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Mauritian Supreme Court Robustly Rejects Challenge to Arbitrator Jurisdiction

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In a recent decision, the Mauritian Supreme Court has roundly rejected a challenge to an arbitrator's jurisdiction brought under section 20 of the Mauritian International Arbitration Act 2008, and in doing so touched upon the interesting question of the standard of review in such cases.

Section 20 of the International Arbitration Act 2008 ("IAA") allows an arbitral tribunal to hear a challenge to its jurisdiction as a preliminary issue. If the challenge is rejected, the applicant may make an application to the Supreme Court to decide the challenge. The Supreme Court will be constituted as a panel of three judges, as with all substantive hearings under the IAA, and an appeal lies from the Supreme Court to the Judicial Committee of the Privy Council of England and Wales.

The recent judgment in *Liberalis Limited and anor V Golf Development International Holdings Ltd and others* (2013 SCJ 211, SCR No. 107600) is an example of this approach in practice, which raises an interesting issue of general application.

An arbitration was commenced arising out of a contract relating to a property development in Mauritius between international parties. A submission agreement (or *compromis*) was signed by the parties by which they agreed to arbitration seated in Mauritius. Following the appointment of the single arbitrator, the Respondent disputed the arbitrator's jurisdiction. The arbitrator agreed to make a preliminary ruling on the issue.

The jurisdiction issue arose because it had become apparent that a Respondent, one of the parties to the arbitration agreement and a company incorporated in South Africa, had been in provisional liquidation at the time of signature of the arbitration agreement. This brought into question whether the company could be bound by the agreement to arbitrate, which had not been signed by the liquidator on behalf of the company.

However, following the signature of the arbitration agreement, the provisional liquidation was discharged by an order of the court in South Africa. The Directors of the company then passed a resolution, following the discharge of the provisional liquidation, ratifying the arbitration agreement on behalf of the Respondent company.

The arbitrator found that he had jurisdiction to hear the arbitration on the grounds that, although only the liquidator had the authority to bind the Respondent company during the liquidation, the

resolution had the effect of ratifying the arbitration agreement.

The Respondent sought to persuade the Court that the arbitrator's decision was wrong and they should substitute a conclusion that the arbitrator did not have jurisdiction. The application was roundly dismissed, the Court reviewing the expert evidence and agreeing with the arbitrator's finding that the ratification of the arbitration agreement rescued the agreement from the lack of authority caused by the liquidation. The Court also rejected the other attacks which were made on the validity of the agreement and the approach taken by the arbitrator, and upheld the arbitration agreement.

The most thought-provoking aspect of the judgment is the approach taken by the Court to the question of the standard of review which the Court should apply to the decision made by a tribunal that it has jurisdiction.

The Court's stated approach was that:

“whilst it may take into account the ruling of the arbitral tribunal and express its agreement or disagreement with any views expressed therein, it is not sitting on appeal as such against the said ruling, such that the normal appellate perspective focusing on errors and misdirections on the part of the arbitral tribunal is not in point.”

A considerable amount of ink has been devoted in the past to the issue of the standard of review to be exercised by a court which is considering a challenge to the tribunal's jurisdiction after the tribunal has delivered an award on the point. But the approach set out by the Court in this case would be unlikely to provoke much disagreement, provided that the Court did not mean to go too far in saying that the Court could “take into account” the tribunal's ruling. Subject to that caveat, the Mauritian court appears to have selected a balanced approach. On the one hand, it avoided the illogicality of showing deference to the tribunal's decision that it has jurisdiction, which can result in the tribunal ‘pulling itself up by its own bootstraps’. On the other hand, it acknowledged that it could take advantage of the useful illumination and discussion of the dispute which might be gleaned from the tribunal's consideration of the matter.

Seen in this way, the approach does not appear too different from the English court's approach, exemplified by the words of Lord Saville in *Dallah Real Estate and Tourism Holding Co v Government of Pakistan* (referring to decisions on enforcement):

“The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question.”

The French courts agree that the Court is free to re-examine matters of fact or law, confirming in the *Abela* case (Cass civ 1ere, 6/10/2010) that the Court “*contrôle la décision du tribunal arbitral sur sa compétence... en recherchant tous les éléments de droit ou de fait...*”

However, the Court in *Liberalis* was also called upon, as part of its ruling, to consider a plea that

the arbitration agreement was vitiated by *dol*. *Dol* is a concept of French law, which has similarities to misrepresentation but which also connotes an element of deliberate intention to mislead. The tribunal therefore had had to make factual findings on the issue.

In rejecting this argument on its merits, the court referred to and relied upon the findings of fact of the tribunal. The court displayed considerable deference to the tribunal's findings of fact, holding that they ought not to be interfered with "lightly".

Given that the Supreme Court did not have the benefit of hearing the evidence heard by the tribunal, it seems that there was little choice but for the Court to take into account the tribunal's decision on the facts. The judgment does not suggest that the Court was asked to rehear the factual evidence on which the tribunal had relied.

But, putting aside practical reasons which may have compelled the approach taken, this does revive an interesting issue for further discussion: should a different approach be taken in such applications depending on whether the issue depends on factual findings or findings of law? Most jurisdictions have decided that this would be illogical, although in Switzerland it has been suggested that this approach might be appropriate (*Transport – en Handelsmaatschappij Vekoma BV v Maran Coal Company* 8 WDRLJ 87 (1999)).

It would be bold indeed for the Courts of Mauritius to go down this path. It is suggested that the Mauritian courts are unlikely to do so when further such cases arise in future, given the weight of international judicial opinion against it, in both civil and common law jurisdictions.

In conclusion, the decision in *Liberalis* represents a robust approach by the Supreme Court to a challenge to jurisdiction. The Court appeared to steer a pro-arbitration course through the choppy waters of court reviews of jurisdiction following a positive tribunal award, but the decision leaves some further questions to be resolved in future cases. Will the Court stick to the received wisdom and make such decisions without regard to the findings of the tribunal, or will it start from some other position, for example that the tribunal's findings of fact may be relied on unless good reason is shown not to do so? Despite the Court's positive attitude to arbitration, which is to be applauded, practitioners may hope that they will draw back from making such a bold move.

The international arbitration community in Mauritius and beyond will look forward to further decisions of the Supreme Court applying the IAA, particularly taking into account the recent clarifying amendments to the IAA (not in issue in this case) and the new Rules of the Supreme Court.

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