be borne in mind.

69. The copy of the arbitration agreement tendered to Court has been certified by the Counsel for the Respondent. This cannot be encouraged as it is equivalent to the Counsel on record testifying on behalf of the client which should not be allowed. Nevertheless, I note that the Appellant has never denied the existence of this arbitration agreement. In these circumstances, I am of the view that no prejudice has been caused to the Appellant.

70. For the reasons alluded to above, ground of appeal (f) fails.

Grounds of Appeal (g) and (h)

71. The Appellant submits that the arbitration proceedings were held without proper notice to the Appellant, without the Appellant being able to nominate an arbitrator for the Committee and based on a void and unenforceable Consortium Agreement.

72. However, the Supreme Court has clearly explicated the reasons for determining otherwise. I am in respectful agreement with the reasoning including, but not limited to the fact that the LNTP agreement was not the agreement on which the disputes went into arbitration.

73. For the reasons alluded to above, grounds of appeal (g) and (h) fails.

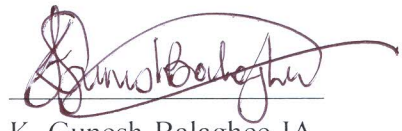
74. The appeal is dismissed with costs to the Respondent.

J. De Silva JA

I concur:

S. Andre JA

I concur:



K. Gunesh-Balaghee JA

Signed, dated and delivered at Ile du Port on 3 May 2024.