REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: AC70/2011

Before the Hon Mr Justice NJ Yekiso

NAME OF SHIP: MV "COS PROSPERITY"

In the matter between:

PHOENIX SHIPPING CORPORATION Applicant

and

DHL GLOBAL FORWARDING SA (PTY) LTD First Respondent

BATEMAN PROJECTS LIMITED

t/a BATEMAN ENGINERRED TECHNOLOGIES Second Respondent

Coram:	**NJ Yekiso, J**
Judgment by:	**NJ Yekiso, J**
Counsel for Applicant:	**Adv D J Cooke**
Attorneys for Applicant:	John Taylor & Associates
Counsel for 1st Respondent:	**Adv M J Fitzgerald SC & Adv A M Smalberger**
Attorneys for 1st Respondent:	Fullard Mayer Morrison
Counsel for 2nd Respondent:	**Adv D A Gordon SC & Adv A W T Rowan**
Attorneys for 2nd Respondent:	Bowman Gilfillan Inc
Date of Hearing:	**1 February 2012**
Date of Judgment:	**24 February 2012**

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Coram: **NJ Yekiso, J**

Heard: **1 February 2012**

Delivered: **24 February 2012**

Summary:

Enforcement of a foreign arbitral award ito section 2 of the Recognition & Enforcement of Foreign Arbitral Awards Act, 40 of 1977 – Such an award cannot be enforced if the agreement on the basis of which the award was made is invalid or if the recognition and enforcement of such an award will be contrary to public policy in the Republic.

Held: The agreement on the basis of which the foreign arbitral award was made is invalid -further held that the recognition and the enforcement of such an award would be contrary to public policy in the Republic.

An important characteristic of arbitration is its consensual basis.

IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(WESTERN CAPE HIGH COURT, CAPE TOWN)

(Exercising its Admiralty Jurisdiction)

CASE NO: **AC70/2011**

NAME OF SHIP: **MV "COS PROSPERITY"**

In the matter between:

PHOENIX SHIPPING CORPORATION Applicant

And

DHL GLOBAL FORWARDING SA (PTY) LTD First Respondent

BATEMAN PROJECTS LTD
t/a BATEMAN ENGINEERED TECHNOLOGIES Second Respondent

JUDGMENT DELIVERED ON 24 FEBRUARY 2012

YEKISO, J

[1] This is an application for the recognition and enforcement of a foreign arbitral award. The application arises out of an award made on 16 March 2011 when Phoenix Shipping Corporation ("Phoenix"), a company duly incorporated in accordance with the laws of Delaware, United States of America, obtained a foreign arbitration award pursuant to proceedings conducted in the London Court of International Arbitration, based in London, United Kingdom, under the auspices of the London Maritime Arbitrators Association. The parties to the arbitration proceedings were Phoenix

Shipping Corporation ("Phoenix"), DHL Global Forwarding SA (Pty) Ltd ("DHL") and Bateman Projects Limited, trading as Bateman Engineered Technologies ("Bateman"). The latter two companies are South African based companies, having registered places of businesses at 10 Patrick Road, Jet Park, Boksburg North, in the province of Gauteng and Founder 1 Building, Barttel Road, Beyers Park, Boksburg, in the province of Gauteng, respectively.

[2] In terms of the award –

[2.1.] DHL was obliged to pay Phoenix US$253,694, being an equivalent of an amount of R1,807,072-11 in accordance with the rate of exchange prevailing at the date of the award, plus interest thereon at the rate of 4,5% *per annum* or *pro rata* compounded at three monthly intervals from 5 May 2008 until date of payment. The terms of this contract were reflected on a contract of carriage referred to as "the Recap".

[2.2.] Bateman was obliged to indemnify DHL in respect of DHL's liability to Phoenix (alternatively DHL was entitled to damages in a like amount) pursuant to a sub-contract allegedly concluded between DHL and Bateman. The terms of this sub-contract were reflected in a document referred to as the "Conline booking 2000 Booking Note" dated 20 March 2008.

[3] The remedy that Phoenix seeks, as against DHL, is to have the portion of the award made in its favour referred to in paragraph 2.1 of this judgment made an order of court and, once made an order of court, the enforcement of such an order as provided

in section 2 of the Recognition & Enforcement of Foreign Arbitral Awards Act, 40 of 1977 ("Foreign Arbitral Award Act").

[4] DHL, on the other hand, seeks leave to intervene as a co-applicant in the proceedings instituted by Phoenix, and, in so doing, seeks, as against Bateman, an order that the portion of the award made in its favour referred to in paragraph 2.2 of this judgment made an order of court, and, once made an order of court, for the enforcement of such an order as provided in section 2 of the Foreign Arbitral Awards Act.

[5] Bateman resists the relief sought by DHL against it on the basis that it never was a party to any agreement which contained a submission to arbitration; that it is no party to any agreement that seeks to submit the parties to the application of English law; that the arbitrator had no jurisdiction to determine the dispute; that the arbitrator had no jurisdiction over Bateman and arising therefrom, Bateman refused to submit to arbitration; and that in view thereof, the enforcement of the arbitral award, as against Bateman, would be contrary to public policy in the Republic as contemplated in section 4(1)(a)(ii) of the Recognition & Enforcement of Foreign Arbitral Awards Act.

[6] All those issues relating to the order for the recognition and the enforcement of the award by Phoenix as against DHL; the application for leave by DHL to intervene as the co-applicant in the proceedings instituted against it by Phoenix and, in the event of the intervention application being granted, for the recognition and enforcement of that

portion of the award made in its favour against Bateman; and the resistance by Bateman in the granting of the relief sought against it by DHL, were argued before me on Wednesday, 1 February 2012. DHL did not resist the relief sought against it by Phoenix so that the order sought by Phoenix, as against DHL, was granted. Once I had heard argument as regards the order sought by DHL against Bateman, and the argument by Bateman in resisting the order sought by DHL against it, I reserved judgment. I indicated to the parties that judgment would be delivered in due course. In the paragraphs which follow, is my judgment in the matter.

FACTUAL BACKGROUND

[7] The factual background which gave rise to the referral of the dispute to the foreign arbitrator is clearly set out in Bateman's answering affidavit and the factual background evidence which follows, is derived therefrom. During September 2007 Bateman procured two steel ball mills, shells and accessories, including electrical parts, panels and motors (the machinery) from a Chinese based company, Citic Heavy Machinery Company Limited, operating from Luoyong, China. Bateman required the machinery on a fairly urgent basis for one of its projects, known as "the Blue Ridge Project" outside Groblersdal, South Africa. The project was managed by a Mr Theron who, in turn, reported to the general manager, Mr Immink.

[8] Following Bateman's purchase of the machinery, Bateman set out to arrange for the shipment of the machinery from Luoyong, China to South Africa. Steven John Davis ("Davis"), at the time a Transport and Logistics Manager at Bateman's

Johannesburg office was requested to make enquiries for the shipment of the machinery from Shanghai.

THE FIRST BOOKING WITH DHL

[9] In the course of making enquiries from different freight forwarders Davis approached DHL whose quote he found offered the lowest rate for the shipment of the machinery to South Africa. According to Davis' recollection, the rate offered by DHL was $160 per weight measure. On the basis of the rate so offered, Bateman took a decision, in principle, to engage DHL as the freight forwarder for the shipment of the machinery to South Africa. In the discussion which ensued, and because of the nature, the value of the goods in question and the value of the carriage, Bateman insisted that there would be no binding agreement between the parties unless Bateman would be supplied with a written contract of carriage for signature by Bateman, which would have to include terms and conditions as suggested by Bateman. In these discussions, Davis made it clear and insisted that no part of the machinery was to be carried on deck and that the entire machinery be stored below deck. In these discussions, Davis dealt with a Rob Coventry ("Coventry") of DHL.

[10] During the course of these discussions Coventry indicated to Davis that DHL intended to transport the machinery aboard a "Cosco" vessel and, for that reason, DHL had booked the transportation of the machinery aboard the Cosco vessel. In the course of these events and, with a view to ascertaining if indeed the ocean transportation of the machinery had been booked with the Cosco vessel, Mr Theron, the project manager,

made some enquiries. Having made enquiries, Theron discovered that the booking with the Cosco vessel had indeed been made but had since been cancelled. It appears that the booking had been cancelled because the Cosco vessel had secured a more profitable cargo. Thus, DHL was unable to transport the shipment at the affordable rate it had originally offered. This signalled the end of negotiations with DHL for the transport of the shipment. More so, Coventry never supplied a written contract of carriage for signature by Bateman as Davis had consistently insisted.

THE BOOKING WITH SPEDAG

[11] Once the shipment arrangement with DHL failed, Bateman approached yet another freight forwarder, M & R Spedag Group ("Spedag"). Spedag booked the shipment of the machinery for what is referred to in the chartering parlance a "laycan" of 20 to 30 March 2008. What this means, in effect, is that the shipment of the machinery would occur between the 20th March 2008 and the 30th March 2008. The latter date was later changed to 7 April 2008, and Bateman was informed that there was no guarantee that this could not be changed to a later date. Bateman was concerned about this change in "laycan" which could only have resulted in further delays. This resulted in the booking of Spedag being cancelled. Bateman reverted to DHL.

THE SECOND BOOKING WITH DHL

[12] Prior to cancellation of the arrangement with Spedag, there had already been communication between Davis of Bateman and Coventry of DHL during the period 18 March 2008 and 20 March 2008. These discussions, it would appear, were prompted by

a change in laycan in the booking of the Spedag vessel. In the course of these discussions Coventry advised that he had two ships with which he could potentially make a booking for the shipment of the machinery. The one of such ships, mv Cos Prosperity, had a laycan of 27 March 2008 to 5 April 2008 at a rate of $165 per weight measure and yet another vessel, an mv Unitec, which had a laycan of 6 April 2008 to 10 April 2008 at the rate of $160 per weight measure. The estimated transport time on both vessels was about 25 days. This information was communicated to Bateman by way of an e-mail of 18 March 2008. Bateman ultimately opted for the use of mv Cos Prosperity.

[12.1.] During the course of these discussions Bateman expressly set out the conditions under which Bateman would agree to the shipment of the machinery and insisted that these be included in the proposed contract of carriage, and these were that the rate be at $165 per weight measure; that the laycan be 27 March 2008 to 5 April 2008; that the proposed vessel, mv Cos Prosperity, not be a Cosco vessel; that no part of the machinery be carried on deck, and that the machinery be securely stored in the hold; and that these terms be included in a written contract of carriage to be supplied to Bateman for signature. Bateman had lost confidence in Cosco because of the earlier arrangement which had been aborted. Bateman did not want to have anything to do with the Cosco vessel or any vessel related to Cosco. The proposed conditions, which Bateman insisted be included in the proposed contract, were contained in e-mail communications exchanged between Davis and Conventry during the period 18 March 2008 to 20 March 2008.

[13] As at 20 March 2008 Bateman still had not received any written contract from DHL for signature by Bateman. Bateman was concerned as the matter of the shipment of the machinery had by then become extremely urgent. Time was of the essence and the arrangement for shipment of the machinery had to be finalised without delay. Davis telephoned Conventry seeking assurance that the mv Cos Prosperity was not a Cosco vessel and, in the process, insisted that DHL supply them with a written contract containing the suggested terms and conditions without delay. In this telephonic discussion, Coventry advised that he was not in office; Coventry had assured Davis that the terms set out by Bateman would be included in the written contract; that the vessel to be booked had nothing to do with Cosco; and that as soon as he would be back in office, he would let him have the contract for the required signature. In the course of such conversation Coventry suggested to Davis that he telephone a Mr Barry Windrin ("Windrin") on his behalf, as Coventry was indisposed, and ask Windrin to book the vessel.

[14] Windrin was a director of Windward Shipping (Pty) Ltd of Durban, and was apparently assisting DHL in the procurement of a vessel or acted as DHL's agent. There was no relationship between Windrin and Bateman and no approaches were made by Bateman to Windrin to procure a vessel on behalf of Bateman. Whatever communication there was between Bateman and Windrin, through the person of Davis, was at the request of Coventry.

[15] As suggested by Coventry, Davis telephoned Windrin and asked him to proceed with the booking of the mv Cos Prosperity. Windrin, on the other hand, suggested that Davis sends him an e-mail with regards to the proposed booking. At 14h15 on 20 March 2008 Davis sent Windrin an e-mail. The relevant part thereof reads as follows:

"Dear Barry / Rob

We would like to give you the go ahead to book 1607 cubes of cargo for the Blue Ridge project. We will cancel the booking with Spedag on the basis that we do not accept the change in laycan dates. Please urgently give us a confirmed booking order."

There is no indication in this e-mail that Bateman had dispensed with the terms and conditions Bateman had insisted be included in the contract.

[16] As at 25 March 2008 Bateman had still not received a written contract from DHL. Davis thereupon telephoned Coventry to obtain an explanation. Coventry assured Davis that he did not need to be concerned and that everything was in order. Concerned about the delay in finalising the arrangement Davis, on this occasion, insisted that Bateman be furnished with a written contract by no later than 10h00 the next day, 26 March 2008 failing which Bateman would not make use of DHL for the ocean transport of the machinery. Time had now become of the essence.

[17] On 26 March 2008 Bateman had still not received the contract. In the meanwhile Bateman had received an e-mail from M & R Forwarding in China advising that the vessel mv Cos Prosperity had no plans to call in Shanghai where Bateman's

machinery would be loaded; that the vessel was berthed in Xiangiang, China, loading 35,000 tons of "coke"; that the vessel had no underdeck storage cabins; that the coke would occupy all the space in the vessel; and that the ship was insufficient to load Bateman's cargo. That the equipment would not be stored below deck was of great concern to Bateman.

[18] Arising from what has been stated in the preceding paragraph, and other developments, Davis spoke to Theron, the project manager and Immink, the general manager. Theron and Immink were obviously concerned about this turn of events. It was then decided, for a second time, to abort the shipment of the equipment through DHL and to, once again, look for an alternative freight forwarder on an urgent basis.

[19] Following the decision referred to in the preceding paragraph, Davis telephoned Coventry and advised him that Bateman would not be making use of DHL for the shipment of the machinery. Davis made a point that he had agreed with Coventry that Bateman be furnished with a written contract by no later than 10h00 on 26 March 2008; that Coventry had failed to meet this deadline; that it was unacceptable that Coventry failed to meet the deadline; and that Bateman still did not have a written contract.

[20] At 14h53 on 26 March 2008 Windrin sent an e-mail to Coventry. This e-mail was not sent to Davis or anybody at Bateman. This e-mail is a document which was referred to as "the Recap" in the London arbitration proceedings. It is on the basis of this

document that the arbitrator found Bateman was obliged to indemnify DHL in respect of DHL's liability to Phoenix. It purport to confirm a booking with mv Cos Prosperity with a laycan of 25 March 2008 to 5 April 2008; that the mv Cos Prosperity is a single deck bulk carrier and further purports to set out terms and conditions of carriage, as for an example, the rate per weight measure; it purports to subject the proposed agreement to the English legal system; and, that, In the event of a dispute, the parties subject themselves to the London Court of Arbitration, under the auspices of the London Maritime Association of Arbitrators.

[21] The document referred to in the preceding paragraph is a document upon which Phoenix relied in the arbitration to found a claim against DHL. It purports to confirm a charter between Phoenix and DHL. There is no reference to Bateman being a party to this document. It contains apparent terms that were never discussed either between Davis and Coventry or between Davis and Windrin. It contains an arbitration clause submitting the parties to the jurisdiction of the London Court of International Arbitration and to the application of the English law, these being terms which did not feature in any discussion either between Davis and Coventry or between Davis and Windrin.

THE BOOKING NOTE

[22] At 16h45 on 26 March 2008 Coventry sent Davis an e-mail under cover whereof was attached a document entitled "Bimco Line Booking Note", codenamed "Online booking 2000". To this document was attached yet another document under the

heading "Full Terms of the Carrier's Bill of Lading Form". To this latter document was attached yet another document under the heading "Additional Clauses to DHL Industrial Projects / Bateman Projects Limited Conline Booking Note 2000 dated 20th March 2008 / MV Cos Prosperity". This latter document, consisting of two pages, purports to contain additional clauses, and these range from clause 19 upto clause 38. Apart from the fact that these clauses did not feature in any discussion between Davis and Coventry, and between Davis and Windrin, for that matter, there is no signature on this document by Bateman to signify that Bateman assented to the terms proposed.

[23] At the time Coventry sent the e-mail referred to in the preceding paragraph, Davis had already left office, having left at 16h30, to go continue working at home. As soon as Davis had an opportunity to do so, and this was at 20h39, Davis sent Coventry an e-mail to confirm that Bateman would no longer be making use of DHL for the ocean transportation of its machinery; that the purported written contract was sent long after the agreed deadline of 10h00 in the morning of 26 March 2008 had lapsed and that Bateman was making alternative arrangement for the sea-ferrying of its machinery. As far as Davis was concerned, no written contract of carriage was received by Bateman before the agreed deadline for signature by Bateman and, in view thereof, no agreement was concluded as between Bateman and DHL. In the London arbitration proceedings the arbitrator found that a valid contract was concluded between DHL and Bateman on the terms and conditions as contained in the Booking Note dated 20 March 2008.

THE LONDON ARBITRATION PROCEEDINGS

[24] On 5 May 2008 Phoenix demanded payment of an amount of US$253 674 from DHL and Bateman based on an unsigned Conline booking dated the 20th March 2008. Bateman resisted this claim on the basis that no agreement was concluded between it and DHL or between it and Phoenix. During June 2008 Bateman received a notice of commencement of arbitration proceedings from Phoenix through its London solicitors. Bateman, as also DHL, were called upon to agree to the appointment of the arbitrator. Bateman maintained its position that it was not a party to any agreement either with Phoenix or DHL; that it did not conclude any agreement containing a clause submitting it to arbitration in the London Court of Arbitration.

[25] In the London arbitration proceedings, DHL adopted the position that no valid contract was concluded between it and Phoenix; that DHL was no party to any agreement which incorporates the application of English law; and that the arbitrator had no jurisdiction to determine the dispute. Furthermore, DHL did not, in the London arbitration proceedings, seek to rely on any agreement concluded between it and Bateman.

[26] During July 2008 Phoenix instituted proceedings in the United States of America out of the Courts of the Southern Districts of New York to obtain an attachment order against Bateman's property, being electronic funds due to Bateman transferred to it via banks in the United States of America on the basis of an alleged breach of maritime contract. Pursuant to these proceedings Phoenix succeeded in attaching

electronic funds of Bateman which were in the course of being transferred to Bateman via banks in the United States of America. Funds due to Bateman to the value of US$419 318.07 were attached in two attachments, the first such attachment having been on 23 July 2008 and the second attachment on 20 August 2008.

[27] It is because of the attachments referred to in the preceding paragraphs that Bateman was forced to attend and participate in the arbitration proceedings in London. In the arbitration proceedings, Bateman persisted with its position that it was not a party to any agreement containing a clause submitting it to arbitration; that it was not a party to any agreement involving either Phoenix or DHL; and that, therefore, the arbitrator had no jurisdiction over it. Once the arbitration proceedings were concluded, and on the basis of the Booking Note dated 20 March 2008, the arbitrator found as against Bateman, that Bateman was obliged to indemnify DHL in respect of DHL's liability to Phoenix (alternately DHL was entitled to damages in a like amount) pursuant to a sub-contract concluded between DHL and Bateman, as evidenced by the Conline booking 2000 Booking Note dated 20 March 2008. It is for the recognition of that award, and the enforcement thereof, that DHL applies to intervene as co-applicant in these proceedings.

[28] Bateman has not taken any aspect of the arbitration award on appeal or review in terms of any available arbitral process relating to appeal or review. In terms of section 70(3) of the English Arbitration Act, 1996 any application or appeal must be brought within 28 days of the date of the award. Sections 67(1), read with sections 70(2)

and (3) and section 73 of the English Arbitration Act create a statutory estoppel in circumstances where a party to arbitral proceedings fails to avail itself of any available arbitral process or review or to challenge the award within the time limits allowed by the agreement or the English Arbitration Act, 1996.

[29] It is because of failure by Bateman to challenge any finding by the arbitrator that DHL contends in its submissions that Bateman must abide by the arbitrator's award and that it is too late for any party to challenge any finding of the award as Bateman seeks to do in these proceedings.

THE ENFORCEMENT OF AN ARBITRAL AWARD

[30] It would appear that there are three legal regimes, existing *in tandem*, which provide for the recognition and enforcement of arbitral awards in South Africa based on common law and statutory enactments. These are the common law, the Arbitration Act, 42 of 1965 ("the Arbitration Act") and the Recognition & Enforcement of Foreign Arbitral Awards Act, 40 of 1977 which has already been referred to earlier in this judgment. Whereas section 42 of the Arbitration Act repealed former provincial legislation, it does not repeal the common law. The Arbitration Act applies to all arbitration proceedings in South Africa, both domestic and international (Joubert: The Law of South Africa 2nd Edition para 54 at p400). Arbitration is international if, at the conclusion of the agreement, the parties to an arbitration agreement have their places of business in different states. Foreign arbitral awards are governed by a special legislation in the form of the Recognition & Enforcement of Foreign Arbitral Awards Act.

THE STATUTORY REGIME

[31] Section 31 of the Arbitration Act, which, as has already been pointed out, applies to both domestic and international proceedings, provides as follows:

"31 **Award may be made an order of court –**

(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

It is trite that an unsuccessful party in the arbitration may resist the enforcement of the award on the grounds that the award is invalid. It further appears that the provisions of section 31 of the Arbitration Act are permissive which, in itself, is a strong indicator that courts have a discretion in the enforcement of arbitral awards.

[32] On the other hand, section 2 of the Recognition & Enforcement of Foreign Arbitral Awards Act provides, where appropriate:

"2. **Foreign arbitral award may be made order of court and enforced as such –**

(1) Any foreign arbitral award may, subject to the provision of section 3 and 4, be made an order of court by any court.

(2) ...

(3) Any such award which has under subsection (1) been made an order of court, may be enforced in the same manner as any judgment or order to the same effect."

[33] Section 3 of the Recognition & Enforcement of Foreign Arbitral Awards Act deals with certain requirements with regards to the enforcement of foreign arbitral awards. Section 3 provides as follows with regards to the application for enforcement of an arbitral award referred to in section 2(1):

"Application for an order of court mentioned in section 2(1) shall be made to any court and shall–

(a) be accompanied by –

(i) the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court; or

(ii) a certified copy of that award and of that agreement; ..."

What the section clearly provides is that any application for the recognition and the enforcement of a foreign arbitral award shall be accompanies by the original foreign arbitral award and the original arbitration agreement duly authenticated.

[34] Section 4 of the Recognition & Enforcement of Foreign Arbitral Awards Act deals with circumstances under which recognition and enforcement of the award may be refused. The relevant provisions, for the purpose of this judgment, are sections 4(1)(a)(ii) and 4(1)(b)(i). Section 4(1)(a)(ii), where appropriate, provides:

"(1) A court may refuse to grant an application for an order of court in terms of section 3 if –

(a) the court finds that –

(i) ...

(ii) enforcement of the award concerned would be contrary to public policy in the Republic;"

On the other hand, section 4(1)(b)(i) provides:

"(b) the party against whom the enforcement of the award concerned is sought, proves to the satisfaction of the court that –

(i) the parties to the arbitration agreement concerned had, under the law applicable to them, no capacity to contract, or that the said agreement is invalid under the law to which the parties have subjected it or of the country in which the award was made; ..."

[35] On an international plain, the enforcement of foreign arbitral awards is governed by the Convention on the Recognition & Enforcement of Foreign Arbitral Awards of 1958, commonly known as the New York Convention. South Africa acceded to this convention without reservation in 1976, such accession having been effective from 1 August 1976 (Joubert: The Law of South Africa, supra, para 613 at p456). The enactment of the Recognition and the Enforcement of Foreign Arbitral Awards Act in 1977 was to give effect to this ratification.

[36] The New York Convention also recognises the circumstances under which the recognition and enforcement of an award may be refused. It provides as follows in article V(1)(a):

"(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; ..."

It is worth noting that section 103(2(b) of the English Arbitration Act, 1996 contain words which are identical to the provisions of section 4(1)(b)(i) of the Recognition & Enforcement of Foreign Arbitral Awards Act, as also article V(1)(a) of the New York Convention.

[37] A model law for commercial arbitration which was accepted by the United Nations Commission on International Trade Law in 1985, and which was further accepted by the General Assembly of the United Nations on 11 December 1985 still has no legal effect and, as such, is not even regarded as soft law. (Hercules Booysen: International Transactions & the International Law Merchant: Interlegal, Pretoria 1995 p372) The New York Convention thus still remains the only source in international law governing the recognition and the enforcement of foreign arbitral awards.

EVALUATION

[38] It is within the common law framework and the legal statutory matrix set out in paragraphs [30] to [36] that I have to determine if there is merit in the proposed

intervention by DHL as the co-applicant in these proceedings; and if there is merit in the proposed intervention, if DHL has made out a case for the enforcement of that portion of the award made in its favour. As for Bateman, the issue I have to determine is whether there is merit in the resistance by Bateman of the recognition and the enforcement of that portion of the award made against it on the basis that the agreement, on the basis of which the award was made, is invalid or whether, the recognition and the enforcement of such arbitral award, as against Bateman, is contrary to public policy in the Republic.

[39] The chronology of events and the circumstances under which the "Conline booking 2000 Booking Note" was issued is set out in Bateman's answering affidavit deposed to by Davis. Davis clearly sets out in the affidavit that he has personal knowledge of all the facts set out in Bateman's answering affidavit, the circumstances surrounding the issuing of the Booking Note and the alleged agreement containing the submission to arbitration. Bateman's evidence in this regard, by way of the affidavit deposed to by Davis, is neither contradicted by Phoenix or DHL. As a matter of fact, neither Phoenix nor DHL makes any attempt to do so. As is correctly pointed out by *Gordon* SC (with him *A W T Rowan*) even if there would have been a factual dispute, such dispute would have had to be resolved by having regard to what is stated in Bateman's answering affidavit.

[40] By way of summary of the salient features of the events surrounding the Booking Note: Since the resumption of negotiations between Bateman and DHL after

the booking of Spedag was aborted, Davis made it clear to Coventry of DHL the terms and the conditions under which Bateman would agree to the contract of carriage and these were that the vessel to be booked should not have anything to do with the Cosco vessel; that no part of the machinery should be stored on deck; that the entire machinery be stored in the hold; and that a written contract, containing the suggested terms and conditions, be supplied to Bateman for signature. Several requests by Davis, spanning the period 18 March 2008 to 25 March 2008 that DHL supply them with a written contract, were to no avail.

[41] As at 25 March 2008 Coventry had still not sent Bateman a written contract. On that date, 25 March 2008, Davis telephoned Coventry and gave him an ultimatum. Davis insisted that Coventry supply Bateman with a written contract by no later than 10h00 the following day (26 March 2008) failing which Bateman would not make use of DHL to transport the machinery. The deadline of 10h00 on 26 March 2008 had come and gone when, at 16h45 on 26 March 2008, Coventry sent Davis a Booking Note which purported to be a draft agreement containing terms and conditions as proposed by Bateman. Bateman did not accept the terms and conditions set out in the draft, did not sign it let alone that the draft was supplied to Bateman long after the deadline of 10h00 on 26 March 2008 had passed.

[42] The Booking Note referred to in the preceding paragraph is the document upon which Phoenix relied in the Arbitration to found a claim against Bateman. Clause 35 of the Booking Note provides that the parties submitted to London arbitration under

the London Maritime Arbitration Association Rules. As has already been pointed out, Bateman never accepted the terms contained in the Booking Note in as much as Bateman never signed it.

[43] In the light of the summary of events surrounding the issuing of the Booking Note, based as it is on Bateman's version of events, by no stretch of imagination can it be said, in South African law, a valid and binding contract of carriage for the ocean transportation of Bateman's machinery, in which the parties submit to arbitration, was concluded between Bateman and DHL. An important characteristic of arbitration is its consensual basis. There is absolutely no evidence before me to suggest that there ever was consensus, either between Bateman and DHL or between Bateman and Phoenix, for that matter, to conclude a contract in which the parties agreed to submit to arbitration.

THE MERIT OF DHL'S APPLICATION TO INTERVENE

[44] The basis upon which DHL wants to intervene as the co-applicant in the proceedings for an order for the recognition and the enforcement of that portion of the award made in its favour is that the arbitrator in the arbitration proceedings made an award, against Bateman, and that Bateman has failed to satisfy the award; that the arbitrator made a finding as to his own jurisdiction and that the arbitrator had jurisdiction to determine the dispute; that the arbitrator's finding as to his own jurisdiction is final and binding on the parties in as much as none of the parties challenged any finding of the arbitrator; and that it is now too late for any party to challenge any finding of the

arbitrator as the time periods for doing so, in terms of the English Arbitration Act, has long elapsed. DHL thus contends that it is not competent for this Court to revisit the merits of the dispute between the parties.

[45] It is further contended, on behalf of DHL, that because Bateman failed to avail itself of the appeal and review processes provided for in the English Arbitration Act, and having participated in the arbitration proceedings, Bateman is, in terms of section 73 of the English Arbitration Act, prevented from raising want of jurisdiction as a defence at the enforcement stage of the proceedings.

[46] It is submitted on behalf of Bateman that according to the common law a party seeking to enforce an arbitration award, whether it is a local foreign award, bears the burden of proving that the arbitrator who handed down the award had jurisdiction to determine the award. This, of necessity, will require the party to prove, on the ordinary standard of proof required in civil cases, that there was an arbitration agreement containing a clause submitting the parties to arbitration. The provisions of section 4(1)(b)(i) of the Recognition & Enforcement of Foreign Arbitral Awards Act only alter the common law to the extent that, in the instance of Bateman, Bateman bears the onus to prove the absence of the agreement.

[47] Moreso, the provisions of section 3(a)(i) of the Recognition & Enforcement of Foreign Arbitral Awards, under the heading "Application for award to be made an order of court" provide that such an application shall be accompanied by the original award

concerned and the original arbitration agreement in terms of which the award was made, duly authenticated, or a certified copy of that award and of that agreement.

[48] In the arbitration proceedings in London, DHL challenged the jurisdiction of the arbitrator and the validity of the agreement purportedly submitting the parties to arbitration. DHL, in the position it adopted in the London arbitration proceedings, did not seek to rely on an agreement submitting the parties to arbitration. In this court, all that DHL alleges and say, is that the arbitrator made an award against Bateman, and that Bateman has failed to satisfy the award. Bateman does not, in the proceedings before me, allege the existence of an agreement in which the parties agreed to submit to arbitration. Both the common law and the Recognition and Enforcement of Foreign Arbitral Award Act recognise the importance of an arbitration agreement as a pre-requisite to the enforcement of the award. In the instance of this matter, I cannot, as a matter of fact, find that there was a valid agreement concluded between DHL and Bateman submitting the parties to arbitration, both in terms of English law and the South African law.

[49] Reflecting on the position at common law in England, Devlin J made the following observation in *Christopher Brown Ltd v Genossenschaft Oesterreichischer* [1953] All ER 1039:

"To succeed, therefore, the plaintiffs, first, must prove the making of the contract which contains the submission; secondly, they must prove that the dispute which arose was within terms of the submission; thirdly, that arbitrators were appointed in accordance with the clause that contains

the submission; fourthly, they must prove the making of the award; and lastly they must prove the amount awarded has not been paid."

[50] It therefore, follows, in my view, that DHL, in the proceedings before me, has failed to allege and prove, on the ordinary civil standards, a valid agreement containing a submission to arbitration.

ESTOPPEL

[51] The position consistently adopted by Bateman, in the arbitration proceedings in London and in the proceedings before me, is that it is not a party to any agreement containing a clause submitting it to arbitration either with DHL or Phoenix. In the absence of an agreement submitting it to arbitration, no arbitrator shall have jurisdiction over Bateman. Bateman, thus, both in the London arbitration proceedings and in the proceedings before me challenged the jurisdiction of the arbitrator. Once the arbitrator found against Bateman in the London arbitration proceedings, Bateman did not avail itself of the appeal and review remedies in that jurisdiction. Bateman seek to do so in this jurisdiction. In this regard, it is contended on behalf of DHL that Bateman cannot now challenge the jurisdiction of the arbitrator in this jurisdiction having failed to do so in a foreign jurisdiction. It is thus contended on behalf of DHL that Bateman is precluded from raising the issue of want of jurisdiction on the part of the arbitrator in the light of the English statutory estoppel created by section 67(1) read with section 70(2) and (3) and section 73 of the English Arbitration Act, 1996.

[52] The general proposition is that it is normally appropriate to leave a party to a foreign arbitration to pursue any remedy it has in the foreign jurisdiction. The position was accepted as such in such authorities as *Seton Co v Silveroak Industries Ltd* 2000(2) SA 215 (T) where the court held that a court is not entitled to refuse recognition of foreign arbitral award on ground of fraud in circumstances where the party resisting the recognition of the award has not exhausted the remedies available to it in a foreign jurisdiction or proper forum. This position appears to have been occasioned by a need to avoid contradictory judgments where a foreign court may enforce the award because no objection was raised in the foreign jurisdiction, but a South African court would decline to enforce the award. The approach seems to be that in those instances where an element of turpitude in the granting of the foreign award is alleged by a party resisting the recognition and the enforcement of a foreign arbitral award, that it is appropriate to leave the party resisting the granting of the relief to pursue any remedy it has in the foreign jurisdiction. This approach is resorted to for the simple reason that extraneous evidence would be necessary to prove that element of turpitude as opposed to granting an order for the enforcement of a foreign arbitral award which, on the face of it, is contrary to public policy. But, it would appear, a challenge to the arbitrator's jurisdiction stands on a different footing to other challenges to an award, whether on substantive or procedural grounds.

[53] In paragraph [50] of this judgment I determined that DHL failed to allege and prove a valid agreement containing a submission to arbitration. The jurisdiction of the arbitrator is derived from a valid arbitration agreement. Absent the agreement

submitting the parties to arbitration, no arbitrator can claim jurisdiction to determine the dispute. Absent proof that a party has bound itself to an arbitration agreement, containing a clause submitting the parties to arbitration, the arbitrator does not have jurisdiction over that party. An order for the recognition and enforcement of a foreign arbitral award which, on the face of it, is invalid, would be contrary to a legal order in any civilised world.

[54] As has already been pointed out elsewhere in this judgment, in the London arbitration proceedings Bateman challenged the jurisdiction of the arbitrator. Bateman persists in this position in the present proceedings. As has been further pointed out, DHL contends that Bateman cannot challenge the jurisdiction of the arbitrator now as Bateman has failed to avail itself of the remedies available to it in England and that, in any event, Bateman is precluded from doing so in terms of the provisions of the English Arbitration Act, 1996.

[55] In a recent decision of the English Supreme Court (previously the House of Lords) in the matter of *Dallah Real Estate & Tourism Holding Company v Government of Pakistan* 2010 4 KSC 46 the facts were briefly as follows: Dallah, a Saudi-Arabian based company had acquired land in Mecca. Dallah concluded contracts for a housing development on its land with a trust set up by the Government of Pakistan. The contract contained an arbitration clause submitting the parties, in the event of a dispute, to arbitration in the International Chamber of Commerce in Paris. A dispute arose but by the time Dallah wished to institute arbitration proceedings in Paris, the trust had ceased

to exist. Dallah instituted proceedings against the Governments of Pakistan on the basis of these contracts.

[56] In the arbitration proceedings which ensued in the International Chamber of Commerce in Paris, the Government of Pakistan refused to submit to the jurisdiction of the tribunal. The arbitrator had to determine whether the Pakistani Government was a party to the arbitration agreement. The tribunal found that the Government of Pakistan was a party to the agreement and that the tribunal had jurisdiction to determine the dispute.

[57] When Dallah sought to enforce the award in the English Court, the Government of Pakistan objected to the tribunal's jurisdiction on the basis that it was not a party to the agreement. It was contended on behalf of Dallah that if the Government of Pakistan sought to challenge the jurisdictional ruling of the tribunal it should have done so in Paris. This argument was rejected by the English Supreme Court in spite of the English statutory estoppel rules. Thus the English Supreme Court held that the jurisdiction of the arbitration tribunal could be challenged in England regardless of the rules applicable in France.

[58] In rejecting the contention by Dallah that the Government of Pakistan can only challenge the jurisdictional ruling in France, the Supreme Court held, per Lord Mance, that neither article V(1)(c) of the New York Convention nor section 103(5) of the English Arbitration Act, 1996 contain any suggestion that a party resisting recognition or

enforcement of an award in any one country has an obligation to seek to set aside the award in the other country where the award was made. Thus, by implication, the English Supreme Court held that the provisions of section 103(f) of the English Arbitration Act, 1996 did not preclude a challenge in England a jurisdictional challenge of a foreign award.

[59] The English Arbitration Act, 1996 contains the same provision to section 4(1)(b)(v) of the Recognition & Enforcement of Foreign Arbitral Awards Act. There is no reason, in the instance of this matter, not to follow the interpretation of the English Supreme Court in interpreting the provisions of section 4(1)(b)(v) of the Recognition & Enforcement of Foreign Arbitral Awards Act. I am enjoined by section 233 of the Constitution of the Republic of South Africa, 1996 that, when interpreting any legislation, including the Recognition & Enforcement of Foreign Arbitral Awards Act, to follow any reasonable interpretation of the legislation or statutory enactment that is consistent with international law.

[60] Following that approach, I similarly hold, that Bateman can challenge the jurisdiction of the arbitrator in this court in spite of the statutory estoppel provisions contained in the English Arbitration Act, 1996; that DHL failed to prove that the arbitrator who handed down the award had jurisdiction to determine the award; and, in the light thereof, the application by DHL to intervene as the co-applicant in the main application ought to fail on this ground alone.

[61] In paragraph [38] of this judgment I indicated that Bateman resists the order for the recognition and enforcement of that portion of the award made in favour of DHL, and against Bateman, on the basis that the enforcement thereof would be contrary to public policy in the Republic as contemplated in section 4(1)(a)(ii) of the Recognition & Enforcement of Foreign Arbitral Awards Act; I further indicated, in the same paragraph of this judgment, that the resistance to the recognition and the enforcement order is based on a contention by Bateman that the purported agreement on the basis of which DHL was granted the award against Bateman, is invalid as contemplated in section 4(1)(b)(i) of the Recognition & Enforcement of Foreign Arbitral Awards Act.

[62] The term "invalidity" is not defined in the New York Convention, nor is the term defined in either the English Arbitration Act, 1996 or the Arbitration Act presently applying in South Africa. The framers of the New York Convention thus left to the signatories to the Convention to determine in their respective countries what meaning to attribute to the term "invalidity". Invalidity, in the circumstances of the matter before me, would include a "contract" purportedly concluded between the parties in circumstances where consensus cannot be proved. In paragraph [50] of this judgment I determined that DHL failed to allege and prove a valid agreement containing a submission to arbitration. The purported agreement is invalid because of, among other things, lack of consensus.

[63] An arbitration agreement is based on consensus between the parties. Consensus is a fundamental element of a contract. Consensus is an element of such

fundamental importance in the law of contracts which no nation in the civilised world can derogate from. Any contract which does not contain consensus as an element would offend those norms and values which characterise a civilised society. Absent the element of consensus in any alleged or purported contract, the purported agreement or contract is invalid. With these values and norms in mind I determine that the purported agreement, on the basis of which the tribunal in London found Bateman liable to DHL, is invalid. The recognition and the enforcement of an award derived from such alleged or purported agreement would offend public policy in the Republic.

[64] Having thus found the contract, on the basis of which the award was made, the "Conline booking 2000 Booking Note", is invalid, any recognition and the enforcement of an award derived therefrom would be contrary to public policy in the Republic. It therefore follows that the application by DHL to intervene as the co-applicant in the main application ought to fail.

[65] In the result, I make the following order:

[65.1.] The application by the applicant (DHL) to intervene as the co-applicant in the main application is dismissed.

[65.2.] The applicant in the intervention application (DHL) is ordered to pay the respondent's (Bateman) costs, such costs to include costs consequent upon employment of two counsel, duly taxed or as agreed.

N J Yekiso, J