IN THE SEYCHELLES COURT OF APPEAL

[Coram: B. Renaud (J.A), M. Burhan (J.A), R. Govinden (J.A)**]**

Civil Appeal SCA 15 & 18/2017

(Appeal from Supreme Court Decision CC 33/2015)

Vijay Construction (Proprietary) Ltd — Appellant & Cross Respondent

Versus

Eastern European Engineering Ltd — Respondent & Cross Appellant

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Heard: 25 November 2017

Counsel: Mr. Bernard Georges Attorney at Law for the Appellant

Mr. Nichol Gabriel Attorney at Law for the Respondent

Mrs. Samantha Aglae Attorney at Law for the Respondent

Miss Alexandra Madeleine Attorney at Law for the Respondent

Delivered: 13 December 2017

JUDGMENT

B. Renaud (J.A)

1. This matter is before the Seychelles Court of Appeal on Appellant Vijay Construction (Proprietary) Limited's ("Vijay") amended notice of appeal filed on 21 June 2017.

2. In its amended notice of appeal, Vijay raises several grounds of appeal against the decision of Learned Judge Robinson J (as she was then) which was delivered on 18 April 2017, wherein it was declared that an international arbitral award in favor of Respondent Eastern European Engineering Limited ("EEEL") was enforceable in the Seychelles.

RELEVANT BACKGROUND FACTS

3. Vijay and EEEL are companies incorporated in the Seychelles. In 2011, EEEL hired Vijay to carry out construction work for a hotel called "Savoy Resort and Spa" (hereinafter referred to as "Savoy") through six contracts.

4. The Six Contracts concluded for the execution of various construction works were dated as follows: Contract 1 (15 April 2011); Contract 2 (4 August 2011); Contract 3 (30 August 2011); Contract 4 (30 September 2011); Contract 5 (19 October 2011); and Contract 6 (23 December 2011).

5. It is to be observed that each contract in the Six Contracts included similar arbitration clauses, which provided that:

> *(i) any dispute, disagreement or claim arising under or from the contracts, including disputes on breach, termination and validity of the contracts shall be finally settled by arbitration under the rules of Arbitration of the International Chamber of Commerce;*
>
> *(ii) the arbitral tribunal would consist of a sole arbitrator; and*
>
> *(iii) the place of arbitration would be in Paris.*

6. Thereafter a dispute arose and EEEL filed a Request for Arbitration on 10 September 2012 before the International Chamber of Commerce ("ICC") in Paris, France. The sole Arbitrator was Andrew Lotbiniere McDougall, who delivered an award dated 14 November 2014 generally in favor of EEEL (hereinafter referred to as the "Award").

7. In summary, the Award declared that EEEL had validly terminated the Six Contracts and ordered Vijay to pay EEEL the following sums at an interest rate of 8 % per annum:

> a. € 12, 857, 171.04 under Contract 6 for damages, overpayments to complete the Savoy, and provision of reinforcement steel;
> b. € 150, 000 under Contract 6 for breaching its confidentiality provisions;
> c. € 600, 449.32 under Contracts 1-5 for damages for delays and provision of reinforcement steel;
> d. € 640, 811.53 representing 80 % of EEEL's costs for the arbitration; and

e. $ 126, 000 representing 80 % of EEEL's costs to the ICC.

8. Additionally, the Award ordered EEEL to pay Vijay the following sums at an interest rate of 8% per annum:

f. € 905, 849 under Contracts 1-5 for the value of work performed by Vijay and the Acceleration Fee for the timely completion of work under Contract 4; and
g. € 250, 000 for damages resulting from EEEL's occupation of Vijay's temporary building.

9. Subsequently, EEEL initiated proceedings in the Supreme Court of the Seychelles to have the Award recognised and enforced. Vijay in response challenged the enforcement of the Award, on the following grounds:

(a) the Supreme Court had no power to enforce the Award under statute or common law;

(b) the Arbitrator lacked jurisdiction to hear the dispute;

(c) the Arbitrator violated its due process rights by accepting a third report by EEEL's expert, Mr. Danny Large, and allegedly did not accord it an equal opportunity to respond;

(d) EEEL bribed, blackmailed, and harassed Mr. Sergei Egorov, the former Project Director of the Savoy and a potentially material witness, to change his statement to support EEEL and to discourage him from attending the evidentiary hearing in the proceedings; and

(e) the Arbitrator failed to completely address Vijay's argument that Article 1230 of the Civil Code of the Seychelles ("Seychelles Civil Code") required that EEEL send notice before claiming any damages in relation to the Savoy construction works.

SUMMARY OF JUDGE ROBINSON'S FINDINGS

10. Upon review, in a 119 page ruling, the Learned Judge made the following findings:

(a) the Supreme Court had the power to enforce the Award;

(b) the Arbitrator had jurisdiction to hear the dispute;

(c) the Arbitrator did not violate Vijay's due process rights;

(d) Vijay waived or was estopped from raising the witness tampering defense; and

(e) that the Arbitrator correctly dismissed Vijay's defense regarding the notice requirement under Article 1230 of the Seychelles Civil Code.

GROUNDS OF APPEAL

11. The Appellant has advanced the following grounds of appeal:

Ground 1

The Learned Trial Judge erred in her finding at paragraph 208 of the Judgment that the issue of the arbitrator's lack of jurisdiction was not able to be raised in the matter as such an issue is possible by law only in respect of domestic arbitration.

Ground 2

The Learned Trial Judge erred at paragraph 215 of the Judgment in holding that the arbitrator's finding in his Interim Award on the interpretation of the arbitration Clause of the Contracts was correct.

Ground 3

The whole tenor of the judgment shows a clear predisposition by the Learned Trial Judge to find for the Respondent and to tailor all her findings to that end, thus rendering her significant finding unsafe and unsatisfactory.

Ground 4

The Learned Trial Judge erred in her finding at paragraph 185 of the Judgment that the provisions of section 4 of the Courts Act applied in Seychelles to enable the powers, authorities and jurisdiction of the High Court in England to be exercised by the Supreme Court of Seychelles in addition to (but not in the absence of) the jurisdiction of the Supreme Court and in consequence, having correctly found at paragraph 173 of the Judgment that the Award was incapable of being enforced and recognised in terms of the New York Convention in Seychelles erred in importing the powers of the High Court in England under the English Common Law and concluding that the Supreme Court had jurisdiction under section 4 of the Courts Act to enforce and recognise that award.

Ground 5

The Learned Trial Judge erred in her endorsement of the Award in that she:

a. Erred in finding that the arbitrator had not denied the Appellant a fair hearing by allowing the Respondent to introduce the third report by the witness, Mr. Danny Large, after the close of evidentiary part of the arbitration.

b. Erred in her finding at paragraph 241 of the Judgment that Mr. Toitmilan (sic) assisted counsel for the Appellant in the cross-examination of Mr. Large and that this required Mr. Large to prepare and the Respondent to submit the third report of Mr. Large.

c. Erred in her finding at paragraph 243 of the Judgment where she accepted the clearly erroneous proposition of the expert witness at the trial – without herself assessing the propriety in terms of Seychelles principles of public policy – that, because counsel for the Appellant had been informed by counsel for the Respondent would be producing a further report, and without disclosing that report to the Appellant as the Respondent had promised to do, this was sufficient to make the production proper.

d. Erred in her assessment of the issue at paragraph 248 of the judgment insofar as she gratuitously supported the Respondent's position, clearly demonstrating a propensity to support the Respondent without a fair and balanced assessment of the issue.

e. Erred in her refusal at paragraph 253 of the Judgment to follow the important authorities of *Morel and Cable & Wireless* for the reasons given, and in particular, erred in her finding that third Report of Mr. Large had not 'introduced matters not previously addressed in his first two reports', which finding is contradicted, *inter alia*, by the arbitrator that Mr. Large's third report introduced 'new evidence.'

f. Erred in not accepting that the suborning by the Respondent of the witness, Mr. Egorov, to change his statement filed with the arbitration was contrary to public policy, irrespective of the fact that the Appellant had not brought this to the attention of the arbitrator.

g. Erred in her assessment of the law with regard to the requirement of notice before terminating the contracts for breach.

Ground 6

The whole judgment of the Learned Trial Judge amounts to an endorsement of the denial of due process and the granting of impunity to those who clearly set out to suborn witnesses and prevent the course of justice from proceeding independently. In that respect, the Judgment as a whole contravenes the provisions of Article 19 of the

Constitution of Seychelles and Article 6 (e) and (g) of the Treaty Establishing the Common Market for Eastern and Southern Africa.

Ground 7

The Learned Trial Judge erred in dismissing the motion to deny the Respondent judgment on the basis of the contempt shown to the Supreme Court by the Respondent in preventing the witness, Mr. Egorov, from testifying before the arbitration, and in attempting to prevent the witness from testifying before the Supreme Court, in that the Learned Trial Judge:

a. Made a wholly wrong assessment of the behaviour of the witness, Mr. Egorov, and

b. Was selective in her assessment of the evidence place before her by the Appellant, leaving out crucial documents which supported the Appellant's case and Mr. Egorov's credibility.

GROUNDS OF CROSS-APPEAL

12. The Respondent cross-appealed on the following grounds:

Ground 1

The Learned Trial Judge erred in law in treating and considering the issue – from paragraph 69 to 173 of the Judgment – as one of enforcement under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 instead of treating and considering the issue as one of enforcement in terms of Articles 146 to 150 of the Commercial Code of Seychelles.

Ground 2

The Learned Trial Judge erred in law in holding that Articles 146 and 150 of the Commercial Code did not have legal effect since Seychelles is not a signatory and party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.

Ground 3

The Learned Trial Judge erred in law and on evidence in holding that there was no "reciprocity" in terms of Article 146 of the Commercial Code of Seychelles between Seychelles and France.

Ground 4

The Learned Trial Judge erred in law and on the evidence in holding that "reciprocity" in terms of Article 146 would have been applicable solely if Seychelles was a signatory and party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THE POWER OF THE SUPREME COURT OF SEYCHELLES TO ENFORCE THE AWARD

13. We are of the considered view that at the very outset, we ought to consider Ground 4 of the Appellant's grounds of appeal as well as Ground 1 to 4 of the Respondent's Grounds of cross-appeal, as these are issues which would determine the threshold issue of whether the Supreme Court of Seychelles has the jurisdiction to recognise and enforce the Award referred to herein.

14. We would therefore first proceed to carefully consider the issues framed by the Learned Trial Judge and her reasoning and determination in respect of same on these Grounds. The Learned Trial Judge framed the issues presented for the Supreme Court's determination as follows:

> **(i)** whether the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "NY Convention") applies so as to render a foreign arbitral award enforceable in the Seychelles; and
>
> **(ii)** whether the Supreme Court is empowered by the Seychelles Courts Act to look to English law and thereby conclude that it has the power to enforce a foreign arbitral award in the Seychelles.

15. In establishing that the Award could not be enforced in terms of the NY Convention, the Learned Judge first referred to Article 227 of the Seychelles Code of Civil Procedure, which provides in relevant part that:

> *"Arbitral awards under the [NY Convention], as provided under articles 146 and 148 of the Commercial Code of Seychelles, shall be enforceable ..."*

16. Referring to Articles 146 and 147 of the Commercial Code of Seychelles, the Learned Judge accepted Vijay's argument that while Articles 146-150 regarding the NY Convention *"ha[s] been enacted as part of the Commercial Code"* of Seychelles, the articles have no legal effect because Seychelles is not a party to the NY Convention and

there is no reciprocity – in terms of the NY Convention – between Seychelles and member States to the NY Convention.

17. In accepting Vijay's argument, the Learned Judge dismissed EEEL's claim that the said reciprocity was not based on the NY Convention. Robinson J supported her conclusion by applying the holding in *Omisa Oil Management v Seychelles Petroleum Company Limited* [2001] SLR 50 to conclude that the enactment of Articles 146-150 of the Commercial Code as municipal law of Seychelles does not bind France to any degree or extent and that France's obligation under the NY Convention is only towards other States party to the said Convention. For those reasons, she held that the Award could not be enforced in terms of the NY Convention.

18. Having found that the Award could not be enforced in terms of the NY Convention, the learned Judge then went on and framed the issue for the court's determination as follows:

> - whether the court is *"entitled to resort to English common law enabling enforcement of foreign arbitral awards if there are provisions of the written laws of Seychelles which exist."*

19. Given the absence of an effective provision enabling the enforcement of a foreign arbitral award, it appears that the Learned Judge was of the opinion that the court *"should fill the gap somehow on the basis that it is inconceivable that a trading nation such as ours would unfairly protect its nationals from the consequences of their international obligations freely entered into."*

20. To support her decision to resort to English law, the Learned Judge first referred to Article 125 of the Constitution of the Republic of Seychelles, which provides that in addition to the jurisdiction specified therein, the Supreme Court shall have such other jurisdiction as may be conferred by an Act. Relying on the decided case of *Finesse v Banane* [1981] SLR 103 – which interpreted section 4 (then 3) of the Courts Act as enabling the Supreme Court to exercise all the powers, authorities and jurisdiction of the High Court of Justice in England as at 22 June 1976, she concluded that in addition to its own jurisdiction, the Supreme Court had all the powers, authorities, and jurisdiction of the High Court in England.

21. In response to Vijay's argument that relied on section 17 of the Courts Act to claim that section 4 is only applicable where Seychellois law is silent, the Learned Judge emphasized that section 11 of the Courts Act, which provides that the jurisdiction of the court shall extend through the Seychelles, shall not be construed as diminishing any jurisdiction of the Supreme Court relating to matters arising outside Seychelles.

22. In support, she cited *Albyazov v Outen & Ors.* [2015] SCCA 23, a case regarding the enforcement of a receiving order, wherein the Seychelles Court of Appeal affirmed recognition of a receiving order and in so doing stated that the Supreme Court *"has the same powers as the High Court of England and Wales."* She concluded by stating that "*even if it can be successfully argued that our written laws in respect of the enforcement of [a] foreign arbitral award are not silent, section 4 of the Courts Act is still applicable*."

23. The Learned Judge then indicated that other than enforcement under the NY Convention, there were two methods of enforcing a foreign arbitral award in England: section 26 or section 40(a) of the United Kingdom's Arbitration Act of 1950 (the "UK Arbitration Act"). Accepting the parties' suggestion that section 26 was not the method used by EEEL, she referred to section 40(a) of the UK Arbitration Act, the law applicable in June 1976, which provided that:

> *"Nothing in this Part of this Act shall - . . . (a) prejudice any rights which any person would have had of enforcing in England any award or of availing himself in England of any award if neither this Part of this Act nor Part I of the Arbitration (Foreign Awards) Act. 1930, had been enacted."*

24. The Learned Judge found that Rule 199 (White Book) established that a foreign arbitral award would be enforced in England if the award were;

(i) in accordance with an agreement to arbitrate that was valid by its proper law; and

(ii) valid and final according to the law governing the arbitration proceedings.

25. Reading section 40(a) of the UK Arbitration Act together with Rule 199 of the English Rules of the Conflict of Laws (the law applicable in June 1976), she concluded that the High Court of England had the power to enforce a foreign arbitral award and that therefore the Supreme Court of Seychelles had the same power.

OUR FINDINGS ON THE ISSUE OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THE POWER OF THE SUPREME COURT OF SEYCHELLES TO ENFORCE THE AWARD

26. We have given careful and thoughtful consideration to the written and oral submissions of all Learned Counsel on this issue and the reasons contained in the Judgment of Robinson J.

27. The Appellant contends in its appeal that the Leaned Judge erred in using the provisions of section 4 and other provisions of the Courts Act to extend to the Supreme Court of Seychelles, the statutory powers exercised by the High Court of Justice of England under the UK Arbitration Act.

28. The Cross-Appellant, on the other hand, advances the proposition that the Learned Judge should have treated the matter of enforcement under Article 146 of the Commercial Code as a domestic law issue with no necessity of treaty reciprocity, since the NY Convention is incorporated in our law, and that as such, the ruling that non-accession by Seychelles to the NY Convention meant non-reciprocity in term of the article was therefore wrong.

29. Learned Counsel for both the Appellant and Cross-Appellant submitted at length on this point with interjections, as and when necessary from the bench. Much time was spent in the discussions and interactions on this issue given its crucial importance in this case.

30. We are of the firm view that given that the issue of jurisdiction raised in the different grounds of appeal and cross-appeal are heavily interrelated, they will be best addressed as one issue by this Court. The question before us therefore is as follows:

- **Did the Learned Judge err when she relied on the reception provisions of section 4 of the Courts Act to resort to English law and recognize and enforce the Award in the Seychelles, given that the Seychelles legislature had seemingly domesticated the provisions of the NY Convention?**

31. We will answer this question by dealing with what we consider to be three cardinal issues arising in this case:

(A) the reception of English statutory law and its application in the case;

(B) the constitutional justification for such a reception; **and**

(C) the constitutionality of the treaty-making process applicable in this case.

LEGISLATIVE HISTORY OF ARTICLES 146-150 OF THE COMMERCIAL CODE

32. Before we address these issues, it is essential that we set out the legislative history of Articles 146-150 of the Commercial Code. There has been some confusion regarding the history of these Articles and reliance on UK statutes in the court below. In fact, the Appellant contends that Articles 146-150 of the Commercial Code were legislated with a

view of subsequently ratifying the NY Convention. We feel this matter ought to be clarified, given its relevancy to the issues arising on appeal in this case.

33. In this regard, we proceed to consider the history prior to the coming into force of the Commercial Code, which came into effect on the 13th of January 1977. The NY Convention came into force on the 7th of June 1959. The United Kingdom acceded to the New York Convention by instrument dated 24th September 1975. At the time the United Kingdom acceded to the NY Convention, Seychelles was a colony of Britain.

34. On Seychelles gaining independence from the British in 1976, pursuant to an exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Seychelles concerning Treaty Succession, an agreement was reached, whereby all obligations and responsibilities of the Government of the United Kingdom and Northern Ireland, which arose from any valid international instruments, as from the 29th of June 1976, were to be assumed by the Government of Seychelles insofar as such instruments may have been held to have had application to Seychelles.

35. The then President, Sir James Mancham, confirmed that the Government of Seychelles was in agreement with the provisions set out in the Note. Therefore, at the time the Commercial Code came into existence on the 13th of January 1977, Seychelles by this instrument had from the 29th of June 1976 succeeded to all obligations and responsibilities arising from any valid instrument. Included in these instruments was the NY Convention, as the United Kingdom had acceded to it on the 24th of September 1975.

36. Based on this history, we are therefore inclined to disagree with the contention of Learned Counsel for the Appellant that Articles 146 to 150 of the Commercial Code were legislated with a view that the Seychelles would in the near future ratify the NY Convention. At the time, Articles 146 to 150 of the Commercial Code of Seychelles were enacted, Seychelles had succeeded to the NY Convention, hence their inclusion in the Commercial Code.

37. Subsequently, however, pursuant to Article 8.1 of Vienna Convention on the Succession of States in Respect of Treaties ("VCSSRT"), the Ministry of Foreign Affairs, by Note No. 37/79, notified the British Government that it did not consider itself bound by treaties which came within the ambit of the Treaty Succession Agreement.

38. Article 8.1 of the VCSSRT, which deals with "Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State", reads as follows:

> "*The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a*

succession of States do not become the obligations or rights of the successor State towards other States Parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State."

39. The Ministry of Foreign Affairs of Seychelles informed Britain that Seychelles reserved the right to review such treaties and decide to adopt or terminate the rights and obligations arising from such treaties.

40. Thereafter on 12 July 1985, Seychelles sent a communiqué to the Secretary-General of the United Nations regarding the current legal status of treaties covered by the Treaty Succession Agreement. With regard to multilateral treaties covered by the Treaty Succession Agreement, save in respect of treaties acceded to by the Republic of Seychelles, Seychelles indicated that it did not regard any of the relevant treaties as continuing in force in Seychelles.

41. We find that with the repudiation of the Treaty Succession Agreement, all obligations and responsibilities of the Government of United Kingdom and Northern Ireland arising from any valid international instrument, which would have included the NY Convention, ceased to have effect. This repudiation resulted in the non-applicability of Articles 146-150 of the Commercial Code of Seychelles. Importantly, there is no evidence to indicate that Seychelles acceded to the said NY Convention thereafter.

42. It is to be borne in mind that the 1979 Constitution of Seychelles declared Seychelles to be a Sovereign Socialist Republic State, a one party State with a unilateral party system and a positive system of non-alignment which would explain the change of stance by Seychelles in not pursuing a more open, treaty and convention friendly international policy.

(a) The Reception of English Statutory Law and Its Application in the Case

43. To what extent does English law apply in the Republic of Seychelles in the year 2017? In answering this question, we re-visit the decision in the case of *Sultan Gemma Finesse v Marie Leopold Banane* [1981] SLR 103.

44. This question arises 24 years after Seychelles adopted a Constitution that proclaimed in Article 1 that *"Seychelles is a sovereign democratic Republic"* and 41 years following our independence from the United Kingdom. This is a very significant question of law

that has very far-reaching consequences and we are aware of the impact that our decision will have on the practice and precedents of the courts. Nonetheless, it is one that has to be addressed.

45. Whilst English common law applies by virtue of section 4 of the Courts Act, the applicability of English statutory law remains unclear given the current constitutional realities that we live in, as pronouncedly depicted in this case. The issue appears to be one of interpretation of the reception provisions in our laws in the light of articles in our Constitution that give jurisdiction to our courts, especially the Supreme Court.

46. These reception statutes and provisions were extended to most of the former colonies of the United Kingdom. It was a way for the new nations to adopt or receive the pre-independence English common law, to the extent that it was not explicitly rejected by the legislative bodies or the constitutions of these new nations.

47. Well aware of the limitations and deficiencies in the legal environment of the newly independent States, these reception provisions were meant to keep open the door to the applications of English law so as to prevent a situation of total absence of law and a breakdown in the Rule of Law.

48. Generally, the reception statutes and provisions allowed the receipt of the English common law dating prior to the independence and operated as the default law in the absence or *lacunae* in the local law. Given this concern for the breakdown in the Rule of Law, many Commonwealth States have more or less the same provisions as section 4 of our Courts Act in their legislation. New Zealand, India, Belize, Mauritius and various Caribbean and African nations adopted the English common law through reception statutes; although they did not inevitably seek to copy the English law.

49. Many of them now draw on decisions of other common law jurisdictions, however, more former British colonies are revisiting the scope and extent of the applicability of these reception provisions in their laws, based on their current constitutional and statutory constraints.

50. For instance, in the British Virgin Island, the relevant reception provision is section 11 of the Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act. According to that section:

> "*the jurisdiction vested in the High Court in civil proceedings and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the territory and rules of court, and where no special provisions is therein contained such jurisdiction shall be exercised as nearly as may be in*

conformity with the law and practice administered for the time being in the High Court of Justice in England'.

51. In *Panacom International Inc. v Sunset Investment Ltd. and Another* (1994) 47 WIR 139, the Court of Appeal of the Eastern Caribbean had to consider the scope of section 11 of the Supreme Court Act of Saint Vincent and the Grenadines, which is identical to that of the British Virgin Island. The court made two crucial points: Firstly, it held that section 11 relates solely to the manner of the exercise of a pre-existing jurisdiction and was intrinsically a procedural provision, and secondly, the words "law" and "practice" were *"evidently intended to be references to procedural (as distinct from) substantive law"*.

52. Likewise, in *Veda Doyle v Agnes Deane of Eastern Caribbean* HCVAP 2011/020, the Eastern Caribbean Court of Appeal was faced with a similar issue as to whether the Judgment Act 1838 of England, which provided for the automatic attachment of post-judgment interest on judgment debt, could be imported into the law of the Grenadines in the absence of local law governing the award of interest following judgment.

53. Although the facts were similar to those in the case of *Dominica and Industrial Development Bank v Mavis William* (Commonwealth of Dominica Civil Appeal No. 20 of 2005), where the court had held that section 11 was capable of importing English statutes, the court in *Veda Doyle* held that the English law intended to be imported by section 11 was the procedural law administered in the High Court of Justice in England and not English statute nor English procedural law which is adjectival and purely ancillary to English substantive law.

54. The judgment in *Veda Doyle* relied on legislative intention to conclude that what was not intended was the importation of English law generally to fill *lacunae*, however desirable filling the gap may seem. To emphasize the point, the Learned Judge in that case said that such a construction would leave much to be desired in any sovereign State and would create uncertainty as to what laws a citizen may be subject to at any given point without regards to its own parliament which is constitutionally mandated to enact laws for the State as it may deem necessary for the State's good governance.

55. Finally, in *Ocean Conversion v Attorney General of the Virgin Islands* (BVI HCV2008/0192), the issue before the court was whether to award pre-judgment interest by reference to the English Law Reform (Miscellaneous Provisions) Act 1938, since there were no express powers in the British Virgin Island which permitted the Judge to do so. There, the plaintiff sought to rely on section 7 of the West Indies Associated States Supreme Court (Virgin Islands) Act, which provided as follows:

"*The High Court shall have and exercised within the territory all such jurisdiction (save and except the jurisdiction in admiralty) and the same powers and authorities incidental to*

such jurisdiction as on the 1st day of January 1940, were vested in the High Court of Justice in England".

56. The court in *Ocean Conversion,* rejected the argument that section 7 conferred it jurisdiction to grant pre-award interest. Instead, the court held that when section 7 refers to powers and authorities incidental to such jurisdiction, it is referring to the court's inherent jurisdiction and not referring to specific powers conferred on the High Court under particular statutes. The court felt that such powers were not vested in the High Court, but were made available by legislation to the High Court for that purpose.

57. In Seychelles, our reception provisions can be found in the Courts Act (CAP 52) (hereinafter referred to as "the Act"). Section 4 of the Act provides that: *"The Supreme Court shall be a court of record and in addition to any other jurisdiction conferred under this Act and any other law, shall have and may exercise the powers, authority and jurisdiction possessed and exercised by the High Court of Justice in England".*

58. Section 5 of the Act vests in the Supreme Court full original jurisdiction in civil matters and in so exercising such powers gives to that court all powers, privileges, authority and jurisdiction which is exercised by the High Court of Justice in England. And Section 6 of the Act contains the equitable jurisdiction of the Supreme Court in cases where no sufficient legal remedy is provided by the law of Seychelles.

59. Moreover, section 7 gives to the Supreme Court admiralty jurisdiction as possessed by the High Court of Justice in England under the Administration of Justice Act 1956 and section 9 vests in the Supreme Court all criminal jurisdiction as vested in the High Court of Justice of England.

60. The Seychelles Supreme Court has previously addressed the scope of section 4 of the Courts Act and the applicability of English law in Seychelles. In *Finesse*, Judge Sauzier (as he then was) held that section 4 (formerly section 3A) of the Courts Act, vests in the Supreme Court powers, authority and jurisdiction of the High Court of Justice of England and that these include both the inherent powers and jurisdiction and powers under statutory laws of England, provided that they predate 22 June 1976. The 22nd of June 1976 being the date of the enactment of Ordinance 13 of 1976, the amendment that promulgated the Ordinance in our law.

61. Having found these English statutes applicable, Judge Sauzier applied the provisions of the Matrimonial Procedure and Property Act 1970 of the United Kingdom in the Seychelles.

62. In so doing, Judge Sauzier chose not to follow the Mauritian Supreme Court case of *Koo Poo Sang v Koo Poo Seng* 1957 MR 104, which held that section 15 of the Mauritian Courts Ordinance (CAP 150), which is nearly in the same terms as that of section 4 of the

Act, did not give to the Supreme Court of Mauritius the jurisdiction which the High Court in England had under section 18(1) of the Matrimonial Causes Act 1950.

63. The Learned Judge in the *Koo Poo Seng's* case based himself on the Mauritian Supreme Court precedents of *Michel v Colonial Government* 1896 MR 54 and *B v Attorney General* 1914 MR 94. These two cases being authorities for the principle that section 15 of the Mauritian Courts Ordinance vested the Supreme Court of Mauritius with only inherent powers of the High Court of England and not jurisdiction granted by statutes.

64. However, the holding in *Finesse* and resort to English statutes is tempered by the holding in *Kim Koon & Co. Ltd v Republic (*1969) SCAR 60. In *Kim Koon*, the Seychelles Court of Appeal was faced *inter alia* with an issue as to the application of the English Criminal Evidence Act 1965 to the Seychelles. In finding that this statute was inapplicable to the Seychelles, the court referred to section 3 of the Seychelles Judicature Ordinance, enacted on 15 October 1962, which as amended, provided that:

> *"12. Except where it is otherwise provided by special laws now in force in the Colony or hereafter enacted, the English Law of Evidence for the time being shall prevail." (Kim Koon* (1969) SCAR 60 at p. 64).

Applying this provision to the facts before it, the Court of Appeal held that:

> *"We have no doubt that it is not competent for the Seychelles Legislature to delegate the power to legislate, and that so far as section 12 of the Evidence Ordinance as may purport to apply to Seychelles future amendments of the English law of evidence, it is inoperative. In our judgment the effect of the section is to apply to Seychelles the English law of evidence as it stood on the 15th October 1962, the date of enactment of the Seychelles Judicature Ordinance, 1962. Accordingly, the Criminal Evidence Act 1965, does not apply in Seychelles."*

65. Despite the fact that the Criminal Evidence Act of 1965 was a statute in force in England that conferred certain powers and jurisdiction on the High Court of Justice in England, the Court of Appeal found that given that local Seychelles law (*i.e.*, the Judicature Ordinance) had given primacy to the evidentiary rules as found in the English Law of Evidence, other statutory evidentiary rules were not applicable to the Seychelles.

66. Relying on the principle enunciated in *Kim Koon* as regard to the applicability of the English Law of Evidence in the Seychelles, several Court of Appeal decisions have stated that it should be applicable *"only if it is not otherwise inconsistent with the 1993 Constitution which provides for equal protection of the law and if considered relevant and keeping in line with the modern notions of the law of evidence acceptable in other democratic counties."* ***Lucas v Republic*, *SCA 17/2009***, 22 adding that - *"Paragraph*

2(1) of Schedule 7 of the 1993 Constitution should be given a fair and liberal meaning and the continuation in force of existing law should not be understood as making applicable to the Seychelles the English law of evidence which has now been abrogated".

67. In the instant case before us, the Learned Judge applied the reception provision of section 4 of the Courts Act in accordance with the principles enunciated in *Finesse*. The Learned Judge first found that the provisions of Article 146 of the Commercial Code were not enforceable due to the lack of ratification on the part of Seychelles, hence absence of reciprocity. She supported her conclusion by applying the ratio in *Omisa Oil Management v Seychelles Petroleum Company* [2001] SLR 50 ("*Omisa Oil*").

68. Having come to this conclusion, she went on to apply the reception provisions of section 4 of the Act and imported the provisions of the UK Arbitration Act. The Learned Judge also referred to article 125(1) (d) of the Constitution of Seychelles and concluded that the Act that grants jurisdiction and powers to the Supreme Court, other than the Constitution of Seychelles, is the Courts Act -- as determined in *Finesse*.

69. Having reached this determination, the Learned Judge thereafter accepted the submissions of both counsel that in terms of section 40(a) of the UK Arbitration Act read with Rule 199, the High Court of England, as at June 1976, had powers, authorities and jurisdiction to enforce an arbitral award. The Learned Judge held that:

> *"On the other hand, the Supreme Court has all the powers, authorities and jurisdiction of the High Court of England in addition to (but not in the absence of), the jurisdiction of the Supreme Court. In addition, the powers, authorities and jurisdiction granted to the Supreme Court by section 4 of the Court Act is in addition to and independent of, any other powers, authorities and jurisdiction that the Supreme Court may have . The court agrees. If accepted, Vijay's interpretation would be contrary to the clear and explicit wording of article 125 (d) of the Constitution of the Republic of Seychelles and section 4 of the Courts Act. The court agrees that even if it can be successfully argued that our written laws in respect of the enforcement of foreign arbitral award are not silent, section 4 of the Court's Act is still applicable*." (Our emphasis).

70. In the present case, although Article 227 of the Civil Procedure Code, discussing the NY Convention, and Articles 146-150 of the Commercial Code exist as law on the statute books, they cannot be enforced because of Seychelles' decision not to ratify the NY Convention.

71. As is the practice in countless cases in Seychelles, courts regularly refer to English jurisprudence as persuasive authority for assistance in clarifying and understanding Seychellois law. However, the reference to English jurisprudence should not be misconstrued as a license to graft or introduce new laws to the legislation(s) already in place in the Seychelles.

72. To do so would amount to a violation of the separation of powers between the National Assembly and the Judiciary, and -- in some cases – of the Executive. Article 85 of the Constitution clearly indicates that legislative power is vested in the National Assembly; this power cannot be delegated to a foreign legislative making body.

73. Finally, the Supreme Court's reliance on section 11 of the Courts Act to hold that section 17 should not be read as diminishing the court's jurisdiction is equally unconvincing. Section 11 provides that:

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

74. The phrase *"Provided that this section"* indicates that it is section 11 that should not be read as diminishing the jurisdiction of the Supreme Court, but not other sections in the Courts Act.

75. With respect to its interpretation of section 11, the Supreme Court erred because it is not section 11 that is diminishing the court's jurisdiction; it is Article 125(1)(b) of the Constitution read together with Article 227 of the Civil Procedure Code and Articles 146-150 of the Commercial Code that diminish or circumscribe the court's jurisdiction, as these articles make it clear that the Supreme Court is legislatively empowered with regard to the enforcement of foreign arbitral awards, but that exercise of such powers will be ineffective given the reciprocity provision of Article 146 of the Commercial Code.

(b) The Constitutional Justification for such a Reception

76. Article 125(1) of the Constitution provides that:

> "125 (1) *There shall be a Supreme Court which shall, in*

addition to the jurisdiction and powers conferred by this Constitution, have

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

(b) Original jurisdiction in civil and criminal matters;

(c) Supervisory jurisdiction over subordinate courts , tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and

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

77. Jurisdiction is the authority "which a court has to decide matters that are litigated before it…." *See Ernesta & Ors. v R* [2017] SCCA 24. On the other hand, "powers" of the court are catered for in the wordings of the legislations that empower the courts in their adjudicative functions. Hence powers and jurisdiction are not interchangeable notions. They are two distinct terminologies that carry significant differences in meanings in the law and the Constitution.

78. Considering how Article 125(1) (a) to (d) of the Constitution is drafted, the Supreme Court cannot have more jurisdiction and powers other than those granted to it by the Constitution itself and with respect to jurisdiction, as further provided under an Act. This leaves us to scrutinise Article 125(1)(a), (b), (c) and (d) of the Constitution to see whether they could legitimately allow for the existence of the reception provisions of section 4 to be used as an extra jurisdictional clause, as the Supreme Court did in this case.

79. The Learned Judge relied on sub-article (d) of Article 125 (1) by holding that the Supreme Court has "*all the powers, authorities and jurisdiction of the High Court of England in addition (but not in absence of), the jurisdiction of the Supreme Court. In addition, the powers, authorities and jurisdiction granted to the Supreme Court by section 4 of the Courts Act is in addition to and independent of any other powers, authorities and jurisdiction that the Supreme Court may have*."

80. To our minds the Learned Judge erred. Article 125 (1) read as a whole, does not allow the Supreme Court to rely on the statutes of the United Kingdom, be they pre-22nd June 1976 or not. If jurisdictions exist under Article 125(1) (a) to (c), an Act promulgated under Article 125 (1) (d) cannot confer the same jurisdiction. This would mean duplicity of similar jurisdictions, with one imported from abroad under Article 125(1) (d); that Act would be *ultra vires* Article 125 (1) and in contravention of Article 5, which provides that the Constitution is the supreme law of Seychelles and that any law inconsistent with the Constitution is void.

81. Sub-article 125(1) (d) was therefore meant to cover a new jurisdiction, not one already existing in sub-article 125 (1) (a) to (c); and it was meant to cover a new jurisdiction which had its basis in domestic law, not a foreign statute.

82. In the instant case before us, the Supreme Court received the UK Arbitration Act in our law and applied it to the facts of this case. It did so through section 4 of the Courts Act and it based its ruling on the Supreme Court case of *Finesse.* It did so as the Supreme Court sitting in its original jurisdiction in civil matters under article 125(1) (b) of the Constitution.

83. With the advent of the 1993 Constitution of Seychelles our reference point should be articles of the Constitution. The Supreme Court had jurisdiction expressly conferred by the Constitution. The court was sitting as the Supreme Court in its original civil jurisdiction under article 125 (1) (b) of the Constitution and was deciding a case based on a Plaint.

84. Having been enjoined with such Constitutional jurisdiction, the court had to adjudicate on the enforceability of Article 146 of the Commercial Code of Seychelles. It was given this power by the laws of Seychelles in the form of the Commercial Code. It could and should have exercised that jurisdiction without having to resort to a jurisdiction under Article 125(1) (d) of the Constitution.

85. This exercise of original civil jurisdiction should have been carried out regardless of the outcome of the case. A court should never seek to construct a jurisdiction in order to suit or accommodate the facts of the case. Given that it had jurisdiction under Article 125(1) (b) of the Constitution, it may be argued that what the court did was attempt to use powers given to the High Court under the UK Arbitration Act. However, this was not permissible as the court was already so empowered by Article 146 of the Commercial Code.

86. We note that there is an ever increasing tendency on the part of courts in the Seychelles to be very quick in resorting to the power, authority and jurisdiction of the English High Court in attempts to do justice in a case by using the reception provisions of the Courts

Act. Such practice though is doubtful when the law is unambiguously clear as in this case.

87. In our view, Article 125(1)(d) grants to the Supreme Court jurisdictions other than civil, criminal, constitutional and supervisory jurisdiction over other bodies, as those are already provided in sub article 125(1)(a) to (c). This interpretation is more in line with Article 1 of the Constitution and the legislative supremacy of our National Assembly to enact laws, pursuant to Article 85 of the Constitution, and an ever increasing amount of foreign case laws that limit the extra-territorial application of colonial reception laws.

88. It is to be noted, however, that Article 125(1) of the Constitution would not take away the power of the Supreme Court to seek inspiration from the common law of the United Kingdom as an aid to interpretation of statutes inspired by the common law or that from the rules, practice and precedents of the English High Court, which in the case of common law would not be of a binding nature. It would also not take away the inherent powers of the Supreme Court as received by the High Court.

(c) The Constitutionality of the Treaty-Making Process Applicable in this Case

89. Our Constitution separates the three arms of Government. It grants to the Executive, the Judiciary and the Legislature separate and distinct powers. This concept of separation of powers was thought of by the French political philosopher Baron de Montesquieu as a means to prevent authoritarianism. He made the proposition that democracy and liberty are best served when the arms of the State exercise their powers independently from each other.

90. With the powers being exercised separately and independently there arises the need to ensure that one arm of the State checks and balances the powers of the others through an intricate constitutional oversight system. Exercised in such a manner, the powers of each one prevent that of the other from being supreme and unchecked.

91. In Article 49 of the Constitution, the people of Seychelles have, amongst other things, defined our democracy as one where there is a balance of powers between the Executive, Judiciary and Legislative arms of the State.

92. Our Constitution, similarly to other constitutions setting up a Presidential system of Government, entrusted the powers of execution of international treaties to the President of the Republic, as part of his powers as Head of State.

93. Article 64 (3) of the Constitution provides as follows:

"The President may receive or cause to be executed treaties, agreement or conventions in the name of the Republic".

94. The execution of international treaties is therefore a matter for the discretionary powers of the President vested in him by the Constitution. No other arms of Government can constitutionally and/or legally usurp or interfere with the exercise of that power. There is no constitutional obligation on the President that compels him to execute treaties, agreements or conventions.

95. The reception of those instruments or their execution would depend on the policy of the Government of the day, through the execution of some of those instruments by the comity of nations and their universal execution by the international community may lead the Executive with little discretion in that respect. This would be so, especially in international human rights matters, where even the Constitutional Court and this Court is empowered by the Constitution in Article 48 to take judicial notice of international instruments containing the human rights obligations when deciding cases brought under Chapter III of our Constitution.

96. However, consonant with the balance of powers principle, the Constitution has set up a dualist as compared to a monist system of treaty making. The monist system exists only in matters of Chapter III relating to constitutional enforcements. Hence, though the President receives, executes or causes treaties and conventions to be executed, it is the constitutional role of the National Assembly to ratify them and cause them to be domesticated and be made applicable in the domestic law of Seychelles. This ratification, however, applies only in instances where the instruments would affect international relations.

97. Article 64(4) of our Constitution is relevant here and it states that:

> *"A treaty, agreement or convention of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by:*
>
> *(a) An Act; or*
> *(b) a resolution passed by the votes of a majority of the mem*bers *of the National Assembly.*

98. Therefore, though the President starts and initiates the first step in treaty implementation, unless the National Assembly enacts a law or passes a resolution, the Treaty will not be domesticated. The power is therefore shared and balanced between these two arms of Government in order to ensure that the President and the National Assembly check each other, in the interest of the people of Seychelles. And only those instruments that are deemed in the national interest of the Republic are entered into by Seychelles and constrain the rights of people in Seychelles.

99. In this case, Article 146 of the Commercial Code calls for reciprocity of signature or execution by the Executive and ratification of the New York Convention by the National Assembly. "Reciprocity" here can only have one meaning; it would be what is invited by Article 1(3) of the NY Convention itself. This article allowed State Parties to ratify or sign the NY Convention subject to non-reciprocal treatment for non-State Parties. When the treaties, including the NY Convention, was devolved by the United Kingdom upon Seychelles in June 1976, this is the treaty arrangement that we inherited.

100. At the time of the promulgation of the Commercial Code on the 1st of January 1977, Article 146 was therefore fully operational, it was working, provided that the other transacting State was a member of the NY Convention. As we have seen, this was so by virtue of the British ratification of the NY Convention and the subsequent Seychelles Independence Order.

101. However, it was short lived. 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.

105. We take judicial notice that there are many other areas of law where the repudiation of the colonial treaty arrangements in 1979 may have affected or could potentially affect the application of the law. For example, the Extradition Act (CAP 78) is dependable on treaty arrangements in order to allow Seychelles, based on reciprocity, to extradite persons to other States. So far, only Kenya and the United Kingdom has been scheduled as

applicable jurisdictions and no new Extradition Treaties have been entered into with a foreign State under section 3(1)(b).

106. The same applies to mutual assistance in criminal matters under the Mutual Assistance in Criminal Matters Act (CAP 284). Even there, there would be a need for us to comply with the dictate of the provisions of our Constitution. No bilateral or multilateral mutual assistance in criminal matters treaties have been entered into by Seychelles under section 4(1) (b) since the promulgation of this Act in 1995.

107. The Court cannot have recourse to colonial treaties executed by the United Kingdom given the constraints of Article 64 of the Constitution. It may be advisable that the President and the National Assembly consider doing an evaluation of our situation in that respect and ensure that priority is given to execution and domestication of the relevant international instruments which are in our national interest, including the New York Convention.

108. The Constitution of 1993 is fundamentally based on the doctrine of Separation of Powers. The duty of the Judiciary is to interpret the existing laws. Article 64 of the Constitution specifically grants the President, as Head of State, the power to decide on whether to sign, ratify, or accede to any international treaties and the Legislature to pass the necessary laws once ratified and acceded to as part of the dualist system reflected within the said Article.

109. It would be improper for the Judiciary to usurp the powers in this arena as it is vested in the Executive and based on government policy. If any *lacunae* exist as suggested in this Judgment, the concerned authorities should move to ensure that necessary steps are taken to fill up the void for the benefit of the nation.

110. For the aforementioned reasons, we proceed to hold as follows:

1. With respect to **Ground 4** of Vijay's appeal, we find that the Learned Trial Judge **ERRED** in finding that provisions of section 4 of the Courts Act applied in Seychelles to enable the powers, authorities and jurisdiction of the High Court in England to be exercised by the Supreme Court of Seychelles in addition to (but not in the absence of) the jurisdiction of the Supreme Court.

   Ground 4 of Vijay's appeal is therefore **UPHELD**.

2. With respect to **Ground 1 to Ground 4** of EEEL's cross-appeal, we find that the Learned Trial Judge **DID NOT ERR** in:

i. Treating the issue as one of enforcement under the NY Convention instead of treating it as one of enforcement under Articles 146-150 of the Commercial Code (**Ground 1**);

ii. Holding that Articles 146-150 of the Commercial Code did not have legal effect since Seychelles is not a party to the NY Convention (**Ground 2**);

iii. Holding that there was no reciprocity in terms of Article 146 of the Commercial Code between Seychelles and France (**Ground 3**); and

iv. Holding that reciprocity in terms of Article 146 of the Commercial Code would have been applicable solely if Seychelles was a party to the NY Convention (**Ground 4**).

Ground 1 to Ground 4 of EEEL's cross-appeal are therefore **DISMISSED** with costs to the Appellant/Cross-Respondent.

111. We therefore hold that the Award, referred to herein, is not enforceable in the Seychelles.

112. We therefore proceed to hold as follows:

1. The New York Convention is not applicable to the Seychelles and accordingly Articles 146 to 150 of the Commercial Code have no legal effect.

113. In view of our conclusion here above, there is no necessity to consider the other grounds of appeal.

B. Renaud (J.A) **M. Burhan (J.A)** **R. Govinden (J.A)**

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017