ESSAR STEEL LIMITED v ARCELORMITTAL USA LLC

2021 SCJ 248

Record No.: 116299

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Essar Steel Limited

Applicant

v

Arcelormittal USA LLC

Respondent

JUDGMENT

Background to the application

1. This is an application by Essar Steel Limited (ESL) to set aside a provisional order, issued by the Supreme Court on the 22nd February 2018 granting the recognition and enforcement of an ICC arbitral award dated the 19th December 2017 in favour of Arcelormittal USA LLC (AMUSA), and to stay enforcement of the said award.

2. ESL is incorporated under the laws of Mauritius. It was the holding company of Essar Steel Minnesota LLC (ESML). ESML was a company incorporated in the USA engaged in the business of producing and supplying iron ore pellets. Following an agreement between the parties, ESL, AMUSA and ESML agreed on the supply from ESML and purchase by AMUSA of iron ore pellets over a ten-year period, to be produced from an iron ore mine and pelletizing plant developed by ESML in Nashville, Minnesota.

3. ESL was not a party to the original agreement between ESML and AMUSA but was included by way of an amendment to the initial agreement in order to make ESL and ESML jointly and severally responsible for the performance of the agreement, among other things. ESML was therefore at the relevant times a subsidiary of ESL.

4. Clause 12 of the agreement contains an arbitration clause which provides for "*disputes, claims, questions or disagreements ("controversies") arising under, out of, relating to, or in connection with*" the agreement, to be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Paris (ICC Arbitration Rules), by an arbitral tribunal (the tribunal). The agreement is governed by the laws of the State of New York, USA. Under clause 12(g) of the agreement, it was further provided that, "*unless otherwise agreed by the parties, the evidentiary hearings shall be completed within six (6) months from the execution of the Terms of Reference, from the issuance of the Terms of Reference by the Arbitral Tribunal and the parties, or, if a party refuses to execute the Terms of Reference by the ICC Court*".

5. On the 27th May 2016 AMUSA terminated the contract for anticipatory and repudiatory breach by ESML.

6. ESML entered into bankruptcy proceedings in the USA on the 8th July 2016. ESL avers that since that day it no longer had control over ESML and that the latter's affairs were managed by a chief restructuring officer appointed on the 1st August 2016.

7. On the 9th August 2016, AMUSA initiated arbitration proceedings pursuant to the arbitration clause in the agreement (clause 12). On the 18th November 2016, ESL filed its Answer and Counterclaim in response to AMUSA's request for arbitration. On the 6th February 2017, an arbitral tribunal was appointed and confirmed by the ICC International Court of Arbitration.

The case for ESL – the applicant

8. It is ESL's case before us that it was unfairly treated by the arbitral tribunal as a result of which it was put in such a position that it was unable to prepare its defence and to present its case. On the 9th August 2017 it informed the tribunal that it would in the circumstances not be in a position to participate in the arbitration and to assist the tribunal any further. ESL did not thereafter participate in the evidentiary hearings which were held on the 10th and 11th October 2017.

9. ESL essentially avers that the 6-month time frame imposed by the tribunal was unrealistic and inappropriate given the complexity of the dispute and the practical difficulties it was facing and was not sufficient to adequately and fairly prepare its defence and present its case. ESL was unable to access documents from ESML as the latter was undergoing bankruptcy proceedings and its chief restructuring officer did not respond to ESL's request for such access. Apart from the unavailability of "*significant documentary evidence and of key personnel to assist*", it is further averred that the terms of the Confidentiality Order issued by the tribunal on the 26th June 2017 resulted in ESL's counsel being unable to share some documents disclosed by AMUSA with his internal client in order to obtain instructions and prepare a defence.

The award of the arbitral tribunal

10. On the 19th December 2017 the tribunal gave its award and ordered USD 1, 379, 457, 503 as damages, and USD 1, 533, 853. 04 as costs of arbitration, with interest payable at the rate of 8.60%, compounded on a total principal amount of USD 1, 380, 991, 356. 04, from the date of the award until payment, or the entry of a judgment enforcing it.

11. On the 22nd February 2018 AMUSA filed a notice of motion to enforce the arbitral award against ESL in Mauritius and the Supreme Court granted the provisional order for the recognition and enforcement of the arbitral award (the "provisional order").

The arguments of ESL – the applicant

12. In a nutshell, it is ESL's contention that the provisional order should be set aside as it was treated unfairly by the arbitral tribunal and it was unable to present its case in the arbitration proceedings. As a result, the enforcement and recognition of the arbitral award would be contrary to the public policy of Mauritius.

13. The grounds on which the application to stay the enforcement of the arbitral award rest are therefore (i) under Article V(1)(b) of the Convention for the Recognition and the Enforcement of Foreign Arbitral Awards ("the Convention" or "the New York Convention"), that ESL was otherwise unable to present its case, and (ii) under Article V(2)(b) of the Convention, that recognition or enforcement of the award would be contrary to the public policy of Mauritius.

14. Although ESL concedes that the relevant arbitration clause set a time frame of 6 months to complete evidentiary hearings, it argues that the clause was meant to deal with disputes over delivery of iron ore pellets, as opposed to disputes relating to the entire performance of a billion-dollar contract, and that it was evident that the arbitration involved complex issues and that documentation would be heavy because of the sums at stake. ESML's bankruptcy would also delay proceedings and ESL had insisted that the 6-month timeframe be extended.

15. ESL claims that it could not sign the terms of reference for the arbitration unless certain issues were thrashed out, namely (i) the reconsideration of the 6-month timeframe and (ii) the fact that AMUSA had served a statutory demand on ESL in Mauritius while the arbitration was pending.

16. The volume of documents provided by AMUSA also required several weeks to review before ESL could prepare a meaningful defence and it had no access to any employee or former employee of ESML holding most of the relevant information relating to the agreement as it had not been involved in the performance of the agreement. ESML's affairs had moreover been taken over by a chief restructuring officer and it was not a party to the arbitration.

17. In addition, ESL could not review any of the documents provided by AMUSA because of the terms of the Confidentiality Order.

18. The tribunal had also misconstrued the meaning of clause 12(g) of the agreement since it had provided that the evidentiary hearings should be completed within six months from the execution of the terms of reference. The 28th June 2017 being the date on which the terms of reference were finally approved by the ICC Secretariat, the deadline for completion of the hearings should have been set to six months later, i.e. the 28th December 2017.

A. ESL's inability to present its case – Article V(1)(b) of the Convention

19. It is submitted on behalf of ESL that the approach to be adopted by this Court in setting aside an international arbitration award should be that recommended in **KB v/s S and Others HCCT 13/2015**, namely:

    (1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
    (2) Under the Arbitration Ordinance, the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.
    (3) Subject to the observance of the safeguards that are necessary in the public interest, the parties should be free to agree on how their dispute should be resolved.
    (4) Enforcement of arbitral awards should be '*almost a matter of administrative procedure*' and the courts should be '*as mechanistic as possible*' (Re **Petrochina International (Hong Kong) Corp Ltd [2011 4 HKLRD 604**).
    (5) The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (**Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA)**).
    (6) In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings.

In this regard, the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined the due process. (**Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA)**).

(7) In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (**Xiamen Xingjingdi Group Ltd v Eton Properties Limited [2009] 4 HKLRD 353 (CA)**).

(8) Failure to make a prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide (**Hebei Import & Export v Polytek Engineering Co Ltd (1999) 2HKCFAR 111**).

(9) Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (**Hebei Import & Export v Polytek Engineering Co Ltd (1999) 2HKCFAR 111**).

(10) The Court of Final Appeal clearly recognized in **Hebei Import & Export v Polytek Engineering Co Ltd** that parties to the arbitration have a duty of good faith, or to act bona fide (p 1201 and p 1378 of the judgment).

20. ESL unequivocally agrees, whilst referring to the above principles, that it bears a heavy burden in order to establish the ground that it was unable to present its case. It nonetheless submits that there was something seriously wrong with the structural integrity of the arbitral process which caused it clear prejudice as it was unable to defend the claims against it.

21. ESL argues that had it had access to ESML's documents there would have been no difficulty in complying with the 6-month timetable. The tribunal's insistence on sticking to the 6-month timeframe in spite of ESL's complaints resulted in the tribunal failing in its duty to treat both parties equally.

22. ESL relies on **Minmetals Germany GmbH v Ferco Steel [1999] 1 All ER (Comm) 315,** where Colman J observed that "*…, the inability to present a case to arbitrators within section 103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice.*"

23. ESL therefore contends that it was put in a position where it could not participate in the arbitral process as it was unable to present its case and defend AMUSA's claim because (a) the arbitral tribunal adopted a rigid and unreasonable insistence on the six-month timeframe provided for in clause 12(g) of the agreement, in circumstances where ESL faced a real practical predicament as it had no access to the documents of ESML, and also, due to (b) the terms of the Confidentiality Order in respect of Highly Confidential information.

B. Public Policy – Article V(2)(b)

24. As regards the issue of public policy, ESL refers to **Cruz City 1 Mauritius Holdings v Unitech Limited & Another** [2014 SCJ 100], which held that the applicable public policy principles are those in the international context, and that "… *the respondent has to show with precision and clarity in what way and to what extent enforcement of the award would have an adverse bearing on a particular international public policy of this country. Not only must the nature of the flaw in the arbitration proceedings be unambiguously described but a specific public policy must be identified and established by the party relying on it.*" ESL submits that the elements of breach of public policy under article V(2)(b) of the New York Convention are present.

25. It is accordingly argued that as a result of serious fundamental defects in the procedure adopted by the tribunal, ESL was unable to present its case in the arbitration. This amounts to a breach of public policy in the international context and under Mauritian law.

The Prayers

26. Pursuant to section 4(1) of the **Convention for the Recognition and Enforcement of Foreign Arbitral Awards Act 2001** and rule 15(7)(a) of the **Supreme Court (International Arbitration Claims) Rules 2013**, ESL moves for an Order setting aside the Provisional Order made in case SCR No. 116222/5A/181 on the 22nd February 2018, granting the recognition and enforcement of the award delivered by the ICC Arbitral Tribunal in Minneapolis, Minnesota, USA, and it further moves for an Order rescinding the attending Order for costs awarded against it. ESL additionally prays for an Order pursuant to section 42(1C) of the International Arbitration Act 2008 prohibiting the publication of all information relating to these proceedings except for the present Judgment.

The arguments of AMUSA – The Respondent

27. According to AMUSA, the simple issue requiring determination is whether the applicant has made a persuasive case of breach of due process engaging either Articles V(1)(b) and/or V(2)(b) of the New York Convention which would then require this Court to exercise its discretion to refuse recognition and enforcement of the award in Mauritius. AMUSA submits that when taking ESL's own conduct in the arbitration into consideration, it is clear that the application is devoid of merit and that it must fail.

28. It is argued that an important factor in favour of the enforcement of the award is that it was duly recognised and enforced in the United States District Court in Minnesota. ESL took no steps to resist the recognition and enforcement of the award before that Court, although it alleges that it did not do so because it had no assets in operation in the USA. The determination of the Court of the seat of the arbitration is an important consideration for enforcing courts of any State Party to the New York Convention.

29. By contractually electing the juridical seat of their arbitration to be Minneapolis, Minnesota, the parties must have intended to be bound by the decisions of the Minnesota Court, especially when section 12(h) of the agreement specifically provided that the arbitration was governed by the United States Federal Arbitration Act. Reference is thus made to the English case of **Minmetals Germany v Ferco Steel [1999] 1 All ER (Comm) 315,** where Colman J observed:

> "*In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. […] That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English Court considering enforcement of a foreign award*."

30. AMUSA further relies on Article III of the New York Convention, which is the source of the obligation for Mauritius under international law to recognize and enforce arbitral awards, and which provides as follows:

> *"Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. …*"

31. The mandatory language of that Article has been referred to by courts of Contracting States as embodying a pro-enforcement bias, e.g., in **Dardana v. Yukos Oil [2002] 2 Lloyd's Rep. 326 at 331,** where Mance L.J. observed that a successful party to a New York Convention award had a *prima facie* right to recognition and enforcement.

32. AMUSA further submits that the following international principles govern the interpretation of the New York Convention, as set out in **Redfern and Hunter on International Arbitration** (6th Ed. p. 622-623):

(i) the New York Convention does not permit any review on the merits of an award to which the Convention applies;

(ii) the grounds for refusal of recognition and enforcement set out in the New York Convention are exhaustive. They are the only grounds on which recognition and enforcement may be refused;

(iii) the New York Convention sets out five separate grounds on which recognition and enforcement of a Convention award may be refused at the request of the party against whom it is invoked;

(iv) the burden of proof is not upon the party seeking recognition and enforcement;

(v) even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court is not obliged to refuse enforcement. The opening lines of Article V(1) and V(2) of the Convention say that enforcement "may" be refused; it does not say that it "must" be refused. The language is permissive, not mandatory;

(vi) The intention of the New York Convention is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively.

(i) The "compressed timetable" argument

33. Insofar as that argument is concerned, AMUSA submits that the context of the tribunal's decision to hold the hearings in October 2017 is material. AMUSA filed its request for arbitration on the 9th August 2016 and the evidentiary hearings took place 14 months later. It was ESL's own actions which contributed to the proceedings being stretched for so long as it engaged in dilatory tactics by changing counsel twice and it refused to sign the terms of reference before it failed to comply with the timetable imposed by the tribunal.

34. Had ESL been diligent about pursuing its case and signed the terms of reference on the 30th March 2017 in application of section 12(g) of the agreement, the evidentiary hearings would have been fixed to September 2017. ESL never satisfied the tribunal, in spite of the latter's request for it to do so, that there was legal authority which would permit the tribunal to disregard the 6-month deadline contained in the agreement. In the circumstances the tribunal cannot be said to have acted unfairly towards ESL as it had in effect tolerated its dilatory tactics.

35. Reference is also made to clause 12 of the agreement, namely:

> *"The parties agree that all disputes, claims, questions or disagreements ("Controversies") arising under, out of, relating to, or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules")*."

AMUSA submits that this clause is widely drafted without qualification as to the type of claims submitted to arbitration and that at the time of entering into the agreement the parties ought to have appreciated the magnitude of their commercial enterprise. The tribunal cannot be faulted for giving effect to the timeline contractually agreed by two sophisticated commercial entities and for exercising its wide procedural discretion to manage the conduct of the arbitration.

36. Although it stopped participating in the arbitral proceedings, the tribunal ensured that ESL's rights to a fair hearing were not compromised as it kept asking ESL to participate in the evidentiary hearings and it provided ESL with transcripts of the hearings.

(ii) The "no access to documents" argument

37. With regard to ESL's complaint that it did not have access to documents to enable it to present its case because they were held by ESML (the operating company which went into bankruptcy in the USA and which was involved in the performance of the agreement), AMUSA argues that ESL does not in effect identify which documents or, at least, which class of documents, it required for the purpose of the arbitration.

38. ESL in fact had access to information and documents throughout the arbitration through ESML's former CEO, Mr Vuppuluri, who was also ESL's named official representative in the arbitration and who had been directly involved in all the significant communications regarding the negotiation, performance and amendment of the agreement. ESL simply avers that Mr Vuppuluri was under a genuine mistake that documents relating to ESML had been deleted from his laptop. ESL should therefore have made the requests for documents to Mr Vuppuluri.

39. AMUSA further submits that ESL had not made use of the procedures available to obtain documents and had made no attempt to obtain them from ESML. No specific documents were thus requested from the chief restructuring officer, there was no follow up to communications with him, and no further effort seems to have been made to obtain the documents from ESML. On the 19th April 2017 the tribunal offered to help ESL in any manner it could to obtain documents. That offer was renewed on the 16th May 2017. ESL however maintained that the chief restructuring officer had not responded to its requests so that it had assumed that "*no allowance would have been made by the Arbitral Tribunal to extend the arbitration timetable*". By failing to enlist the help of the tribunal and by not consulting AMUSA's extensive disclosure of documents, AMUSA submits that ESL only had itself to blame.

40. AMUSA's disclosure process had in effect culminated in 23, 000 pages of documents being made available to ESL on the 28th June 2017 and ESL had never looked at these documents.

(iii) The "Confidentiality Order" argument

41. ESL argues that it would have been futile to access the documents provided by the respondent due to the Confidentiality Order imposed by the tribunal because of the "*Highly Confidential*" categorization of certain documents which contained price-sensitive information from third party iron ore suppliers and which its counsel could not disclose to his internal client, i.e., ESL.

42. AMUSA submits in that respect that ESL had the opportunity to comment on the Confidentiality Order and that it did so on more than one occasion, namely on the 2nd and 16th June 2017. ESL did not however identify a single individual with whom it had to share any document produced by AMUSA. Had counsel for ESL genuinely wished to communicate and discuss a "*Highly Confidential*" document with anyone at ESL, he could have availed himself of the mechanism under clause 10 of the Confidentiality Order to seek a declaration from the tribunal permitting him to do so. The 23, 000 pages of documents disclosed by AMUSA were in fact marked as "*Confidential*" and could have been shared with anyone at ESL.

43. The tribunal moreover had a wide discretion to make the Confidentiality Order under article 22(3) of the ICC Arbitration Rules, interpreted in **The Secretariat's Guide to ICC Arbitration** (ICC 2012) as specifically empowering "*tribunals to issue orders relating to confidentiality generally or the confidentiality of certain aspects of the case, such as trade secrets or other confidential information*. […] *As the purpose of Article 22(3) is to allow orders to be tailored to the circumstances of each case, the provision places no restriction on the arbitral tribunal other than limiting its orders to matters 'in connection with the arbitration'*". It is submitted by AMUSA that confidentiality orders that restrict competitive information such as pricing information to counsel and experts are common in proceedings governed by US laws.

44. AMUSA concludes that ESL is estopped from arguing that it was unfairly treated by the arbitral tribunal or that its due process rights were breached. The three purported complaints could not be said to engage Article V(1)(b) of the New York Convention as it is trite law that an arbitral tribunal had a broad discretion to manage a case as it considers appropriate subject to due process safeguards, as per article 22(4) of the ICC Arbitration Rules which provides:

> "*In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.*"

The article thus provides for a *reasonable* opportunity to a party to present its case as opposed to a *full* opportunity.

45. AMUSA further argues that since ESL failed to take the benefit of the assistance offered to it by the tribunal and declined to participate in the arbitration it cannot now benefit from the protection of Article V(1)(b) of the New York Convention.

46. AMUSA relies on the case of **Gold Reserve v. Venezuela (2015) US Dt. Ct. District of Columbia,** regarding the interpretation of the legal standard required to engage an Article V(1)(b) defence, where it was held that the "*unable to present its case*" defence should be construed narrowly as it was incumbent on a party invoking that defence to show exactly how the due process violation complained of had prevented it from presenting its case.

47. AMUSA argues that ESL waived its right to rely on the Article V(1)(b) defence in the light of its own conduct during the arbitration. The following extract from professor Van Den Berg in his treatise on the New York Convention is referred to:

> *"The equal opportunity to be heard means that a party must have been effectively offered the opportunity to be heard. But if, after having been duly notified, a respondent refused to participate or remains inactive in the arbitration, he must be deemed to have deliberately forfeited the opportunity. Default in arbitration after having been duly notified has invariably been held not to bar enforcement of a Convention award. The counterpart of due process is an active participation in the arbitration."*

The "public policy" argument

48. As for the defence of public policy, AMUSA submits that ESL had no independent complaint to invoke such a defence. It relies on the test adopted in **Deutsche Schachtbau-und Tiefbohrgesellschaft v. Ras al-Khaimah National Oil Co. [1987] 2 Lloyd's Rep. 246** at 254, where Donaldson M. R. observed:

> "*It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the state are exercised*."

49. Reference is made to **IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp [2005] 2 Lloyd's Rep. 326** at 328, where Gross J. observed:

> "*Considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution. The reference to public policy in s. 103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards*."

50. AMUSA thus submits that Article V(2)(b) calls for a heightened standard of proof and that ESL had to produce compelling evidence to sustain a breach of public policy arguments (**Cruz City 1 v. United Limited [2014 SCJ 100]**) but that it failed to do so. ESL had instead conflated the tribunal's case management and procedural decisions as breaches of due process amounting to an affront to the international public policy of Mauritius.

51. The test in **Cruz City 1** had not been satisfied as ESL had not shown with precision and clarity in what way and to what extent enforcement of the arbitral award would have an adverse bearing on the international public policy of Mauritius.

52. As held by the Paris Court of Appeal in **SNF v. Cytec (2007) Rev. Arb. 100**, it is not the duty of an enforcing court to evaluate the intrinsic merits of the award but to effect an extrinsic control to ensure that enforcement is compatible with public policy, and the party raising a public policy defence can only prevail if the conflict with public policy is "*flagrante, effective et concrète*." It is submitted that such a high standard had not been met and that ESL's arguments on the alleged breach of due process could not be elevated to a public policy defence.

53. AMUSA therefore moves that the application be set aside with costs and that the tribunal award be recognized and enforced pursuant to the international law obligations of Mauritius under Article III of the New York Convention. It does not however oppose the request that publication of all information relating to the present proceedings be prohibited pursuant to section 42(1C) of the International Arbitration Act.

Source of the law in Mauritius

54. Section 3(1) of the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act**, as amended by the **International Arbitration (Miscellaneous Provisions) Act 2013** ("the Act") provides that "*Notwithstanding any other enactment, the Convention shall have force of law in Mauritius*". The Convention which is given the force of law in Mauritius is the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", commonly referred to as the '**New York Convention**' ("the Convention").

55. Section 3A of the Act goes on to provide that the Convention shall apply to the recognition and enforcement of all arbitral awards made in any State other than Mauritius. It is to be noted that section 40 of the International Arbitration Act makes similar provisions but with regard to the recognition and enforcement of arbitral awards rendered pursuant to the Mauritian International Arbitration Act.

56. Section 4(1) of the Act further provides that the Supreme Court, as constituted under section 42 of the International Arbitration Act, is empowered to hear any application made pursuant to the Convention.

57. In the present application, the question which arises is whether the Court should decline to recognise and enforce the award in Mauritius on the grounds that:

    (i) ESL was treated unfairly by the arbitral tribunal in that it was "*unable to present its case*" in the course of the arbitral proceedings, in breach of Article V(1)(b) of the Convention.
    (ii) The recognition or enforcement of the award would be contrary to the public policy of Mauritius, in breach of Article V(2)(b) of the Convention.

58. The relevant parts of Article V of the Convention provide the following in that connection:

> "***Article V(1)(b)**:*
>
> *1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *(a) … … …*
>
> *(b) The party against whom the award is invoked … … … was otherwise **unable to present its case**;*
>
> ***Article V(2)(b)**:*
>
> *2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) … … …*
>
> *(b) The recognition or enforcement of the award **would be contrary to the public policy of that country**.*" [The emphasis is ours].

59. The inability of a party to present its case constitutes a distinct and separate defence to the enforcement of an award under Article V(1)(b), independently of the public policy defence afforded by Article V(2)(b).

60. Article V(1)(b) obviously has some interaction and overlap with Article V(2)(b) since the due process which is given protection under Article V(1)(b) may be based on facts which can also give rise to a defence of violation of due process amounting to a breach of public policy under Article V(2)(b). The applicant invokes both provisions in order to resist the enforcement of the award.

A. Exception under Article V(1)(b) of the Convention

61. Most authorities from various jurisdictions have held that Article V(1)(b) must be applied in the light of "*the Convention's general pro-enforcement objectives and, as a consequence, narrowly interpreted, with the burden of proof on the award-debtor*" p3496. [See **Gary B. Born in International Commercial Arbitration (2nd Edition) Vol III at para 26.05 – p 3496**]. It was similarly observed in **Generica Ltd v. Pharm. Basics, Inc., 1996 WL 535321, at *3 (N.D.Ill.), aff'd, 125 F.3d 1123 (7th Cir. 1997)**, that "*the exception arising from an inability to present one's case 'should be narrowly construed' in light of the Convention's goal of encouraging the timely and efficient enforcement of awards."*

62. "*It is clear that Article V(1)(b) only permits non-recognition of an award based on a serious or grave denial of procedural fairness. Minor inequalities or unfairness are not a basis for non-recognition of an award.*"[1]

[1] Page 3532 para [e] International Commercial Arbitration by Gary B. Born 2nd ed.

63. The Court in **Reynolds v Lomas, 2012 WL 4497358 at *3 (N.D. Cal.)** thus held that the award debtor bears "*substantial burden to demonstrate that he was denied due process and was unable to present his case*".[2]

64. "*This pro-enforcement approach to the application of Article V(1)(b) is consistent with the recognition of the parties' procedural autonomy under the Convention and national law (…), which makes Courts hesitant to interfere with the parties' agreed arbitral procedures.*"[3] [**Baravati v Josephtal, Lyon & Ross, 28 F.3d 704, 709 (7th Cir. 1994)**].

65. In the same vein, arbitral "*tribunals have considerable discretion in determining the appropriate procedures by which a party may respond to its counter-party's submissions or evidence*."[4] [See, e.g., **Indus. Risk Insurers**, **141 F. 3d at 1443**; **Essex Cement Co. v. Italmare, SpA**, **763 F. Supp.55, 58(S.D.N.Y. 1991)**; **Kanoria v. Guinness [2006] 2 All ER (Comm) 413, 30, 32 (English Ct. App.)**].

66. The relevant question, therefore, is not whether a party used (either well or at all) its opportunity to present its position, but rather whether it was afforded a reasonable opportunity to do so. It is only where the opportunity is unfairly denied by the tribunal that Article V(1)(b) can be invoked to support an application for non-recognition of an award. [*vide*, **Iran Aircraft Indus, 980 F.2d at 146; Schreter v. Gasmac Inc., (1992) 7 O.R.3d 608 (Ontario Super. Ct.)**][5].

67. The same principle was reiterated by a Japanese Court which laid down that Article V(1)(b) applies only "*in cases of severe violation of procedural process, such as where a party was not given opportunity to appear in arbitral proceedings*" [**Judgment of 28 July 2009, 1304 Hanrei Taimuzu 292 (Tokyo Chiho Saibansho) (2009)**][6].

[2] Note 714 p. 3532 International Commercial Arbitration
[3] Page 3497 para [iii] International Commercial Arbitration
[4] Page 3516 International Commercial Arbitration
[5] Page 3516 note 643 International Commercial Arbitration
[6] Page 3496 note 540 International Commercial Arbitration

68. "*The award debtor's conduct is also relevant for purposes of Article V(1)(b)*"[7] **[Iran Aircraft Indus v Avco Corp., 980 F.2d 141 (2d Circ 1992)**, and as was observed in the Canadian decision of **Corporación Transnacional de Inversiones SA de CV v. STET Int'l SpA, (1999) 45 O.R.3d 183, 65 (Ontario Super. Ct)**, it is incumbent on the parties to participate actively in the proceedings:

> "*Due process which pertains to public policy, implies as a fundamental principle, that the parties have an equal opportunity to be heard. This principle demands that each party must have been effectively offered such opportunity. But if, after having been duly notified, a party refuses to participate or remains inactive in the arbitration, it must be deemed to have deliberately forfeited the opportunity. Default in arbitration, after having been duly notified, has been invariably held not to bar enforcement of a Convention award. In other words, the counterpart of due process is an active participation in the arbitration*."[8]

69. As a result, parties can seldom challenge the enforcement of an award invoking that it has been unable to present its case under Article V(1)(b):

> "*Parties often unsuccessfully challenge an award on the basis of alleged procedural defects such as refusal to permit discovery, to allow witness testimony or cross-examination, or to accommodate attorney or witness schedules. These types of challenges are rarely successful because they do not generally constitute serious procedural defects that had a material effect on the proceedings, and because the procedural decision made by the arbitral tribunal is determined to be within the tribunal's discretion in managing the proceedings.*" [**Restatement (Third) U.S. Law of International Commercial Arbitration §4-13, comment e (Tentative Draft No. 2 2012)**].[9]

B. Public Policy exception under Article V(2)(b)

70. Article V(2)(b) provides that the non-recognition of an award may be allowed where giving effect to the arbitral award is "*contrary to the public policy of that country*", i.e., the country where recognition is sought which, for present purposes, would be the public policy of Mauritius as the enforcing state.[10]

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[7] Page 3534 International Commercial Arbitration notes 731 and 732

[8] Page 3534 note 732 International Commercial Arbitration

[9] Pages 3496-3497 International Commercial Arbitration

[10] Page 3658 International Commercial Arbitration

71. It is however generally accepted that a very limited notion of public policy should apply to recognition of foreign awards than that applied to domestic awards. In the words of the often-quoted judgment of the second circuit of the United States Court of Appeal:

> "…*the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice*." [**Parsons & Whittemore, 508 F.2d at 973-74.**]

72. The English High Court in **IPCO Nigeria Ltd v Nigerian Nat'l Petroleum Corp. [2005] EWHC 726, ¶13 (Comm) (English High Ct.)**[11] adopted a similar reasoning:

> "… *considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution … [the public policy exception] was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards.*"

73. In **Traxys Europe S.A v. Balaji Coke Industry Pvt Ltd., Federal Court of Australia, 23 March 2012, [2012] FCA 276**, it was held that "*it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement*"[12].

74. In **Hebei Import & Export Corp. v Polytek Engineering Co. Ltd., Court of Final Appeal, Hong Kong, 9 February 1999, [1999] 2 HKC 205**, an award that violated public policy was defined as one which is "*so fundamentally offensive to notions of justice (of the enforcing state) that, despite its being party to the Convention, it cannot reasonably be expected to overlook the objection*"[13].

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[11] See also paragraph 50. of this Judgment.

[12] UNCITRAL Secretariat Guide on the Convention of the Recognition and Enforcement of Foreign Arbitral Awards p. 241, para 6.

[13] UNCITRAL's Guide, p.241, para 6.

75. The Swiss Federal Tribunal also held that an award contravenes public policy "*if it disregards essential and widely recognized values which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order*" **[X S.p.A v Y S. r. L, Federal Tribunal, Switzerland, 8 March 2006, Arrêts du Tribunal Fédéral (2006) 132 III 389]**.[14]

76. In France, the Court of Appeal of Paris described international public policy as being "*the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character*" **[Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha, Court of Paris, France, 16 October 1997].[15]**

77. In Germany, it is considered that an award contravenes public policy when it violates a norm which affects the basis of German public and economic life or irreconcilably contradicts the German perception of justice. **[Oberlandesgericht [OLG] München, Germany, 34 Sch 019/05, 28 November 2005; Oberlandesgericht [OLG] Düsseldorf, Germany, VI Sch (Kart) 1/02, 21 July 2004; Hanseatisches Oberlandesgericht [OLG] Bremen, Germany, (2) Sch 04/99, 30 September 1999; Bundesgerichtshof [BGH] Germany, III ZR 269/88, 18 January 1990**.[16]

78. In the recent decision of the Judicial Committee of the Privy Council in **Betamax Ltd v State Trading Corporation [2021] UKPC 14**, it was highlighted that the court had a limited role with regard to an application for the setting aside of an international arbitration award on the ground of public policy pursuant to section 39(2)(b)(ii) of the International Arbitration Act.

[14] UNCITRAL's Guide, p. 244, para. 16.
[15] UNCITRAL's Guide, p.241, para. 8.
[16] UNCITRAL's Guide, p.241, para. 9.

79. The Judicial Committee had this to say:

> "*In relation to the issue of whether the award conflicts with public policy, the court's intervention proceeds on the court's application of public policy to the findings (whether of fact or law) made in the award. To read section 39(2)(b) more widely would be contrary to the clear provisions as to the finality of awards. The provision can be given full application by respecting the finality of the matters determined by the award and confining the ambit of the section to the public policy of the state in relation to the award. The question for the court under section 39(2)(b)(ii) is whether, on the findings of law and fact made in the award, there is any conflict between the award and public policy. … The effect of section 39(2)(b)(ii) is simply to reserve to the court this limited supervisory role which requires the court to respect the finality of the award.*"

The Court's determination

80. Having considered the arguments put forward by both sides, we agree with AMUSA that the issue is simply whether ESL has made out a persuasive case that there has been a breach of due process by the tribunal, engaging either article V(1)(b) or V(2)(b) of the New York Convention which would justify the setting aside of the provisional order for the recognition and enforcement of the arbitral award in Mauritius.

81. Since ESL claims that its inability to present its case was caused by fundamental defects in the arbitral procedure which also resulted in a breach of public policy, we must first consider ESL's complaints regarding the causes which allegedly placed it in the position where it was unable to present its case.

82. ESL's claim under that limb is that because the arbitral tribunal was rigid and unreasonable in its adherence to the 6-month timetable stipulated in the agreement, it could not present its case as AMUSA's claim was complex; ESL had no access to documents from ESML which had gone into bankruptcy; and the Confidentiality Orders imposed by the arbitral tribunal further made it impossible to have access to documents within the time frame imposed.

83. We must first observe that ESL had much more than 6 months to collect evidence in order to defend itself against AMUSA's arbitral claim since the request for arbitration dated back to the 9th August 2016, i.e., 14 months before the evidentiary hearings were held by the tribunal.

84. Secondly, ESL does not challenge that AMUSA submitted 23, 000 pages of documents in disclosure material, or that ESML's former CEO, Mr Vuppuluri, who was also ESL's named representative in the arbitration, was directly involved in the negotiation and performance of the agreement. In addition, ESL tellingly downplays Mr Vuppuluri's alleged mistaken belief that documents had been removed from his laptop although this serious oversight considerably undermines ESL's contention that it could not access documents due to the unrealistic and inappropriate timeline imposed by the tribunal.

85. ESL's complaint that it could not access documents within the "*compressed timetable*" is therefore clearly devoid of merit, especially since it is also conceded that ESL never even looked at the 23, 000 pages of documents disclosed by AMUSA during the arbitral proceedings. ESL rather chose, for reasons best known to itself and to its legal advisers, to indulge in speculative argumentation as to what the tribunal might not have allowed in spite of clear signs from the arbitral authority that it was ready to assist ESL in obtaining some of the documents it required. It was thus not disputed that ESL could have applied for arbitral subpoenas and that the tribunal had twice (on the 19 April 2017 and 16 May 2017) offered its assistance to ESL to obtain documents.

86. As for the argument that the documents could not be obtained within the 6-month time frame due to the complexity of the arbitral claim and the averment that the relevant clause was only meant to deal with delivery disputes, clause 12 of the agreement very clearly refers to "*all disputes, claims questions or disagreements arising under, out of, relating to or in connection with*" the agreement (see paragraph 36 earlier), so that, as correctly pointed out by AMUSA, not only was the clause drafted in very broad terms, but ESL must have been aware of the complexity of the contract since the start of negotiations being given the nature of its own activities and of the contract. ESL could not, therefore, short of bad faith, subsequently invoke the non-applicability of clause 12 in order to avoid compliance with the agreed time frame.

87. As regards the Confidentiality Order, it was clearly pointed out in **Firmode (International) Company Limited v. International Watch Group Inc. [2009 WL 3698137]**, that "*pricing and supplier information have been widely recognized as 'confidential business information' that … warrants a protective order limiting disclosure to counsel for the parties*".

88. This is especially so since "*Article 22(3)* (of the ICC Rules) *specifically empowers the arbitral tribunal to issue orders relating to confidentiality generally or the confidentiality of certain aspects of the case, such as trade secrets or other confidential information. It recognizes the arbitral tribunal's power to determine whether the arbitration or any aspects of the arbitration are confidential and to order that such confidentiality be respected."*[17]

89. In the light of the above, it could not have been improper for the tribunal to impose the Confidentiality Order regarding price-related information, especially since it had the discretion to determine its own procedure. ESL's arguments in that respect remained vague and unsubstantiated, especially since, as submitted by AMUSA, it never availed itself of the mechanism under clause 10 of the agreement to seek a declaration from the tribunal which could have allowed its lawyer to discuss any "*Highly Confidential*" material with anyone at ESL and it also did not identify any particular person with whom it wished to share any document under the Confidentiality Order.

90. There was also no response to AMUSA's argument (at paragraph 68 of its written submissions) that the 23, 000 pages of documents it disclosed were only marked as "*Confidential*", so that they could have been shared with anyone working at ESL, and to the fact that the redacted versions of its 28th July 2018 disclosures could also have been shared with everyone at ESL.

[17] [**The Secretariat's Guide to Arbitration by J. Fry, S. Greenberg and F. Mazza**].

91. We note in that respect that the terms of the Confidentiality Order (reproduced at paragraph 3.13 of ESL's written submissions) define "*Highly Confidential Disclosure Material*" as information which could be disclosed to "*experts or consultants*" in order to assist counsel, as well as to "*authors or prior recipient(s)*", and that such Highly Confidential Disclosure Material was limited to material which reflected pricing-related information with regard to AMUSA's purchase of iron ore from suppliers other than ESL and ESML.

92. The terms of the Confidentiality Order were therefore limited to a specific section of AMUSA's claim and clearly catered for the sharing of Highly Confidential material with experts and prior recipients. The fact that ESL never even took the trouble to access the 23, 000 pages of documents disclosed by AMUSA, or that Mr Vuppuluri chose not to consult his laptop for useful material because he mistakenly thought that documents had been deleted from it, in addition to the vague and unsubstantiated complaints made by ESL in respect of the Confidentiality Order, very much support the contention that ESL in effect had only itself to blame for not participating in the arbitral proceedings.

93. As we have already observed, ESL's conduct is a relevant consideration for an application under Article V(1)(b) and it is abundantly clear that it was given more than a reasonable opportunity to appear and be heard and to present its defence to the arbitral tribunal, but that it unreasonably failed to avail itself of that opportunity.[18]

94. For the reasons outlined, we have found nothing in this application which would justify the finding that there was such a material breach of due process or serious irregularity by the arbitral tribunal which would constitute a breach of the principle of due process as contemplated by Article V(1)(b) of the Convention.

95. We must therefore conclude that since the alleged irregularities were not established, ESL consciously chose not to play an active part in the arbitration, so that it cannot now prevent the enforcement and recognition of the arbitral award when it was never put in a position where it was unable to present its case.

[18] See paragraphs 67-70 of this Judgment.

96. ESL having failed to establish any serious breach of due process by the arbitral tribunal, which was its only argument in support of its objection on the ground of public policy, we consequently find that it was unable to show that there was any flagrant or specific breach of our "*most basic notions of morality and justice*"[19] by the way in which the arbitral proceedings were conducted.

97. In the light of the authorities referred to, we accordingly find that the applicant has failed to meet the requisite threshold for this Court to refuse recognition and enforcement of a foreign arbitral award on the ground of public policy pursuant to Article V(2)(b) of the Convention.

98. We therefore find no merit in ESL's application.

99. AMUSA having agreed to the prayer that the publication of all information relating to these proceedings be prohibited, pursuant to section 42(1C) of the International Arbitration Act 2008, we order accordingly.

100. Otherwise, and for all the reasons given in this Judgment, the application is set aside. With costs to be paid by the applicant, in accordance with the Supreme Court (International Arbitration Claims) Rules 2013.

A. Caunhye
Chief Justice

N. Devat
Judge

N. F. Oh San-Bellepeau
Judge

This 23 July 2021

[19] See paragraph 72 of this Judgment.

Judgment delivered by Hon N. F. Oh San-Bellepeau.

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