TRIKONA ADVISERS LIMITED v SACHSENFONDS ASSET MANAGEMENT GMBH

2011 SCJ 440A

SCR 1039

IN THE SUPREME COURT OF MAURITIUS
(APPELLATE JURISDICTION)

In the matter of:

TRIKONA ADVISERS LIMITED

Appellant

V

SACHSENFONDS ASSET MANAGEMENT GMBH

Respondent

I.P.O:

TSF ADVISERS MAURITIUS LIMITED

Co-Respondent

AND

In Referral under Section 42 of the International Arbitration Act

CO77/10

TSF ADVISERS MAURITIUS LIMITED

(The "Company")

And

SACHSENFONDS ASSET MANAGEMENT GMBH

Petitioner

And

TRIKONA ADVISERS LIMITED

Intervening Party

JUDGMENT

Sachsenfonds Asset Management Company GMBH (SAMC) based in Germany, set up two investment funds, Immobilien 1 and Immobilien 2, for investing in real property in India. It also linked up with Trikona Advisers Ltd (TAL), a company based in Cayman Islands to set up a company based in Mauritius, TSF Advisers Mauritius Ltd (TSF). TAL then sold half of its shares in TSF to SAMC. On 29 April 2008, TAL and SAMC entered into a Shareholders Agreement which includes a Dispute Resolution Clause [Clause 15]. TSF also entered into Port Folio Management Agreements (PMA) with Immobilien 1 and Immobilien 2 and into Outsourcing Agreements (OA) with TAL.

Following differences between SAMC and TAL, in September 2009, TSF terminated the PMAs and the OAs allegedly through the unlawful intervention of the nominees of SAMC on the board of TSF. Thereupon, SAMC called a Board meeting for a voluntary winding up of the company on the ground of alleged insolvency. The draft financial statements of TSF, according to TAL omitted to make mention of some receivables owed to it by Immoblien I and Immobilien II funds which, according to it, constitute assets and which should have appeared therein. The stand of TAL is to the effect that SAMC's clear intention is to liquidate TSF so that Immobien I and Immobilien II would avoid their obligations towards TSF. TAL went to the Judge of the Commercial Division to seek injunctive relief to prevent the Board meeting which was scheduled for 15 January 2010 from taking place. Following this, one of the 3 Mauritian Directors resigned from the Board of TSF.

On 19 March 2010, Immobilien I and Immobilien II started proceedings against TAL, TSF and a number of persons claiming EUR 127,701,916.79 together with interest, following what they alleged as the large amount of losses, damages and immense prejudice suffered by them arising out of a series of omissions, breaches, defaults, misrepresentations, deceit, concealment, "*manoeuvres dolosives,*" etc.

On 2 April 2010, SAMC applied by way of petition before the Bankruptcy Division of the Supreme Court for the winding up of the TSF (Co. 77/10) and the appointment of a provisional liquidator (Co. 76/10).

On 12 May 2010, both cases were called before the Bankruptcy Division and TAL applied to intervene. The motion allowing TAL to intervene in both cases was granted on 16 June 2010.

Following an amendment to the petition and the exchange of affidavits, the winding up case was fixed for hearing on 26 November 2010.

On 26 November 2010, the Court did not proceed with a hearing of the petition but instead made an order, pursuant to section 104(2) of the Insolvency Act 2009, directing the Director of Insolvency to prepare a report by 15 December 2010 on whether it is appropriate in the circumstances for the company to be placed in administration. Learned senior counsel for TAL moved for leave to appeal against that decision. The Learned Judge refused leave. On 10 December 2010, Special Leave was granted by the Chief Justice. The main contention of TAL was that no report by the Director of Insolvency could have been ordered in the absence of a request by any party and in view of the fact that the shareholders' agreement provided for the resolution of any dispute by way of arbitration in Singapore.

On 15 December 2010, the Director of Insolvency filed his report. The Court adjourned both cases to 12 January 2011, after counsel for TAL informed the court of TAL's moves to appeal against the interlocutory order made by the Bankruptcy Court on 26 November 2010.

At the same time, in January 2011, the learned Judge of the Bankruptcy Court took the view that the facts and circumstances of the cases called for a determination of this Court, pursuant to section 5 of the International Arbitration Act 2008 (the Act). This Court is, to all intents and purposes, a special jurisdiction comprising 3 Judges of the Supreme Court established under section 42 of the Act. He referred the matter to us, as a result.

At the hearing which started with submissions on the appeal against the interlocutory ruling and moved on to the reference to this Court by the learned Judge, learned counsel for TAL dropped his appeal. Accordingly, what subsists for our consideration and determination is the referral and the effect of the referral on the cases pending before the Mauritian Court.

TSF, be it noted, is the holder of a Category 1 Global Business Licence under Mauritian law. TAL and SAMC are the sole shareholders of TSF and each holds 50% of the share capital of that company.

Before we move on to the respective arguments of the parties, it would help to examine what section 5 of the Act provides in terms of substance and what section 42 of the Act provides in terms of the jurisdiction of this Court.

SECTION 5 OF THE ACT

The *res materiae* of our jurisdiction is provided for by section 5 of the Act. It reads (underlining ours):

> "(1) *Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.*
>
> *(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.*
>
> *(3) Where the Supreme Court finds that the agreement is null and void, inoperative or incapable of being performed, it shall transfer the matter back to the Court which made the transfer."*
>
> *(4) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and one or more awards may be made, while the issue is pending before any Court."*

SECTION 42 OF THE ACT

The section which confers jurisdiction on the present Court and decides on its composition is section 42 of the Act. The section provides:

> *"For the purposes of any application or transfer to the Supreme Court under this Act or any matter arising out of an arbitration subject to this Act before the Supreme Court, the Court shall be constituted by a panel of 3 Judges.*

ORDER OF SUBMISSIONS

We first heard the substantive issues on the effect of the reference to this Court. It is after these were completed on 23 March 2011 that we saw that one fundamental issue had gone a-begging: the very applicability of the Act to the facts of the case. Parties addressed us on that aspect on 1 April 2011. Our judgment will follow the order of submissions: i.e. the substantive issues first before the issue of the applicability of the Act.

THE CONTENTION OF THE TWO PARTIES

It is the case of Mr Basset, S.C., learned counsel for TAL, that the referral to the present specialized jurisdiction of three judges by the learned Judge of the Bankruptcy Division who was hearing the two cases (the winding up petition and the application for the appointment of a provisional liquidator) puts automatically on hold those two cases in favour of the arbitration proceedings which incidentally are taking place in Singapore under the Singapore International Arbitration Centre. It is worthy of note that SAMC has positively submitted to the jurisdiction of the foreign arbitrator and filed its statement of defence to the claim of TAL, which statement of defence includes a counter claim by SAMC against TAL. We have been informed that parties have willingly embarked upon the arbitration proceedings which are ongoing.

On the other hand, it is the case of Sir Hamid Moolan, Q.C., learned counsel for SAMC, that, while the proceedings in Singapore should proceed unimpeded, so should both cases before the Banruptcy Division of the Commercial Court.

PART 1

Mr Basset, S.C., was of a different view. His submissions are that: (1) the disputes which underpin the winding up petition are the very disputes that have to be determined by arbitration in Singapore; (2) this Court by referring in turn the cases pending before the Bankruptcy Court to the arbitrator in Singapore until their disposal will only give effect to the will of the legislator under section 5 (4) of the Act.

His view is that if our Courts were to insist on assuming local jurisdiction relying on the concept of an immutable *ordre public* as set out in articles 6 and 2060 of the Civil Code then instead of assisting arbitration as a means of settling disputes in international commercial transactions, our Courts will end up by frustrating the sovereign will of Parliament as well as the expectations of the international commercial community.

He pointed out that the Third Schedule to the Act is clear as to what is intended to be achieved by the Act. The Act is no more than the incorporation of the amended UNCITRAL Model Law on International Commercial Arbitration by an Act of Parliament into our legal system. Of the many sections of the Act which reproduce the Articles of the Model Law, one may refer to section 5 which replicates Article 8 and section 3(9) which replicates Article 2A. As

regards guidance for interpretation, the Act makes it clear that reference is to be made to cases from UNCITRAL Clout Database under article 8 of the Model Amended Law.

He further submitted before us that the dispute which has generated the arbitration proceedings as well as the petitions before the courts is a dispute in terms of Clause 15 of the Shareholders' Agreement. TAL alleged that the company was unable to pay a debt of €19,000 as a result of a deadlock at the level of the board which has been provoked by SAMC. To him, such a controversy falls squarely within the dispute resolution clause where the Arbitrator has been given competence.

Mr Basset S.C. also argued that the likelihood of the petition of winding up succeeding is little for the following reasons: a shareholder's loan was signed by SAMC for the sum of €19,000. When that sum was not paid, SAMC who only had 50% shareholding of the company petitioned for the winding up of TSF; it did so behind the back of TAL, the other 50% per cent shareholder. As a result, TAL applied to intervene. That application was initially resisted by SAMC before the objection was eventually waived.

He referred to a number of court decisions from comparable jurisdictions in support of his argument that the only option that is reasonable in the circumstances is to refer the parties to arbitration in Singapore and stay proceedings before the Mauritius Court until matters have been sorted out in arbitration. That to him is the only reasonable interpretation that may be given to section 5(1) of the Act which provides that where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court.

Sir Hamid Moollan Q.C., learned counsel for SAMC, on the other hand, submitted that the grounds for winding up the company are completely unrelated to the issues in arbitration proceedings; that we are faced with three cases before the Courts of Mauritius and an arbitral proceedings before the Arbitrator in Singapore under the SIAC Rules. His arguments are:

1. that the two applications of winding up and the appointment of a provisional liquidator need to proceed resting as they are on serious and substantive grounds;
2. that the dispute in the arbitral proceedings is very different from that in the petitions for winding up and the appointment of a provisional liquidator;
3. that the existence of an arbitration clause or the commencement of arbitration proceedings cannot operate as an automatic stay of a court case involving the winding up of a company and the appointment of a provisional liquidator.

THE GROUNDS FOR WINDING UP

With respect to the first question relating to the seriousness and substantive issues for which the dissolution has been sought, Sir Hamid Moollan Q.C. referred us to the following factors: the relationship between TAL, SAMC and Immobilien is such that they will never be able to sit together and talk. There is deadlock in the running of TSF. Debts of the company have remained unpaid and this is admitted by the company. The whole business arrangement had one investment objective, which investment objective has failed. Accordingly, the substratum of the business has gone. The prime concern in a winding up case is grounded in equity, based on the just and equitable principle that the Court applies before making a winding up order in all the circumstances of the case rather than on the limited issue as to whether the parties may be restored in their legal rights.

Sir Hamid Moollan Q.C. referred us to a number of passages from the leading cases and some recent ones on winding up to submit that the insolvency proceedings lodged before the Commercial Division are seriously based on solid grounds in law and on the facts. The following have been considered as valid grounds for dissolution:

(a) inability of a business to pay its debts: **D.M.H. Finance Corporations Ltd v. Deocity Ltd & Anor 2010 SCJ 418; China Jiangsu International Economic Corporations v Lateral Holdings Ltd. 2010 SCJ 428;**

(b) **"**break down in relationship" treated as "irretrievable break-down" between business associates**: In re, Freerider Ltd. (Unreported, Grand Court of Cayman Islands, April 2010;**

(c) lack of confidence which rests on a lack of probity in the conduct of the company's affairs between the parties: **Loch v. John Blackwood Ltd. [1924] AC 783;**

(d) disappearance of substratum: **Re German Date Coffee Company (1882) LR 20 Ch D 169;**

(e) failure of objective for which the business was set up: **Belmont Asset Based Lending Ltd (unreported) FSD 15/2009;**

(f) misconduct of one of the business associates, even if the grounds of a winding up order may be independent of any wrong-doing by any of them: **Worldham Park Golf**

Course Lits, Ferris Whidbourne v. Charles Troff & Anor (Unreported) 19 May 1997;

(g) where it has become impracticable, if not actually impossible, for a company to carry its investment business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering document: **Belmont Asset Based Lending Ltd (unreported) FSD 15/2009;**

(h) in any other situation found by the Court inasmuch as the categories are not closed on which businesses may be pronounced dissolved: **In Re, Ebrahami v Westbourne Galleries Ltd. & Ors [1973] AC 360**, **In Re, Yenidje Tobacco Co. Ltd (1916) 2 Ch 426**;

(i) it is otherwise just and equitable: **In Re, Ebrahami v Westbourbe Gallereis Ltd. & Ors [1973] AC 360**, **In Re, Yenidje Tobacco Co. Ltd (1916) 2 Ch 426.**

Sir Hamid Moollan Q.C. referred to the case of **Belmont Asset Based Lending Ltd (unreported) FSD 15/2009** where the court stated that *"investment management agreements are invariably made on the assumption that the fund is a going concern and that the investment manager will be responsible for making investment decisions and managing investments …".* Where that objective becomes illusory for one reason or the other, the result should lead to a pronouncement of the demise of the business arrangement. It would not matter for the purposes of winding up that the order was objected to by the majority of the shareholders. Nor would it avail an objector to plead that the balance sheet is positive inasmuch as the passing of the balance sheet test is no answer to a petition of winding up. In **Yenidge Tobacco [supra]**, large profits were made even if the partners who had equal voting rights became so hostile that they would not even speak to each other. An order for winding up was made.

In his submission, Sir Hamid Moollan Q.C. also emphasized on the just and equitable ground for the winding up which lies in equity. It does not lie in the determination of legal rights. It is for the Court finally to be satisfied, on the particular facts and circumstances whether it is just and equitable that the business be wound up. That is an exercise in discretion of the Court: **In Re, Ebrahami v Westbourne Galleries Ltd. & Ors [1973] AC 360; In Re, Yenidje Tobacco Co. Ltd (1916) 2 Ch 426.** The powers of the Court are wide powers and they are sovereign in their appreciation of the facts which warrant a winding up order, under the above authorities as well as under section 102 (4) of the Insolvency Act.

DISPUTES IN ARBITRATION AS AGAINST ISSUES IN WINDING UP PROCEEDINGS

With respect to the second issue relating to the difference between what is the *res materiae* in an arbitration compared to that in a winding up proceedings, Sir Hamid Moollan Q.C. referred inter alia, to the Singaporean decision of **Four Pillars Enterprises Co. Ltd v. Beiersdorf Aktiengesellschaft 1999 SECA 11.** The Respondent as creditor and shareholder of a joint venture company (JVC) presented a petition to wind up the JVC on the ground that it was insolvent and that it was just and equitable that the JVC be wound up. The Appellant served notice of his intention to appear and oppose the winding-up petition under Rule 28 of the Companies Winding Up Rules. Subsequently, it sought, inter alia, an order for stay of the winding-up proceedings pursuant to Section 7 of the Arbitration Act of Singapore, and an order requiring the Respondent to refer all disputes raised in the winding-up petition to be resolved in the arbitration in accordance with the joint venture agreement. One of the issues was whether the existence of an arbitration clause in the agreement forestalled an action of winding up before the courts. The Court of Appeal in Singapore held that it did not. The contrary argument in the appeal was dismissed for the reason that "*the Respondent has a statutory right under the Companies Act to present a winding-up petition … and the arbitration clause in the agreement did not restrict or exclude the Respondent from exercising this right.*"

This is also reflected in the learned opinion of Messrs **Loukas A. Mistelis and Julian D.M. Lew, Q.C. Kluwer Law**, at **para. 18-16, p. 360, Pervasive Problems in International Arbitration:**

> *"When the tribunal's jurisdiction or other questions raised by the filing for insolvency arise before a court of the country where the insolvency proceedings were initiated, the court will apply its insolvency law insofar as its provisions are mandatory and supersede the otherwise applicable provisions of the relevant arbitration law."*

The interplay between insolvency and arbitration proceedings is in fact an interplay of the various conflicts in areas of law: private law and public law; national law and international law and common law and civil law, monist systems and dualist systems: see **Belohlavek, Arbitration, Ordre Public and Criminal Law, Vol I, p. 735**. The exercise requires more than a reconciling of the various interests involved but a rationalized balancing so that any one interest does not go contrary to any other interest involved. This arises from the fact that:

> *"Unlike courts, the arbitral tribunal is not part of a judicial system of any given country."* **[ibid. para. 18-17].**

While the right of a person to proceed to the winding up of a company resides in statute, the right of any party to proceed to arbitration is derived from a mutual agreement or a private covenant between the parties. In **Best Floor Sanding Pty Ltd. v Skyer Australia Pty Ltd 1999 VSC 170,** the Supreme Court of Victoria, Australia, had the following to say, at para. 18:

> *"The arbitration clause in the joint venture agreement is null and void insofar as it purports to subject the parties to an arbitration with respect to the dissolution or winding up of the company. The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company."*

Sir Hamid Moollan Q.C. submitted that it was not even a case of competing jurisdictions. Winding up is exclusively within the jurisdiction of the Courts and beyond an arbitrator's competence so that one cannot speak of competing jurisdictions. He referred to the position taken by the Indian Court in **Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. AIR 1999 SC 2354,** where the learned Judges decided that:

> *"Despite any agreement between the parties, arbitrators will have no jurisdiction into order of winding up of companies."*

The reason is that the outcome sought in a winding up petition is often not that of payment of money as such which may be owed by one party to the other but that of the very commercial viability of the business whether it should continue to exist as envisaged by law under the Companies Act.

STAY OF WINDING UP PENDING ARBITRATION PROCEEDINGS

With respect to the third issue, whether the existence of an arbitration clause or the commencement of arbitration operates as a stay of a court case involving the winding up of a company, Sir Hamid Moollan Q.C., pointed out that in the case of Four Pillars, the Court accepted that *"such winding-up proceedings could in certain appropriate circumstances be stayed."* A stay may be granted where such proceedings were frivolous, vexatious, or otherwise an abuse of process.

The rule, however, remains that a stay of a winding up petition is not granted *"as the relief sought was not one available in Arbitration."* He also pointed out that in this case, the Arbitration relates to two claims for money which comes up to some £ 1 million. If the contention of TAL is that it is ready to take on that debt and pay the company, the fact remains that it would still add to the liabilities of the Company and not decrease these.

Sir Hamid Moollan Q.C. also pointed out that it was only fair that the winding up matter should proceed so that the Official Receiver could take up the case of the company at the Arbitration in his own right. If a stay is granted, the arbitration will proceed without the company being represented at the arbitration. On the other hand, if the winding up petition moves along with the arbitration the Official Receiver will be able to assist in a proper outcome of the disputes.

In his view, the two petitions and the arbitral proceedings can run parallel inasmuch as they are not seized of the same matter. The argument is that TAL will not be prejudiced even if the winding up petition were granted and a provisional liquidator or an Administrator as the case may be were appointed. On the contrary it will re-activate the company and get a company functional which has been so far dysfunctional. For all one can say, the liquidator may end up producing assets for the good of every one for distribution.

PARALELL RUN OF ARBITRATION PROCEEDINGS AND WINDING UP PETITION

As regards the question whether the arbitration should gain precedence over a court case, he referred to the decision in **Re Jade Union Investment Ltd, HCCW 400/2003** a decision of the Hong Kong Court dated 5 March 2004 where the learned Judge stated as follows:

> *"…the Court is not obliged to strike out or stay a petition merely because the Petitioner and the Company have entered into a contract with an arbitration clause, or even if the company has commenced arbitration."*

His submission in law is that it is not the Arbitration which would dictate to the Bankruptcy Court what should satisfy the Judge in the exercise of his powers under the law and his appreciation of the evidence which supports the different contentions of the parties.

The parties did not favour us with an agreed statement of facts. But the few facts on which the arguments were based could be gleaned from their submissions.

Mr Basset S.C., Learned counsel for TAL, commented that it is arguable whether TAL is responsible for the deadlock and the non payment. His understanding is that it is the SAMC which brought about the *impasse* through a scheme by the replacement of Sachsensfond's nominees on the Board so that once they were there, they attempted to extinguish the debt owed by Immobilien I and Immobilien II as regards the management fees that was owed to TSF.

The result was that a Statement of Accounts which was presented to the Board with a credit balance soon became a debit balance which resulted in the inability to pay. Furthermore, the termination of the OA1, OA2, PMA1 and PMA2 were all inter-linked.

In the light of the above, Mr Basset S.C. conceded that he was uncertain whether, in law, the Court has the power to grant a stay of the two actions before the Bankruptcy Division. On the other hand, he was certain that it has the power to make an automatic transfer of the two actions engaged in Mauritius to arbitration in Singapore under the SIAC Rules, thus giving effect to the spirit of the Act and the autonomy of the parties to which the Act gives recognition.

He referred to the case of **Gaya Sugar Mills Ltd, Re, [1950] 20 Com Cases 151, 154-156 (Pat); 1955 (3) BLJR 79** and **Rainbow Insurance Co. Ltd v Financial Services Commission & Anor 2010 SCJ 351**, where stays of winding up orders were granted. He further argued that the appointment of a provisional Liquidator is a very drastic measure and may be resorted to only if a clear and strong ground for winding-up is present and the Court being of the view that it is necessary to do so. The appointment of a Representative, or of a Provisional Liquidator, or of a Provisional Receiver, at this stage, will nullify the purport and implementation of the arbitration proceedings under the Shareholders' Agreement.

As regards the nature of the powers of this 3-Judge Court to decide a matter of stay, Mr. Basset S.C. referred to the case of **Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] 2 WRL 141** (no inherent power in the courts to supervise the conduct of arbitrators)**; Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd. [1993] 2 W.L.R. 262. [1993] A.C. 334** (scope and power of courts to grant interim relief in matter related to arbitration) and **Taylor & anor v Lawrence [2002] EWCA Civ 90** (objectivity in approach)**; [2003] Q.B. 528** while admitting the fact that he is submitting these authorities with the caveat in mind that, as per the ***"Travaux Préparatoires"*** in relation to section 5, Mauritius jurisprudence on the matter has to be *sui generis.*

THE INTERNATIONAL ARBITRATION ACT 2008 AND ITS APPLICABILITY

After learned counsel had completed their submissions on the merits of the case on 23 March 2011, we invited them to specifically address us on one fundamental question which to us is crucial to the determination of the controversy before us. Does the Act find its application to the facts of this case?

THE FACTS

Those facts are as follows. SAMC is based in Germany. It set up Immobilien 1 and Immobilien 2 to invest in real property in India. TAL is based in Cayman Islands. Both SAMC and TAL then set up TSF Advisers Mauritius Ltd, a company under Mauritian law. The date of the Shareholders' Agreement which contains Clause 15, the Dispute Resolution Clause, which binds parties to resolve their disputes by arbitration in Singapore under the SIAC Rules, is 29 April 2008. The date of termination of the Port Folio Management Agreements (PMA) and the Outsourcing Agreements (OA), which termination generates the dispute of the indebtedness of the company is September 2009.

Proceedings before the Courts in Mauritius effectively began in mid-January 2010. The arbitration was initiated in May 2010. TSF is the holder of a Category 1 Global Business Licence. The juridical seat chosen by the parties is Singapore. The Act came into force on 1 January 2009.

THE LAW

It is section 3 of the Act which deals with the application of the Act. It is an elaborate section comprising 10 subsections. An examination of the section reveals that it provides for a *commencement* test, a *parties* test, an *international arbitration* test and a *GBL company* test. That section reads (underlining ours):

"3. Application of Act

(1) (a) This Act shall not apply to arbitrations initiated before its commencement.

(b) This Act shall apply to arbitrations initiated on or after its commencement under an arbitration agreement whenever made.

(c) (i) Subject to subparagraph (ii), this Act shall apply solely to international arbitrations (as defined in subsection (2)).
(ii) Sections 5, 6, 22 and 23 shall apply to an arbitration which satisfies the criteria set out in subsection (2)(b), whether or not its juridical seat is Mauritius.

(d) The fact that an enactment confers jurisdiction on a Court but does not refer to the determination of the matter by arbitration does not per se indicate that a dispute about the matter is not capable of determination by arbitration.

(e) Where any other enactment provides for the statutory arbitration of a dispute, this Act shall not apply to an arbitration arising under that other enactment.

(2) For the purposes of subsection (1)(c)(i), an arbitration shall, subject to subsection (6), be an international arbitration where -

(a) the juridical seat of the arbitration is Mauritius; and

(b) (i) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States; or

(ii) one of the following places is situated outside the State in which the parties have their places of business -

(A) the juridical seat of the arbitration if determined in, or pursuant to, the arbitration agreement; or

(B) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State, or that this Act is to apply to their arbitration; or

(iv) the shareholders in a GBL company have determined, pursuant to subsection (6) that any dispute concerning the Constitution of the company or relating to the company shall be referred to arbitration under this Act.

(3) For the purposes of subsection (2)(b) -

(a) where a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) where a party does not have a place of business, reference is to be made to its habitual residence.

(4) Subject to subsection (6), the First Schedule or any of its specific provisions shall apply to an international arbitration only if the parties so agree by making express reference to that Schedule or to that specific provision.

(5) (a) Any issue as to -

(i) whether an arbitration is an international arbitration; or

(ii) whether the First Schedule or any of its specific provisions apply to an international arbitration, shall be determined by the arbitral tribunal.

(b) Where an issue referred to in paragraph (a) arises before a Court or the PCA -

(i) that Court or the PCA shall decline to decide that issue and refer it for determination by the arbitral tribunal; but (ii) where the arbitral tribunal has not yet been constituted, the Court or the PCA may make a provisional determination of the issue pending the determination thereof by the arbitral tribunal.

(6) (a) Without prejudice to the right of a GBL company to agree to the arbitration of any dispute between itself and any third party under this Act, its shareholders may determine that any dispute concerning the constitution of the company or relating to the company shall be referred to arbitration under this Act.

(b) Notwithstanding any agreement to the contrary, the juridical seat of any arbitration under this subsection shall be Mauritius and the First Schedule shall apply to that arbitration.

(c) The shareholders of a GBL company may incorporate an arbitration agreement in the constitution of the company, whether by reference to the model arbitration clause contained in the Second Schedule or otherwise -

(i) at the time of the incorporation of the company; or

(ii) at any later time by a unanimous resolution of all current shareholders.

(7) A party who knows or could with reasonable diligence have known that any provision of this Act from which the parties may agree to derogate or any requirement under the arbitration agreement has not been complied with but proceeds with the arbitration proceedings without stating an objection to the noncompliance within a reasonable time or such time as may have been agreed by the parties shall be deemed to have waived its right to object.

(8) …..

(9) In applying and interpreting this Act and in developing the law applicable to international arbitration in Mauritius -

(a) regard shall be had to the origin of the Amended Model Law (the corresponding provisions of which are set out in the Third Schedule) and to the need to promote uniformity in its application and the observance of good faith;

(b) any question concerning matters governed by the Amended Model Law which is not expressly settled in that law shall be settled in conformity with the general principles on which that law is based; and

(c) recourse may be had to international materials relating to the Amended Model Law and to its interpretation, including -

(i) relevant reports of UNCITRAL;

(ii) relevant reports and analytical commentaries of the UNCITRAL Secretariat;

(iii) relevant case-law from other Model Law jurisdictions, including the case-law reported by UNCITRAL in its CLOUT database; and

(iv) textbooks, articles and doctrinal commentaries on the Amended Model Law.

(10) In carrying out the objects of subsection (9), no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to domestic arbitration.

When the facts as stated above are applied, we find no difficulty in concluding that the commencement test is satisfied under section 3(1)(b) when it states that the Act shall apply to arbitrations initiated on or after its commencement under an arbitration agreement whenever made. In our case, it started in May 2010.

The facts also pass the *parties* test in that the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States as per section 3(2)(b)(i).

However, the case fails under the *international arbitration test* under section 3(1)(c)(i). This subsection specifically provides that this Act shall apply solely to international arbitrations as defined in subsection (2). When we go to subsection (2), we find that, it imposes a number of characteristics laid down in subsection 2(b)(i), (ii)A, (ii)B, (iii), (iv) and subsection (3). None the less, one characteristic that is common to all the subsections is that the juridical seat of the arbitration is Mauritius subject to section 3(6) as expressly stated in section 3(2)(a). In the present case, the juridical seat is in Singapore. For that reason, it cannot be said that the facts of this case falls under the purview of the Act.

However, that cannot be the end of the matter. Do the facts satisfy the GBL test? As correctly submitted by Sir Hamid Moollan Q.C., as per section 3(6), the Act will apply to a GBL company in two ways:

(a) optionally, under section 3(6)(a), which provides that the shareholders may determine that any dispute concerning the constitution of the company or relating to the company shall be referred to arbitration under the Act; and

(b) mandatorily, under section 3(6)(b), which provides that, notwithstanding any agreement to the contrary, the juridical seat of any arbitration under this subsection shall be Mauritius.

We are concerned here with the mandatory point (b) above rather than optional point (a) above. To the extent that section 3(6)(b) is a mandatory provision with respect to a GBL company, the question which arises is whether there has been compliance with this subsection when a GBL company has chosen a juridical seat other than that imposed by the Act. Mr Basset S.C. showed us that the Agreement is dated 29 April 2008 and the Act came into force on 1 January 2009. Accordingly, in his reckoning, it would be oppressive, if with respect to the choice of their juridical seat of arbitration, one were to impose upon the two parties such a post contract

compliance. We agree. There cannot be a retrospective application of this section in the absence of any express provision to that effect. The Act does not make such a provision.

In the light of the above, the conclusion is compulsive that the facts of the case do not attract the application of the Act for having failed the juridical seat test.

For the above reason, we agree with Sir Hamid Moollan Q.C. that, in any case, we may have been involved in an academic exercise under section 5 of the Act for the additional reason that both parties have already gone and submitted to arbitration: this section is all about transfer to this Court and the reference of the parties by this Court to arbitration so that the question of juridical seat is in effect tantamount to making the Court break into an open door.

We agree. One, we cannot apply section 3(6) which imposes GBL companies to have juridical seats in Mauritius where the agreements for juridical seats other than Mauritius have pre-dated the coming into force of the Act. Two, since the case fails under the International Arbitration test and section 3(6) is not applicable, section 5 cannot, therefore, be invoked for a transfer of dispute to arbitration to a foreign seat.

THE SPECIFICITY OF THE INTERNATIONAL ARBITRATION ACT 2008

It is not our view that we have been engaged in an exercise of futility, none the less. The International Arbitration Act 2008 is a new legislation with new features. It would help to identify them for the purposes of gaining some clarity, in the light of which we shall examine the scope and limitation of section 5.

Until 2008, our law on arbitration was governed by the Mauritian *Code de Procédure Civile* which was itself amended in 1981. However, that has been used mostly for domestic arbitration even if nothing prevented its use for international disputes. In 2008, the legislator decided to introduce a specially dedicated law for international arbitration, the International Arbitration Act, which came into force on 1 January 2009.

The specificities of this law are many, the most striking being that it is a law in its own right. It is also anchored on the UNCITRAL Model Law of 21 June 1985 as amended on 7 July 2006. It additionally offers an attractive and unique option in the region.

This new model is also conceived from the experiences of the past in the field of arbitration. It seeks to address problem areas that beset other jurisdictions involved in international arbitrations. It addresses the negative impact of the doctrine of competence-competence by an imaginative device of up-front court determination. As such, it opts for an early intervention by the Courts on whether the dispute shall be determined before the courts or the arbitrator. Power to make that early intervention is conferred upon 3 Judges of the Supreme Court. By restricting the scope of such early judicial intervention, it enables the arbitrator to decide all issues within his remit so long as the fundamental questions of rule of law is not compromised. The 3-Judge Court acts as such as a screening mechanism. It decides on a prima facie basis whether there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed. The result is that there operates an automatic transfer to the arbitrator with a minimum of intervention by the court by a generous screening mechanism.

Thus, where an arbitral tribunal has ruled on its own competence one way or the other, the party aggrieved with the decision is allowed to determine the issue before the Supreme Court in parallel of the arbitral hearing.

The philosophy of the Mauritian international arbitration regime is quite clear. It effects a necessary paradigm change. The Court system and the arbitration system are not competing but collaborative jurisdictions. The objective is to ensure that any international dispute is given a quick and economical dispatch by the system of placing party autonomy in the agreement as the priority subject to the fundamental parameters of the law. Litigation and arbitration, therefore, do not fight for turf but play on the part reserved for each. It is with this end in view that a special court is established under section 42 comprising 3 Judges of the Supreme Court and its scope and jurisdiction is delimited and circumscribed in section 5 of the Act.

THE JURISDICTION OF THE 3-JUDGE COURT

Section 42 of the Act creates the Court and section 5 confers upon this Court its competence. Section 5(1) reads:

> "*Where an action is brought before any Court, and a party <u>contends</u> that the action is the subject of an arbitration agreement, that Court shall automatically transfer*

the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.

First, it is noteworthy that the statutory jurisdiction of this specially created Court is limited to deciding a "contention." This contention should arise between the parties to an action before the court. As we may note on the facts of this case, there was no direct contention that arose between the parties as such. We were seized by a reference by the Bankruptcy Court on a *proprio motu* basis. When the parties arrived before us they had already submitted to arbitration. The contention, therefore, was prompted by the Bankruptcy Court, following an appeal against a decision of an interlocutory nature.

An anxious reading of section 5 of the International Arbitration Act shows us that this Court enters the arena only to determine an either-or contention between the parties: namely, as to which route between the two needs to be taken - the litigation route or the arbitration route with a clear criterion laid down for determination.

Our reading of the law is that the legislator never intended to vest a power in a Court already seized of a matter and where the parties have no *inter-partes* contention to make a *proprio motu* reference without express power as is the case when the Chief Justice refers a matter to the Mediation Judges on his own initiative or on the request of parties. The latter is provided in the law.

Only live contentions should come before this section-42-jurisdiction of the Supreme Court. Parties are already before the Arbitrator. By that fact alone, the jurisdiction of this Court has been taken away: namely to determine, on a prima facie basis, whether there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed.

There is no further jurisdiction which has been given to us by section 5(2) of the Act which reads:

> *"(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.*

Also, a reading of section 5(3) and (4) shows that there is a limitation on what this statutory jurisdiction could do once it has decided that there is a prima facie case: litigation should continue without prejudice to arbitral proceedings commencing or continuing:

> *"(3) Where the Supreme Court finds that the agreement is null and void, inoperative or incapable of being performed, it shall transfer the matter back to the Court which made the transfer.*
>
> *(4) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and one or more awards may be made, while the issue is pending before any Court."*

We wish to make the following observations with respect to the exercise of the jurisdiction of the 3-Judge Court under section 42 of the Act. It is incumbent upon any Court to "*automatically transfer the action to the Supreme Court" pursuant to section 5(1)* only where –

(a) there is a contention by a party that the very action which is before the Court is the subject of an arbitration agreement; and

(b) the party makes a request when submitting his first statement.

CONCLUSION

On the question of law, therefore, our analysis of the various submissions on law and on the facts leads us to the conclusion that we are not in presence of an arbitration that falls under the definition of international arbitration as defined by the International Arbitration Act. The juridical seat test is not satisfied on account of the dates. Clause 15 of the agreement whereby all disputes were to be resolved in Singapore, under the SIAC Rules, was entered into in April 2008. The Act came into force on 1 January 2009. Accordingly, the business arrangements had been effected prior to the coming in force of the Act which came subsequently to impose, in its section 3(6)(b), that notwithstanding any agreement to the contrary, the juridical seat of any arbitration shall be Mauritius.

For the reasons given above, we decline to intervene in this matter. It is up to the Bankruptcy Court to decide the outcome of a matter with which it has been *seised* under the law, more particularly the Insolvency Act. We would not want to pre-empt any outcome. The Bankruptcy Court shall apply the various principles involved in the determination of the issues raised in the petition, including the principle that a winding up petition based on a debt will be

dismissed where the allegedly insolvent company is able to establish that the debt relied upon is genuinely disputed on substantial grounds: see **Re Sinom (Hong Kong) Limited**, **Re Jade Union Investment Ltd [supra]**.

We have stated above that the conclusion is compulsive that this reference by the learned Judge does not attract the application of the Act and for the reason that the facts fail to pass the juridical seat test referred to above.

Y K J Yeung Sik Yuen
Chief Justice

A Caunhye
Judge

S B Domah
Judge

28 December 2011

Judgment delivered by Honourable Y K J Yeung Sik Yuen, Chief Justice

For Appellant : *Mr D Basset, SC*
Mr T Chellum, of counsel

Mr A Robert, Attorney-at-Law

For Respondent : *Sir H Moollan QC*
Mr A Moollan, of counsel
Mrs S Carrim, of counsel

Mr T Koenig, SA