VSOFT HOLDINGS LLC v PEEPUL CAPITAL FUND II LLC & ANOR

2017 SCJ 445

Record No. 111525

THE SUPREME COURT OF MAURITIUS

In the matter of:-

VSOFT HOLDINGS LLC

Applicant

v

1. **Peepul Capital Fund II LLC**
2. **Millenium Strategic Group Ltd**

Respondents

AND

Record No. 113669

In the matter of:-

1. **Peepul Capital Fund II LLC**
2. **Millenium Strategic Group Ltd**

Applicants

v

VSOFT HOLDINGS LLC

Respondent

AND

Record No. 113767

In the matter of:-

VSOFT HOLDINGS LLC

Applicant

v

1. **Peepul Capital Fund II LLC**

2. Millenium Strategic Group Ltd

Respondents

JUDGMENT

The applicant ("VSoft") and the respondents ("the claimants") were parties to a dispute which was referred to arbitration in Mauritius.

In an award ("the Award") dated 8 January 2015, the Arbitrator determined the dispute in favour of the claimants. VSoft has been asked to pay to the claimants:

(1) A sum of USD 22,855,741 inclusive of interest as at 12 October 2014 and such sums that may become due as interest as per the Shareholders' Agreement until the date of final payment;
(2) A sum of USD 185,000 as damages; and
(3) A sum of USD 418,639 as costs.

On 25 March 2015, the Supreme Court of Mauritius issued a provisional order for the recognition and the enforcement of the Award.

The main case.

VSoft has lodged the present case ("the main case") pursuant to section 39 of the International Arbitration Act 2008 ("the Act") and Rules 5,6 and 15(7) of the Supreme Court (International Arbitration Claims) Rules 2013 ("the Rules"), praying for:-

(a) an order setting aside the arbitral Award;
(b) an order setting aside the order of the Supreme Court dated 25 March 2015 which granted the claimants the provisional recognition of the Award;
(c) such other order that the Court may deem fit and reasonable to make in the circumstances.

There are 2 more ancillary applications which have been made following the Award and the provisional order made by the Supreme Court.

1. The claimants' injunction application

On 17 August 2016, following an *ex-parte* application, the claimants obtained an interim injunction from the Judge in Chambers "*restraining and prohibiting VSoft from disposing of its assets and/or its shareholdings in one of its subsidiaries namely VSoft*

Technologies Pvt Ltd ("India")". This injunction is still in force pending the hearing and determination of the present case.

2. VSoft's injunction application and VSoft's confidentiality application

Following an application for interim relief by VSoft on 12 September 2016, the Judge in Chambers ordered "*the status quo be maintained by both parties and that "the claimants" should abstain from pursuing any action directly or indirectly on the basis that they are shareholders in VSoft Holdings LLC*". This order also remains in force pending the hearing and determination of the present case.

VSoft also prayed for an order, pursuant to section 42(IB) and (IC) of the Act and Rule 11(3) of the Rules, prohibiting the publication of all information relating to the present court proceedings, and asking that all proceedings should take place in private.

As a result of the above applications, it remains to be determined whether:

(1) the claimants' injunction should be discharged and indemnity costs be granted to VSoft as claimed by VSoft;
(2) VSoft should be granted an injunction prohibiting the claimants from pursuing any action on the basis that they are shareholders in VSoft and from obtaining any relief which may be inconsistent with the Award which the claimants are seeking to enforce;
(3) there should be an order under section 42(1B) and (1C) of the Act and Rule 11(3) of the Rules prohibiting the publication of all information relating to the present proceedings.

Since all the above cases have been heard together, we shall deliver a single judgment, a copy of which will be filed in each record.

Factual Background

VSoft Holdings LLC ("VSoft") is a company incorporated in Mauritius. It is the beneficial owner of the entire Equity Shares in VSoft Infosol Limited, a company incorporated under the Indian Companies Act 1956. VSoft Holdings is also the legal and beneficial owner of the entire common stock in VSoft corporation, a company set up under the laws of the State of Georgia, USA.

The claimants, Peepul Capital Fund II LLC, a company incorporated in Mauritius, and Millenium Strategic Group Ltd, a company incorporated in the British Virgin Islands, invested USD 7,999,992 in VSoft pursuant to an investment agreement dated 29 December 2006 ("the Investment Agreement").

Investment agreement

As per the investment agreement, the proceeds of the investment were to be used as follows:-

(i) USD 4,270,000 would be remitted, in accordance with a Stock Purchase Agreement executed by VSoft Corporation (USA), to and in favour of the existing shareholders.

(ii) The remaining proceeds of the investment would be used to grow the business of VSoft Holdings and its subsidiaries.

Exit Clause

Clause 12(d) of the Investment Agreement provided the claimants as "Investor" with an option to request the promoters of VSoft, Mr Veerajhanta and Mr Viswanathan, to facilitate an exit of the claimants' shareholding in VSoft Holdings. This was referred to as a "Promoter Assisted Exit" in Clause 12(d) ("*The Exit Clause"*):-

> *"(d) Promoter Assisted Exit*
>
> *Beginning on July 1st, 2010 the Investor have the option of requesting the promoter group to facilitate an exit of its shareholding within six months of the request date ("The Promoter Assisted Exit"). The Promoter Assisted Exit shall endeavor to provide the Investor a minimum return on investment equalling the original purchase price plus a 30% IRR as of that date*".

The claimants exercised that option on 28 September 2010. They requested an exit in accordance with Clause 12(d) of the Investment Agreement, within 6 months from the date of the request which was 28 September 2010, such that "*they get a minimum return on investment equalling the investment price plus a 30% IRR (Interim Date of Return) as of the date of exit*". According to the claimants, the amount which would have been payable under that exit clause stood at USD 32.5 million on 2 May 2012.

However, no payment was effected pursuant to exit Clause 12(d) of the Investment Agreement. Instead, following negotiations, the parties signed a Termination Agreement and a Shareholders' Agreement on 2 May 2012.

Termination of Investment agreement

By virtue of the Termination Agreement, the parties agreed to terminate the Investment Agreement by mutual consent with effect from 2 May 2012 (Clause C). On the same day, the parties signed the Shareholders' Agreement for the claimants to exit their investments in VSoft Holdings as per the terms set out therein. Clause D provided that "*the parties have agreed to the revised terms and conditions governing their rights and obligations as shareholders in the company until the complete exit of the Investor Group [*the claimants*]".*

The Shareholders' Agreement – section 3

The Shareholders' Agreement thus provided, in its section 3, that VSoft Holdings and the Promoters Mr Veerajhanta and Mr Vishwanathen

> "*shall procure the exit of the Investors (*claimants*) of their entire shareholding in the Company ("Investor Exit") for an aggregate sum of USD 17 million plus a return on the Second Tranche Minimum Payment and Third Tranche Minimum payment as per section 3(d) plus an X1RR @ 15% on the short fall amounts from the due date as detailed in section (3e)"*

It was agreed therefore that the USD 17 million would be paid as follows:-

Under section 3(a), VSoft had to effect a "*first tranche minimum payment"* of USD 10,000,000 (Ten million) prior to 31 August 2012.

Under section 3(b), VSoft had to effect a "*Second Tranche Minimum Payment*" of USD 5,000,000 (Five million), plus Deferred pay-outs if any, before 28 February 2013.

Under section 3(c) VSoft had to effect a "*Third Tranche Minimum Payment*" of USD 2,000,000 (Two million), plus Deferred Pay outs if any, before 31 August 2013.

Under section 3(d) VSoft agreed to pay to the claimants "*in addition to the "Second Tranche" and "Third Tranche" minimum payments amounts equivalent to X1RR@15% on the "Second Tranche" and "Third Tranche" minimum payments from 1st September 2012 until the date of actual receipt of the full amounts*".

Under section 3(e), VSoft agreed to pay any shortfall in the payment of any "*tranche*" along with 15% X1RR calculated up to the respective final payment date of any shortfall in payment in respect of any "*tranche*".

Shareholders' Agreement – section 5 – Exit steps

Section 5 of the Shareholders' Agreement made provisions for "Exit steps". It provided that the parties shall do all acts necessary to ensure the completion of the "*Investor Exit*" and shall ensure for that purpose to take the following steps for cancellation of the claimants' shares

(i) Upon the surrendering by claimants of all but one equity share ("*Surrender Shares*") to VSoft for cancellation, VSoft agreed to complete the cancellation of the Surrender shares within 3 days from the surrender date. Further to that, the claimants were to be issued with

  (i) One series A Compulsorily Convertible Cumulative Preference Share ("*Convertible share*") and such other rights and privileges attached to such shares as set out in Schedule V of the Shareholders' Agreement. That Schedule provided that, upon the occurrence of a default event in respect of the payment of either the First or Second Tranche, the convertible share would automatically stand converted into 1 series A Equity Share having 51% of the voting rights of VSoft.

  (ii) A demand promissory note for USD 10 million in favour of the claimants.

  (iii) An optionally redeemable preference share, redeemable at the option of VSoft, for a sum of USD 5 million plus the accrued X1RR@15% till the date of payment from 1 September 2012.

  (iv) An optionally Redeemable Preference Share, redeemable at the option of VSoft, for a sum of USD 2 million plus the accrued X1RR @ 5% as from 1 September 2012.

VSoft executed and subscribed a promissory note dated 3 May 2012 in favour of the claimants as security for repayments.

VSoft did not pay the first tranche of USD 10 million that was due prior to 31 August 2012 and also failed to pay the second tranche of USD 5 million which was due prior to 28 February 2013.

Mr Veeraghanta, the Chairman and Director of VSoft, had in a letter dated 14 November 2012 informed the first claimant that the "*company is in process of identifying new equity investors and debts bankers for repayment of agreed amount as per schedule".*

On 13 May 2013, the first claimant caused a "*mise en demeure"* to be served calling upon VSoft to effect payment of the money due under the Agreement.

In a letter dated 24 May 2013, Mr Pisupatic, Advocate, acting for and on behalf of VSoft, stated with reference to the payment due by VSoft under the Shareholders' Agreement that VSoft –

(i) has "*all the intentions to honour the terms of the Shareholders Agreement and will pay the amount due*" to the claimants;
(ii) is "*under the process of exploring avenues to raise capital from other investors, financial institutions, venture capital funds and other agencies to pay the outstanding amounts";*
(iii) shall endeavor to pay the amounts due to the claimants at the earliest possible time.

As no payment was effected by VSoft, on 14 June 2013 Peepul Capital Ltd caused a Statutory Demand to be served upon VSoft claiming payment of:-

(i) USD 9,090,909.09 as the sum due pursuant to the promissory note dated 3 May 2012 subscribed by VSoft in favour of the claimants to secure the First Tranche payment due and payable at latest on 31 August 2012.
(ii) USD 5 million being the "Second Tranche" payment due and payable to the claimants at latest on 28 February 2013.
(iii) Interest computed at 15% X1RR pursuant to clause 3(d) and clause 3(e) of the Shareholders' Agreement.

Since VSoft failed to comply with the Statutory Demand, the claimants lodged a winding up petition against VSoft before the Supreme Court of Mauritius on 12 August 2013.

The Arbitration

The winding up petition was withdrawn as the parties entered into an Arbitration Agreement to refer the disputed issues to an Arbitrator in Mauritius. By agreement of the parties, Mr Antoine Domingue, SC, was appointed as Arbitrator. By virtue of the Arbitration

Agreement it was agreed that the issues to be arbitrated upon by the Arbitrator would be the following:

> *"(i) Whether payment is due to the Claimants under either the Investment Agreement or the Exit Agreements or both.*
> *(ii) Whether following the defaults and continuing failings of VSoft Holdings LLC*
> *a. The Exit Agreements of May 2, 2012 are still valid and in force.*
> *b. Or whether the Investment Agreement has now revived.*
> *(iii) Whether payment is due under any of those agreements to the Claimants.*
> (iv) *Whether the right to payment under the Investment Agreement for the Claimants is an accrued right surviving the termination of the said agreement and remains due*."

The claimants were claiming:

a. the sum of USD 21.71M as at 31st May 2014 together with running interest under the Exit Agreements;
b. the sum of USD 185,000 as damages; and
c. costs.

VSoft did not press with its counterclaim which was dropped during the arbitration proceedings.

After evidence had been heard by the Arbitrator, and following short submissions made by Sir Hamid Moollan, QC, on behalf of the claimants, Counsel for VSoft, Mr R. Chetty, SC, started his submissions.

Counsel referred to the various agreements between the parties which followed upon the initial Investment Agreement. His first submission was that "*The Investment Agreement cannot be considered in abstraction in considering the exit process of the claimants as investors from VSoft".* Counsel referred extensively to the Agreements and the mechanism which has been prescribed, more particularly under Clauses 3 and 5 of the Shareholders' Agreement, with regard to the implementation of the Investors' exit.

Learned Counsel raised the question as to whether the procedures laid down in the Shareholders' Agreement, more particularly those with regard to the exit steps prescribed under Clause 5, have been followed by the claimants although it was agreed by VSoft that

the claimants would be entitled to exit the company and to obtain payments as laid down in Clause 3 of the Shareholders' Agreement. He also submitted in that connection that "*the Investment Agreement cannot be taken to be abstracted completely from the present matter*" and that any entitlement to payment under Clause 3 of the Shareholders' Agreement was conditional upon compliance with the requirements of Clause 5.

The Arbitrator, however, made certain observations with regard to the points raised by Counsel for VSoft in the course of his submissions and expressed the view that Counsel should seek further instructions from his client.

At that stage, following a break in the proceedings, Counsel for VSoft came back and stated, *inter alia,* that the claim was not in dispute but stated the following:-

> "*But the difficulty of the respondent is at this particular stage, where are we in the implementation process and to that extent, the respondent has no objection that you Mr Arbitrator, determines where we are within the process and determines the amount payable according to that particular process which is to be identified by you."*

The arbitration proceedings ended following a short submission by Sir Hamid Moollan, QC. He submitted that there was no doubt that the totality of the amount under the Shareholders' Agreement was still due and should be the object of a payment. He added that the only calculation is for the Arbitrator to calculate the interest at 15% X1RR and to include the claim of USD 185,000 as damages as quantified by both sides.

There were subsequent communications by e-mail and letters to the Arbitrator with regard to the quantum and computation of the amount which should be paid by VSoft. The claimants were claiming USD 22,855,741 on the basis of the Shareholders' Agreement whereas according to VSoft, it owed only a sum of USD 10,388,451.59 calculated on the basis of the terms set out in the Investment Agreement.

On 8 January 2015 the Arbitrator awarded to the claimants USD 22,855,741 inclusive of interest as at 12 October 2014. He also awarded USD 185,000 as damages and USD 418,639 as costs.

The application

VSoft has invoked several grounds for the setting aside of the Award pursuant to section 39 of the Act.

1. The Arbitrator has acted in breach of due process. The various failings which occurred during the arbitration amount to a serious breach of natural justice and/or due process by which the rights of the applicant have been substantially prejudiced. The Arbitrator failed in particular to approach matters with an open mind and was responsible for exerting improper pressure upon counsel for VSoft.
2. The Arbitrator has failed to decide live issues which had been submitted to him.
3. The Arbitrator failed to give proper reasons.
4. The award is in conflict with the public policy of Mauritius.

The law

It is apposite at this stage to refer to relevant parts of section 39 of the Act upon which the present application is based:-

> "***39. Exclusive recourse against award***
>
> *(1) Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section*.
>
> *(2) An arbitral award may be set aside by the Supreme Court only where –*
>
> *(a) the party making the application furnishes proof that –*
>
> *(i) […. …]*
>
> *(ii) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or*
>
> *(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration: or*
>
> *(iv) [… …]*
>
> *(b) the Court finds that –*
>
> *(i) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law;*
>
> *(ii) the award is in conflict with the public policy of Mauritius;*

> *(iii)* *[… …]*
>
> *(iv)* *a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced."*

Submissions

It is submitted in the first place by Counsel for VSoft that the Arbitrator was wrong to assume that VSoft had abandoned its argument that it was not liable under the Shareholders' Agreement but only under the Investment Agreement. It is however submitted that if there has been any such abandonment, it was due to the exercise of improper pressure by the Arbitrator. VSoft was therefore "*unable to present its case"* as contemplated by section 39(2)(a)(ii) of the Act.

Counsel submitted that the arbitration was conducted under pressure of time. The Arbitrator failed to approach matters with an open mind and to fairly listen to VSoft and consider its arguments. The Arbitrator embarked in a lengthy and one-sided intervention during the submissions of Counsel for VSoft, in the course of which the Arbitrator highlighted what he described as the difficulties with VSoft's position and applied pressure on VSoft's counsel to seek instructions as to the stand that should be adopted by VSoft.

Still according to counsel, the strong views expressed by the Arbitrator as to the merits of the submissions made by counsel for VSoft and his suggestion that VSoft's counsel should seek further instructions from his client exerted pressure on VSoft's Counsel to withdraw their argument. The purpose of the intervention must have been to apply pressure on VSoft to concede the bulk of its case, on which the Arbitrator had already reached a conclusion adverse to VSoft. Counsel argued that if the Arbitrator had considered the point raised was wrong, his duty was to decide it with an open mind on the basis of the evidence and not to pressurise VSoft's counsel to abandon it.

It was submitted that this was quite improper and constitutes a fundamental breach of due process. Learned counsel quoted in support of his argument the following extract from Mustill and Boyd, Commercial Arbitration (2nd edition, 1989) at p. 349 where it was stated by reference to the practice of stopping counsel: "*it should only be used when the Arbitrator's decision is in a party's favour. It should not be used as a way of cutting short a*

long-winded argument when the Arbitrator has decided against the party making the submission".

Counsel for VSoft dwelt lengthily on another aspect of breach of due process which, he submitted, arose out of the Arbitrator's failure to understand the submissions of counsel and which also constituted a breach of section 39(2)(a)(iii) of the Act. It was submitted that the Arbitrator misunderstood the submissions made on behalf of VSoft and, as a result, completely failed and omitted to resolve issues which called for his determination.

Although VSoft had accepted at the hearing that the claimants were entitled to payment, it had denied that claimants were entitled to their claim of USD 17 million together with interest at 15% X1RR from 1 September 2012 until date of final payment or was entitled to any claim by way of damages. The issues that had been set out in the Arbitration agreement raised the question as to whether the claimants were entitled to any sum under the Shareholders' Agreement or whether their entitlement would only arise by virtue of the Investment Agreement. VSoft position was that no sums were due to the claimants under the Shareholders' Agreement, one of the reasons being that the claimants had failed to comply with the requirements of Clause 5 of the Shareholders' Agreement to surrender their shares as a precondition of exit.

The Arbitrator therefore still had to determine, which he failed to do according to counsel, whether the claimants would be entitled to payments under Clause 3 of the Shareholders' Agreement unless and until they had surrendered their equity shares in compliance with Clause 5.

According to VSoft, the claimants had only sent their share certificates on 8 October 2012, which is much after the 31 August 2012, the date on which the payment of the "*First Tranche*" of the exit amount had fallen due. This also raised another issue about the "*quantification*" of the sum due under the Shareholders' Agreement. Even if it were to be assumed that the claimants were entitled to base their claim under the Shareholders' Agreement, the Arbitrator was still required to determine whether the claimants were complying with the "*implementation process*" and were entitled to payment as set out in the Shareholders' Agreement and which relates to an amount of USD 17 million and interest at the rate of 15% X1RR. Claimants further maintained in a letter dated 17 November 2014 that VSoft's calculation was wrong and that the calculation should be by reference to the Shareholders' Agreement. Counsel for VSoft submitted that this was an additional reason

for the Arbitrator to have realised that it was incumbent upon him to determine the question of which agreement - the Shareholders' Agreement or the Investment Agreement – governed the claimants' entitlement to payment.

Furthermore, when the Arbitrator received the late submissions regarding quantum, it should have been obvious to him that there was a wide disparity between the parties' positions. The Arbitrator ought to have sought clarification and invited submissions in that respect. Counsel therefore submitted that the Arbitrator's determination following the exchange of letters without inviting any submissions, is a further breach of due process.

Counsel for VSoft submitted that independently of the above the Arbitrator misconstrued the stand taken by counsel for VSoft at the arbitration proceedings. Although Counsel did state to the Arbitrator that "*the claim is not in dispute, but it is the determination of the quantification of that claim",* the Arbitrator was also called upon by Counsel to determine "*where we are within the process and … … the amount payable according to that particular process which is to be identified by you"*. It was submitted, therefore, that the Arbitrator wrongly proceeded on the assumption that "*liability has been eventually admitted"* and that the only issue was the calculation of the quantum.

Counsel added that not only was the Arbitrator revealing by his unduly long intervention that he had prejudged the issue, but the Arbitrator had also misunderstood another important aspect of VSoft's case regarding the obligations under the Investment Agreement: VSoft had no obligation to give a 30% return on the Investment in relation to a Promoter Assisted exit as was wrongly assumed by the Arbitrator.

The various failings relied upon by Counsel in support of his submissions for the setting aside of the Award may therefore be summed up as follows:

(1) The Arbitrator committed a serious breach of the rules of natural justice and due process by exerting pressure on VSoft to withdraw its argument.
(2) The Arbitrator failed to act fairly and to determine the issues with an open mind as a result of which VSoft "*was unable to present its case".*
(3) The Arbitrator failed to invite further submissions or seek further clarification despite the wide disparity between the parties' positions after they had submitted post hearing communications.

(4) The Arbitrator failed to decide the issues which had been submitted to him in accordance with the terms of reference of the arbitration agreement as well as the submissions made on behalf of both parties.

(5) The Arbitrator failed to deal with the issue as to which agreement governed the claimants' entitlement to payment and whether the claimants had a claim under the Shareholders' Agreement at all.

(6) The Arbitrator failed to deal with issues relating to the implementation process and failed to appreciate that there was an issue about "*quantification*" of any sum due by VSoft even if the Shareholders' Agreement were applicable.

(7) The Arbitrator failed to address issues of shareholding and the question of the surrender of shares in the exit process. This has left the door open for claimants' vexatious and oppressive conduct against VSoft in India as the claimants have been proceeding as if they are entitled to both the shares and the Exit monies.

Counsel submitted that the various failings which occurred during the arbitration proceedings amount to a serious breach of the rules of natural justice and/or due process. These failings would justify the setting aside of the Award pursuant to (1) section 39(2)(a)(ii) which provides that an arbitral Award may be set aside where it is established that a party "*is unable to present its case"*; (2) section 39(2)(a)(iii) which provides that the Award may be set aside where "*the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration*"; and (3) section 39(2)(b)(iv) which provides that the Award may be set aside where the Court finds that a "*breach of rules of natural justice occurred during the arbitral proceedings … … by which the rights of any party have been or will be substantially prejudiced".*

Counsel went on to argue that Vsoft has been substantially prejudiced as a result of all the above-mentioned failings. This has left the door open for the vexatious and oppressive conduct adopted by claimants against VSoft in India and which has been having serious consequences for VSoft and its business. Had there not been such unfairness on the part of the Arbitrator, there would not have been such an Award for costs against VSoft; a different conclusion would have been reached as regards the quantification of the claim; and the claimants would not have been entitled to interest at the rate of 15% X1RR since they failed to surrender their shares prior to the payment of the '*First Tranche*' in order to procure their exit.

Failure to give proper reasons

It was submitted that the Arbitrator's failure to address and determine issues that were referred to him consequently led to a failure on his part to motivate his Award and to give any reasons pertaining to the determination of all the live issues. Having failed to understand that there were still outstanding live issues, he failed to determine them.

Counsel argued that the Award is brief and is limited essentially to a summary of the background of the proceedings. The Arbitrator then stated that he need not concern himself any further with the first four issues which had been referred to him under the Arbitration Agreement and observed: "… … *As I see it, the only issue which falls to be determined is in relation with quantum ..."* As a result he proceeded to deal only with quantum, damages and costs. Counsel argued that even on the issue of quantum and costs, the Arbitrator failed to understand the submissions and failed to give any reason as to why and how he was disposing of the arguments raised on behalf of VSoft. When VSoft put forward a calculation based on the investment agreement, in line with its stand, the Arbitrator failed to understand this and wrongly assumed "*bad faith"* and "*an intent to mislead"* on the part of VSoft and eventually awarded costs against VSoft on that express basis.

It was thus submitted that the Award is insufficiently reasoned and constitutes a breach of natural justice and due process for which the Award must be set aside pursuant to section 39(2)(b)(iv) of the Act.

Breach of rules of natural justice

It would be appropriate at this juncture to examine the governing principles in respect of the application of the rules of natural justice and more particularly the approach adopted by the Courts with regard to the requirements imposed on an arbitrator by the rules of natural justice.

In **Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80**, it was the contention of the applicant before the High Court of Singapore that the Arbitrator had breached the rule of natural justice since there was no basis on which the Arbitrator could have concluded that Front Row had abandoned a ground which it had raised in its counterclaim. Although the Court concluded on the facts that there has been a breach of natural justice, the Court observed from the outset that "*the threshold which an applicant ... … has to surmount is high*".

The Court set out the test which should be applied in order to determine whether there has been such a breach of natural justice which would justify the setting aside of the arbitral Award:

> "20. *In order to establish that a breach of natural justice had occurred such that the Award may be set aside, Front Row had to satisfy the test set out by Choo Han Teck J in John Holland Pty Ltd v Toyo* Engineering *Corp (Japan) [2001] 1 SLR(R) 443 and affirmed by the Court of Appeal in Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007], 3 SLR(R) 86 ("Soh Beng Tee"). At [29] of Soh Beng Tee, the Court of Appeal said:*
>
> *It has been rightly held in John Holland Ptd Ltd v Toyo Engineering Corp (Japan) [2001]) 1 SLR (R) 443 ("John Holland"), at [18], that a party challenging an arbitration award as having contravened the rules of natural justice must establish: a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights …"*

It is also appropriate to refer to the principles laid down by the Hong Kong Court of Appeal in **China Property Development (Holdings) Ltd v Mandecly Limited** where the Court adopted a summary provided in **Pang Wai Hak v Hua Yunjian [2012] 4 HKLRD 113:**

> "*1) In determining whether to set aside an arbitral award on the ground that a party was unable to present his case under Article 34(2)(a)(ii) of the UNCITRAL Model Law, the Court is not concerned with the substantive merits of the dispute, or the correctness or otherwise of the award. This is because the Court is not hearing an appeal from the decision of the arbitral tribunal.*
>
> *2) To justify setting aside an arbitral award on this ground, the Court has to be satisfied that a party has been denied due process.*
>
> *3) For this purpose, the conduct complained of must be serious or even egregious.*
>
> *4) It is not possible to set out exhaustively all possible situations of denial of due process. Whether there has been a denial of due process must depend on the Court's evaluation of the relevant facts and circumstances of each individual case.*
>
> *5) One particular instance in which a party can justifiably complain that he was unable to present his case and thus denied due process is where the tribunal carried out its own investigation or inquiry on primary facts, or decided a case based on a wholly new point of law or fact without giving the parties a fair opportunity to consider and respond to such point.*
>
> *6) The Court has a discretion not to set aside an arbitral award even if a violation of Article 34(2)(a)(ii) of the Model Law has been established, but this discretion should only be exercised where the Court is satisfied that the outcome could not have been any different. Put in another way, the party*

seeking to set aside the arbitral award does not have to show that the outcome would have been different had there been no violation of that article; it suffices for that party to show that the outcome could or might have been different.

7) Ultimately, in considering whether a party was 'unable to present his case', the question is one of fairness in the arbitral process.

8) It is not necessary for a party seeking to rely upon the 'unable to present his case' limb in Article 34(2)(a)(ii) of the UNCITRAL Model Law to show any form of dishonesty or reprehensible conduct by the arbitral tribunal or of the other side.

9) The 'unable to present his case' ground is not limited to situations where a party is prevented from presenting legal arguments or deal with evidence on an issue going to the substantive merits of a case, but may extend to a situation where a party is prevented from presenting his case on a procedural issue which is taken by the arbitral tribunal against him out of the tribunal's own volition."

In **Soh Beng Tee & Co. Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86**, the Singapore Court of Appeal considered the prerequisites of a fair hearing and the natural justice issue in relation to arbitration proceedings. The Court had to determine whether there had been a breach of the rules of natural justice, contrary to section 48(1)(a)(vii) of the Singapore Arbitration Act, which bears close resemblance with the provisions contained in section 39(2)(b)(iv) of the Mauritius International Arbitration Act and which is also inspired from the UNCITRAL Model law.

The Court said that "*it is an indispensable, one might even say universal, requirement in every arbitration that the parties should have an opportunity to present their respective cases as well as to respond to the case against them. This is more commonly referred to in common law systems as due process or the Magna Carta of arbitration".* The Court referred to Article 18 of the UNCITRAL Model law which provides that "*the Arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting his case*".

Following a review of leading cases from various comparable jurisdictions, the Court laid down the following guiding principles with regard to the approach to be adopted by the Courts in reviewing an arbitral process:

"*59. These cases must be read in the context of the current judicial climate which dictates that courts should not without good reason interfere with the*

arbitral process, whether domestic or international. It is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention: … … As rightly observed in Weldon Plant Ltd v The Commission for the New Towns [2001] 1 All ER (Comm) 264 ("Weldon") at [22], "[a]n award should be read supportively … [and] given a reading which is likely to uphold it rather than to destroy it".

Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.

60. … … …

The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice. … … …

It is therefore plain that the Court's supervisory role is to be exercised with a light hand and that arbitrators' discretionary powers should be circumscribed only by the law and by the parties' agreement".

"62. This minimal-interference policy underscores two further considerations. The first is the need to support arbitration as a "useful and efficient alternative dispute resolution (ADR) process to settle commercial disputes … … Aggressive judicial intervention can only result in the prolonging of the arbitral process and encourage myriad unmeritorious challenges to arbitral award by dissatisfied parties. Left unchecked, an interventionist approach can lead to indeterminate challenges, cause indeterminate costs to be incurred and lead to indeterminate delay.

… … …

For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.

It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the process.

64. … …

(a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in The Vimeira ([46] supra), is fairness". … …

(b) Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a

result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.

(c) Indeed, the latter conception of fairness justifies a policy of minimal curial intervention, which has become common as a matter of international practice. To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.

(d) … … In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously."

Although section 39(2)(b)(iv) of the Act relating to breach of the rules of natural justice has been specifically included in our legislation, we endorse the above statements which generally reflect both the letter and spirit which govern the Mauritian International Arbitration Act. This is aptly reflected in the following concluding remarks by S. Moollan, QC, in an article published in MIAC 2010 The Mauritius International Arbitration Conference 2010. Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat (Papers from the joint conference of the Government of Mauritius, UNCITRAL, PCA, ICSID, ICCA and LCIA, 13 and 14 December 2010) at page 37:

"*In particular, the International Arbitration Act seeks to tailor the concepts so as to ensure that parties who come to arbitrate in Mauritius actually end up arbitrating and not litigating, with the Mauritian courts supporting, and not interfering with, arbitrations".*

With these principles in mind, and for the reasons that follow, we are of the view that VSoft has been unable to substantiate its complaint that its counsel had been subjected to

any pressure or had been unable to present its case as a result of which there has been a breach of due process or a breach of the rules of natural justice.

We have scrutinised the record of the proceedings in the light of the submissions made by Counsel for both parties. On the last day of the arbitration proceedings and prior to the observations made by the Arbitrator, Counsel for VSoft had offered substantial submissions setting out in a detailed and explicit manner the issues upon which the case for VSoft rested. It was then that the Arbitrator made certain observations and comments with regard to submissions made by Counsel for VSoft, more particularly in respect of the implementation process and the conditions for the application of the Shareholders' Agreement under sections 3 and 5. Since the representative of VSoft was in attendance, the Arbitrator invited Counsel to seek further instructions as to the stand to be adopted by VSoft. The reaction and statements made by Mr R. Chetty, Counsel for VSoft, at that juncture after he had taken instructions from his client and the exchanges which followed are self-explicit:

"*Mr R. Chetty: Yes Mr Arbitrator. Before we had a break, Mr the Arbitrator, you have made a statement and you have raised certain issues we have taken into account your observations. We are very grateful to you Mr Arbitrator for those observations and I was submitting as regards clauses 3 and 5 from the Shareholders Agreement, I also referred to the two annexures, annexure 4 & 5 which are annexed to the witness statement of the claimants. Our position Mr Arbitrator as regards the observations made by Sir Hamid and as regards the two documents and the shareholders agreement, is as follows and has always been as follows, that the respondent does not dispute the claim of the claimants and I personally I would like to dispel any impression if ever there was an impression, that the claim was not in dispute. The claim is not in dispute. I would also like to dispel the impression that I was not putting the case of the claimants to the respondent to the claimants, in as much as we are not disputing the claims of the claimants. My instructions have always been that we are not disputing the claim of the claimants. But the difficulty of the respondent is at this particular stage, where are we in the implementation process and to that extent, the respondent has no objection that you Mr Arbitrator, determines where we are within the process and determines the amount payable according to that particular process which is to be identified by you. I don't know, what is the response on behalf of the claimants.*

Arbitrator: We have to hear the reply of Sir Hamid and see so that we are concerned of his various positions.

Mr R. Chetty: As I say the claim is not in dispute but it is the determination of the quantification of that claims, and we would like to seek your assistance, in the present matter. This is our position.

Sir H. Moollan: Is my learned friend taking a stand on the claim of the respondent, the counter claim which is being called.

Mr R. Chetty: Well at this stage, I have the instruction that we are not insisting on the counter claim."

This marked the end of any statement or submission made by Counsel for VSoft and the end of the arbitration proceedings as well, following some short closing remarks by Counsel for the claimants.

Any suggestion of coercion or pressure on Counsel for VSoft with regard to the stand which he took following the observations of the Arbitrator, has remained totally unfounded. The record shows that Counsel was given full latitude with regard to the conduct of VSoft's case. There is not the slightest indication that there was at any stage any form of pressure whatsoever exerted upon him by the Arbitrator.

The Arbitrator, after Counsel for VSoft had presented concisely his arguments that the claim should be calculated in accordance with the Investment Agreement and not the Shareholders' Agreement, raised in detail the issues which should according to him be addressed in that respect and with which VSoft stood confronted. The Arbitrator then invited Counsel for VSoft to '*seek instructions*' from his client in the light of his observations.

It is apt to refer to what the Court said in **Soh Beng Tee (*Supra*)** at para. 69 with regard to fairness in the conduct of arbitration proceedings by an Arbitrator:

"*The rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties*".

Counsel for VSoft was at all times free to take whatever stand he might have considered fit to take on behalf of his client. There is not the slightest indication of any pressure exerted by the Arbitrator which led to counsel for VSoft stating that the respondent was not disputing the claim of the claimants.

There was nothing indeed which prevented counsel for VSoft from pressing ahead with his arguments or from taking any different position in opposition to the Arbitrator's comments. VSoft has failed to establish that its counsel was subjected to any pressure in the conduct of its case or that he was "*otherwise unable to present his case*".

We shall now turn to the next ground which relate to the Arbitrator's alleged misconstruction of the stand taken by counsel for VSoft and his eventual failure to address the issues raised by counsel. It has been submitted that the Arbitrator failed to understand and determine the points raised by VSoft with regard to the applicability and implementation of the Shareholders' Agreement and the issues referred to the Arbitrator under the Arbitration Agreement.

Again the sequence of events, as is reflected in the relevant extracts of the arbitration proceedings and when situated in context, defeats the arguments raised in that respect on behalf of VSoft.

As has already been set out earlier in this judgment, the claimants had on 28 September 2010 exercised their option to exit the company by virtue of an exit clause in the Investment Agreement. Since no payment had been effected by 2 May 2012, the parties by common accord terminated the Investment Agreement and entered into a new agreement, the Shareholders' Agreement, with the express purpose of claimants exiting their investments in VSoft. Clause 3 provided for the payment of an aggregate sum of USD 17 million in 3 '*tranches'* starting on 31 August 2012 and the last '*tranche'* to be paid by 31 August 2013. It was also agreed that VSoft would pay interest at 15% X1RR for any shortfall in payment as scheduled.

Clause 5 of the Shareholders' Agreement made provision for the parties to ensure the completion of the claimants' exit and for the cancellation of the claimants' shares.

In compliance with the Shareholders' Agreement, on 3 May 2012 VSoft subscribed a promissory note in the sum of USD 9,090,909.09 as security for the repayments which had to be made by VSoft to the claimants under the Shareholders' Agreement.

The claimants surrendered their share certificates on 8 October 2012. No payment was effected as undertaken by VSoft under the Shareholders' Agreement.

In two communications which were subsequently sent to the claimants, in response to the claims for payment of the sums due under the Shareholders' Agreement, VSoft plainly asserted that it was looking for funds "*for repayment of agreed amount as per schedule"* and that it has "*all the intentions to honour the terms of the Shareholder's Agreement and would pay the amount due".*

VSoft never effected any payment.

In the course of the Arbitration proceedings, VSoft invoked the failure of the claimants' to comply with Clause 5 of the Shareholders' Agreement with regard to the surrender of the share certificates to argue that the Shareholders' Agreement would not be applicable. It was in this context, in the course of the submissions of Counsel for VSoft that the Arbitrator raised the issues as to the applicability of the Shareholders' Agreement which finally led to the stand taken by counsel for VSoft, stating, *inter alia,* with reference to the Arbitrator's observations:

> "*Our position, Mr Arbitrator as regards the observations made by Sir Hamid and as regards the two documents and the Shareholders' Agreement, is as follows and has always been as follows, that the respondent does not dispute the claim of the claimants … The claim is not in dispute*".

Counsel also added: "*As I say the claim is not in dispute but it is the determination of the quantification of that claims, and we would like to seek your assistance, in the present matter. This is our position*"

Counsel had prior to that statement evoked '*a difficulty'*: since the parties were at that particular stage in the implementation process "*the respondent has no objection that you, Mr Arbitrator, determines where we are within the process and determines the amount payable according to that particular process".*

The proceedings came to an end leaving absolutely no doubt that the stand of Counsel for VSoft was that there was no longer any dispute under the Arbitration Agreement, the only outstanding issue being the determination of the "*quantum".* This was left to be determined by the Arbitrator who was asked to determine the amount payable in accordance with the exit process. This is further confirmed by the following closing statement made by counsel for the claimants to which there was not the least opposition, objection or reaction on the part of counsel for VSoft.

"Sir H Moollan: Mr Arbitrator, there is little if anything for me to say in respect of this claim. I do not have to prove what was matters during the course of the evidence seem to be heavily contested and now my learned friend has dropped all those matters and we are left only with something which we cannot really encompass, except by saying is my learned friend leaving the issue of quantum to the Arbitrator, or to what issue. As you said earlier, and quite rightly, the Shareholders' Agreement is very clear, it is the company and the group shall procure the exit, so that this is a positive obligation and not the endeavor or may, etc. and in fact probably is a justification, while in an earlier agreement was to cancel and terminate at this one which is positive and clearly say so. And it gives this obligation and we know now, [there] is no point in historical aspect, but as of today there is no doubt, that the totality of the amount is due and should be the object of payment. The respondent has said two things, first of all it is not in a position to pay the amount yet, and secondly it is not in a position to state when he will be able to pay, it is as simple as that. It seems to me as if the whole exercise, is, what can we do, not to pay without incurring any problem, but I think we have reached a clear stop … But that has come to a clear stop. Today in October 2014, they cannot pay the amount which is admittedly due and [they] cannot offer any alternative of the totality of payment. I submit that the alternative of set-off is dropped, I will humbly submit what is left for the arbitrator, the quantum is clear, there is no ambiguity on quantum you are asking it is the sum due … …

Arbitrator: 185,000. This is to be found in the legal as damages. … It seems on both sides they have quantified it at 185,000.

Sir H Moollan: There is the same sum on both sides. Therefore the only calculation which is left to the arbitration is to do a fair, for the only calculation which will be left to the arbitration is the interest to be computed at 15% XYRR, don't ask me to do it …"

The above statement was not in any way challenged or countered by VSoft, quite understandingly in view of the stand already taken by counsel for VSoft with regard to the claimants' claim under the Shareholders' Agreement as to which there was no longer any dispute.

The record also shows that the representative of VSoft, in the course of his cross-examination, conceded that the Investment Agreement had been terminated and that VSoft had obliged itself to pay the claimants under the Shareholders' Agreement as may be gathered from the following extract of his cross-examination:

"Q: You seem, you don't know or you don't care basically you have no intention to pay any …, do you remember that there was something which are called a termination agreement?

A: Yes.

Q: What was it?

A: It was an agreement that was signed on 3 May to terminate the Investment Agreement.

Q: Why you speak of the Investment Agreement today, please look at the Arbitrator and explain to the Arbitrator?

A: Because I believe that was the first foundation for our relationship?

Q: <u>But it has been terminated, it has been terminated hasn't it?</u>

A: <u>Yes.</u>

Q: And why do you raise now, why don't you speak of the shareholders agreement?

A: That's the money I original owed.

Q: That's the amount you were bound to pay, isn't it?

A: We tried to work hard to pay …

Q: <u>You oblige yourself to pay, was it not</u>?

A: Work hard to pay under the shareholders agreement?

Q: Under the Shareholders Agreement. Do you read your English is different from anybody else's English?

A: <u>Under the Shareholders' Agreement</u>.

Q: You oblige to pay under the shareholders' agreement, and it was the original agreement, Invest Agreement was terminated so that you would enter into the agreement which is the Shareholders Agreement. Even under that obligation have you fulfilled it?

*A: Not so far." **(Underlining Ours)***

It is abundantly plain therefore from an examination of the record that there was no outstanding issue which the Arbitrator had failed to determine as submitted by counsel for VSoft. Following the close of the arbitration proceedings, it was only left to the Arbitrator to work out the '*quantification'* or quantum of the claim. Although the parties sent further communications with regard to the computation of the claims, the Arbitrator had never asked for this and was already in presence of all the evidence and submissions for him to determine the claims payable by VSoft. There was no need for the Arbitrator to invite any

further submissions or seek any further clarification on that issue as submitted by counsel for VSoft.

For all the above reasons, we conclude that VSoft has been unable to establish that the Award should be set aside for any alleged breach of due process or failure on the part of the Arbitrator to address and determine any live issue upon which he still needed to arbitrate. There has accordingly been no breach of section 39(2)(a)(iii) of the Act for any of the reasons invoked by VSoft which could justify the setting aside of the Award.

Following the unequivocal stand of counsel for VSoft, the Arbitrator proceeded to decide the only outstanding live issue relating to the claim payable by VSoft on the basis of the evidence before him as is made explicit in the following passages from his Award:

> "*16. In the Respondent's annexed workings, in its table, it has been asserted by it that: (a) the principal amount due by it is 8 million USD; and (b) the total interest payable is 2,388,451.59 USD, so that in the Respondent's view the total amount due by it amounts to 10,388,451.59 USD, on the basis of interest calculations worked out by it by applying LIBOR as the reference rate for the corresponding month, plus 2%, as from December 2006 to September 2014, 'on compounding basis'. I have not been referred to the relevant parts of the agreements which support this proposition.*
>
> *17. By his written communication dated 17 November 2014 Mr Bucktowonsing has quite rightly objected to the Respondent's computation on the ground that it is wrong and erroneous. He has quite rightly pointed out to me that the provisions of section 3 of the Shareholders' Agreement dated 2 May 2012 ("Effective Date") which in its interpretation section contains a definition of 'XIRR' and its calculation in accordance with a defined formula. Mr Bucktowonsing has further again quite rightly directed my attention to "Section 3, EXIT OBLIGATION".*
>
> *18. It is indisputable that the Claimants are right in their assertions and that the provisions of section 3(a) to (d) of the Shareholders' Agreement should apply to the hilt. The agreed 'Investor Exit' was for an aggregate sum of 17 million USD, plus a return, as expressly provided for, with three specific tranches and specified timelines".*

It cannot be said therefore that there has been any failure on the part of the Arbitrator to decide any critical issue which had been referred to him. The exit process would not absolve VSoft from the payments which were long overdue by VSoft and which VSoft had indisputably bound itself to pay to the claimants under the Shareholders' Agreement and in respect of which precisely the Award was made.

As a result, any alleged complaint that the Arbitrator has failed to give proper reasons and thereby committed a breach of natural justice would also be untenable. It follows that since there was no need to determine all the issues which were no longer in dispute as a result of the stand adopted by VSoft, the need to give reasons in connection with the determination of these issues would not arise. Furthermore, as is evident from the Award and in particular the above extracts which dealt with the determination of the quantum of the claim, the Arbitrator's decision to award a sum of USD 22,855,741 as well as the damages and costs have been clearly reasoned out by the application of the relevant provisions of the Shareholders' agreement.

We accordingly find no merit in the submission that the Award should be set aside on account of the Arbitrator's failure to provide proper reasons in breach of section 39(2)(b)(iv) of the Act.

Public Policy

It was also submitted that the Award is in conflict with the public policy of Mauritius so that it would be in breach of section 39(2)(b) (ii) of the Act. It is VSoft's case that if the Award is to be construed that the claimants are entitled to both the shares and the Exit monies, as the claimants are now contending by their actions both in India and in Mauritius, the Award would be plainly contrary to public policy.

It was submitted that the Court should not condone an Award which is granting the claimants as Shareholders considerable amounts by way of exit monies in return for exiting the company, whilst leaving it open to them to continue to exert purported rights as shareholders. To allow the claimants to have both the monies and the shares would be contrary to public policy, for it would mean that despite the making of a large payment by VSoft to the claimants, purportedly so as to acquire their shares, the claimants would continue to remain shareholders.

It is also submitted that the Award contravenes the public policy in view of the exorbitant rate of interest, i.e 15% X1RR which the claimants themselves describe as penal rate of interest after they had from the outset claimed only what they termed as 'enhanced interest'. Counsel referred to Article 1152 of the Civil Code and the "*Revue Critique de droit international privé 2013 p. 898, Note – Ci. Ire, 7 nov. 2012,* in support of his argument that an award which orders the payment of penal interest rate is contrary to public policy.

The issues presently raised by VSoft in relation to public policy were neither raised nor debated in the course of the arbitration proceedings. The fact that reference was made to a 'penal rate' by the claimants at a much later stage, or that the interest was referred to as being 'exhorbitant' or 'enhanced', does not make any difference inasmuch as the determining question is whether the 15% X1RR rate would be contrary to public policy. We need first to point out that neither Article 1152 of the Civil Code nor for that purpose any other law, prohibit the imposition of any such rate, which had been freely agreed by VSoft in a binding agreement. In fact Article 1152 only provides for judicial intervention with regard to a 'Clause Pénale' where such a clause is "manifestly excessive". There is no case which has been made out by VSoft to establish that the imposition of such a rate is manifestly excessive or should be struck down as being illegal for any other reason.

As regards the first ground raised by VSoft, which is that the claimants cannot be entitled to both the exit monies and continue to remain shareholders, it is to be noted that the payment of exit monies and the transfer of shares have to be carried out in accordance with the provisions of the Shareholders' Agreement by which both parties are bound. The mechanism prescribed in the Shareholders' Agreement not only binds VSoft to procure the exit of the claimants by effecting payment of all sums due under the Shareholders' Agreement but also creates obligations on both VSoft and the claimants to carry out all the acts necessary to ensure the completion of the claimants' exit as shareholders. Following the surrender of the shares as provided for under Clause 5, it was incumbent upon VSoft to complete the cancellation of the surrender shares within 3 business days. It was further incumbent upon VSoft, upon cancellation of shares to do the needful for issuing to the investor:

(1) One Series A Compulsorily convertible Cumulative Preference Share having a face value of USD 1.
(2) A demand promissory note executed by VSoft in favour of the claimants for an amount of USD 10 Million.
(3) One Optionally Redeemable Cumulative Preference Share redeemable at the option of VSoft for a sum of USD 5,000,000 plus interest from 1 September 2012 until the date of payment.
(4) One Optionally Redeemable Cumulative Preference Share redeemable at the option of the company for a sum of USD 2,000,000 plus interest from 1 September 2012 until the date of payment.

The express provisions contained in the Shareholders' Agreement would therefore bind the parties both as regards payments to the claimants for their exit and the cancellation of their shares as well as the issue of preference shares as set out in Clause 5 of the Shareholders' Agreement.

The failure in the first place by VSoft to effect payments in accordance with the Shareholders' Agreement has stultified the whole process and the Arbitrator cannot be faulted in the circumstances for having made an Award for the payment of the outstanding amounts which had remained long overdue and demandable by virtue of the Shareholders' Agreement as was conceded by VSoft itself.

In view of the fact that VSoft had not so far effected any payment in accordance with the Shareholders' Agreement and that both parties are eventually bound to follow the process laid down in Claude 5, we consider that there is no substance in the complaint of VSoft that the Award is contrary to public policy for any of the reasons advanced by VSoft. VSoft has thus been unable to prove any breach of section 39(2)(b)(ii) of the Act which would entitle it to obtain an order for the setting aside of the Award.

VSoft has accordingly failed to establish any of the grounds invoked in its application which would justify the setting aside of the arbitral Award under section 39 of the Act. VSoft's application to set aside the Award is accordingly dismissed with costs.

We shall now turn to the 2 ancillary applications now pending between the parties. VSoft's confidentiality application can be easily disposed of. The need for any order prohibiting the publication of all information relating to the present court proceedings, which have been held in public so far, would no longer arise. This application must accordingly be set aside.

As regards both claimants' and VSoft's injunction applications, in view of (1) our decision to dismiss VSoft's application to set aside the arbitral Award, (2) the legitimate apprehensions which have been expressed by both parties in support of their applications pending the hearing and determination of the 'main case', and (3) the claimants' entitlement to proceed with the enforcement of the Award, but which would be subject to the mechanism for the cancellation of shares prescribed under the Shareholders' Agreement, we consider that there are compelling reasons in the circumstances to make an order extending both interim injunctions until the final enforcement of the Award. This is eminently required in

order to safeguard the interests of the parties pending the payments which have to be made by the claimants in accordance with the Award and the consequential transfer in respect of shareholding. In either case, any resulting prejudice which may be caused by the granting of the order would be outweighed by the need to afford protection to the other, in view of the outcome in the main case, and during the current process of the implementation and enforcement of the Award.

For all the above reasons we:

(1) dismiss the application of VSoft to set aside the arbitral Award and the order of the Supreme Court for the provisional recognition of the Award.
(2) grant the claimants an interlocutory injunction restraining and prohibiting VSoft from disposing of its assets and/or its shareholdings in one of its subsidiaries namely VSoft Technologies Pvt Ltd ('India') pending the enforcement of the arbitral Award.
(3) grant VSoft an interlocutory injunction restraining and prohibiting the claimants from pursuing any action directly or indirectly on the basis that they are shareholders in VSoft Holdings LLC pending the enforcement of the arbitral Award.
(4) set aside the application of VSoft for an order, pursuant to section 42(1B) and (IC) of the International Arbitration Act 2008, prohibiting the publication of all information relating to the present court proceedings.

In view of the outcome in the 2 injunction applications, we shall in the circumstances make no order as to costs.

As regards the main case SCR 111525, we order VSoft to pay costs to the claimants. Since we consider that it is not practicable to make a summary assessment of the costs, we order that the costs be determined by detailed assessment in accordance with Rule 24 of the Rules.

A. Caunhye
Ag. Senior Puisne Judge

N. Devat
Judge

D. Chan Kan Cheong
Judge

13 December 2017

Judgment delivered by Hon. A. Caunhye, Ag. Senior Puisne Judge

For Applicant in the 1st and 3rd case	**:**	**Mr J. Gujadhur, SA** **Mr. S. Moollan, QC, together with** **Mr M. Gujadhur, of Counsel**
For Applicants in the 2nd case	**:**	**Mr R. Bucktowonsing, SA** **Sir H. Moollan, QC, together with** **Mr I. Rajahbalee, SC** **Mr Y. Rajahbalee, of Counsel, and** **Mr M. Namdarkhan, of Counsel**
For Respondents in the 1st and 3rd case	**:**	**Mr R. Bucktowonsing, SA** **Sir H. Moollan, QC, together with** **Mr I. Rajahbalee, SC** **Mr Y. Rajahbalee, of Counsel, and** **Mr M. Namdarkhan, of Counsel**
For Respondent in the 2nd case	**:**	**Mr J. Gujadhur, SA** **Mr. S. Moollan, QC, together with** **Mr M. Gujadhur, of Counsel**