SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 641
MA 101/2019
Arising in CC 2/2019)

In the matter between

EUROPEAN ENGINEERING LTD **Applicant**
(rep. by Elvis Chetty

and

SJ (SEYCHELLES) LTD **Respondent**
(rep. by Bernard Georges)

Neutral Citation:	*European Engineering Ltd v SJ (Seychelles)Ltd* (MA101/2019 arising in CC2/2019) [2019] SCSC 929 July 2019)
Before:	Twomey CJ
Summary:	Stay of proceedings on grounds of arbitration clause in contract- arbitration awards from ICCIA non enforceable in Seychelles – futility of arbitration- articles 113, 147, 150 of the Commercial Code, Section 227 of the Seychelles Code Civil Procedure - jurisdiction of Seychelles Supreme Court in default
Heard:	22 May 2019- 26 June 2019
Delivered:	29 July 2019

ORDER

The Application for a stay of proceedings is refused. The case will proceed to a hearing on the merits.

RULING

TWOMEY CJ

The subject matter of this application

[1] The Applicant is sued by the Respondent in a Plaint filed on 28 January 2019 for a breach of contract and for which the Respondent claims damages.

[2] The Applicant has now applied to this Court for a stay of proceedings on the grounds that the contract in issue contains an arbitration clause, namely 20.2 which states:

> *"any dispute, controversy, claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration rules of the Arbitrator Institute of the International Chamber of Commerce."*

[3] It submits that in conformity with this agreement, the Applicant (the Defendant in the head suit) agrees to submit to arbitration proceedings subject to the arbitration clause which is valid and subsisting under the governing law of the contract which by agreement of the parties is Seychellois law.

[4] In response, the Respondent (the Plaintiff in the head suit) has contended that the Respondent has filed the action before this court and not before the International Chamber of Commerce Institute of Arbitration (ICCIA) since based on the law as it exists in Seychelles today, any award resulting from a resolution of a dispute by foreign arbitration will not be able to be enforced in Seychelles, where the Applicant is resident and where any assets it possesses are situate. That being the case arbitration of the dispute before the ICCIA would be an expensive exercise in futility.

[5] It also submits that the Applicant is a Seychellois incorporated company with no business or assets anywhere other than Seychelles and that despite the fact that the contract contains an arbitration clause, the parties may opt instead for the dispute to be settled by a court of competent jurisdiction, namely the Supreme Court of Seychelles.

[6] I need not explore the rest of the contents of the Applicant's and Respondent's supporting affidavits as they have no relevance to the present proceedings.

The issue to be decided by the Court

[7] The only issue before me at this stage is whether this Court should decline jurisdiction to hear the plaint and in terms of Article 113.1 of the Commercial Code of Seychelles stay proceedings to allow the dispute to proceed to a resolution by the ICCIA notwithstanding the fact that the resulting award may not be enforceable in Seychelles.

Law for staying of proceedings

[8] The law for staying proceedings in respect of arbitration and the law regarding enforcement of arbitral awards generally is contained in the following provisions of law. Article 147 (4) of the Commercial Code of Seychelles provides:

> *"At the request of a party to an arbitration agreement, or of any person claiming through or under him, the Court shall make an order to stay any proceedings already commenced before such Court and such other order as it thinks fit in the circumstances, subject to the rules which permit the Court to refuse to enforce an award under the Convention under article 150 of this Code"* (Emphasis added)

[9] In the context of arbitration proceedings which precedes arbitration proper by the parties' chosen forum and arbitrator, Article 113 (1) of the Commercial Code provides:

> *"The Court seized of a dispute which is the subject of an arbitration agreement shall, at the request of either party, declare that it has no jurisdiction, unless, insofar as the dispute is concerned, the agreement is not valid or has terminated."* (Emphasis added)

[10] With respect to the instances when court can refuse the enforcement of an arbitral award, Article 150 of the Commercial Code provides in relevant part:

> *1. Enforcement of an arbitral award shall be refused if the person against whom it is invoked proves:*
>
> ...
>
> *(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the law of the country where the arbitration took place; or*
>
> *2. Enforcement of an arbitral award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."*

Also with regard to the enforcement of arbitral awards section 227 of the Seychelles Code of Civil Procedure provides in relevant form:

> *"...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 1, Title X of the said Code."*

Background to the issue in the present matter

[11] So much for the applicable statutory provisions in this matter. In deciding the issue before this Court it is important to give a little background as to why arbitration proceedings at the ICCIA are being resisted by the Applicant.

[12] The enforceability of international arbitration awards was considered extensively by this Court 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).

[13] Vijay Construction (hereinafter VIJAY) and Eastern European Engineering Ltd (hereinafter EEEL) are companies incorporated in Seychelles. In 2011, EEEL hired VIJAY to carry out construction work for a hotel through six contracts, which included arbitration clauses similar to the one in the present suit. A dispute arose and EEEL filed a request for arbitration in 2012. In 2014, the arbitrator issued an award generally in favour of EEEL and ordered VIJAY to pay several million Euros in damages. EEEL then initiated proceedings in the Supreme Court to have the Award recognised and enforced. This was granted by the Supreme Court but challenged by VIJAY in the Court of Appeal. VIJAY's appeal was successful.

[14] This Court is bound to abide by the decision of the Court of Appeal to the extent to which the latter ordered that:

> *"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.

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

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);

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

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).
...

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

We therefore proceed to hold as follows:

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

[15] The Court of Appeal's decision that the international arbitration award arising out of the arbitration at the ICCIA in terms of the contract in question cannot be enforced in Seychelles 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 (supra), insofar as to give legal effect to foreign judgments and awards in Seychelles, this Court is nevertheless bound by the decision.

The submissions of the parties with respect to the present application.

[16] In the present matter, the same arbitration clause which was the subject of the enquiry of the courts is central to the dispute I am now being asked to rule on. The enquiry is of course different to the extent that in the VIJAY case (supra) the parties to the contract containing the arbitration clause had referred the dispute, as required by the contract, to arbitration in Paris. An arbitration award was issued and attempts were made to enforce the award in Seychelles, as this is where the defaulting party's assets were located. The legal challenge concerned the enforceability of a foreign arbitration award in Seychelles, which was ultimately found to be unenforceable.

[17] In the present suit, the Respondent has approached this Court to resolve a dispute arising from the contract instead of referring the dispute to arbitration despite the same arbitration clause contained in the contract. The initiation of proceedings in this Court however has been challenged and the Applicant is asking the Court for a stay of proceedings on the ground that the Court has no jurisdiction in light of the existence of the arbitration clause. The Respondent in these stay proceedings however is arguing that if the Respondent did refer this matter to arbitration in Paris it would not be enforceable in the Seychelles and is therefore void.

This court's deliberations

[18] It is important to note that national (including Seychellois law) and international law do make allowances for a Court to intervene at different stages of arbitration, but in very narrow circumstances. In Seychelles, Articles 110-150 of the Commercial Code grants the Court power to intervene at different stages of arbitration. In VIJAY (supra) the Court

was called upon to intervene after an award was made, and the enquiry was limited to enforceability in Seychelles. In the present matter however, initiation of court proceedings to remedy a breach of the contract, instead of proceeding to arbitration is being challenged. Notwithstanding, the decision in the Court of Appeal has a direct bearing on the present case.

[19] Julian D.M. Lew in "Does National Court Involvement Undermine the International Arbitration Process?" (American University International Law Review (2008) Vol. 24 499) identifies the court's interaction with the arbitration process at four different levels: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage. In the present matter, this court is concerned with stage 1 (the Court of Appeal was concerned with stage 4). Lew notes that:

> *"Prior to the establishment of the arbitral tribunal, courts become involved where a party initiates proceedings to challenge the validity of the arbitration agreement; where one party institutes court proceedings despite, and perhaps with the intention of avoiding, the agreement to arbitrate; and where one party needs urgent protection that cannot await the appointment of the tribunal..." (at p. 496)*

Lew notes that in all the circumstances it is the court's duty to uphold the agreement to arbitrate.

[20] In this context, learned Counsel for the Respondent, Mr. Georges has submitted first, that because foreign arbitration awards arising from this arbitration clause are not enforceable in Seychelles as a result of the reasoning of the Court of Appeal, the arbitration clause is effectively invalid because any resultant award would not be recognised in Seychelles, therefore denying redress (which would have access to remedy and justice implications). The jurisdiction and involvement of this Court is therefore sought at the initiation stage.

[21] Mr. Georges has however conceded that under Seychellois law, the general principle is that the arbitration clause prevails in excluding the jurisdiction of national courts when a dispute arises, which is the very purpose of the *clause compromissoire.* Under Article

113 (1) of the Commercial Code (supra), the Court would generally accept the arbitral tribunal (or arbitrator's) jurisdiction or competence unless the arbitration agreement itself is not valid or has terminated. Similar provisions are present in other jurisdictions but go further.

[22] Mr. Georges has cited by comparison Kenyan law of which section 6 of the Kenya Arbitration Act 1955 provides that a court can stay proceedings in the case of an arbitration agreement when the arbitration agreement is null and void, inoperative or incapable of being performed. The wording of our equivalent provisions in Article 113 (1) is merely that "the agreement is not valid or has terminated" – hence much more restrictive.

[23] Mr. Georges has submitted nevertheless that this court ought to give a wide interpretation to the word *valid* to do justice to the parties before it. In order to be valid an arbitration agreement must be able to grant the parties the same rights they would have had before a court, namely due process culminating in a result which can afford the successful party the relief sought.

[24] Secondly Mr. Georges has submitted that given that Article 6 (2) of the Civil Code provides that rules of public policy apply to all agreements even when not expressly stated, such rules include a court assuming jurisdiction in a matter subject to arbitration when the arbitral award would be unenforceable in Seychelles. He has relied for this submission on G. Cardero-Moss's argument in her book "International Commercial Contracts (Applicable Sources And Enforceability)" Cambridge University Press (May 29, 2014) 2014 where she states at pages 211 - 224:

> *"However the primacy of the parties [arbitration] agreement needs to be coordinated with applicable rules on validity and enforceability of the arbitral award... In this situation if the arbitral tribunal follows the will of the parties, it may face the prospect of rendering an award that is invalid and cannot be enforced...*
>
> *An arbitral tribunal may even consider disregarding the contract's choice of law if following the contract's choice of law would result in an award that is invalid*

or cannot be enforced because it violates certain principles of the country where the tribunal has its seat or of the country where enforcement will be sought."

[25] Counsel for the Applicant has made no additional arguments in support of a stay of this court's proceedings to permit arbitration in the particular circumstances of this case. However, the purport of the Applicant's affidavit, especially in terms of the averment at paragraph 8 that the court in a similar application, this time by the Respondent in CS 38/14, stayed proceeding pending arbitration amount to an irony that is not lost on this Court. To put it lightly, the Applicant in not being able to reap the fruits of the arbitration proceedings in the previous case is averring that what's sauce for the goose is also sauce for the gander. This Court however cannot engage in such conjecture.

The court's findings

[26] Largely, Mr. Georges' submissions can be conflated into the single question as to whether the impact of the Court of Appeal's decision rendering international arbitration awards made in terms of the current contract unenforceable invalidates the present arbitral clause on the ground that it is void.

[27] Both the Seychellois law of contract and the common law recognise that in instances where performance is impossible, contrary to public policy and/or illegality, the clause, and in some instances the entire contract may be declared invalid. However, this Court is not being asked to make this determination. Here the enquiry is more complicated in that arbitration is not impossible and on a literal reading, the dispute could be referred to arbitration. However, this would not allow any remedy to be enforced in Seychelles. It is therefore important to consider what the intention of parties who include arbitration agreements in commercial contracts are. Arbitration is intended to allow parties to resolve disputes in a cost effective manner.

[28] How does the Court then give effect to the parties' clear intention of resolving their disputes by arbitration? In *Insigma Technology Co Ltd v Alstom Technology Ltd* [[2009] 3 SLR (R) 936, the Court of Appeal of Singapore in considering a hybrid arbitration clause (with a mismatch between the applicable rules and the administrating institution) - coined *pathological arbitration clauses*- stated:

[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars... so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party ..."

[29] Similarly, in the 2015 Swedish case of *The Government of the Russian Federation I.M.* v *Badprim S.R.L.*, Case No. T 2454-14, the Svea Court of Appeal in the majority decision held that the approach to interpreting a pathological/hybrid clause was as follows:

"If an arbitration agreement in some respect provides a self-contradicting or otherwise ambiguous procedure, which is not practicably doable, the general principle is that the agreement should, to the extent possible, be interpreted in line with the parties' basic intentions with the arbitration agreement, i.e. that disputes between the parties should be settled by arbitration. This could entail that the court will disregard a contradicting provision if it is clear that the remainder of the arbitration agreement otherwise represents the parties' actual intentions. In some particular instances the natural order could, however, be to disregard the arbitration agreement in its entirety (Redfern and Hunter, On International Arbitration, 5th ed., p. 146, Lindskog, op. cit., p. 145 and Heuman, Skiljemannarätt, p. 138)." (Emphasis added)

[30] Although these cases are not on all fours with the court's present dilemma they do provide a good guide as to the approach to be followed in instances of pathological arbitration clauses. It stands to reason that where the expediency and efficiency in resolving disputes is lost due to legal circumstances such as the present and the purpose of arbitration can no longer be achieved, the Court must intervene so that the dispute can be resolved. Such an intervention is certainly not in breach of the spirit of the provisions of the Commercial Code (supra). I find it necessary in the circumstances to give a purposive interpretation (as per Lord Denning's judgement *in Notham v London Borough of Barnet* [1978] 1 WLR 220, an interpretation that will "promote the general legislative

purpose underlying the provisions") to the word "valid" in Article 113 (1) of the Commercial Code.

[31] Furthermore, it is important to note that the Respondent is not opposed to this matter being referred to arbitration. Mr Georges, on behalf of his client, wrote to Vijay stating that they could refer the matter arbitration in the Seychelles. Domestic arbitration is provided for in Articles 110 – 145 of the Commercial Code. This is still an avenue open to the parties.

[32] In light of the above, this Court must deny the stay of proceedings on the basis that the arbitration agreement is void due to any awards arising out of the arbitration being unenforceable. This Court therefore can exercise jurisdiction in this dispute as provided for in Article 113 of the Commercial Code.

[33] Finally, this Court wishes to point out that it respects the deference to arbitration proceedings and that only in the very limited circumstances permitted by law will it assume jurisdiction.

The Court's order

[34] In the circumstances, the application for a stay of the proceedings is refused. This case will proceed to a hearing on the merits.

Signed, dated and delivered at Ile du Port on 29 July 2019.

M Twomey CJ

Dr. Mathilda Twomey
Chief Justice
Supreme Court of Seychelles