

**Omisa Oil Management v
Seychelles Petroleum Company Ltd
(2001) SLR 50**

Bernard GEORGES for the plaintiff
Ramnikal VALABHJI for the respondent

Ruling delivered on 23 November 2001 by:

JUDDOO J: This is an application for leave to register an arbitration award made on 7 August 1998 pursuant to arbitration proceedings held from 4 to 7 August 1998 in Geneva, Switzerland and based upon identical arbitral clauses in a Management Agreement dated 6 June 1986, a Management Agreement dated 22 January 1991, and a Finance Manager Agreement dated 7 October 1998 between the parties. An authenticated copy of the award has been deposited with the Registry of this Court. The respondent has raised objection to the instant application.

Various issues have been raised by both parties and more particularly by the respondent in his wide ranging grounds of objection. However, the instant determination shall concentrate on those issues that were made relevant in the submissions before the Court on behalf of both parties. The remaining issues that were left out of the submissions are understood not to be insisted upon.

It is common ground that the award made on 7 August 1998 is a foreign arbitration award and that the instant application for leave to register the said foreign arbitration award forms part of the enforcement proceedings brought under the provisions of articles 146 to 150 of the Commercial Code Act (Cap 38). This is confirmed as per the submissions of counsel for the applicant that

... this is an arbitration award, it falls outside the ambit of the Act (Foreign Judgment Reciprocal Enforcement Act – Cap 85). It falls within the Commercial Code of Seychelles, which specifically explains how arbitral awards are to be enforced, foreign or domestic, so this apply completely different law ... it would be my submission that articles 146 to 150 deal with the enforcement of non-domestic awards, namely foreign arbitration awards and thereafter ...we now come to the question of enforcement of the award which is in favour of the applicant and it is for this reason that this application for leave has been brought...

It is also confirmed that a prior stand that the said foreign arbitration award was enforceable without leave of the Court and which issue has been the subject of a determination from this Court that such leave was necessary is not being insisted upon. As aptly put by counsel for the applicant

... rather than contesting that interpretation, the applicant has chosen to come to

Court and to seek leave in any event...

In summary, the submissions of the counsel for the applicant run as follows:

My consideration of the Commercial Code (is that it is) dealing with domestic awards from articles 110 to 145... Articles 146 to 150 deal with the enforcement of non-domestic arbitration awards, namely foreign arbitration awards...

The legislator has brought into our municipal domestic legislation the text of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards...

The text with appropriate adaptations to the law of Seychelles now features in article 146 to 150 of the Commercial Code. Seychelles is not party to the Convention but Switzerland is ...

There must be reciprocity between the two countries. We know that because Switzerland has signed and ratified the New York Convention, Switzerland is a party to it and that because Seychelles has in article 146 made the Convention part of our law and stated that the Convention shall apply to the recognition of arbitral awards made in a territory other than Seychelles, that Seychelles has also implemented, not by signing but by legislating for it, we are left in exactly the same position as if Seychelles has also signed and ratified the Convention. In other words, there is now reciprocity between Seychelles and Switzerland....

The basis for enforcement [is] that Switzerland has ratified the Convention and is a party thereto and Seychelles has brought the Convention into municipal law...

On behalf of the respondent's objection, counsel for the respondent claimed that:

under our laws, a non-domestic award can only become executory after registration ... Just because we enacted in the Commercial Code articles of the New York Convention does not establish reciprocity. If the award was granted in Seychelles, on the basis of this Code of ours, we could not go to Switzerland and enforce the award, because the laws of Seychelles do not apply to Switzerland. On that basis alone, there is lack of reciprocity... We have to accede to the New York Convention ... This is the very basis of our objection.

In further reply thereto on behalf of the applicant, it is argued that even in the absence of reciprocity a foreign arbitration award made in the territory of a State party to the Convention is registrable, enforceable and binding under article 146 of the Commercial Code Act.

The relevant legislation under article 146 and 148 of the Commercial Code Act (Cap 38) provides that:

146 – On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and an 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.

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 of 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.

In addition section 227 of the Seychelles Code of Civil Procedure (Cap 213), in as far as it relates to arbitration awards, provides as follows:

... Arbitral awards under the New York Convention, as provided under articles 146 and 148 of the Commercial Code of Seychelles, shall be enforceable in accordance with the provisions of Book I, Title IX of the said Code.

Elaborating upon these issues, Chloros in *Codification in a Mixed Jurisdiction* at page 156 comments as follows:

It has become increasingly obvious that legislation in Seychelles on arbitration in business disputes was a matter of some urgency. Arbitration in business disputes has expanded widely and most trading countries subscribe to the New York Convention on Arbitral Awards, 1958. As Seychelles is a trading nation, it was important that it should acquire a modern system of arbitration, preferably one that was known and established in the world. (It is also important that Seychelles should adhere to the New York Convention at the earliest opportunity...)

It was decided to introduce in the Commercial Code ... the text of the uniform law on Arbitration proposed by the European Convention on Arbitration 1967. The text was prepared by the Rome Institute for the Unification of Private law. The text, with appropriate adaptations, now features in articles 110-150 of the Commercial Code. Moreover, the New York Convention is adopted as internal law on the basis of reciprocity...(citations omitted).

The issue to be determined is whether a foreign arbitration award made in the territory of a state other than Seychelles and which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 is registrable, and can be made enforceable and binding, under the relevant provisions of articles 146 to 150 of the Commercial Code Act.

It is certain that the above quoted sections of the Commercial Code Act have made provision for the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award to Seychelles. However, it is equally certain that the said provisions of the Commercial Code Act can only be made to operate "on the basis of reciprocity." It is only where the condition of reciprocity is satisfied that an arbitral award within the meaning of the said Convention or an arbitral award not considered as a domestic award can be binding.

The question raised is, does the enactment of articles 146 to 150 of the Seychelles Commercial Code Act as municipal law without more provide reciprocity to the municipal legislation with regard to the country in issue, Switzerland. Reciprocity, in this instance, would necessitate that both municipal legislations would be under a mutual legal obligation with regard to each other and bound to the same extent or degree.

The enactment of articles 146 to 150 of the Seychelles Commercial Code Act as municipal law of Seychelles does not bind Switzerland to any degree or extent. The obligation of Switzerland under the Convention is only towards a State party to the said Convention and even then only to the extent that each state concerned has bound itself to apply the Convention. This is made explicit under articles III and XIV of the Convention (text found in *Russell on Arbitration* (20th ed) at p 504):

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in the rules of procedure of the territory when the award is relied upon

...

Article XIV

A Contracting State shall not be entitled to avail itself of the present convention against other contracting states except to the extent that it is itself bound to apply the Convention.

Seychelles is not a Contracting State to the Convention. There is no mutual legal obligation in Switzerland and Seychelles with regard to the registration and enforcement of a Convention award or a non-domestic award made in each other's jurisdiction. Accordingly, it cannot be said that there is reciprocity between the two municipal jurisdictions.

It has been further submitted, on behalf of the applicant, that even in the absence of

reciprocity municipal legislation in Seychelles under the Commercial Code Act, as quoted, allows for the enforcement of a foreign award made in a territory of a state party to the Convention. Counsel stressed that the second sentence in article 146 of the Commercial Code Act should be read separately and distinctively from the first sentence and that section 148 should be read completely on its own. I cannot find that the condition of 'reciprocity' can be obliterated in such a manner. The condition of 'reciprocity' is a pre-requisite which allows the award made in a foreign country to be made binding on the recipient state albeit although valid objections may be taken and determined to the enforcement thereof.

The second issue raised by counsel for the respondent is what is termed "lack of existence" of the applicant which is alleged to amount to an 'incapacity' under section 150 of the Commercial Code Act. In that respect, it is averred –

The Applicant having through its legal advisors in Geneva emphatically asserted that it does not have its own constitutive documents on file and is unable to procure such document, has no existence in law, cannot sue or make any application.

In support of the objection, counsel for the respondent referred to 150(a) of the Commercial Code Act which reads:

Enforcement shall be refused if the person against whom it is involved proves that a party to the arbitration agreement is (under the law applicable to him) under some incapacity...

Furthermore, counsel added that

As regards capacity, I have produced this letter from 'Omissa' that they do not have constitutive documents and therefore they do not exist ... Lack of existence is an incapacity...

At the outset, it needs to be clarified that the respondent's legal advisors were not present in Geneva although reply, counterclaim and documents were filed. Additionally, no such letter referred to has been produced in the present proceedings. The instant determination originates from an application on behalf of the applicant to "execute the arbitration award" filed on 30 July 1999 and which, in compliance with this Court's ruling on 31 July 2000, was followed by an "application for leave to register arbitration award" filed on 16 January 2001 with all supporting documents. On behalf of the respondents an objection was filed thereto on 26 June 2001 with no supporting document.

There is indication that a prior "objection" which had been separately filed on behalf of the respondent on 21 August 1998 (C/S 258 of 1998). This was found to be a premature exercise made prior to any demand to enforce an arbitration award. The said objection was, accordingly, withdrawn on 1 December 1998.

Counsel for the respondent only made reference to "*this letter from Omissa*" and counsel for the applicant attempted to quote from certain documents in the application which stood withdrawn. Suffice it to say that it is both inadequate and inconclusive for documents relied upon by parties not to be produced and exhibited at the proceedings under which reliance is being sought thereon. Mere reference to documents filed in an earlier application that had been withdrawn and which documents are on the face of the record incomplete does not suffice. Neither is the Court entitled to embark upon a voyage of discovering to ascertain from documents in a separate application. Accordingly, without embarking on the merits of the objection raised, I will set it aside in its present form and tenor.

In the end result, for reasons given earlier, I find that the application for registration and enforcement of the foreign arbitration award made in Switzerland, dated 7 October 1998, cannot be granted in view of the lack of reciprocity between Switzerland and Seychelles in that respect. Accordingly, the application is dismissed.

No order as to costs.

Record: Civil Side No 85 of 2000