SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC …
CS 23/2019

In the matter between:

EASTERN EUROPEAN ENGINEERING LIMITED **Plaintiff**
(rep. by Alexandra Madeleine)

and

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED **Defendant**
(rep. by Bernard Georges)

Neutral Citation:	*Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (*CS 23/2019) [2020] SCSC ….. (30 June 2020).
Before:	E. Carolus J
Summary:	Registration of orders of the High Court of England and Wales - section 3(1) of the Reciprocal Enforcement of British Judgments Act
Delivered:	30 June 2020

ORDER

1. I hereby order that the Order of Mr. Justice Cooke dated 18th August 2015 and the Order of Mrs. Justice Cockerill dated 11th October 2018 be registered in terms of section 3(1) of the Reciprocal Enforcement of British Judgments Act.

2. Accordingly, pursuant to Rule 4 of the Practice and Procedure Rules GN 27 of 1923, I hereby make order in favour of the plaintiff in terms of the Orders of Mr. Justice Cooke and Mrs. Justice Cockerill.

3. In accordance with the Order of Mr. Justice Cooke dated 18th August 2015, the defendant shall pay to the plaintiff the following sums -

    a) In relation to the arbitration proceedings:

        i. the sum of Euros 15,963,858.90 (arbitral award in favour of plaintiff against the defendant);
        ii. the sum of Euros 640,811.53 (plaintiff's legal and other costs of the arbitration);

iii. the sum of US Dollars 126,000 (plaintiff's costs to the ICC).

b) In relation to the application for leave to enforce the arbitral award and to enter judgment in terms of the award, the costs of such application, including the costs of entering judgment, such costs to be summarily assessed if not agreed.

c) In relation to post award interest the defendant shall pay to the plaintiff the following sums:

i. Euros 145,498.25 in respect of the damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61;
ii. Euros 3,385,261.64 in respect of the damages under Contract 6 and accruing hereafter at the daily rate of Euros 2,818.01;
iii. Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88.

4. In accordance with the Order of Mrs. Justice Cockerill dated 11th October 2018 the defendant shall pay to the plaintiff –

a. the Claimant's (plaintiff's) costs of (1) the defendant's application to set aside the Order of Mr. Justice Cooke dated 18th August 2015 and (2) the defendant's application to cross-examine witnesses of the plaintiff, on the indemnity basis, to be assessed if not agreed;

b. an interim payment on account of the costs referred to in sub-paragraph (a) above in the sum of £245,315.90.

5. In accordance with section 3(3)(c) of the Reciprocal Enforcement of British Judgments Act the reasonable costs of and incidental to the registration of the Orders (including the costs of obtaining a certified copy thereof from the original court) and of the application for registration before this Court shall be borne by the defendant.

JUDGMENT

CAROLUS J

Background

[1] The plaintiff Eastern European Engineering Limited ("EEEL") has filed a plaint against the defendant Vijay Construction (Proprietary) Limited ("Vijay"), seeking the registration of two orders of the High Court of England and Wales dated 18th August 2015, and 11th October 2018 respectively, under section 3(1) of the Reciprocal Enforcement of British Judgments Act ("REBJA"). The defendant has filed a statement of defence in which it raises several pleas *in limine litis*, and deals with the matter on the merits. The parties agreed to proceed by filing a statement of agreed facts and written submissions on the basis of which the matter would be determined, all of which were duly filed.

[2] The undisputed facts of this case as they appear from the statement of agreed facts and the pleadings, and which form the background to the present application, are as follows: Both parties are companies incorporated and registered under the laws of Seychelles. The defendant company is involved in the business of civil engineering and construction in Seychelles. The parties entered into six agreements for the construction of the Savoy Resort and Spa Hotel. The agreements provided that any dispute arising under or from the agreements were to be settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC") and that the place for the arbitration should be Paris, France. Disputes arose between the parties resulting in the termination by the plaintiff of all six agreements. The plaintiff referred the disputes to arbitration in Paris under the Rules of Arbitration of the ICC on 12th September 2012. The defendant submitted to the arbitral tribunal which delivered its final award ("the arbitral award") on the disputes on 14th November 2014. The defendant applied for the award to be set aside by the French Courts, namely the *Cour D'Appel* and the *Cour de Cassation.* The *Cour D'Appel* dismissed the application on the merits and the Defendant allowed the application before the *Cour de Cassation* to lapse.

[3] The plaintiff applied to the Supreme Court of Seychelles for the recognition and enforcement of the award in Seychelles which was granted by Robinson J in **Eastern European Engineering (Proprietary) Ltd v Vijay Construction (Proprietary) Ltd (C/S 33/2015) [2017] SCSC (18 April 2017).** She found that although the1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New

York Convention") was not applicable in Seychelles, the arbitral award was enforceable in Seychelles under section 4 of the Courts Act. The defendant appealed against the decision of Robinson J and the Court of Appeal in **Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd (Civil Appeal SCA 15 & 18/2017) [2017] SCCA 41 (13 December 2017)** ruled that the award was not enforceable in Seychelles because Seychelles was not a party to the Convention, but did not deal with the matter on the merits.

[4] The Plaintiff then filed an application before the High Court of England and Wales pursuant to the UK Arbitration Act 1996, seeking leave to enforce the arbitral award made in its favour on 14th November 2014 and judgment in terms of the award. Pursuant to that application, Mr. Justice Cooke made an Order dated 18th August 2015 ("the Cooke Order") in terms of which he (i) granted leave to the plaintiff to enforce the arbitration award such leave to include leave to enforce post-award interest, (ii) entered judgment against the defendant in terms of the award, (iii) dismissed the defendant's counterclaim in the arbitration, (iv) awarded costs of the application including the costs of entering judgment to the plaintiff, such costs to be summarily assessed if not agreed, and (v) gave the defendant 14 days after service of the Order to apply to set aside the said Order.

[5] On 23rd October 2015, the defendant applied under section 103 of the UK Arbitration Act 1996, for the Cooke Order to be set aside and the set aside application was heard by Mrs. Justice Cockerill, who after hearing submissions of counsel for the parties (i) dismissed the set aside application, (ii) dismissed the application of the defendant to cross-examine two persons who had made statements on behalf of the plaintiff, (iii) awarded to the plaintiff costs of the set aside application and the application to cross-examine, to be assessed if not agreed, and |(iii) ordered an interim payment on account of costs which the defendant failed to comply with.

[6] The parties further agree in paragraph 2 of their statement of agreed facts that

> *The Order made on 18th August 2015 and the Order made on 11th October 2018 are not part of the arbitral award.*

[7] In addition to these undisputed matters, the plaintiff further claims in its plaint that the High Court of England and Wales had jurisdiction to entertain the applications of the

plaintiff and that of the defendant; that all the rights of the defendant were respected in the proceedings in that Court; that the Cooke Order and the Cockerill Order were not contrary to public policy and were not obtained through fraud; that the said Orders are not subject to an appeal and the relevant time limits under the English Civil Procedure Rules for mounting any appeal have expired; and that the Cooke Order and the interim costs payment ordered by the Cockerill Order are capable of being enforced in England and Wales. All this is denied *proforma* by the defendant.

[8] The plaintiff avers that it is desirous of rendering the Cooke Order and the Cockerill Order executory in Seychelles and prays for the following Orders:

(i) to register and render executory the Order of Mr. Justice Cooke made on dated 18 August 2015 and the Order of Mrs. Justice Cockerill made on 11 October 2018 ... in Seychelles under 3(1) of the Reciprocal Enforcement of British Judgments Act;
(ii) The British judgments shall be registered without any impediment;
(iii) That upon registration the said judgments shall be executed forthwith;
(iv) That the execution of the British Judgments can not be stayed before the date when the Defendant's Application for Stay of execution has been heard and granted by the Court;
(v) any other orders the court deems fit in the circumstances of the case; and
(vi) costs of the case.

[9] The defendant raises the following pleas in limine litis:

1. *The Orders sought to be enforced in Seychelles are not 'judgments' within the definition of the word 'judgments' in the Reciprocal Enforcement of British Judgments Act.*
2. *Insofar as the award on which they are based was rendered in a country not covered by the Reciprocal Enforcement of British Judgments Act, the parties having chosen to specifically arbitrate outside those countries, the Orders sought to be enforced are not judgments falling within the definition of the term.*
3. *Given that the parties chose not to seat the arbitration in Great Britain, the High Court in England and Wales, in hearing the matters filed there by the plaintiff, was sitting as a subsidiary jurisdiction (and one of potentially many jurisdictions) in making the Orders, such that the Orders have legal applicability only territorially in Great Britain and are unable to be enforced elsewhere, including in Seychelles.*
4. *Given that the judgment of the Seychelles Court of appeal in December 2017 deciding that the arbitral award was not enforceable in Seychelles is not binding or enforceable*

in Great Britain, a British Judgment to the contrary effect cannot be enforceable in Seychelles under a law the very basis of which is reciprocity.

[10] On the merits, the defendant in its statement of defence, claims that it did not comply with the Cooke Order because it was seeking to set aside the said Order. It avers that the Order was made ex-parte without notice to the defendant, that the Court did not hear evidence from the defendant before making its Order and as such no judgment was made, the Order being merely an administrative order. The defendant further avers that both the Cockerill Order and the Cooke Order were limited to recognition and enforcement of the award in the United Kingdom. The defendant also denies the plaintiff's claims as stated at paragraph 4 hereof.

[11] The defendant further avers on the merits, that the Orders sought to be registered amount to judgments upon the arbitral award and are not judgments based on an assessment of the facts in issue by the High Court in England and Wales; that the Seychelles Court of Appeal has determined that the arbitral award is unenforceable in Seychelles; and for these reasons:

a. *The Plaint here seeks to enter through the back door when the front door is firmly closed to it. The Seychelles Court of Appeal has decided that the arbitral award is unenforceable and it would be unconstitutional, unconscionable and contrary to public policy if this Court were to enforce Orders made upon the award.*
b. *The law does not allow a party to clothe a foreign judgment in the garment of another jurisdiction in order to evade the jurisdictional process of Seychelles and in consequence to recognise and enforce the arbitral award through a foreign judgment.*
c. *The Orders sought to be enforced do not constitute judgments on the merits of the arbitral action and are not merged with the arbitral award. They are simply orders of exequatur and the Plaintiff by this action seeks to obtain a double exequatur in breach of the legal position that that an exequatur order on another exequatur order is not admissible in law.*
d. *If this Court enforces the Orders it will be enforcing exequatur orders and not the arbitral award itself, which is not possible in law.*
e. *In any event, the unenforceable award, which is not purporting to be clothed in a British 'Order' was obtained by fraud, rendering it unenforceable as a matter of public policy.*

[12] The defendant avers that for these reasons the Court should determine that it is neither legally possible, nor just and convenient that the Orders be enforced in Seychelles under

the Reciprocal Enforcement of British Judgments Act. It therefore prays for the dismissal of the plaintiff's application, for a declaration that the Orders of the High Court of England and Wales sought to be registered are not capable of being registered and rendered executory in Seychelles; and alternatively to declare that it is not just and convenient that the Orders be enforced in Seychelles.

[13] The matters arising for the determination of the Court are circumscribed by paragraph 1 of the statement of agreed facts, in which the parties agree:

> 1. *That the matter be determined by the court by way of written submissions. Both parties are to address on the plea in limine litis and whether the two Orders, namely the Order made on 18th August 2015 and the Order made on 11th October 2018 by the High Court of Justice of England and Wales are enforceable in Seychelles as per the provisions of section 3(2) Reciprocal Enforcement of British Judgments Act.*

[14] Both parties have filed written submissions with supporting documents. The Court has carefully considered both submissions and will refer to them in the course of the judgement.

Analysis

[15] The plaintiff seeks to register and render executory the Cooke Order and the Cockerill Order under section 3(1) of the REBJA.

The law relating to enforcement of foreign arbitration awards in Seychelles

[16] Although plaintiff's counsel maintains throughout her submissions that it is the Orders that are sought to be registered, it is clear that in seeking to register and thereby render enforceable the Cooke and Cockerill Orders, the plaintiff is effectively seeking to enforce the arbitral award, the plaintiff's attempts to render enforceable in Seychelles the said arbitral award having been thwarted when the Court of Appeal ruled in 2017 in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd (supra)* that the New York Convention was not applicable in Seychelles as Seychelles was not a party to it, and that in consequence the arbitral award obtained by the plaintiff in France was not enforceable in Seychelles. In light of this, I find it appropriate to set out briefly the evolution of the position in Seychelles regarding enforcement of foreign arbitration awards.

Article 227 into of Seychelles Code of Civil Procedure ("SCCP") provides the mechanism for the recognition and enforcement of foreign arbitral awards. It provides that:

> *227. 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.*
>
> *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 X of the said Code.* (Emphasis added)

[17] I note that it is Title IX of Book I of the Commercial Code which deals with Arbitration and not Title X. Articles 146 and 148 which are found in Title IX of Book I of the said Code provide that:

> ***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 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.*

[18] In spite of these provisions, three major Seychelles Court decisions basically established that the foreign arbitration awards are not enforceable in Seychelles. In **Omisa Oil Management v Seychelles Petroleum Company Ltd (CS 85/2000) [2001] SCSC 29 (23 November 2001)** the court refused to recognize and enforce an arbitral award from Switzerland as there was no reciprocity between the Seychelles and Switzerland for the purposes of Article 146 of the Commercial Code, Seychelles not having ratified the New

York Convention. In *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd* (supra), which concerns this very case and is referred to in paragraph 3 hereof, the Court of Appeal confirmed the findings in the *Omisa Oil* case and refused to recognize and enforce the ICC arbitral award made in Paris. The *Vijay* decision was in turn followed by the Supreme Court in ***European Engineering Ltd v SJ*** **(MA 101/2019) [2019] SCSC 641 (29 July 2019)**, although Twomey CJ expressed her reservations regarding it, thus:

> *"The Court of Appeal's decision … is unequivocal. Much as I might have reservations regarding the views of the Court of Appeal with respect to the interpretation of sections 227 of the Seychelles Code of Civil Procedure and sections 146-150 of the Commercial Code …, this Court is nevertheless bound by the decision."*

[19] The effects of these decisions rendered articles 146 and 148 of the Commercial Code inoperative. As stated by the Court of Appeal in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd (supra) "… 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 Court concluded that such awakening could only be achieved by the President and the National Assembly, while the Court could only interpret existing laws.

[20] However as of 2020, Seychelles has officially become party to the New York Convention rendering the provisions of the Commercial Code of Seychelles relating to foreign arbitral awards operational, as a result of which foreign arbitration awards made in state parties to the Convention are now capable of being registered and enforced in Seychelles.

Reciprocal Enforcement of British Judgments Act

[21] This plaint has been filed pursuant to section 3 of the Reciprocal Enforcement of British Judgments Act ("REBJA"), the relevant provisions of which provide as follows:

> *3. (1) Where a judgment has been obtained in the High Court of England or of Northern Ireland or in the Court of Session in Scotland, the judgment creditor may apply to the court at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in*

the court, and on any such application the court may, if in all the circumstances of the case it considers it just and convenient that the judgment should be enforced in Seychelles, and subject to the provisions of this section, order the judgment to be registered accordingly.

(2) No judgment shall be ordered to be registered under this section if:

(a) original court acted without jurisdiction; or

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.

(3) Where a judgment is registered under this section:

(a) the judgment shall, as from the date of registration be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration in the court;

(b) the court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section;

> *(c) the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment.* (emphasis added)

In Limine Litis

[22] The defendant has raised a number of pleas in *limine litis* which are reproduced at paragraph 9 above, the first two of which rest on the contention that the Cooke and Cockerill Orders should not be registered and made enforceable under the provisions of the REBJA as they are not "judgments" within the definition of that word under that Act.

[23] The plaintiff on its part submits that the Cooke and Cockerill Orders *"were orders made pursuant to a civil proceedings (sic) before the High Court of England, and the orders were for a sum of money against the Defendant in pursuant (sic) to section 101 of the Arbitration Act 1996 and the Civil Procedure Rules ("CPR"). The Orders are capable of being enforced in England as per the provisions of CPR 70, CPR 40.7 and CPR 44-47. (Pg 2 paragraph 5 of plaintiff's submissions)".* On that basis the plaintiff contends that the Orders fall within the definition of "judgment" as provided for in the REBJA and can be the subject of an application under section 3 thereof. In support of her argument she cites the case of **Ablyazov v Outen & Ors SCA 56/2011 & 8/2013 [2015] SCCA 23.**

[24] It is my view that the *Ablyazov* case cannot be used to show that the Orders sought to be registered in the present proceedings fall within the definition of "judgment" in the REBJA under which the present application is made. In that case, the English Court, following an adversarial hearing lasting 4½ days, issued a Receiving Order and appointed the respondents as joint receivers in respect of the assets of Mr. Ablyazov. The respondents applied exparte to the Supreme Court for the recognition of the Receiving Order, to enable them to extend their powers of receivership over the assets of Mr. Ablyazov within the jurisdiction of Seychelles, and the Supreme Court granted the recognition order.

[25] Mr. Ablyazov appealed against that decision as well as against a second decision of the Supreme Court which listed 11 companies as falling under the mandate of the receivers, *inter alia* on the ground that the failure to register the foreign judgment before proceeding

with the process of recognition rendered such process inherently flawed. The respondents submitted that their action was not under the Foreign Judgments (Reciprocal Enforcement) Act, Cap 85, which according to them dealt with the execution of money judgments, and that their application did not deal with a money judgment.

[26] Rejecting Mr. Ablyazov's argument, the Court of Appeal after reviewing the definition of "judgment" under Cap 85, stated that it covered civil proceedings not limited to monetary orders but nevertheless found that Cap 85 made a distinction between three categories of foreign judgments and that only *"foreign judgments which are money judgments which are enforceable on registration under the Act and become executory after the process"* need to be registered. It also found that *"[T]he English Receiving Order … is not and could not be treated as a judgment which involved "payment of a sum of money in respect of compensation or damages to an injured party" through either a civil or a criminal proceeding"* and consequently held that Cap 85 was not applicable to that case and that therefore the question of registration of the Order under that Act did not arise.

[27] The Court further held that the jurisdiction of the Courts in Seychelles to recognise foreign judgments had not been curtailed by the enactment of Cap 85 but saved by its section 11(3).

[28] Although it dismissed the appeal on all the grounds raised by the appellant thereby upholding recognition of the Receiving Order the Court of Appeal saw it befitting to set out the law of recognition of foreign receiving orders, and stated:

> *"From the decisions of various jurisdictions, it would appear that actions of receivers and their recognition in countries other than where they were originally appointed fall under a different category of cases with transnational ramifications and concerns for the legal system of all the national Courts. Various reasons have been put forward as the rationale behind giving effect to the decisions of courts such as the comity of nations, the principle of conflicts of laws, the rule of competence-competence etc. Whichever may be rationale, the fact remains that recognition of receiving orders has emerged as a genus of its own in mutual judicial assistance, whether or not there has been a formal law for such deference …*
>
> *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. But we shall not enter into this debate. A distinction is made between making a foreign judgment executory and recognising a foreign judgment. A national court seems to take into account that a receiving order is not an enforcement exercise but a protection exercise under the principle of good order under the rule of law. Protection of assets no matter which jurisdictions the assets exist in is of a universal concern. Courts have therefore invoked their inherent jurisdictions to do so." (Emphasis added)

[29] Having made the distinction between making a foreign judgment executory and recognising a foreign judgment, the Court of Appeal nonetheless recognised that the principles underlying the two concepts have similarities and referring to the case of **Privatbanken Aktieselkab v Bantele 1978 SLR 226** stated:

> *"Privatbanken Aktieselkab v Bantele 1978 SLR 226 had to do with execution of judgments but the principles behind recognition and exequatur are not far different. The relevant part reads:*
>
> > *"foreign judgments can only be enforced in Seychelles if declared executory by the Supreme Court of Seychelles, without prejudice to the contrary provisions contained in any enactment or treaty." (see p. 232)*

[30] The Court of Appeal went on to confirm as good law the decision of Judge Sauzier in the Privatbanken case as regards execution of foreign judgments and held that the same conditions for a foreign judgment to be rendered executory are applicable for recognition in matters of receiverships. However it went on to remind that:

> *"It bears repetition that recognizing a receivership is an asset protection exercise and not an asset enforcement exercise. It relates to the power of the competent court in one country to exercise authority to co-operate with the competent court in another jurisdiction within the limits permissible under the rule of law under both jurisdictions and subject to the internal laws of each state for the purpose of ensuring that no jurisdiction becomes either a safe haven or a safe conduit for ill gotten gains."*

[31] The conclusion that can be drawn is that although the fulfilment of similar conditions may be required by a Court to declare executory a foreign judgment or to recognise a receivership order, a foreign judgment and a receivership order are different in nature (the former being an asset enforcement exercise and the latter being an asset protection exercise) and the jurisdiction of the Court to deal with either is derived from different sources.

[32] On the jurisdiction of a court to recognise a receivership order, the Court of Appeal referred to **Schemmer v Property Resources Ltd 73 [1975] 1 Chancery** in which it was held that *"the Court must be satisfied that there is a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction."* After considering a number of judgments which adopted the "*test of sufficiency of connection: whether the defendant involved in the action has a sufficient connection with the jurisdiction in which the receiver was appointed",* including the case of **Millenium Financial Limited and Thomas MC Namara and Anor, HCAP 2008/012** decided by the Court of Appeal of Saint Christopher and Nevis, the Court pointed out that in the latter case, the Court of Appeal of Saint Christopher and Nevis had added that *"in the absence of a statutory basis, the inherent jurisdiction of the court provides the requisite authority for a foreign appointed receiver. But where a statute makes provision for any matter, the statute will prevail and inherent jurisdiction may not be invoked."* The Court in the *Ablyazov* case concluded that the jurisdiction of Seychelles Courts to adopt the English position in recognising foreign receivership orders as in the *Schemmer* case is founded in the powers and jurisdiction of the Supreme Court which are the same as those of the High Court of England by virtue of Article 125 of the Constitution and sections 4, 5, 6 and 11 of the Courts Act. The Court concluded as follows:

> *(60) This matter of the receivership, albeit issued in another country, concerns Seychelles by virtue of their registration in Seychelles and facts which show they may hold tainted assets. Our jurisdiction is seriously concerned – whether under the name of comity of nations, conflict of laws, competence-competence, parity or*

any other name –to recognize it in Seychelles, all the more so when the Supreme Court has the same powers as the High Court of England and Wales.

[33] In contrast, the Court's jurisdiction to render executory the Cooke and Cockerill Orders is derived from the REBJA and as stated by the Court of Appeal of Saint Christopher and Nevis in the *Millenium Financial Limited* case "*where a statute makes provision for any matter, the statute will prevail and inherent jurisdiction may not be invoked."*

[34] It follows from the above analysis of the *Ablyazov* case that it should be distinguished from the present case rather than relied upon to show that the Cooke and Cockerill Orders fall within the definition of "judgment" in the REBJA. The *Ablyazov* case concerned the recognition of a Receiving Order which was held by the Court not to be a judgment which involved payment of a sum of money whereas the plaintiff in this case claims that the Orders sought to be registered are money orders (although the defendant claims that they are not but this argument will be dealt with later in this judgment). It also appears that because of the nature and peculiarities of foreign receiving orders their recognition is treated differently from recognition of other foreign judgments. The Court in setting out the law of recognition of foreign receiving orders in the Ablyazov case pointed out that actions for recognition of such orders *"fall under a different category of cases with transnational ramifications and concerns for the legal system of all the national Courts"* and as such *"recognition of receiving orders has emerged as a genus of its own in mutual judicial assistance".* This, in my view distinguishes such orders from the ones in hand. Further, the Court went on to state that the jurisdiction of the Court to recognise receivership orders is derived from its inherent jurisdiction *"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"*. In the present case the Court's jurisdiction is provided for under the REBJA and it has to comply with the provisions of that Act, although admittedly as it was held in the *Ablyazov* case, the same conditions for a foreign judgment to be rendered executory are applicable for recognition in matters of receiverships. The Court in the *Ablyazov* case also made a distinction between making a foreign judgment executory and recognising a foreign judgment and stated that recognition

of foreign a receiving order is not an enforcement exercise but an asset protection exercise. It is clear that the registration of the Orders sought in the present case is an enforcement exercise. I also note that the Receiving Orders sought to be recognised in Seychelles in the *Ablyazov* case were made by the English Court after *"an adversarial hearing lasting 4½ days"*. On the other hand the Cooke and Cockerill which are sought to be enforced in Seychelles simply enforced the award made by the arbitral tribunal without hearing the matter on the merits.

[35] Having said this, I will proceed with determining whether the Cooke and Cockerill Orders fall within the definition of "judgment" in the REBJA. The expression "judgment" is defined in section 2 of the REBJA as follows:

> *"The expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place;"*

[36] A reading of the latter part of this provision shows that an arbitral award which has become enforceable in the place where such award was made is considered as a judgment for the purposes of the REBJA. A literal construction of that part of the provision would lead to the conclusion that an arbitral award made in any foreign country would be considered as a judgment under that Act and consequently could be registered pursuant to section 3(1) and rendered enforceable in Seychelles. This would mean that the arbitral award made in Paris and made executory in France could be the subject of an application for registration under section 3(1) of the REBJA. I agree with Counsel for the defendant that such a construction would make nonsense of the fact that registration of the Orders in this case is sought under the Reciprocal Enforcement of *British* Judgments Act, and that it is only arbitral awards made in England, Northern Ireland and Scotland and not elsewhere, and which are enforceable under the laws of one of these three aforementioned countries in which the award was made, would fall under the definition of judgment under the REBJA and consequently be the subject of an application for registration under section (3(1) thereof. The fact that section 3(1) of the REBJA provides for the registration of judgments

obtained in *"the High Court of England or of Northern Ireland or the Court of Session in Scotland"* supports this view.

[37] Presumably, this is why the plaintiffs took the trouble to have the arbitral award which was made in Paris rendered enforceable in the United Kingdom by application under the UK Arbitration Act 1996 to the High Court of England. This resulted in the Cooke Order and the Cockerill Order which are now sought to be registered as "judgments" as defined under section 2 of the REBJA, under the first part of such definition, namely *"any judgment or order given or made by a court in any civil proceedings, … whereby any sum of money is made payable …"*

[38] There is no doubt that the Cooke and Cockerill Orders are *"order[s] given or made by a court in … civil proceedings"*. The defendant argues however that they are not *"order[s]… whereby any sum of money is made payable …"* The defendant submits that this is so because they are *"simply Orders made on the basis of an arbitral award. It was the award which made the sums payable, not the Orders. The Orders are simply repeating what the award granted, and making consequential Orders. These cannot by any stretch amount to 'judgments whereby any sum is made payable'." (Para 24 of defendant's submissions).* The defendant also submits that *"The clear intention of the definition is that a judgment must be one where, at the end of civil proceedings, a sum of money is made payable, not simply – as was the case here – a granting of leave to enforce an award made elsewhere." (Para 25 of defendant's submissions.)* The defendant further submits that the Cooke Order was made upon an *ex-parte* application supported by a solicitor's statement without hearing any evidence and that it granted automatic leave to enforce the arbitral award in terms of section 101(2) of the Arbitration Act 1996. *(Para 20 of defendant's submissions.)* In light of these submissions it is necessary to examine the two Orders closely.

[39] As submitted by the defendant, the Cooke Order is a very brief two page document which reads as follows:

ORDER

UPON reading the Claimant's application dated 14 August 2015 and the witness statement of Sohail Ali dated 14 August 2015

IT IS ORDERED THAT:

1. *Pursuant to section 10(2) of the Arbitration Act 1966, the Claimant do have leave to enforce the arbitration award dated 14 November 2014 made pursuant to an arbitration agreement contained in the contracts of sale dated 15 April 2011 ("Contract 1"), 4 August 2011 ("Contract 2"), 30 August 2011 ("Contract 3"), 30 September 2011 ("Contract 4"), 19 October 2011("Contract 5") and 23 December 2011 ("Contract 6") (together the "contracts"); such leave to include leave to enforce post-award interest in the amounts of:*

    i. *Euros 145,498.25 in respect of the damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61.*
    ii. *Euros 3,385,261.64 in respect of the damages under Contract 6 and accruing hereafter at the daily rate of Euros 2,818.01*
    iii. *Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88*

2. *Pursuant to section 101(3) of the Arbitration Act 1966, judgment be entered against the Defendant in the terms of the said award, namely:*
    2.1 *the Defendant shall pay the Claimant the sum of Euros 15,963,858.90*
    2.2 *the Defendant shall pay the Claimant the sum of Euros 640,811.53 in respect of the Claimant's legal and other costs of the arbitration.*
    2.3 *the Defendant shall pay the Claimant the sum of US Dollars 126,000 in respect of the Claimant's costs to the ICC; and*
    2.4 *the Defendant's Counterclaim is dismissed.*

3. *The costs of this application, including the costs of entering judgment, be paid by the defendant, such costs to be summarily assessed if not agreed.*

4. *Within 14 days after service of the order, the Defendant may apply to set aside the order. The award must not be enforced until after the end of that period, or until any application made by the Defendant within that period has been finally disposed of.*

Dated 18 August 2015

[40] I note that the only requirements prescribed under section 102 of the English Arbitration Act for recognition or enforcement of a New York Convention Award are the production of certain documents proving that such award was made and the terms of the award . I also note that leave to enforce the arbitration award granted by the Cooke Order includes leave to enforce post-award interest in the sums specified in the Order. Costs of the application were also awarded against the defendant

[41] As to the Cockerill Order the defendant concedes that *"it is an order made independently based on the proceedings before it, i.e. it is not an order based on another order from another jurisdiction"*. However he states that this Order is as short as the Cooke Order, that *"it dismisses the set aside application made by the Defendant and awards costs, including an interim payment on account of costs."* (paragraph 23 of defendant's submissions). The Order is reproduced below:

> *ORDER*
>
> *UPON the Defendant's application by letter dated 23 October 2015 to set aside the order of Mr. Justice Cooke dated 18 August 2015 (the "Main Application")*
>
> *AND UPON the Defendant's application by letter dated 20 August 2018 (the "Crosss-Examination Application"), such application having been adjourned by the order of Baker J dated 28 September 2018 to the hearing of the Main Application*
>
> *AND UPON hearing Benjamin Pilling QC and Daniel Khoo for the Claimant and Sandip Patel QC and Muthupandi Ganesan of Scarmans, the Defendant's solicitors, for the Defendant on 8 and 9 October 2018*
>
> *AND UPON the Court handing down written Judgment dated 11 October 2018*
>
> *AND UPON hearing Benjamin Pilling QC and Daniel Khoo for the Claimant and Muthupandi Ganesan of Scarmans, the Defendant's solicitors, for the Defendant on 11 October 2018*
>
> *IT IS ORDERED THAT:*
>
> 1. *The Main Application is dismissed.*
> 2. *The Cross-Examination Application is dismissed.*

3. *The Defendant shall pay the Claimant's costs of the Main Application and the Cross-Examination Application on the indemnity basis, to be assessed if not agreed.*
4. *The Defendant shall, by 4pm on 25 October 2018, make an interim payment on account of the costs referred to in paragraph 3 above in the sum of £245,315.90.* (Emphasis added)

[42] I observe that although the Cockerill Order is indeed brief, it is based on and refers to the 20 page judgment of Mrs. Justice Cockerill of the same date, namely 11 October 2018, which is far from brief.

[43] Although conceding that the Cockerill Order "*is not an order based on another order from another jurisdiction",* the defendant maintains that it would not be just or convenient to render it registrable and thereby executory for reasons which will be discussed below, in relation to both the Cooke Order and the Cockerill Order, namely: firstly because the arbitral award was not rendered in Britain, secondly because the two Orders are only applicable to Great Britain and thirdly because the Orders are not reciprocally enforceable in Seychelles.

[44] In light of the above submissions, the issues for consideration by this Court are as follows:

(a) Whether the Cooke and Cockerill Orders are *"judgments"* within the definition given to the expression in the REBJA given that they render executory an arbitral award made in France and not in Great Britain. The defendant's argument set out at paragraph 38 hereof, that the Cooke and Cockerill Orders are not orders whereby any sum of money is made payable, in that it was the arbitral award which made the sums payable and not the Orders as they merely repeated what the award granted and made consequential orders, is closely linked to the defendant's contention that the said Orders are not *"judgements"* within the definition of the REBJA because the arbitral award was not rendered in Britain. As such both arguments will be considered together.

(b) Whether the Cooke and Cockerill Orders are "judgments" within the definition given to the expression in the REBJA given that the said Orders are only **applicable** to Great Britain.

(c) Whether the Cooke and Cockerill Orders are **reciprocally enforceable** in Seychelles.

Are the Cooke and Cockerill Orders "Judgments" in terms of the REBJA given that the arbitral award which they render executory was made in France and not in Great Britain

[45] The defendant submits that in order for the Cooke and Cockerill Orders to fall within the definition of "judgment" under the REBJA and therefore be capable of registration under section 3 of that Act *"the arbitral award must have gone through a process resulting in a judgment of one of these Courts as a threshold matter before the provisions of the Act can be utilised."* It is further submitted that *"it follows therefore that where it is an arbitral award that is the vehicle which has awarded the sum in the first place, that award must have been made the subject of a British Judgment first in order to qualify as a 'judgment'."* (paragraph 29 of defendant's submissions). It is the defendant's contention, on that basis, that the Cooke and Cockerill Orders are not "judgments" as defined under the REBJA. Similar arguments are made by the defendant in its submissions on the merits (paragraphs 52 to 67 of defendant's submissions) in support of the applicability of the maxim *exequatur sur exequatur ne vaut,* which is dealt with further in this judgment.

[46] As previously stated the term *"judgment"* is defined in section 2 of the REBJA as including arbitral awards. As a result arbitral awards made in England, Northern Ireland and Scotland which are enforceable under the laws of these respective countries in which the award was made, may be subject of an application for registration under section (3(1) of that Act. These arbitral awards are directly registrable under section 3 of the REBJA provided that they are enforceable in the place where they were given. The question which arises in this case is whether an Order of the High Court of England and Wales rendering enforceable an arbitral award given in a jurisdiction other than England, Northern Ireland and Scotland and which is enforceable in the jurisdiction in which the award was rendered, may be registered under section 3(1) of the REBJA.

[47] In determining this question, the Cooke and Cockerill Orders must not be taken in isolation of each other. The Cooke Order was made pursuant to an application under section 101 of the British Arbitration Act 1996, which provides as follows:

101 Recognition and enforcement of awards.

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
As to the meaning of "the court" see section 105.

(3) Where leave is so given, judgment may be entered in terms of the award.

[48] Section 102 of that Act provides for the evidence to be produced by a party making an application for recognition or enforcement of an arbitral award as follows:

102 Evidence to be produced by party seeking recognition or enforcement

(1) A party seeking the recognition or enforcement of a New York Convention award must produce –
(a) the duly authenticated original award or a duly certified copy of it, and
(b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

[49] Section 103 of that Act further provides for circumstances in which recognition or enforcement of a foreign arbitral award may be refused. These are as follows.

103 Refusal of recognition or enforcement.

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

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

(d) 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 (but see subsection (4));

(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 in which the arbitration took place;

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

(3) Recognition or enforcement of the 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 recognise or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

[50] As submitted by the defendant, leave to enforce a foreign arbitral award is granted almost automatically provided the requirements of section 102 of the Arbitration Act relating to production of documentary evidence in support of the application are complied with. However the applicant may file an application to set aside the order, on any of the grounds enumerated in section 103 of that Act, as occurred in the present case. As correctly stated by the defendant in its submissions the set aside application is designed to test the foreign award and to satisfy the Court as to its integrity, the jurisdiction of the tribunal making that award, its finality and that due process was followed throughout the arbitration process. I observe that the provisions of the Commercial Code governing recognition and enforcement of foreign arbitral awards in our jurisdiction are much the same as obtains in England under the Arbitration Act. The defendant may invoke the same grounds under

section 150 of the Commercial Code as section 103 of the British Arbitration Act for refusing enforcement of a foreign arbitral award.

[51] Similarly if an arbitral award is sought to be registered under the provisions of the REBJA, the Court shall refuse registration of such an award if any of the grounds set out in section 3(2)(a) to (f) of that Act which are reproduced at paragraph 21 hereof exist. There are similarities between the grounds for refusing enforcement of a foreign arbitral award under section 102 of the British Arbitration Act and section 150 of our Commercial Code, and the grounds on which the Supreme Court may refuse to register an arbitral award under section 3(2) of the REBJA, despite the different wordings in these provisions.

[52] In the present case, the Court having granted leave to enforce the arbitral award by means of the Cooke Order, the defendant applied to have that Order set aside under section 103 of the Arbitration Act 1996. The Cooke Order was made after considering the documentary evidence produced by the plaintiff as proof that the arbitral award was made and the terms of the award as required by section 102 of the Arbitration Act.

[53] The defendant applied to have the Cooke Order set aside under section 103 of the Arbitration Act 1996, which gave rise to the judgment of Mrs. Justice Cooke dated 11th October 2018. The set-aside application was made on four grounds but pursued only the following three, namely: Ground 1 - that the arbitral tribunal lacked jurisdiction because its composition was not in accordance with the parties agreement (section 103(2)(e)), Ground 2 - that the defendant was unable to present its case because the arbitral tribunal allowed the plaintiff to rely on an expert report to which the defendant was denied an opportunity to respond (section 103(2)(c)), and Ground 3 - that the plaintiff interfered with a witness preventing him from giving evidence in the arbitration thereby rendering enforcement of the arbitral award contrary to public policy (section 103(3)). Mrs. Justice Cooke, in her judgment notes that these three grounds are essentially the same as were raised by the defendant before the French *Cour D'Appel* to set aside the arbitral award, as well as before the Supreme Court in the *EEL v Vijay case* (supra) in the proceedings for enforcement of the arbitral award, the merits of which were never considered on appeal, with regards to which both Courts found no merit. The plaintiff also raised the issue that

the defendant was estopped from raising the first two issues because it had made an application to the French Court to have the application revoked on the same grounds that it was now relying on. Mrs. Justice Cockerill held that the defendant was estopped from bringing ground 1 but the there was no issue estoppel as regards ground 2. The plaintiff alternatively pleaded that there was a strong policy in favour of upholding the arbitral award since the defendant had already pursued these grounds before the French Court which had supervisory jurisdiction over the arbitration and lost and brought proceedings in the Seychelles to have the award declared null and void on the same grounds. The Court although it was of the view that there was merit in that argument considered that a consideration of the merits of the challenge was necessary. After a thorough consideration of the merits of the set aside application, in light of the case's background, the proceedings before the arbitral tribunal insofar as they were relevant to the set aside application, the relevant legal principles and applicable case law, and arguments of the parties, Mrs. Justice Cooke stated in her judgment that she found no merit in any of the three grounds relied upon by the defendant. She further concluded that *"[A]s each ground has been determined to fail on the merits the question of public policy on finality does not arise"*. She further considered the defendant's application to cross-examine two people who had given statements for the plaintiff in relation to the third ground raised in the set aside application and dismissed the application. It is on the basis of this judgment that the Cockerill Order reproduced at paragraph 39 was made.

[54] A reading of the Cockerill judgment shows that the proceedings before the arbitral tribunal were only considered insofar as they had any bearing on the grounds raised by the defendant to set aside the Cooke Order, and that Mrs. Justice Cockerill considered the evidence presented before the arbitral tribunal for the limited purpose of determining whether these grounds had any merit. Mrs. Justice Cockerill did not consider the merits of the dispute between the parties before the arbitral tribunal as such, and neither her judgment and the ensuing Order nor the Cooke Order cannot be said to be a judgment on the merits thereof. Does that mean as contended by the defendant that the Orders are not judgments within the definition of the REBJA?

[55] As stated previously, the inclusion of arbitral awards in the definition of judgments in the REBJA renders arbitral awards made in England, Northern Ireland or Scotland which have become enforceable in the place where they were made directly enforceable under the provisions of that Act. Similar to other judgments envisaged by section 3(1) which are not arbitral awards, such arbitral awards cannot be registered under section 3(1) of the REBJA if any of the circumstances set out in section 3(2)(a) to (f) of that Act exist. The Court which is tasked with rendering enforceable or executory such arbitral awards or for that matter any other judgment, cannot delve into the merits of the dispute between the parties which was dealt with by the arbitral tribunal or by the Court rendering the judgment after hearing the merits of the matter. The Court is limited to consideration of the matters set out in 3(2)(a) to (f). This is similar to the situation which obtains for enforcement of a foreign arbitral award which is sought to be rendered enforceable in Seychelles under the provisions of the Commercial Code. In such a case the Court can only consider the matters set out in section 150 of the Commercial Code and not the merits of the dispute which was submitted to arbitration. Similarly there was no consideration of the merits of the dispute between the parties in making the Cooke and Cockerill Orders. Mr. Justice Cooke only satisfied himself that the evidential requirements under section 102 of the Arbitration Act had been fulfilled and Mrs. Justice Cockerill only considered the matters raised by the defendant under section 103 of the Arbitration Act. I therefore do not find any justification for saying that an English Court order rendering executory an arbitral award rendered in France is not a judgment in terms of the REBJA because the English Court did not consider the merits of the dispute between the parties which was heard by the arbitral tribunal.

[56] In all these cases, the procedure to be followed is essentially the same and the matters to be considered in determining whether to make the awards or judgments enforceable are the same albeit worded differently and do not include the merits of the dispute. In the case of the Cooke and Cockerill Orders the defendant was at liberty to invoke any of the reasons stated in section 103 of the British Arbitration Act which it felt rendered the arbitral award unenforceable which it did, and which the Court ruled upon. The same procedure would apply to an arbitral award which was directly sought to be made enforceable under section 3(1) of the REBJA in which the Court would also be limited to considering the matters set out in section 3(2)(a) to (f). The same applies to a foreign arbitral award sought to be

rendered enforceable under the Commercial Code where the Court could only consider the matters set out in Article 150 thereof. This Court must not lose sight of the fact that at the end of the day, it is the arbitral award which is sought to be enforced although *clothed in the garment of a British judgment*.

[57] In that respect, I am mindful of what Lord Collins in **Dallah v Pakistan [2011] 1 AC 763** stated:

> *... the trend, both national and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law.*

[58] In view of the above, I do not find any merit in the defendant's argument that the Cooke and Cockerill Orders are not judgments within the meaning of the REBJA because the Courts making the Orders did not hear evidence on the merits of the dispute between the parties and made no findings or determinations on the merits.

[59] Having thus found, the next question to be determined is whether the Orders are judgments *"whereby any sum of money is made payable"*, in terms of section 3(1) of the REBJA. It is argued by the defendant that the Orders are not money judgments as they are orders made on the basis of the arbitral award and it is the award, which made sums payable, not the Orders. It is further argued that the intention of the definition is that the judgment must be one where at the end of the proceedings a sum of money is made payable and not simply granting leave to enforce an award made elsewhere. The plaintiff in its submissions does not specifically address the defendant's submissions as state above, but expresses the view that the Orders are money judgments as they order the defendant to pay specific sums of money as per the arbitration award and the Cooke Order also includes leave to enforce post-award interest.

[60] I do not subscribe to the defendant's arguments. The effect of the recognition of the French arbitral award under section 101 of the UK Arbitration Act is to render it enforceable in the same manner as a judgment or order of the British Court. Clearly therefore, a sum of money, namely the award made by the arbitral tribunal is payable under the UK Orders.

[61] An enforcement order is a necessary step in the process for a judgment creditor to be able to obtain money owed to him or her in terms of a judgment, without which he or she would not be able to obtain payment of the same, the end result of which is that such orders do make sums of money payable. I note further that the Cooke Order also granted leave to enforce post award interest in the sums stated in that Order.

[62] Further by allowing registration of the Cooke and Cockerill Orders this Court would be enforcing the obligation of the defendant to pay the plaintiff money owed to it, irrespective of whether this is by recognition of the judgment rendered after hearing the merits of the dispute between the parties and which awarded the sum of money in the first place or by recognition of an enforcement order. In that respect, in *Recognition and Enforcement of Foreign Judgments*, Ralf Michaels states:

> *"A competing theory, especially influential in the common law, focuses less on the public relations of comity or duty between States and more on the private law relations between the parties. As stated by the English House of Lords in 1870, what is enforced is not a foreign judgment as such but the obligation it produces: The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce (Schibsby v Westenholz). A parallel theory explains that what is enforced is not the judgment but the vested right it creates. The vested rights theory has since fallen out of favour for choice of law, but these approaches retain force for foreign judgments, though often tacitly or as fictions."* (emphasis added).

[63] The emphasis here is more on the fulfilment of the obligation of the judgment debtor to pay the sum of money owed to the judgment creditor and less on the means by which such obligation is fulfilled i.e. by enforcement of a judgment awarding a sum of money rendered after hearing the merits of the dispute between the parties or by recognition of an enforcement order.

[64] In the present case the arbitral tribunal in Paris made an award establishing the obligation of the defendant to pay a sum of money to the plaintiff. The arbitral award and hence the defendant's obligation to pay the sum of money to the plaintiff was confirmed by the French *Cour D'Appel*. The plaintiff then sought to have the arbitral award rendered enforceable in Seychelles under the provisions of the Commercial Code, but was

unsuccessful in doing so due to the position of Seychelles on enforcement of foreign arbitral awards under the New York Convention at the time, which has since changed, resulting in previous case law on the subject *(Omisa Oil, Vijay Construction v EEEL* and *European Engineering Ltd v SJ*) having less force than they used to. Further although the Court of Appeal allowed the appeal against the decision of Robinson J in *EEL v Vijay* (supra) in which she held that the arbitral award was enforceable in Seychelles, thereby once again confirming the defendant's obligation to pay a sum of money to the plaintiff, the Court of Appeal never heard the appeal on the merits. Because of the situation existing in Seychelles prior to 2020, in order to have the award recognized in Seychelles, the plaintiff applied to the High Court of England and Wales for Orders rendering the award enforceable in England, with a view to then seeking to have these Orders rendered enforceable in Seychelles. The award was further confirmed by the High Court of England and Wales when Mr. Justice Cooke granted leave to enforce the award in 2015 by the Cooke Order, and again by the Order of Mrs. Justice Cockerill in 2018 when she dismissed the defendant's application to set aside the Cooke Order. It is clear that the defendant's obligation to pay a sum of money to the plaintiff has been established and confirmed numerous times.

[65] In line with Ralph Michael's statement reproduced at paragraph 62 above, what should be enforced is the obligation of the defendant to pay the sum of money owed to the plaintiff and not the judgment that gave rise to the obligation. As such I find no merit in the defendant's contention that the Cooke and Cockerill Orders are not judgments within the definition of the REBJA.

[66] In any event, in light of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1961 (the "FJREA") it would appear that whether the Cooke and Cockerill Orders are categorised as monetary or non-monetary judgments, they can still be registered and rendered enforceable in Seychelles in light of the provisions of that Act. Section 4 (1) of the FJREA which appears under Part I of that Act provides for the registration by the Supreme Court of judgments given by superior courts of foreign countries. In terms of section 4(2) if not set aside, a registered judgment shall, for the purposes of execution, be of the same force and effect as a judgment given by the registering court. The word

"judgment" is defined in section 2 of that Act as meaning *"a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party"*. This definition covers non-monetary civil judgments.

[67] Section 9(1) of the FJREA which appears under Part II of that Act (Application to Commonwealth Countries) further provides for the power of the President to apply Part I thereof to the Commonwealth. It reads as follows:

> *9. (1) The President may by order published in the Gazette direct that Part I of this Act shall apply to the Commonwealth and to judgments obtained in the Commonwealth as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of the President so directing, this Act shall have effect accordingly and the Reciprocal Enforcement of British Judgments Act shall cease to have effect in relation to any part of the Commonwealth to which the said Act extends at the date of the order.*

[68] Pursuant to that provision, the Foreign Judgments (Reciprocal Enforcement) Act (Application to Commonwealth Countries) Order, 1965 was enacted extending the application of Part I of the FJREA to the Commonwealth and to judgments obtained in the Commonwealth. The term *"Commonwealth"* is defined in that Order in the same manner as in section 2 of the Act namely as meaning *"the whole of those territories of which the Queen of the United Kingdom is recognised as the Head"*.

[69] The United Kingdom being a member state of the Commonwealth, it appears that the provisions of the FJREA regarding registration of judgments as defined in section 2 of that Act which seems to include both monetary and non-monetary judgments or orders made in civil proceedings, would apply to Orders made by the High Court of England and Wales. The Cooke and Cockerill Orders irrespective of whether they are considered to be monetary or non-monetary Orders could therefore be registered pursuant to that Act.

[70] In the case of ***Dhanjee v Dhanjee* [2000] SLR 91 (03 July 2000)** the applicant applied to the Supreme Court under section 227 of the Seychelles Code of Civil Procedure ("SCCP") to render executory in Seychelles a foreign judgment delivered by the High Court of Justice in the United Kingdom granting her custody of the parties' child. The Court found that

section 227 of the SCCP was an English translation of Article 546 of the French Code of Civil Procedure (now Article 509 of that Code) which pertains to what is known as "exequatur", and that the French authorities on that Article 546 are relevant in the application of section 227. It found that the jurisprudence in France has established that Article 546 of the French Code of Civil Procedure is applicable to both monetary and non-monetary foreign judgments delivered as a result of civil litigation between the parties but did not apply to administrative or criminal matters. The Court further found that the procedure for exequatur under Article 456 of the French Code of Civil Procedure extended to child custody matters.

[71] The Court then proceeded to consider whether the definition of judgment provided in the REBJA which is limited to monetary judgments, limits the operation of section 227 in respect of British judgments and stated:

> *"The next determination is whether the Reciprocal Enforcement of British Judgments Act (Cap 199) by virtue of its definition of judgment in the Act as "any judgment or order given or made by a court in any civil proceedings whereby any sum of money is made payable…"limits the operation of section 227 as far as U.K. judgments are concerned. The Reciprocal Enforcement of British Judgments Act 1922 (Cap 199) has to be read with section 9(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1961 (Cap 85) Under section 4(1) of the latter Act a foreign judgment may be registered and, if not set aside under section 7, shall for the purposes of execution be of the same force and effect as a local judgment of the registering court. Under section 4(1) the President may by order direct that part 1 of the Act extend to a foreign country.*
>
> *Under Statutory Instrument 56 of 1985 an order was made for part I of the Foreign Judgments (Reciprocal Enforcement) Act to apply to "the Commonwealth and to judgments obtained in the Commonwealth...". Section 9(2) of the Foreign Judgments (Reciprocal Enforcement) Act enacts that where an order is made extending part I to any part of the Commonwealth to which the Reciprocal Enforcement of British Judgments Act applies, the Reciprocal Enforcement of British Judgments Act shall cease to have effect in relation to that part of the Commonwealth. Accordingly, the definition of "judgment" under the Reciprocal Enforcement of British Judgments Act is replaced by the definition of "judgment" under the Foreign Judgments (Reciprocal Enforcement) Act which includes "a judgment or order given or made by a court in any civil proceedings..." This*

definition does not restrict the application of exequatur in respect of the United Kingdom Judgments." (emphasis added)

[72] This case illustrates that non-monetary foreign judgments and orders are capable of being enforced in Seychelles through the application of the provisions of the FJREA, which supercede those of the REBJA - in which the definition of judgment is limited to monetary judgments and orders.

[73] The Defendant also argues that the Orders sought to be enforced are not judgments falling within the definition of the term as provided for in the REBJA as they are based on an award rendered in a country not covered by that Act, the parties having specifically chosen to arbitrate outside those countries. In that respect I note that the arbitral tribunal was seated in Paris which was the jurisdiction of choice of the parties. The Orders sought to be registerd in Seychelles render enforceable in the United Kingdom, the arbitral award made in that jurisdiction of choice of the parties, subject to certain conditions provided for in the English Arbitration Act being satisfied. I therefore find no merit in this argument.

Are the Cooke and Cockerill Orders "judgments" only applicable to Great Britain.

[74] The defendant submits that the Cooke and Cockerill Orders not being original judgments rendered in an action commenced in the British Courts by the plaintiff against the defendant (which could have been registered under the REBJA) but being only procedural orders made pursuant to the UK Arbitration Act 1996, to the effect that the arbitral award made in France can be enforced, the effect of such enforcement would be territorial to the UK.

[75] In support of this argument the defendant quotes extensively from the case of ***Rosseel N.V. v Oriental Shipping Ltd*** [1990] WLR 1387 (quotation reproduced below). In that case an arbitral award had been obtained in New York against the defendants and the plaintiffs applied to the British Court for leave to enforce the arbitral award in England and for injunctions restraining the defendants from dealing with their assets within the jurisdiction and worldwide pending execution by the plaintiffs in satisfaction of the award. The Court granted injunctive relief in respect of the assets held within the jurisdiction of the English Court but refused to extend such relief beyond the jurisdiction on the ground that the appropriate Court for such an application would be either in New York or the foreign Court

where assets were found. The plaintiffs appealed against the judge's refusal to grant injunctive relief worldwide *inter alia* on the ground that the judge erred in principle in considering that merely because the arbitration award was obtained in New York it was inappropriate for him as an English judge to make the orders sought and that New York was the appropriate forum for any application for such orders. In dismissing the appeal, the Court of appeal stated:

> *"... there is all the difference in the world between proceedings in this country, whether by litigation or by arbitration, to determine rights of parties on the one hand, and proceedings in this country to enforce rights which have been determined by some other court or arbitral tribunal outside the jurisdiction.*
>
> *Where this Court is concerned to determine rights then it will, in an appropriate case, and certainly should, enforce its own judgment by exercising what should be described as a long arm jurisdiction. But, where it is merely being asked under a convention or an Act of Parliament to enforce in support of another jurisdiction, whether in arbitration or litigation, it seems to me that, save in an exceptional case, it should stop short of making orders which extend beyond its own territorial jurisdiction.*
>
> *I say that because, if you take a hypothetical case of rights being determined in state A and assets being found in states B to M, you would find a very large number of subsidiary jurisdictions – in the sense that they were merely being asked to enforce the rights determined by another jurisdiction – making criss-crossing long arm jurisdictional orders with a high degree of probability that there would be confusion and, indeed, resentment by the nations concerned at interference in their jurisdictions.*
>
> *It seems to me that, apart from the very exceptional case, the proper attitude of the English Courts – and, I may add, courts in other jurisdictions, is to confine themselves to their own territorial area, save in cases in which they are the court or tribunal which determines the rights of the parties. So long as they are merely being used as enforcement agencies they should stick to their own last."*

[76] I do not agree with the defendant that the reasoning of the appellate Court applies to the matter before us. As it rightly points out at paragraph 34 of its submissions, the *Rosseel* case concerned a request made to the British Courts to extend its jurisdiction beyond Britain (an outreach request) whereas in the present case the Seychelles Court is being

asked to extend a British Order to Seychelles (an importing request). The present case differs from the ***Rosseel*** case in that it is the Seychelles Courts which will determine whether the arbitral award through the Cooke and Cockerill Orders may be enforced in Seychelles or not. It is not the English Court which is attempting, in the words of Lord Donaldson of Lymington M.R. *"to enforce rights which have been determined by some other court or arbitral tribunal outside the jurisdiction"* beyond its own territorial jurisdiction. I therefore find no merit in this argument.

*Whether the Cooke and Cockerill Orders are **reciprocally enforceable** in Seychelles.*

[77] The defendant submits that the REBJA is premised on reciprocity and that British judgments have the potential to be registered and enforced in Seychelles because Seychelles judgments have the potential to be registered and enforced in Great Britain. It submits that the 2017 Court of Appeal judgment in *Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited* (supra) which ruled that the New York Convention was not applicable in Seychelles, and that in consequence the arbitral award obtained by the plaintiff in France was not enforceable, would not be enforceable in Great Britain which would not consider itself bound by it. Mrs. Justice Cockerill therefore upheld the Cooke Order with no reference to the Seychelles judgment. It is also submitted that in doing so the British Court was clearly acting within its legal parameters and upholding an order which had territorial application in the UK alone, and that had it intended its Order to apply extraterritorially to Seychelles, it would have perforce had to consider the Court of Appeal judgment. The defendant further submits that, *"It follows therefore that – since the British Court did not consider itself bound by the Seychelles Court of Appeal judgment – the Seychelles Courts are likewise not bound, on the basis of reciprocity, to consider the two Orders as binding on them, but as binding territorially in Great Britain only"*.

[78] I do not follow the reasoning behind such an argument which in my view is misconceived. The application before the British Courts was for enforcement of the French arbitral award in England under the British Arbitration Act on the basis of reciprocity between England and France both of which are parties to the New York Convention. The Seychelles Court of Appeal judgment had no relevance to these proceedings and there was no reason therefore for the British Courts to consider it. All the British Courts had to do was apply

the provisions of the British Arbitration Act and relevant procedural laws. The present case involves an application under the REBJA, which is where reciprocity between Seychelles and Great Britain in terms of registration and enforcement of their respective judgments comes in. I fail to understand how the Supreme Court is prevented from registering the Cooke and Cockerill Orders on the basis of the defendant's argument.

[79] It follows from the above, that the defendant fails on all the pleas in limine. The Court therefore proceeds to consider the matter on the merits.

On the Merits

Requirements for Registration of Judgment under the REBJA

[80] In order for a judgment to be registered under the REBJA, it must fulfil certain requirements set out in subsections (1) and (2) of section 3 of that Act.

[81] Under subsection (1) of section 3 –

(1) The judgment must have been obtained in the High Court of England or of Northern Ireland or of the Court of Session in Scotland.

(2) The application must have been made within twelve months after the date of the judgment or such longer period as may be allowed by the court.

(3) The Court must consider it just and convenient, in all the circumstances of the case that the judgment should be enforced in Seychelles.

(4) The other provisions of section 3 must be complied with. Subsection (2) of subsection 3 sets out certain circumstances the existence of which prevents the Court from registering a judgment. These are as follows:

(a) original court acted without jurisdiction; or

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.

[82] The Cooke and Cockerill Orders which are sought to be registered are Orders of the High Court of England and Wales. The Cooke Order is dated 18th August 2015, and the Cockerill Order which was made pursuant to proceedings to set aside the Cooke Order is dated 11th October 2018. The plaint was filed on 31st January 2019. Although, strictly speaking, the application for registration of the Cooke Order was not filed within the prescribed time limit, it would have been impossible to file the application within 12 months after it was made, as the proceedings to set it aside had yet not been concluded. The plaint having been filed on 31st January 2019, well within the time limit of twelve months after the Cockerill Order which was made upon determination of the set-aside proceedings, I find that both Orders were properly filed within the prescribed time limit. I therefore find that the first two requirements set out at paragraph 73(1) and (2) have been fulfilled.

[83] The next matter to be considered is whether considering all the circumstances of the case, it is just and convenient that the Cooke and Cockerill Orders should be enforced in Seychelles. The plaintiff has not specifically addressed this issue. The defendant on the other hand, in paragraph 14 of its defence on the merits, raises two issues which it addresses at length in its submissions, and which if the court finds any merit therein, will be relevant to the issue of whether it is just and convenient that the Orders should be registered. These are: firstly, the attempt by the plaintiff by the present proceedings to enforce the arbitral award of the French arbitral tribunal in Seychelles by seeking to render enforceable the Cooke and Cockerill Orders, which render the arbitral award enforceable in England, after

it had been prevented from doing so by the Court of Appeal in *Vijay v EEEL (supra)* (back-door entry). Secondly, the defendant contends that the maxim *exequatur sur exequatur ne vaut* principle is applicable in the present case as *"[T]he said Orders amount to judgments upon the arbitral award and are not judgments based on an assessment on the facts in issue by the High Court in England and Wales".* The defendant then goes on in paragraph 15 of its defence to aver that *"[F]or the foregoing reasons, this Honourable Court should determine that it is neither legally possible, nor <u>just and convenient</u> that the Orders be enforced in Seychelles under the Reciprocal Enforcement of British Judgments Act*". (Emphasis added). In terms of the remedies, the plaintiff prays for the dismissal of the plaintiff's application, for a declaration that the Orders of the High Court of England and Wales sought to be registered are not capable legally of being registered and rendered executory in Seychelles, and "*<u>alternatively … to declare that it is not just and convenient that the Orders be enforced in Seychelles</u>*." (Emphasis added)

[84] I will now proceed to address the two issues raised by the defendant in support of his claim that it is neither legally possible nor just and convenient that the Cooke and Cockerill Orders are enforced in Seychelles.

Back-Door Entry

[85] The defendant contends that the plaintiff having been prevented from enforcing the arbitral award by the Court of appeal in 2017 in the case of *Vijay v EEEL (supra)* is seeking to enforce it through the "back door". It avers at paragraph 14 of the defence that:

> *a. The Plaint here seeks to enter through the back door when the front door is firmly closed to it. The Seychelles Court of Appeal has decided that the arbitral award is unenforceable and it would be unconstitutional, unconscionable and contrary to public policy if this Court were to enforce Orders made upon the award.*
>
> *b. The law does not allow a party to clothe a foreign judgment in the garment of another jurisdiction in order to evade the jurisdictional process of Seychelles and in consequence to recognise and enforce the arbitral award through a foreign judgment.*

[86] In that respect the defendant submits that:

1. *Were the Plaintiff to succeed in its action, the result would be that anyone with the benefit of an arbitral award (wherever obtained) would come to the English Courts to seek an executory order there and then enforce this in other jurisdictions. This is clearly an untenable position.*
2. *Worldwide the enforcement process of arbitral awards is designed to recognise the arbitral award, not judgments upon it.*
3. *What the Plaintiff sets out to do in this matter, faced with the 2017 judgment of the Court of Appeal barring it from enforcing the award directly, is to seek to enforce it indirectly, through the process of obtaining a judgment in the British Courts and, via the British Judgments Act, enforce this in Seychelles. It is submitted that for reasons following, this Court will be loathed to do so as this would be unconstitutional, unconscionable and contrary to public policy*

[87] I note that the defendant, in support of its contention that the Orders should not be made executory, puts great weight on the 2017 judgment of the Court of Appeal in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd (supra)* which held that the arbitral award was not enforceable in Seychelles. This is seen in paragraphs 44 to 46 of its submissions as follows:

44. The 2017 judgment of the Court of Appeal is clear in numerous respects. It recognizes the sovereignty of the Republic of Seychelles in the matter of international obligations and sets this out in paragraphs 33 – 42 of the judgment. At paragraphs 101 to 104 of the judgment, the Court said:

101. '... Through 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 NY 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 Assembly, given the existing provisions of Article 146 of the Commercial Code.

103. This Court only adjudicates on laws properly enacted by the National Assembly and assented to by the President. This Court cannot usurp the

powers of the National Assembly and the President to implement international instruments in the domestic law of the Republic, irrespective of how important the parties may feel the instruments to be.

104. If in all his wisdom the President of the Republic feels that it is not in the best interest of the Republic to execute or cause the execution of the New York Convention, the Court cannot execute or cause its execution by resorting to an execution done by another Sovereign State. This is not constitutionally possible. To do so would be to disrespect the balance of powers and would be an intrusion on a presidential prerogative.'

45. The words in paragraph 104 are especially important. Courts cannot constitutionally be a party to circumventing a power given to another branch of Government. It is clear for the moment that Seychelles has adopted as a national principle that foreign arbitral awards will not be enforced in Seychelles. Whether this is desirable or not is not in issue. Constitutionally, this position has to be respected until the Executive determines otherwise and signs the New York Convention, and the Assembly ratifies it.

46. What this Plaint seeks is to circumvent the constitutional order and de facto obtain the enforcement of the arbitral award by first obtaining a judgment on the award in the British court and then seeking to have this registered here under the British Judgments Act, with a view to then enforcing it. Were this Court to allow this, it is submitted, it would not only be upsetting the constitutional order of the country but also flouting a decision of the Executive not to put in place a mechanism for the enforcement of foreign arbitral awards. The Court of Appeal declined to do this through the mechanism of section 4 of the Courts Act. It would be both unconscionable and contrary to public policy for this Court, with respect to upend the Court of Appeal's judgment and overrule the executive and legislative powers of the state.

[88] That the defendant relies greatly on the 2017 judgment of the Court of Appeal in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd (supra)* in support of his contention that the Orders should not be made executory is also evident in the conclusion to its submissions at paragraphs 68 to 71 which are reproduced below:

68. ... to order registration, the Court must be satisfied that it is both just and convenient to register the judgment, but it may refuse to so order if it is satisfied that registration is either not just or not convenient.

69. … enforcement of a foreign judgment under the Act is not automatic (as in the case of a local judgment) but discretionary after an examination of the judgment to ascertain whether it qualifies for registration and being given exequatur status.

70. In exercising the discretion, the Court has to examine the circumstances that has led to the matter now being subject of an enforcement application as to whether it is now a proportionate exercise of the Court's power in granting the relief sought by the Plaintiff. In considering the proportionality of the application, the Court is invited to conclude that it would be disproportionate to allow the execution for the following reasons:

(i) From the outset of the litigation, the Plaintiff was aware that any international arbitration would be likely to be unenforceable in Seychelles.

[…]

(iv) The Court of Appeal in December 2017, confirmed that the award was unenforceable.

(v) The acts of the Defendant in obtaining a British Orders of 2015 and 2018 are designed to deliberately circumvent and nullify the effect of the ratio decidendi of the Court of Appeal Judgment of December 2017.

71. There has to be finality to the proceedings and the Applicant is only perpetuating the dispute and the litigation thereon. For the reasons given earlier, it is submitted that – in view of the position of Seychelles on the enforcement of foreign arbitral awards, and of the Court of appeal on the issue – it would be neither just nor convenient for this Court to grant exequatur status to the 2015 and 2018 Orders and render them executory in Seychelles. To do so would be to allow the litigant to enter through the back door when the front door is closed to it, to upset the constitutional order of the country, and – in allowing a foreign court to clothe an unenforceable award with the garment of authority by the simple expedient of making a procedural order – to run counter to the public policy of Seychelles. In addition, allowing this application would amount to deliberate circumvention of the Court of Appeal judgment, thus amounting to abuse of process of the law.

[89] The defendant's argument that allowing enforcement of the Cooke and Cockerill Orders will allow the enforcement of the arbitral award, and that as Seychelles has established that foreign arbitration awards are not enforceable in Seychelles, the plaintiff should not be allowed to use the 'back-door entry' by clothing the award in the garment of a British judgment to enforce it, may have carried much weight prior to the ratification by Seychelles of the New York Convention. However, this argument no longer holds much weight. As

stated above, the Seychelles' position has now changed and this argument no longer holds the strength it used to when the case commenced. It can no longer be argued that to allow enforcement of the arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitration awards are now capable of being enforced. The question of circumventing the constitutional order and of flouting the Executive's decision not to put in place a mechanism for the enforcement of foreign arbitral awards no longer arises.

[90] In view of this change of the Seychelles position, this Court finds nothing objectionable about the procedure followed by the plaintiff, which, finding itself unable to render enforceable in Seychelles, the arbitral award obtained in France under the provisions of the Commercial Code because foreign arbitral awards were held not to be enforceable as Seychelles was not a party to the New York Convention at the time, had to resort to this roundabout way of doing it by applying to register not the award itself but orders that enforce the award made by the High Court of England and Wales. In my view, the plaintiff having properly obtained an arbitral award in its favour from an arbitral tribunal of the parties' choice, which was confirmed by the French Cour D'Appel, and which was prevented from enforcing the said award because of the inapplicability of the New York Convention to Seychelles at the time, which situation no longer exists, cannot be faulted for attempting to enforce the arbitral award in this manner.

[91] Further, Seychelles' previous position on enforcement of foreign arbitral awards having changed, and Articles 146-150 of the Commercial Code of Seychelles having now become operational, provided that it is still within the time frame to register the award, and subject to the principle of finality in litigation, the plaintiff could still arguably succeed in registering the award itself under the provisions of the Commercial Code, if it is unsuccessful in the present proceedings or if successful, the defendant successfully appeals against this judgment.

[92] I therefore find no merit in the defendant's argument.

Applicability of the exequatur sur exequatur ne vaut principle.

[93] The defendant raises the defence that the Cooke and Cockerill Orders being orders of exequatur cannot be subject of proceedings to render them executory in Seychelles as this would go against the maxim *exequatur sur exequatur ne vaut.* In paragraph 14 c. and d. of its defence it avers that:

> *c. The Orders sought to be enforced do not constitute judgments on the merits of the arbitral action and are not merged with the arbitral award. They are simply orders of exequatur and the Plaintiff by this action seeks to obtain a double exequatur in breach of the legal position that that an exequatur order on another exequatur order is not admissible in law.*
>
> *d. If this Court enforces the Orders it will be enforcing exequatur orders and not the arbitral award itself, which is not possible in law.*

[94] In its submissions, the defendant argues that the Orders should not be registered as they are simply procedural enforcement orders granted without consideration of the cause of action or the merits of the plaintiff's claim, the evidence having been heard and the determination on the merits having been made by the arbitral tribunal, and not the court that made the Orders. It contends that the Orders are simply orders of exequatur on the arbitral award and according to the maxim *'exequatur sur exequatur ne vaut'* one cannot have an executory decision on another executory decision in international practice. The defendant submitted that according to the maxim, Seychelles courts can only grant exequatur on a substantive judgment on the merits and that to succeed in the present action the plaintiff ought to have obtained a judgment on the facts in the British courts or at least one merging the findings in arbitration with the 2015 recognition Order (paragraphs 63 and 65 of the defendant's submissions).

[95] This Court agrees that the Cooke and Cockerill Orders were made without hearing the merits of the dispute between the parties (see paragraph 54 above). Consequently the Orders are in the nature of an exequatur and the maxim *'exequatur sur exequatur ne vaut'* appears to present difficulties in registering them internationally.

[96] In support of its argument that an exequatur order on another exequatur order is not admissible in law, the defendant in paragraph 63 of its submission relies on a passage from an article by Professor Peter Hay in *Guest Editorial: Hay on Recognition of a Recognition Judgment under Brussels I*[1]'s which reads as follows:

> *"The great majority of Continental writers follows Kegel's view of "exequatur sur exequatur ne vaut" (Festschrift MüllerFreienfels 377, 1986, by him attributed to Gavalda, Clunet 1935, 113): "It has always been accepted" that a recognition judgment "cannot ... be the object of further recognition ..."*

[97] In this article Professor Hay deals with the question of whether recognition by a Member State of a non-member state's judgment should be entitled to recognition in other Member States under the Brussels I Regulation. In the same article, he explains that the above view represents the Continental view of judgment recognition and enforcement, and that the common law tradition sees it differently. He explains the common law view as follows:

> *"In the common law, a foreign-country judgment is a claim. That claim is enforced (thereby recognized) by a proceeding (the old actio judicati), leading to the issuance of a judgment. In the issuing state, this is a judgment like any other: Dicey/Morris/Collins, Conflict of Laws 570 (14th ed. 2007); Scoles/Hay/Borchers/Symeonides, Conflict of Laws § 24.3 et seq. (4th ed. 2004); Whincop, 23 Mel. U. L. Rev. 416, 424 (1999). This is also the case when a modern registration procedure replaces the common-law suit on a judgment: there is now a local judgment. Dicey/Morris/Collins, supra, at 645-46."*

[98] Professor Hay then goes on to question why, *"[I]f the (local) issuing state [in the present case England] does not attribute a different (lesser) effect to the judgment upon the foreign (judgment) claim, why – on what basis – should the present court [in the present case Seychelles] deny it recognition?"* The answer he provides is that –

> *"If it were otherwise, it is said, the present court could no longer check whether the original court observed procedural (due process) requirements or whether its judgment perhaps violates the present state's ordre public. Id. at no. 34. This kind of review would be precluded by required recognition of the recognition judgment."*

[1] https://conflictoflaws.net/2008/guest-editorial-hay-on-recognition-of-a-recognition-judgment-under-brussels-i/

[99] He then points out that, *"Procedural defects in the original proceeding were or could have been reviewed in the first recognition court"* and that, *"[W]hen such an opportunity existed, these issues would be precluded thereafter"*. In the present case, the plaintiff was granted leave to enforce the award by the Cooke Order. The Defendant then applied to set aside the Cooke Order which was considered and gave rise to the judgment of Mrs. Justice Cockerill on which the Cockerill Order is based. A summary of the grounds of the set aside application and the judgment thereon is provided at paragraph 53 of this judgment. After an examination of the judgment, and in light of the grounds raised by the defendant to set aside the application, and bearing in mind that the grounds under section 103 of the Arbitration Act to refuse enforcement of an arbitral award are the same grounds on which a Seychelles Court could have refused to make executory the arbitral award in Seychelles under Article 150 of the Commercial Code, I find that a proper review of the process before the arbitral tribunal was undertaken by the English Court before according it recognition. I further take note that the arbitral award was unsuccessfully appealed against before the French *Cour D'Appel*, and that it was pronounced enforceable by the Supreme Court in a judgment, the merits of which was never considered or overturned on appeal. Substantially the same grounds were advanced in both these courts as before the British court in the set aside application.

[100] Professor Hay further states that *"[T]he isolated cases and comments approving of recognition of a recognition decree point to the circumstance that the (first) recognizing court had expressly pronounced a damage award (parallel to the original award) or had added an award of interest: OLG Frankfurt/M, 13 July 2005, 20 W 239/04; OLG Hamm, RIW 1992, 939; see Wautelet, supra, no. 35)"*, and seems to attribute *the "emphasis on the specific tenor of the recognizing judgment (and a common law court's recognition will of needs reduce the claim for recognition to a judgment)"* to a need *"to be sure that the recognizing court had paid attention"*. (Emphasis added). In that respect, I note that the Cooke Order in the present case not only grants leave to enforce the award but grants post award interest and leave to enforce the same. This would put it in the category of cases where "*the (first) recognizing court … had added an award of interest, as well as show that "the recognizing court had paid attention"*.

[101] Professor Hay also interestingly points out that under Brussels I there is no requirement for a foreign judgment to be recognized by another EU state, *"not because "recognition of a recognition judgment" is not possible, but because 'the recognition judgment itself claims no greater force: its effect is the same as where rendered"*. He further states that *"when recognition action does take the form of a judgment, it seems that it should be treated as such"*.

[102] This Court has held that the Cooke and Cockerill Orders are judgments within the meaning of the REBJA for reasons previously stated in this judgment. I have further found that a proper review of the arbitral process was undertaken by the English Court before according it recognition, and that post award interest was awarded under the Cooke Order. I therefore find no reason why the maxim *exequatur sur exequatur ne vaut* should apply to prevent enforcement of the Cooke and Cockerill Orders in this case, and find accordingly.

[103] I am confirmed in this view by the decision in the case of ***Morgan Stanley & Co International Ltd v Pilot Lead Investments Ltd*** **[2006] 4 HKC 93; [2006] HKCFI 430** in which the High Court of Hong Kong, in an appeal against a decision of the Registrar refusing an application to register a judgment of the Singaporean Courts enforcing a judgment of the High Court of England, although it dismissed the appeal, stated that the appeal would have been allowed and the "judgment on a judgment" registered if it had satisfied all other requirements for registration of foreign judgment.

[104] In that case the judgment creditor, a company incorporated under the laws of England and Wales obtained a default judgment in the High Court of England for the sum of £547,773.07 ("the English Judgment") against the judgment debtor, a company incorporated in BVI. The judgment creditor registered the English Judgment in Singapore ("the Singapore Order") under its Reciprocal Enforcement of Commonwealth Judgments Act ("the Singaporean Act"). By virtue of the Singapore Order, the English Judgment was registered as a judgment of the High Court of the Republic of Singapore pursuant to the Singaporean Act. The judgment creditor was unable to recover the sum in Singapore but it was discovered that the judgment debtor has assets in Hong Kong. The judgment creditor made an application to the Hong Kong Court to have the Singapore Order registered under

the Foreign Judgments (Reciprocal Enforcement) Order ("Hong Kong FJREO") which was refused by the Registrar, whose decision was appealed against.

[105] On appeal, after reviewing the law regarding enforcement of foreign judgments in Hong Kong, the Court stated that generally, a foreign judgment for payment of a monetary sum may be enforced in Hong Kong by registering it under the Hong Kong FJREO or the Judgments (Facilities for Enforcement) Ordinance, or at common law. However UK judgements cannot be registered under either legislation due to lack of reciprocity and thus have be enforced at common law. Singapore on the other hand, is a country to which the provisions of the Hong Kong FJREO have been extended with the result that a judgment given by a superior court of Singapore can be registered under that Order.

[106] In order for a foreign judgment to be registered under the Hong Kong FJREO, it must satisfy four conditions which are similar to the conditions prescribed under section 3(2) of the Seychelles FJREA, namely:

(a) *It must come from a superior court of a designated country.*

(b) *It must be final and conclusive as between the parties thereto.*

(c) *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.*

(d) *It is given after the coming into operation of the order directing that the provisions of FJREO shall extend to that foreign country.*

[107] In *Morgan Stanley* (supra) the appeal was dismissed on the grounds that one of the four prerequisites for registration was not satisfied, in that the Singaporean Order was not final and conclusive between the parties, but the Court went on to consider whether the Singaporean Order could have been registered if all the requirements for registration under the Hong Kong FJREO had been met.

[108] The judge explained that in refusing to register the judgement initially, the learned Registrar agreed with the following view expressed in "Enforcement of Foreign Judgments Worldwide", 2nd Edn, at p.43:

> *"It would thus appear that if judgment is obtained in country A (to which the provisions of the Ordinance have not been extended), and pursuant to an agreement between country A and country B for reciprocal registration, the judgment is registered in country B, even if country B is a country to which the provisions of the Ordinance have been extended, registration of country B's judgment (pursuant to the Ordinance) may be set aside. In short, it appears that it is not the purpose of the Ordinance to provide for the registration of 'secondhand judgments'."*

[109] The judge disagreed with this statement and expressed the following view:

> *"In my view, FJREO does not make any distinction between: (a) a monetary judgment made by a superior court of a designated country and (b) a judgment made by that superior court in proceedings founded on a judgment of a court in another country and having as their objective the enforcement of that judgment". Once the requirements for registration are fully met, both judgment (a) and (b) may be registered."*

[110] The Court supported its interpretation by looking at the legislative history of the English Foreign Judgments (Reciprocal Enforcement) Act 1933, on which the Hong Kong FJREO was modelled. He explained that before 1982, the provisions in the English 1933 Act were similar to those in the current Hong Kong FJREO. However, a new section 2A was added to the English 1933 Act by the Civil Jurisdiction and Judgments Act 1982 that expressly excludes application of the Act to *"a judgment of a recognised court which is a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their objective the enforcement of that judgment"*.

[111] The Court referred to the case of *Clarke v. Fennoscandia Ltd* [2004] SC 197 (Scottish Outer House) to explain the rationale behind adding the new section 2A, as follows:

> *"… section 2A(c)… was no doubt added, as many commentators have concluded, to avoid the 'laundering' of judgments obtained in countries to which the 1933 Act did not apply, i.e. to prevent a party from obtaining a decree conform in respect of a 'foreign' judgment in a country to which the Act did apply and thereafter seeking enforcement by formal registration procedures under the Act in a country or countries which would not themselves otherwise contemplate the recognition of the 'foreign' judgment in question."*

[112] The Court in *Morgan Stanley* (supra) stated that this rationale suggests that prior to the introduction of section 2A, the so-called "laundering" of foreign judgments was permissible under the 1933 Act and section 2A was introduced to stop this 'undesirable practice' and concluded that :

> *26. ... In the absence of any provision similar to section 2A, this practice of "laundering" foreign judgments however undesirable it may be, is permissible under FJREO.*
> *27. Accordingly, had the Singaporean Order fully met the prerequisites for registration, I would have ruled that the court should register it under FJREO and allowed the appeal."*

[113] Similarly to Hong Kong's FJREO, there is no express provision in the Seychelles FJREA excluding registration of a "judgment on a judgment" as in Section 2A of the English Foreign Judgments (Reciprocal Enforcement) Act 1933. On the basis of the reasoning in the Morgan Stanley case, the maxim *exequatur sur exequatur ne vaut* would be held not to apply to registration of Orders such as the ones sought to be registered in the present case if the application had been made under the Seychelles FJREA. However, the FJREA and the REBJA both provide for registration of foreign judgments, although, the application of the latter Act is limited to registration of British judgments. If a foreign judgment which renders executory another judgment is capable of being registered under the provisions of the FJREA, I find no good reason why such a judgment should not be afforded similar treatment under the REBJA. To do otherwise would result in the inconsistent application of our laws relating to registration of foreign judgments, leading to similar matters being treated differently for no reasonable cause, which is neither desirable nor advisable.

[114] For the above reasons I find that the maxim *exequatur sur exequatur ne vaut* does not apply to prevent the registration of the Cooke and Cockerill Orders.

[115] I feel that it is important to add that the REBJA confers a discretion on the Court to order registration of a foreign judgment *"if in all the circumstances of the case it considers it just and convenient that the judgment be enforced"*. This means that should a Court feel that a dubious judgment was sought to be laundered by seeking its enforcement in the way that

the present Orders are, the Court would still be able to refuse its registration as not being just or convenient, provided that a proper case is made for the same.

Conditions under section 3(2) REBJA

[116] Section 3(2) of the REBJA provides for six conditions the existence which, prevents the Court from registering a foreign judgment. These are as follows:

> *(2) No judgment shall be ordered to be registered under this section if –*
>
> *(a) original court acted without jurisdiction; or*
>
> *(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or*
>
> *(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or*
>
> *(d) the judgment was obtained by fraud; or*
>
> *(e) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or*
>
> *(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.*

[117] In respect to these six conditions, the plaintiff avers the following at paragraphs 12, 13, 14, 15 and 16 of its plaint:

> *12. That the High Court of England and Wales had jurisdiction to entertain the applications of the Plaintiff and that of the Defendant.*
>
> *13. That all the rights of the Defendant were respected in the proceedings in the High Court of England and Wales.*

14. *That the Order of Mr. Justice Cooke made on 18 August 2015 and the Order of Mrs. Justice Cockerill made on 11 October 2018 are not contrary to public policy and were not obtained through fraud.*

15. *That the Order of Mr. Justice Cooke made on 18 August 2015 and the Order of Mrs. Justice Cockerill made on 11 October 2018 are not subject to an appeal and the relevant time limits under the English Civil Procedure Rules for mounting any appeal have expired.*

16. *That the Order of Mr. Justice Cooke made on 18 August 2015 and the interim costs payment ordered by the Order of Mrs. Justice Cockerill made on 11 October 2018 are capable of being enforced in England and Wales.*

[118] All these averments of the plaintiff are denied *proforma* by the defendant which has not put up any specific defence thereto except in regards to fraud and public policy, which will be dealt with below in respect of the relevant condition. The court will now proceed to determine whether any of the conditions set out in 3(2)(a) to (f) of the REBJA exist. Because the issues relating to the conditions set out in paragraphs (b) and (c) of subsection (2) of section 3 are interlinked, they will be considered together.

(1) *original court acted without jurisdiction (section 3 (2)(a))*

[119] In the case of ***Privatbanken Aktieselskar v Bantele [1978] SLR 226***, where the plaintiff (a Danish Bank in Copenhagen) sought to have a foreign judgment of a German Court against the defendant (a west German national with residency status in Seychelles) rendered executory, the Court held that *"[T]he jurisdiction of the foreign court must be in relation to (1) international or general competence in the light of the Seychelles private international law, as well as to (2) internal jurisdiction of the foreign law determinable by the internal law of the country of the trial Court"*. The Court stated, in that respect, 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.*

[120] With regards to the international jurisdiction or competence of the foreign court which is determined by Seychelles private international law, the Court stated:

> *"In Seychelles … [T]he Supreme Court came into existence in 1903 by virtue of the Seychelles Judicature Order in Council 1903 when Seychelles became a separate entity from Mauritius. It was the successor of a district court or of a court of limited jurisdiction set up during the British administration of Mauritius. In 1903 the Supreme Court was made a court of unlimited jurisdiction and was given all the powers, privileges, authority and jurisdiction of the High Court of Justice in England. Certain provisions of the Civil Code and of the Civil Procedure Code dealing with the powers and jurisdiction of courts in France were in force in Seychelles at the time and did apply to the Supreme Court. However all those provisions have now been repealed and to some extent replaced by the Seychelles Code of Civil Procedure (Cap 50)…*
>
> *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…*
>
> *In Seychelles, as in England, in the case of a foreign judgment in personam … the criterion of jurisdiction in the international sense under the rules of private international law is either residence or presence in, or submission or agreement to submit to the foreign jurisdiction … The Rules set out in section 6(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 63) are worthy of note. In this case paragraph (iv) of section 6(2)(a) has particular relevance."* (Emphasis added)

[121] On the basis of these principles, I find that the High Court of England and Wales, the original court in the present case, had jurisdiction in the international sense because, although, the defendant was not resident in the foreign jurisdiction i.e. the United Kingdom, it was present or at least represented by counsel and had submitted to the jurisdiction of the foreign court i.e. the High Court of England and Wales. This is shown by the following:

[122] The plaintiff applied to the High Court of England and Wales, under the provisions of the UK Arbitration Act for leave to enforce the arbitral award which resulted in the Cooke Order. The defendant applied to the Court to have the Cooke Order set aside which gave rise to the Cockerill Order. I note that at no time, either in the proceedings before Mr. Justice Cooke of which the defendant was given notice by service out of jurisdiction, or those before Mrs. Justice Cockerill, did the defendant raise any objection as to the jurisdiction of the Court. This is confirmed in Form 110 Certificate for Enforcement in a Foreign Country dated 20th December 2018, issued under section 10 of the UK Foreign Judgments (Reciprocal Enforcement) Act ("Certificate for Enforcement") which certifies at paragraph 3 thereof that *"no objection has been made to the jurisdiction of the Court"*. It is also clear from the very detailed judgment of Mrs. Justice Cockerill, which at no point makes any reference to any challenge by the defendant of the Court's jurisdiction that the issue of the lack of jurisdiction of the court never arose. On the same issue, in his affidavit dated 11th December 2018, at paragraph 5.2 thereof, Daniel Terence Burbeary (solicitor of London law firm Cooke, Young and Keidan LLP ("CYK"), which defended the plaintiff in the application brought by the defendant to set aside the Cooke Order), avers that, *"in my professional view, the High Court of England and Wales acted within its jurisdiction in making the Cooke Order and the Cockerill Order (and Vijay did not, as part of the Set-Aside Application seek to challenge the jurisdiction of the English courts to make those orders)"*. Further, the Orders have neither been the subject of an appeal, nor declared invalid, or been set aside by any English court.

[123] I also note that upon being served with the Cooke Order, which stipulated that an application to set aside the said order had to be filed within 14 days of service, the defendant did file such an application (see paragraph 7 of Certificate for Enforcement) and was represented by counsel in the set–aside proceedings. This is confirmed by Daniel Terence Burbeary, in his affidavit dated 11th December 2018, at paragraph 5.4 in which he avers that, *"Vijay entered an appearance before the High Court of England and Wales and actively participated in the Set-Aside Application, with the assistance of two different firms of solicitors and several different Leading and Junior Counsel. As part of the Set-Aside Application proceedings, Vijay sought permission to cross-examine certain of EEEL's witnesses but that application was refused by Mrs. Justice Cockerill (which is recorded in*

the Cockerill Order)". It is also shown in both the Cockerill Order and judgment that the defendant was represented by counsel in the set-aside proceedings.

[124] With regards to the local jurisdiction of the foreign court which is determined by the law of that country, I find it is the UK law which applies and that the High Court of England and Wales rightly applied the provisions of the UK Arbitration Act in the proceedings before it, which gave rise to the Cooke and Cockerill Orders. I therefore find that the High Court of England and Wales had local jurisdiction in accordance with UK law.

(2) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court (section 3 (2)(b)); and

(3) ***the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court(section 3 (2)(c))***

[125] It is not disputed that the defendant (here the judgment debtor) is a company incorporated and registered under the laws of Seychelles and is involved in the business of civil engineering and construction in Seychelles. I am therefore satisfied that the defendant was *"neither carrying on business nor ordinarily resident within the jurisdiction of the original court".*

[126] The plaintiff made an application to the High Court of England and Wales, the original court, under the provisions of the Arbitration Act for leave to enforce the arbitral award which resulted in the Cooke Order which granted such leave. The defendant then applied to the same Court for the Cooke Order to be set aside which gave rise to a judgment by Mrs. Justice Cockerill and the Cockerill Order.

[127] The Certificate for Enforcement certifies that –

1. *That the claim form, … was issued out of the High Court of Justice, Business and Property Courts of England and Wales Queen's Bench Division, Commercial Court on 14th August 2015 by Eastern European Engineering Limited ("EEEL") the above named claimant, against Vijay Construction Proprietary Limited ("VCL") the above named Defendant, for leave to enforce the Award pursuant to section 101(2), enter judgment in terms of the Award pursuant to 101(3) of the Arbitration Act 1996 and order that the defendant pay the costs of this application, including the costs of entering the judgment.*
2. *That the claim form was served on VCL through the Court further to EEEL's request for service out of England and Wales through the Court.*
3. *That no objection has been made to the jurisdiction of the Court.*
4. *That EEEL obtained an order made by Cooke J against VCL in the High Court of Justice, Business and Property Courts of England and Wales Queen's Bench Division, Commercial Court …*
5. *[…]*
6. *That the judgment has been served on VCL in accordance of the provisions of part 6 of the Civil Procedure Rules 1998*
7. *That VCL acknowledged service of the order by filing an application dated 23rd October 2015 to set the order aside within 14 days of service.*
8. *That the application to set aside the order has been finally disposed of and dismissed , pursuant to the judgment of Cockerill J handed down on 11 October 2018 and the Learned Judge's Order of the same date …*
   […]
10. *The order of Cockerill J has been served on VCL … VCL's legal representatives were also present when the judgment of Cockerill J was handed down on 11 October 2018…*(Emphasis added)

[128] It is clear from the above that the defendant was served with the claim form for leave to enforce the arbitral award and for judgment to be entered in terms of the award, which gave him notice of the claim and the opportunity to be heard thereon. It is also clear that he was served with the ensuing Cooke Order, pursuant to which it filed an application to have the Cooke Order set aside. The above also shows that it made no objection to the jurisdiction of the High Court of England and Wales.

[129] The set aside proceedings gave rise to a judgment by Mrs. Justice Cockerill and the Cockerill Order both of which show that the defendant was legally represented at these proceedings. This is also confirmed by the affidavit sworn on 14th December 2018 by Daniel Terence Burbeary, which shows that the defendant was not only represented at the

proceedings but that its legal representatives were present at the handing down of Cockerill J's judgment on 11 October 2018. In that respect Daniel Terence Burbeary avers the following:

> *"4. On 11 October 2018, following a two day hearing on 8 and 9 October 2018 at which ... Vijay was represented by Leading Counsel (Sanjay Patel QC) and Junior Counsel (Muthupandi Ganesan), Mrs Justice Cockerill dismissed the Set-Aside Application ..."*

[130] I am therefore satisfied, in view of the above that the other requirements set out in sections 3(2)(b) and (c) have been fulfilled, in that the defendant through his legal representatives voluntarily appeared and submitted to the jurisdiction of the original court, that it was served with the process of the High Court of England and Wales, and was represented at the hearing of the application to set aside-application before Mrs. Justice Cockerill.

(4) *the judgment was obtained by fraud (section 3 (2)(d))*

[131] The defendant avers in its defence that *"In any event, the unenforceable award, which is not purporting to be clothed in a British 'Order' was obtained by fraud, rendering it unenforceable as a matter of public policy"*. The defendant's statement of defence does not contain any other reference to fraud, and makes no averments that the Cooke and Cockerill Orders were obtained by fraud. Further it has adduced no evidence of any such fraud.

[132] I also take note that in his affidavit of 14th December 2018, at paragraph 5.5. thereof, Daniel Terence Burbeary avers that *"so far as I am aware, neither the Cooke Order, nor the Cockerill Order was obtained by fraud"*.

[133] In the circumstances, and in the absence of any clear averment in the statement of defence that the Cooke and Cockerill Orders were obtained by fraud and there being no evidence of the same, this Court cannot make a finding that there was such fraud.

(5) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment *(section 3 (2)(e))*

[134] This condition has to do with the finality of the judgment. If a judgment is not final and conclusive it cannot be registered. In terms of the Cooke Order, the defendant was given 14 days after service of such Order to apply to set it aside. The application to set aside the Order was dismissed by the Cockerill Order on 11th October 2018. The plaintiff submits that the defendant had 21 days to appeal against the Cockerill Order but failed to do so and is now time-barred from doing so.

[135] The Certificate for Enforcement certifies -

> *11. That no appeal against the judgment has been brought within the time prescribed.*

[136] In his affidavit sworn on 14th December 2018 at paragraph 5.6 thereof, Daniel Terence Burbeary avers that *"the Cooke Order and the Cockerill Order are final and binding as to the matters they determine."*

[137] A judgment which is still capable of being appealed against and is therefore not final and conclusive will not be capable of execution in the country where it was delivered. The *Privatbanken Aktieselskab v Bantele (supra)* judgment sets out conditions for a foreign judgment to be declared executory in Seychelles which are broadly similar to those set out in section 3(2) of the REBJA. These include the condition that the judgment must be capable of execution in the country where it was delivered. The plaintiff avers in its plaint that the Cooke and the interim costs payment ordered by the Cockerill Order are capable of being enforced in England and Wales, which is denied *proforma* by the defendant. In its submissions (Pg 2 paragraph 5 of plaintiff's submissions) the plaintiff states that *"[T]he Orders are capable of being enforced in England as per the provisions of CPR 70, CPR 40.7 and CPR 44-47".*

[138] The Certificate for Enforcement certifies in relation to the Cooke and Cockerill Orders, that -

> *12. The enforcement of the judgment is not for the time being stayed or suspended, that the time available for its enforcement has not expired and that the judgment is accordingly enforceable.*

[139] Further, in his affidavit sworn on 14th December 2018 at paragraph 4 thereof, Daniel Terence Burbeary avers that, *"As a consequence of the Set-Aside Application having been dismissed by the Cockerill Order, EEEL is now free, as a matter of English law, to proceed with enforcement of the Cooke Order"*.

[140] In his second Affidavit sworn on 1st April 2019, to explain the status under English law of the interim payment on account of EEEL's costs that Vijay was ordered to make pursuant to the Cockerill Order, Daniel Terence Burbeary gives the following explanation:

> *4. ... The Cooke Order and the part of the Cockerill Order ordering Vijay to make an interim payment on account of EEEL's costs require Vijay to pay monetary amounts to EEEL. In particular paragraph 4 of the Cockerill Order provided for Vijay to make an interim payment on account of EEEL's costs of defending the set-Aside Application in the sum of £245,315.90 by 25 October 2018. Vijay has failed to pay any (or any part) of the sums that it is required to pay pursuant to the Cooke Order and/or the Cockerill Order. Although paragraph 3 of the Cockerill Order provides for the final amount of EEEL's costs of defending the Set-Aside Application that Vijay is liable to pay to be assessed (on what is known as the "indemnity basis") if not agreed, the interim payment on account for those costs ordered by paragraph 4 of the Cockerill Order is required to be made in any event. If it (or any part of it) is paid by Vijay, then that sum will be deducted from the final amount of EEEL's costs that Vijay is liable to pay once they are assessed by the English Court.*
>
> *5. Accordingly, under English law <u>the interim payment on account of costs can be enforced against Vijay</u>. By way of illustration, section 1 of the UK Charging Orders Act 1979 provides as follows:*
>
> > *"(1) Where, under a judgment or order of the High Court or the family court or the county court, a person (the "debtor") is required to pay a sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property*

of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order."

6. In my professional view, an order for a payment on account of costs is an order requiring a debtor (in the present case, Vijay) to pay a sum of money to a creditor (in the present case, EEEL) and is, therefore, enforceable in England and Wales, for example by applying for a charging order over any assets of the debtor in England and Wales, for example by applying for a charging order over any assets of the debtor in England and Wales to secure the payment of the costs ordered on account. (Emphasis added)

[141] The defendant has not provided any evidence to counter the plaintiff's evidence that no appeal is pending, or that the defendant is entitled and intends to appeal, against the Cooke and Cockerill Orders or that the said Orders are enforceable in the United Kingdom. On the uncontroverted evidence adduced by the plaintiff I am satisfied that these conditions are fulfilled.

(6) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court *(section 3 (2)(f))*

[142] In the case of **Monthy v Buron (SCA 06/2013) [2015] SCCA 15 (17 April 2015)** the Court of Appeal stated *"[I]n our understanding of public policy as expressed in the Code is of one denoting a principle of what is for the public good or in the public interest"*.

[143] However in the case of *Privatbanken Aktieselskar v Bantele [1978] SLR 226*, the Court widened the concept of public policy in instances where a foreign judgment was sought to be rendered executory in Seychelles. It stated the following:

"Under the fifth condition the foreign judgment must not be contrary to any fundamental rule of public policy. The rules of public policy which are aimed at under this condition are much wider than the rules of public policy which are applied if the trial has taken place in Seychelles. The foreign judgment must not go against some fundamental concept of Seychelles Law."

[144] The defendant avers in its defence that, *"In any event, the unenforceable award, which is not purporting to be clothed in a British 'Order' was obtained by fraud, rendering it unenforceable as a matter of public policy"*. The fraud alluded to is with respect to the arbitral proceedings and not the foreign Orders sought to be registered. In that regard, I take note that in the conclusion to its submissions at paragraph 70(iii), the defendant states that in exercising its discretion to ascertain whether the Orders qualify for registration, the Court has to examine the circumstances that has led to the matter now being subject of an enforcement application and asks whether, in light of such circumstances it is a proportionate exercise of the court's power to grant the relief sought by the plaintiff. The defendant then goes on to invite the Court, in considering the proportionality of the application, to conclude that it would be disproportionate to allow the execution application *inter alia* because *"[T]he Plaintiff entered into tactics to intimidate and bribe a witness of the Defendant, and the lawyers acting for the Defendant."* However, no evidence has been adduced to show such fraud. Further, I take note in that respect, that one of the grounds advanced before the High Court of England and Wales for setting aside the Cooke Order was that the plaintiff interfered with a witness Mr. Ergorov, preventing him from giving evidence in the arbitration and that enforcement of the award would therefore be contrary to public policy. Mrs. Justice Cockerill concluded that, together with the other grounds raised by the defendant that ground also failed. It is noteworthy that Robinson J in her judgment delivered pursuant to proceedings to render enforceable the arbitral award, the merits of which was not considered on appeal, dismissed the defendant's defence that the award was contrary to public policy on substantially the same grounds.

[145] The defendant also objects to the manner in which the plaintiff is seeking to render executory the arbitral award in Seychelles after having been prevented from doing so by the 2017 Court of Appeal judgment, namely by now applying under the provisions of the REBJA to register the Cooke and Cockerill orders which render the award enforceable in Great Britain. It claims that this would be against public policy and in that regards states in paragraph 46 of its submissions that:

> *46. What this Plaint seeks is to circumvent the constitutional order and de facto obtain the enforcement of the arbitral award by first obtaining a judgment on the award*

in the British court and then seeking to have this registered here under the British Judgments Act, with a view to then enforcing it. Were this Court to allow this, it is submitted, it would not only be upsetting the constitutional order of the country but also flouting a decision of the Executive not to put in place a mechanism for the enforcement of foreign arbitral awards. The Court of Appeal declined to do this through the mechanism of section 4 of the Courts Act. <u>It would be both unconscionable and contrary to public policy for this Court, with respect, to upend the Court of Appeal's judgment and overrule the executive and legislative powers of the state</u>. (Emphasis added)

[146] This Court has already pronounced itself in this judgment on the propriety of the procedure followed by the plaintiff, to have the arbitral award rendered enforceable in Seychelles (see paragraph 90 above). In any event this Court is of the view that the inability to enforce a valid arbitral award due to a procedural and legal anomaly would offend public policy. This Court is therefore of the view that enforcing the Cooke and Cockerill Orders does not offend any public policy rules in Seychelles law.

[147] Further, Seychelles' previous position on enforcement of foreign arbitral awards having changed since 2020, and Articles 146-150 of the Commercial Code of Seychelles having now become operational, provided that it is still within the time frame to register the award, and subject to the principle of finality in litigation, the plaintiff could arguably still succeed in registering the award itself under the provisions of the Commercial Code, if it is unsuccessful in the present proceedings.

[148] This Court also finds it appropriate to address the defendant's submissions at paragraph 71 thereof that, *"[T]here has to be finality to the proceedings and the Applicant is only perpetuating the dispute and litigation thereon"*, in the light of public policy.

[149] Although stated in the context of explaining the rationale behind the res judicata rule, I find the statement of the Court of Appeal in the case of **<u>Georgie Gomme v Gerard Maurel and Ors (SCA 06 of 2010)</u>** relevant to the issue of finality in litigation in the present case. The Court stated that, *"the rationale behind the rule of res judicata and its strict application is grounded on a public policy requirement that there should be finality in a Court decision and an end to litigation in a matter which has been dealt with in an earlier case and that the proper adherence to the rule of law in a democratic society enjoins one*

to ensure that one is debarred from rehearsing the same issue in multifarious forms. Litigation must be reserved for real and genuine issues of fact and law".

[150] However, in the present case, although the end result sought by the various proceedings is ultimately the enforcement of the arbitral award, as previously pointed out, the plaintiff having obtained an arbitral award which was confirmed by the French Cour D'Appel was unable to enforce the award in Seychelles because of the unenforceability of foreign arbitral awards pre-2020 which is no longer the case. Further, as also pointed out, the plaintiff may still be able to enforce the arbitral award directly under the provisions of the Commercial Code, and by allowing the registration of the Cooke and Cockerill Orders the Court may in fact be preventing further litigation and not perpetuating the dispute and litigation as submitted by the defendant.

[151] For these reasons, I am of the view that registering the Cooke and Cockerill Orders thereby rendering them enforceable in Seychelles would not be contrary to public policy on the grounds raised by the defendant.

Other options for the plaintiff to resolve the disputes between the parties

[152] The defendant points out that there were other options open to the plaintiff for resolving the disputes between the parties. The defendant, in inviting the Court when considering the proportionality of the application to conclude that it would be disproportionate to allow the execution application, gave at paragraph 70(ii) of its submissions as one of the reasons for so concluding, that:

> *(ii) The Applicant was given an opportunity to resolve the disputes between the parties by way of ordinary civil litigation in the Courts of Seychelles when the Defendant filed claim CS21 of 2012, and the Plaintiff counterclaimed, but the Plaintiff chose to ask this Court to stay the proceedings in the case on the basis that there was an arbitration agreement between the parties. The plaintiff deliberately and willfully chose to follow the international arbitration route and it was consequently the architect of its own misfortune in being unable to enforce the award.*

[153] Although the plaintiff could have availed itself of other options open to it for resolving the disputes between the parties, i.e. by way of ordinary civil litigation, which would not have necessitated it to jump through the hoops that it did to enforce the arbitral award, I am of

the view that the parties having included an arbitration clause in their agreements, the plaintiff was equally entitled to seek redress thereunder as through ordinary civil litigation. It cannot have been the intention of the parties to include an ineffectual arbitration clause in the agreements that they could not avail themselves of. The plaintiff therefore cannot be faulted for choosing to follow that route.

Decision

[154] In view of this Court's findings, I find it just and convenient that the Order of Mr. Justice Cooke dated 18th August 2015 and the Order of Mrs. Justice Cockerill dated 11th October 2018, should be enforced in Seychelles and hereby Order that the said Orders be registered in terms of section 3(1) of the REBJA.

[155] Accordingly, pursuant to Rule 4 of the Practice and Procedure Rules GN 27 of 1923, I hereby make order in favour of the plaintiff in terms of the said Orders, the sums payable thereunder by the defendant to the plaintiff being as follows:

1. In accordance with the Order of Mr. Justice Cooke dated 18th August 2015 -

    a) In relation to the arbitration proceedings:

        i. the sum of Euros 15,963,858.90 (arbitral award in favour of plaintiff)

        ii. the sum of Euros 640,811.53 (plaintiff's legal and other costs of the arbitration)

        iii. the sum of US Dollars 126,000 (plaintiff's costs to the ICC; and

    b) In relation to the application for leave to enforce the arbitral award and to enter judgment in terms of the award, the costs of such application, including the costs of entering judgment, such costs to be summarily assessed if not agreed.

    c) In relation to post award interest:

        i. Euros 145,498.25 in respect of the damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61;

ii. Euros 3,385,261.64 in respect of the damages under Contract 6 and accruing hereafter at the daily rate of Euros 2,818.01;

iii. Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88.

2. In accordance with the Order of Mrs. Justice Cockerill dated 11th October 2018 –

a) the Claimant (plaintiff)'s costs of (1) the defendant's application to set aside the Order of Mr. Justice Cooke dated 18th August 2015 and (2) the defendant's application to cross-examine witnesses of the plaintiff, on the indemnity basis, to be assessed if not agreed.

b) an interim payment on account of the costs referred to in paragraph (a) above in the sum of £245,315.90.

[156] In accordance with –

(a)| Section 3(3)(a) of the REBJA, as from the date of this judgment the Order of Mr. Justice Cooke dated 18th August 2015 and the Order of Mrs. Justice Cockerill dated 11th October 2018, shall be of the same force and effect, as if they had been Orders originally obtained or entered up on the date of this judgment;

(b) Section 3(3)(b) of the REBJA this Court shall have the same control and jurisdiction over the said Orders as it has over similar judgments given by itself, but insofar only as relates to execution of the Orders under section 3 of the REBJA;

(c) Section 3(3)(c) of the REBJA, the reasonable costs of and incidental to the registration of the Orders (including the costs of obtaining a certified copy thereof from the original court) and of the application for registration before this Court shall be borne by the defendant.

Final Remarks

[157] It would be remiss of this Court to remain silent on the concluding parts of the submissions made on behalf of the plaintiff and signed by counsel, on the dependence of Seychelles on

foreign direct investments (FDIs), of the ramifications of this Court's decision on such FDIs, and the consequent economic and social legacy of this decision. The importance of FDIs is pointed out in the creation of employment and increase in taxes as well as being an important vehicle for the transfer of technology and a positive contributor to economic growth. The plaintiff then goes on to state that the *"judicial system causes a great impact on the investment climate in the country"* and that *"the judiciary can make a positive and negative impact on it"*. It expresses the view that *"[F]rom this point of view, there are no doubts that recent Case Law – EEEL v Vijay case – clearly turned the economic system for the worse … it was the matter of a great interest of foreign investors"*. The plaintiff then points out that recent Seychelles' case law related to the case of bona fide foreign investors draws more and more attention of the media inside and outside the country and proceeds to provide recent examples of newspaper articles which it states clearly illustrates public attention to the matter of investment attractiveness, and which it invites the Court to consider. That is all very well, but it is the final remarks in the plaintiff's submissions which this Court finds particularly objectionable which read follows: *"It looks like that more and more members of business as well now wonder, when does the Supreme Court's motto of "Without fear or favour" bear out in practice?"*

[158] Such a statement puts into question the independence of the judiciary which serves as a foundation for the rule of law and is a cornerstone of democracy. It also puts into question the integrity and impartiality of its judges by implying that they allow themselves to be influenced or swayed by extraneous considerations. It bears reminding that Judges are bound by their oath of office to administer justice without fear or favour. This court finds the statement of the plaintiff offensive and unacceptable. The following excerpt from Electoral Commissioner & Ors v Viral Dhanjee (SCA 16/2011) [2011] SCCA 24 (01 September 2011) by Twomey JA reflect perfectly my views on this matter:

> *"2) … In the practice of law it is the tradition of the noble profession of the Bar to uphold the rule of law. It is a poor reflection of one's professional and ethical standards to slip into attitudes, tones, language and vocabulary that do not befit the Bar. It does good to neither the legal practitioner, nor the profession, nor the client, nor the rule of law.*

3) At the same time, for the proper discharge of their responsibilities, Courts require a minimum of respect…

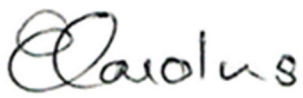
4) The professionalism of the Bar is seriously called into question in such cases and such behaviour threatens the administration of justice and damages the whole judicial process of which we all form part and strive to improve. Members of the Bar are above all officers of the court. A basic tenet of most Bar Associations - and here I quote the American Bar Association Canon of Ethics in the absence of a parallel code of conduct for the Bar Association of Seychelles - is that

> *"...it is the duty of the lawyer to maintain towards the Courts a respectful attitude. This is not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."*

5) This Court is concerned with the constitutional and legal issues arising from the matter before it. It is neither interested in Counsel's opinion of the Court nor in the politics of the day. These will remain outside the door of this Court and all concerned are advised to take note.

6) I strongly urge all member of the Seychelles Bar to desist from such actions in the future and to focus their efforts on the legal issues to be decided instead. This may well improve the lack of erudition of late unfortunately common in this jurisdiction."

Signed, dated and delivered at Ile du Port on 30 June 2020



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E. Carolus J