# Kluwer Arbitration Blog

## New York Convention Now in Force in the Republic of Seychelles

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On 3 February 2020, the Republic of Seychelles became the 162nd Contracting State of the New York Convention (already followed by Palau as number 163, reported here). The New York Convention thus comes into force for the Seychelles today (Article XII(2) New York Convention). The Cabinet and the National Assembly had approved the accession on 28 November 2019 and on 10 December 2019, respectively. On 23 January 2020, the International Affairs Committee of the National Assembly of Seychelles had resolved to seek the President's authority to present the accession instruments to the United Nations.

Today's event brings to an end a journey that has taken the small island republic in the Western Indian Ocean more than forty years. Time to take stock and look to the future.

### The Relevant Provisions of Seychelles Law

Perhaps Chief Justice of Seychelles *Mathilda Twomey* described the mixed common law & civil law legal system of the Seychelles best when she chose a patchwork rug as the cover picture of her book. For the recognition and enforcement of foreign arbitral awards, the coming into force of the 1977 Commercial Code of Seychelles Act inserted a new Article 227(2) into the 1920 Seychelles Code of Civil Procedure, which states that "[a]rbitral awards under the New York Convention, as provided under articles 146 and 148 of the Commercial Code of Seychelles, shall be enforceable in accordance with the provisions of Book 1, Title X of the said Code."

Article 146 of the Commercial Code of Seychelles reads:

> "On the basis of reciprocity, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and the arbitral award within the meaning of the said Convention shall be binding. Such Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than Seychelles and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in Seychelles."

Article 148 of the Commercial Code of Seychelles reads:

> "Arbitral awards under the said Convention shall be recognised as binding and shall be enforced in accordance with the rules of procedure in force in Seychelles. The conditions or fees or charges on the recognition or enforcement of arbitral awards to which the said Convention applies shall not be more onerous than those required for the recognition or enforcement of domestic arbitral awards."

These three provisions marked the beginning of the forty-year journey as they laid the foundation for a controversy surrounding the New York Convention's applicability, manifested in three Seychelles court decisions.

**The Decision in *Omisa Oil Management v Seychelles Petroleum Company Ltd***

In the *Omisa* decision of 23 November 2001, the Supreme Court of Seychelles refused to recognize and enforce a Swiss arbitral award. In doing so, the court found that there was no reciprocity between the Seychelles and Switzerland for the purpose of Article 146 of the Commercial Code. In the words of *Juddoo* J:

"Reciprocity … would necessitate that both municipal legislations would be under a mutual legal obligation with regard to each other and bound to the same extent or degree. The … municipal law of Seychelles does not bind Switzerland to any degree or extent. The obligation of Switzerland under the Convention is only towards a State party to the said Convention and even then only to the extent that each state concerned has bound itself to apply the Convention."

The court also rejected an argument that even in the absence of reciprocity, the recognition and enforcement of a foreign arbitral award should be possible in the Seychelles based on Articles 146(2) and 148 of the Commercial Code. The court took the view that these provisions could not be read separately from Article 146(1) of the Commercial Code and that "[t]he condition of 'reciprocity' is a pre-requisite which allows the award made in a foreign country to be made binding on the recipient state…".

It is submitted here that the court was wrong in concluding that the obligation of Switzerland under the New York Convention is only towards any other Contracting State. While Switzerland had initially made a reciprocity declaration (on p. 477) in accordance with Article I(3) of the New York Convention, it withdrew (End Note 24) that declaration on 23 April 1993. At the time when the Seychelles court delivered the *Omisa* decision, the New York Convention, from a Swiss perspective, consequently applied to any arbitral awards made in the territory of a state other than Switzerland, pursuant to Article I(1) of the New York Convention. Additionally, the Seychelles court could have considered Article 194 of the Swiss Law on Private International Law, which declares the New York Convention applicable without any reciprocity reservation. Consequently, the correct conclusion would have been that Switzerland had bound itself to apply the New York Convention to arbitral awards made in the Seychelles.

Finally, it is worth mentioning that the decision in *Omisa* triggered several critical notes, potentially in the Seychelles itself (on p. 4) and definitely in New Zealand (on p. 953 et seq.),

Austria, and, with a somewhat alternative argumentation, Russia.

**The Decision in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd***

Sixteen years later, the Seychelles Court of Appeal confirmed the findings in *Omisa* in the *Vijay* decision of 25 November 2017 when it refused to recognize and enforce an ICC arbitral award made in Paris.

In that decision, the court reasoned that when the United Kingdom acceded to the New York Convention on 24 September 1975, the Seychelles had been a British colony. According to an agreement between the governments of the United Kingdom and the Seychelles, the Seychelles, on 29 June 1976 (its day of independence), had succeeded to all obligations and responsibilities arising from the New York Convention. When the Commercial Code came into force on 13 January 1977, the New York Convention was in force in the Seychelles.

The court rejected an argument that Articles 146 to 150 of the Commercial Code were passed with a view that the Seychelles would in the near future ratify the New York Convention (at para. 36). It is submitted here that this conclusion is somewhat at odds with a statement made by Professor *A.G. Chloros* of King's College London, the drafter of the Commercial Code, that "[i]t is also important that Seychelles should adhere to the New York Convention at the earliest opportunity."[1)]

The court then clarified that the New York Convention stopped applying to the Seychelles based on a 1979 note to the British Government announcing that several international treaties would no longer apply.

This was followed by an explanation (para. 99) that "reciprocity" in Article 146 of the Commercial Code "…can only have one meaning", namely a reference to a reciprocity declaration made pursuant to Article I(3) of the New York Convention. On the significance of Article 146 of the Commercial Code where the New York Convention was not in force, the court held (para. 101) that "…in 1979, the NY Convention ceased to have its domestic application, though the text of the Article 146 and others remained part of our domestic law. This article needs to have life breathed in into in [sic!] order to waken it from its slumber."

Such awakening, the court concluded, could only be achieved by the President and the National Assembly, while the court could only interpret the existing laws. The court finally recommended that "…the concerned authorities should move to ensure that necessary steps are taken to fill up the void for the benefit of the nation." (para. 109)

**The Decision in *European Engineering Ltd v SJ (Seychelles) Ltd***

To cut a long story short, the *European Engineering* decision of 29 July 2019 of the Supreme Court of Seychelles confirmed *Vijay*, although one may reasonably assume that *Twomey* CJ (para. 15) was not too pleased with that outcome:

> "The Court of Appeal's decision … is unequivocal. Much as I might have

> reservations regarding the views of the Court of Appeal with respect to the interpretation of sections 227 of the Seychelles Code of Civil Procedure and sections 146-150 of the Commercial Code …, this Court is nevertheless bound by the decision."

It is subject to discussion whether, before reaching this conclusion, *Twomey* CJ could have relied on Article 5 of the Civil Code of Seychelles, which provides that "[j]udicial decisions shall not be absolutely binding upon a Court but shall enjoy a high persuasive authority from which a Court shall only depart for good reason."

**Commentary**

One may wonder whether there really is only one possible interpretation of "reciprocity" in Article 146 of the Commercial Code. Could that requirement be fulfilled whenever arbitral awards from the Seychelles may be recognized and enforced in another jurisdiction, based on any instrument or law other than the New York Convention and regardless of whether there is an obligation to do so? This may still be relevant for awards from any jurisdiction where the New York Convention is not yet in force, as the Seychelles made a reciprocity declaration pursuant to Article I(3) of the New York Convention. For the other 162 Contracting States, it is time to join the Seychelles in wishing good riddance to these discussions. The New York Convention is now in force, and Article 146 of the Commercial Code has awakened from its slumber.

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References

**?1** A.G. Chloros, *Codification in a Mixed Jurisdiction*, Amsterdam/New York/Oxford 1977, p. 162.

This entry was posted on Sunday, May 3rd, 2020 at 8:00 am and is filed under Africa, New York Convention, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Reciprocity, Recognition and enforcement of arbitral award, Republic of Seychelles, Switzerland
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