CRUZ CITY 1 MAURITIUS HOLDINGS v UNITECH LIMITED & ANOR

2014 SCJ 100

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

RECORD NO: 107966

Cruz City 1 Mauritius Holdings

Applicant

v

1. Unitech Limited

2. Burley Holdings Limited

Respondents

AND

In the matter of:

RECORD NO: 107967

Cruz City 1 Mauritius Holdings

Applicant

v

Arsanovia Limited

Respondent

JUDGMENT

Introduction

These two applications by way of motion have been consolidated so that there will be a single judgment, a copy to be filed in each Court record. The applicant in the two cases (Cruz City) is moving for an order recognising and declaring executory in Mauritius the foreign Awards, hereinafter referred to as Award 2 and Award 3 respectively, dated 6th July 2012. They were

issued by the Arbitral Tribunal (the Tribunal) constituted by the London Court of International Arbitrations (LCIA) in Arbitration No. 111792 (Arbitration 2) and No. 111809 (Arbitration 3) respectively. These two awards formed part of a set of three arbitral proceedings which were not consolidated but were heard simultaneously by the Tribunal. Arbitration No. 111791 (Arbitration 1) is not in issue in the present applications. Together, respondents Unitech and Burley in the first application and Arsanovia in the second application will be referred to as the respondents.

These applications which are brought under the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001** (the 2001 Act) are the first to be adjudicated upon by this Court as set up pursuant to **section 42** of the **International Arbitration Act 2008** (the IAA). The 2001 Act gives force of law in Mauritius to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) signed on 10 June 1958.

Respondents' objections

In their respective affidavits dated 15 July 2013 and 17 July 2013 the respondents contend that granting enforcement of awards 2 and 3 would be in breach of:

(1) Article V(1)(c) of the New York Convention ("Jurisdictional Issue");

(2) Article V(2)(b) of the New York Convention ("Public Policy Issue"); and

(3) Sections 1, 2, 3, 10, 76, and/or 82 of the Constitution of Mauritius ("Constitutional Issue").

Before addressing the main issues raised by the respondents, we can deal briefly with three matters which came up in the course of the submissions made for or against enforcement. The first concerns the reference made to section 39 of the IAA. The cases before us have been brought under the 2001 Act for recognition and enforcement of New York Convention award and not under the IAA for setting aside or annulment of an international arbitral award where the juridical seat is in Mauritius. Suffice it to say that the IAA, subject to the provisions made under

section 3A, only applies to an international arbitration having its juridical seat in Mauritius. Section 39 under the heading “Exclusive recourse against award” is not one of the exception sections mentioned under section 3A of the IAA. Therefore, regardless of the fact that section 39 includes as grounds for setting aside or annulment of an international arbitral award the grounds available for refusing recognition and enforcement of award under Article V of the New York Convention, section 39 is of relevance when this Court is exercising its role as the supervisory Court to set aside an award in accordance with that section, which is not the case here. The notion of supervision of international award having its seat in Mauritius is different from that of recognising and enforcing a foreign award which is governed by the 2001 Act. By virtue of section 3A of the 2001 Act, the New York Convention is made to apply to the recognition and enforcement in Mauritius of all foreign arbitral awards. If the seat of arbitration is elsewhere, application for setting aside or annulment of the award can only be made before the Court of the juridical seat of arbitration, where normally the award is legally deemed to have been made. It is to be noted however that the New York Convention applies equally to the recognition and enforcement of international arbitration awards rendered under the IAA, that is, where Mauritius is the seat pursuant to Section 40 of the IAA.

With regard to the second matter, as the present applications are for recognition and enforcement of award, we take it that the respondents in fact mean that the 2001 Act incorporating the New York Convention and not, as they have submitted, the IAA, applying the provisions of the UNCITRAL Model Law is akin to requesting this Court to act as mere rubber stamps in enforcing a foreign award. The third matter concerns the submission made on behalf of Cruz City to the effect that Article 28 of the Model Law does not form part of the Mauritian law. It was correctly stated that Article 28 does not form part of the 2001 Act but this Article has been implemented in section 32 of the IAA under the heading “Rules applicable to substance of dispute”. It gives the parties the freedom of choice as to the procedural and substantive law that will be applied by the arbitral

tribunal to resolve their dispute, that is, in relation to arbitration under the IAA seated in Mauritius. Hence it is irrelevant for the same reason that it is not an exception under section 3A of the IAA.

We propose to deal with the third objection of the respondent first.

Constitutional issue

It is obvious, as was also pointed out by Counsel for Cruz City, that in support of their objection under this head the respondents have in paragraphs 18 and 19 of the affidavit dated 15 July 2013 adopted the argument of the plaintiff in **TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5 (13 March 2013)** (**TCL Air Conditioner**), as summarised by the High Court of Australia in paragraph 4 of the judgment, except for a minor adjustment to make it applicable to the Supreme Court in the instant cases. The respondents then aver that, in light of that argument, the 2001 Act and the IAA offend against sections 1, 2, 3, 10, 76 and/or 82 of the Constitution and that enforcing the award will, more specifically, be contrary to sections 76 and 82 of the Constitution whereby, they argue, this Court should act as a watchdog against the "*pro-enforcement bias of the Convention*".

In **TCL Air Conditioner** TCL defaulted on payment of the award made by the arbitral tribunal requiring it to pay to the other party a substantial amount in damages and costs and the latter applied to the Federal Court of Australia to enforce the award under the International Arbitration Act 1974 (the Australian IAA). The matter was considered in relation to the constitutional validity of the Australian IAA. This probably explains the respondents' reference at time to the IAA when they in fact meant to refer to the 2001 Act. In any case it is appropriate to say here that the respondents have not established before us how our IAA and the 2001 Act, which have been enacted to make provisions for the Courts to assist in different ways in facilitating the process of international arbitration chosen by the parties themselves, can be said to interfere with the provisions of the Constitution or undermine the jurisdiction of the Court.

In order to understand the plaintiff's argument in **TCL Air Conditioner** it is appropriate to state that in Australia, laws made by the Parliament of the Commonwealth under the Constitution are binding on the courts and judges and the judicial power of the Commonwealth is vested in the Federal Supreme Court called the High Court of Australia. The Australian IAA gives the force of law to the New York Convention and the UNCITRAL Model Law. Article 35 of the Model Law provides for the recognition and enforcement of arbitral awards. The grounds for refusing to recognise or enforce an award do not include an error of law made by the arbitral tribunal in its resolution of the dispute.

In a gist, the argument of TCL was that recognising and enforcing arbitral awards in accordance with the Australian IAA was unconstitutional as it (a) interfered with the judicial power of the Federal Court in its inability to refuse to recognise or enforce arbitral awards on the ground of error of law appearing on the face of the award, and (b) impermissibly conferred judicial power on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law when deciding the dispute submitted to it.

It was further submitted by the plaintiff in that case that the undermining of the institutional integrity of the Federal Court was compounded because the arbitral award that was to be enforced in spite of any legal error that might appear on its face was one that "*Article 28 of the Model Law, or an implied term of the arbitration agreement requires to be correct in law*", in other words, it was argued that enforcement of an arbitral award should be refused where the arbitrator has made an error of law in his reasoning because under Article 28 of the Model Law the arbitrator's authority under the arbitration agreement is limited to his determining a dispute correctly or, it was alternatively submitted, every arbitration agreement contained an implied term restricting the arbitrator's authority to his applying the law correctly.

However, the plaintiff's argument in **TCL Air Conditioner** was found to have no merit and was rejected by the High Court of Australia. The learned Judges highlighted the significant differences between judicial power and arbitral power. Judicial power "*is conferred and exercised by law and coercively*". "*It is not invoked by mutual agreement but exists to be resorted to by any party considering himself aggrieved*". Its decision is made against the will of at least one side. Whereas, in the case of private arbitration, the arbitrator's powers "*depend on the agreement of the parties*", "*the authorities of the arbitrator of the kind governed by the Model law*" is based "*on the voluntary agreement of the parties*". "*The arbitrator's award is not binding of its own force*". A proceeding for the enforcement of an arbitral award under the Australian IAA "*on application under Art 35 of the Model Law, remains one that involves a determination of questions of legal right or legal obligation resulting in an order that then operates of its own force*". As regards error of law in the arbitral award the Court found that Article 28 is directed to the rules of law that are to be applied and not to the correctness of their application and that it recognises a party's freedom to contract according to the terms of their agreement and to choose rules of more than one legal system. Especially, as provided by the explanatory notes on the Model Law, the parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system.

Counsel for Cruz City submitted that the judgment in **TCL Air Conditioner** is to be considered as persuasive authority that gives the reply to the respondents in the present applications. He referred to several extracts of the reasoning of French CJ and Gageler J., and of Hayne, Crennan, Kiefel and Bell JJ., in particular to the concluding paragraph 111 which reads:

> "*111. Correctly understood, the task of the Federal Court to determine the enforceability of arbitral awards, by reference to criteria which do not include a specific power to review an award for error, is not repugnant to or incompatible with the institutional integrity of that Court. An arbitral award made in the exercise of a power of private arbitration does not involve an impermissible delegation of federal judicial power. In giving the force of law in Australia to Arts 5, 8, 34, 35 and 36 of the Model Law, s 16(1) of the IA Act does not contravene Ch III of the Constitution."*

Senior Counsel appearing for the respondents limited his submission to the fact that the Constitution of Australia was not the same as that of Mauritius, and did not assist us in explaining the difference which would be of relevance for the determination of the present issues. He however agreed that the case of **TCL Air Conditioner** was against the respondents. In any case, we do not consider that the respondents have been able to substantiate their point that enforcing the awards in the instant cases will be in breach of sections 1, 2, 3, 10, 76, and/or 82 of our Constitution or that the 2001 Act undermines the institutional integrity of the Supreme Court.

In the first place, with regard to the submission that recognising or enforcing the award would offend against section 82 of our Constitution, suffice it to say, as was also pointed out on behalf of Cruz City, that section 82 only pertains to the supervisory jurisdiction of the Supreme Court over subordinate courts and is therefore not of relevance here.

Further, we do not accept the views of the respondents that enforcing the Awards under the 2001 Act will be contrary to sections 1, 2, 3, 10, and 76 of the Constitution or that this will undermine the institutional integrity of the Supreme Court. Section 1 of Chapter I of the Constitution provides that the Republic of Mauritius is a sovereign democratic State. Section 2 provides that the Constitution is the supreme law of the country and if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void. Pursuant to section 3 of Chapter II of the Constitution, the fundamental rights and freedoms of the individual are protected. The Constitution affords protection of those fundamental rights and freedoms, subject to limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Under the Constitution an individual is free to dispose of his rights or properties, which by law are available to him to dispose of, as he wishes. There is nothing to prevent him from entering into a

contract which provides for any dispute on the rights and obligations of the parties to the contract to be resolved by way of international arbitration. In fact, provisions are made in the law to that effect. The IAA implements in our law the Model Law, with such modifications and adaptations as are appropriate, to regulate international arbitration as a distinct regime from domestic arbitration. The IAA makes provisions for the national Courts to assist in facilitating the process of international arbitration which the parties have themselves chosen and this, without reducing judicial control or preventing this Court from intervening where appropriate. The IAA promotes international arbitration by laying down rules applicable to such arbitrations and the 2001 Act makes provisions for the enforcement of arbitral awards.

We must keep in mind that the unlimited jurisdiction that the Supreme Court is bestowed with under section 76 of the Constitution is to hear and determine civil or criminal proceedings provided under the law and as per the jurisdiction conferred upon it by the Constitution or any other law. Section 76 (1) reads as follows:

> "*(1) There shall be a Supreme Court of Mauritius which shall have unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law and such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.*" [Emphasis added].

Further, the Supreme Court and the other Courts are established by law to decide cases that are brought before them. Section 10 (8) of the Constitution provides that our Courts are established by law, and are empowered to determine the existence or extent of any civil right or obligation of any person who institutes such proceedings before them for determination and the Courts are to be independent and impartial in adjudicating the matters brought before them and to give the cases a fair hearing within a reasonable time. Section 10 (8) reads as follows:

> *"(8) Any Court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a Court or other authority, the*

> *case shall be given a fair hearing within a reasonable time."*[Emphasis added]

In contrast, arbitration is founded on the common intent and accord of the parties who have entered into an arbitration agreement. As stated above, a party may, voluntarily and freely, in creating the legal relationship that will prevail between him and the other parties in the formation of a contract between them choose arbitration as the agreed means to resolve their differences. He may freely choose not to institute proceedings before a Court of law for the determination of his rights and obligations under the contract and decide that these or certain matters in dispute under the contract be determined by arbitration. The parties may decide that the arbitral tribunal chosen by them should determine the dispute that has arisen between them in respect of a defined legal relationship which they have agreed to submit to arbitration. An arbitrator or arbitral tribunal once appointed by the parties to rule on their dispute has the authority to make an award which will be binding on the parties and which can be enforced by the process of the courts. Such an award is different from a Courts' decision where the Court exercises the power conferred upon it by law to decide the case brought before it by a litigant for the determination of his civil rights or obligations and where the person or persons against whom the judgment is given do not have to give their consent. Parties to an arbitration agreement accept this specific regime of arbitration normally after being guided by their legal advisers and are fully aware of its implications and consequences. While accepting to go to arbitration the parties know perfectly, by the very agreement that they have chosen to bind themselves, that they would subject themselves to the decision of the arbitrator as to the dispute that they have submitted to him.

As we have shown above, the Supreme Court will adjudicate upon the matter brought before it by a party in compliance with the law that is applicable. In the present applications it will apply the 2001 Act implementing the New York Convention, unless that law has been declared unconstitutional. When this Court is asked to recognise or enforce an award, it is being asked to decide on the legal right of the applicant to enforce the award, that is, to enforce that ultimate product of the agreement of

the parties which is already binding on them. It must also be pointed out at the same time that the Supreme Court, when called upon to recognise and enforce an award under the 2001 Act, has nonetheless been given the power to refuse to do so in a number of circumstances. Where the Court is asked to set aside an award under the IAA also, power is given to the Court not to do so in certain circumstances. Very importantly, by virtue of the public policy exception provided in the law governing arbitration and enforcement of the award it is obvious that this Court has the power to exercise ultimate control over the arbitral process where it is considered to be against the public policy of this country. It cannot therefore be said that there are no protective provisions of the institutional integrity of the Supreme Court in such matters. It is also not to be overlooked that even in an application for the recognition of a foreign judgment the Supreme Court may, when applying the rules of private international law, find that it has no jurisdiction in the matter. It cannot be said for that matter that the institutional integrity of the Supreme Court is thereby compromised. Pursuant to section 76 of the Constitution, this Court will use the power conferred on it by the law and may refuse to recognise and enforce the award after the losing party would have proved the grounds for refusal provided under the 2001 Act. This Court may also refuse recognition and enforcement on its own motion.

Besides, as emphasised above, an arbitral award has its foundation in the international arbitration agreement of the parties and it is the outcome of arbitration where the parties have had the freedom to decide as to who they want to resolve the dispute that has arisen between them, and in the way they have agreed and specified. Therefore, a losing party in an arbitration award cannot, just because the award was not in his favour, be allowed, at the stage when this Court is called upon to adjudicate whether to enforce or refuse enforcement in accordance with the criteria laid down in the law, to ask the Court to interfere with the decision of the arbitral tribunal on grounds not laid down in the law. Such a request is not acceptable not only because it will be tantamount to asking this Court to act against the law, to step outside the jurisdiction conferred on it by law as provided by the Constitution, but it will also be unfair, unjust and inequitable as it will deprive the winning party of the benefit of the award, to which the losing party voluntarily agreed to be bound, by delaying and

protracting matters. The more so, as in the present cases the losing parties have already had the chance of exhausting all the avenues available by way of challenge of the award or appeal which derive from the terms of the arbitration agreement. They sought annulment in relation to Award 2 though they did not deem it fit to take the opportunity to challenge Award 3.

In any event, we do not accept the argument that the 2001 Act reduces the role of the Court. Quite to the contrary, in the context of enforcement of the award, the 2001 Act helps in preventing delayed justice and supports the finality of international arbitral awards by only allowing a refusal of enforcement of the awards where there are serious grounds. In the present cases, Awards 2 and 3 are the outcome of the decision of a third party, the Tribunal, in accordance with the powers given to it by the agreement of the parties of their own volition, having agreed to submit their differences for decision by that Tribunal. In these circumstances the respondents cannot find fault with the power given to this Court by the 2001 Act to grant, or refuse, recognition or enforcement of the Awards in accordance with the criteria set out in the New York Convention. For all the above reasons it has not been established that the enforcement of the Awards under the 2001 Act would in any manner contravene any of the sections 1, 2, 3, 10, 76 or 82 of the Constitution or undermine in any manner whatsoever the institutional integrity of the Supreme Court. We therefore reject the respondents' Constitutional challenge as being devoid of merit.

We shall now deal with the first two issues.

The issues under Article V

In order to understand the issues raised it is pertinent to give an insight of the facts leading to the Awards in the present applications:

1. In Arbitration 2 the claimant was Cruz City, a special purpose company incorporated under the laws of Mauritius, and the respondents were the first respondent in the first case (Unitech), a

real estate Indian company, and the second respondent in the first case (Burley), a special purpose Mauritian company wholly owned by Unitech.

2. In Arbitration 3 the claimant was the respondent in the second case (Arsanovia), a special purpose Cypriot company owned jointly in equal shares by Unitech and certain other Indian parties, and the respondent was Cruz City. In Arbitration 3 Cruz City made a counterclaim against Arsanovia and Burley as respondents.

3. The three Arbitrations stemmed from a joint venture arrangement between Cruz City and the respondents for the development of slum areas in Mumbai. For the purpose of the Project known as the Santacruz Project, a special purpose company, Kerrush Investments Limited (Kerrush) was incorporated under the laws of Mauritius with Cruz City and Arsanovia as shareholders. Cruz City, Arsanovia and Kerrush entered into a Shareholders' Agreement (SHA) on 6 June 2008 setting out certain deadlines by which certain targets in the development of the project had to be achieved by the respondents, as well as the consequences of failure in meeting those deadlines. If the conditions for the start of construction had not been fulfilled within a specified period, Cruz City was entitled to exercise a put option requiring Arsanovia and Burley to purchase all of its shares in Kerrush for a certain price. Cruz City, Unitech and Burley entered into a separate agreement known as the Keepwell Agreement (KWA), also dated 6 June 2008 under which Unitech agreed to put Burley in funds to purchase Cruz City's shares in Kerrush, should Cruz City exercise its Put Option, and to cause Burley to make payment of the Put Option Amount due from Arsanovia and Burley in respect of the Put Option under the SHA.

4. On 14 July 2010, 3 days before the expiry of the dead line, Arsanovia served a Buy-out Notice purporting to exercise a right to purchase Cruz City's shares in Kerrush at a 20% discount from the then Fair Market Value defined in the SHA, alleging that Cruz City was subject to an Event of Default as a result of the collapse previously (in September 2008), of Lehman Brothers alleged to be "the Affiliate which controls" Cruz City.

5. As the respondents had not met the terms for the start of the construction by the deadline of 17 July 2010, by notice dated 13 September 2010, Cruz City exercised the Put Option requiring Arsanovia and Burley, jointly and severally, to purchase all of its equity shares in Kerrush for the Put Option Amount, and Unitech to make sufficient funds available to Burley to enable it to pay the Put Option Amount to Cruz City, and to cause Burley to make the necessary payment to Cruz City under the terms of the Keepwell Agreement.

6. The respondents failed to purchase Cruz City's shares in Kerrush and pay the Put Option Amount. The disputes between Cruz City and the respondents led to the three Arbitrations.

7. The SHA as well as the KWA contained an arbitration agreement and both agreements were governed by and were to be construed and interpreted in accordance with the law of India without regard to conflict of laws principles thereof. As stated above, Cruz City commenced arbitration proceedings (i) against Arsanovia and Burley under the SHA (Arbitration 1) and (ii) against Unitech and Burley under the KWA (Arbitration 2). Arsanovia started proceedings against Cruz City under SHA (Arbitration 3) and in response Cruz City made a counterclaim against Arsanovia and Burley. It is common ground that the Tribunal found in favour of Cruz City in the three Arbitrations. The Tribunal ordered as follows:

(a) In Award 2 that

> (i) against delivery of all of Cruz City's shares in Kerrush, free and clear of all liens and encumbrances, each of Unitech Ltd and Burley are jointly and severally liable to pay US$ 298,382,949.34, <u>as the purchase price for those shares</u>, to Cruz City; (Emphasis Added)
>
> (ii) Unitech Ltd and Burley must pay to Cruz City £165,000, less any balance of funds which may be refunded to Cruz City by the LCIA, in respect of Cruz City's contribution to the costs of the Arbitrations;
>
> (iii) Unitech Ltd and Burley must pay to Cruz City interest on the sums referred to in sub-paragraphs (i) and (ii) above, accruing at the rate of 8% per annum, compounded quarterly, from the date of the Second Award until payment;
>
> (iv) Unitech Ltd and Burley must pay to Cruz City US$ 2,900,000 in respect of its legal fees and other costs and expenses; and

(v) Unitech Ltd and Burley must pay to Cruz City any tax payable on the amounts received by Cruz City, as provided in the Shareholders' Agreement; and

(b) In Award 3 that

(i) Arsanovia must pay to Cruz City £165,000, less any balance of funds which may be refunded to Cruz City by the LCIA, in respect of Cruz City's contribution to the costs of the Arbitrations;

(ii) Arsanovia must pay to Cruz City US$ 2,900,000 in respect of its legal fees and other costs and expenses; and

(iii) Arsanovia must pay to Cruz City interest on the sums referred to in sub-paragraph (i) above, accruing at the rate of 8% per annum, compounded quarterly, from the date of the Third Award until payment.

8. The Respondents filed challenges to the Awards before the High Court in England under the English Arbitration Act 1996. They subsequently did not pursue their challenge against Award 3. In his judgment, Mr Justice Andrew Smith set aside Award 1 in Arbitration 1 against both Burley and Arsanovia, but upheld Award 2 in Arbitration 2 against Unitech and Burley. The Respondents' challenge to Award 2 was therefore dismissed. An Order declaring that the Tribunal in Arbitration 1 did not have substantive jurisdiction and that the Tribunal in Arbitration 2 did have substantive jurisdiction was subsequently sealed on 14 January 2013. Neither party has appealed against the Judgment.

9. On 23 January 2013, Cruz City issued ex parte application under Section 66(1) of the English Arbitration Act 1996 seeking permission to enforce Awards 2 and 3. By Orders dated 25 and 29 January 2013 (sealed on 29 and 31 January respectively), Mr Justice Cooke granted the orders sought by Cruz City. No application to set aside the Enforcement Orders was made by the Respondents. Awards 2 and 3 therefore became enforceable in England in the same manner as a judgment or order of the court to the same effect.

From the various affidavits exchanged between the parties (a) affidavits dated 15 July 2013 and 17 July 2013 respectively of Mr Seechurn filed on behalf of the respondents (b) the affidavit dated 24 July 2013 of Mr Tsoulies in response thereto on behalf of the applicant and (c) the written submissions filed on behalf of the applicant in respect of both cases, the respondents' objection to enforcement under Article V (1) (c) is that the Tribunal has exceeded its jurisdiction by adjudicating a dispute which was beyond the arbitration clause embodied in the KWA and by passing an award on the basis of a premature claim made by Cruz City. We note at the same time that in the written and oral submissions for the respondents in respect of both applications against enforcement, emphasis seems to have been laid only regarding the jurisdictional challenge under Article V (1) (c) to the effect that the Tribunal has exceeded its jurisdiction by awarding costs contrary to rule 28.4 of the LCIA rules, and not that it has gone beyond the arbitration clause stipulated in the KWA. However, the respondents have at no time said they have dropped the latter issue under the jurisdictional challenge. We are therefore dealing with the issues raised under Article V on this understanding.

Article V of the New York Convention reads as follows:

"*Article V*

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 11 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; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) *The recognition or enforcement of the award would be contrary to the public policy of that country."*

It is clear that under Article V (1) this Court has the discretion to refuse recognition and enforcement of the foreign awards only if the respondents prove that there has been violation of any of the exhaustive grounds (a) to (e) set out under Article V (1). However, under Article V (2) this Court may also, of its own accord refuse to recognise and enforce an award if it finds under Article V (2) (b) that the recognition or enforcement of the award would be contrary to the public policy of Mauritius. Under this subsection a respondent who relies specifically on this ground must establish it before this Court.

The respondents' objections

The objections raised are under the following subsections of Article V:

(1) Article V (1) (c) and
(2) Article V (2) (b).

Jurisdictional Challenge under Article V (1) (c)

The relevant part of Article V (1) (c) provides as follows:

"*Article V*

> *1. Recognition and enforcement of the award <u>may</u> be refused, at the request of the party against whom it is invoked, <u>only if that party furnishes</u> to the competent authority where the recognition and enforcement is sought, <u>proof that</u>:*
>
> ……
>
> (c) *<u>The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration</u>….*" (Emphasis added).

The respondents contend that enforcement should be refused under this Article on two limbs:

<u>First Limb</u>: because the Tribunal has exceeded its jurisdiction by adjudicating a dispute which was beyond the arbitration clause embodied in the KWA and by passing an award on the basis of a premature claim made by Cruz City as no Event of Default under the terms of the KWA - Clause 10 (a) (i) - has occurred. According to them, the trigger point for the obligations to arise under the KWA is the adjudication on the obligations of Arsanovia and Burley to make payments to Cruz City under the terms of the SHA. As this adjudication by the Tribunal in Arbitration 1 was set aside by the London High Court on the ground of lack of jurisdiction of the Tribunal, the respondents argue that the obligation upon Unitech to fund Burley to make the said payment has therefore not come into effect.

For Cruz City it was submitted that the issue of jurisdiction in respect of Arbitration 2 has already been unsuccessfully raised in the arbitration proceedings as well as at the level of the Supervisory Court. It was contended that the respondents are therefore estopped from relying on the same ground for resisting enforcement. In support of that proposition Cruz City relied mainly on the English decision of **Minmetals Germany GmbH v Ferco Steel Ltd [1999] C.L.C. 647** (**Minmetals Germany**). In that case, the defendant (Ferco) made an application to set aside the leave granted to the plaintiff (Minmetals) to enforce two Chinese arbitration awards. The Court had to decide, inter alia, whether Ferco had been denied an opportunity to present its case; whether the procedure for arriving at the awards had been in accordance with the parties' agreement, thus complying with the CIETAC rules, and whether Ferco had shown that the means of arriving at the awards "was contrary to the concept of substantial justice, so that it would be against English public policy to enforce them".

It was held that when considering whether to set aside leave to enforce a foreign award a Court had to examine the alleged injustice of the arbitral procedure, consider whether the enforcee had sought any remedy available before the supervisory Court jurisdiction and if he had not done so whether such failure was reasonable. It was found that Ferco had failed to avail itself of the opportunity given to it to present its case. The arbitrators had not acted in accordance with Art. 53 of the CIETAC rules on fairness and reasonableness in making the first award but the Beijing Court ordered a resumed hearing and Ferco did not take the opportunity given to it at the subsequent hearing to challenge the evidence relied on by the arbitrators at the first hearing. Ferco was found not to have acted reasonably and to have thereby waived its right to object and that the enforcement of the awards would not lead to substantial injustice. In **Minmetals Germany** (supra) public policy appears to have been the main issue. That case shows the approach and policy of the English Court in relation to international commercial arbitration and the enforcement of a foreign award. Colman J. said the following at p 661 of the judgment:

> *"In International commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award."*

The Chinese Supervisory Court had refused Ferco's application to remedy certain alleged defects in the arbitration procedure and to revoke the awards, leaving the final award undisturbed. Mr Justice Colman held that in the circumstances public policy was strongly in favour of enforcing convention awards and upholding the determinations of the supervisory court; that in exceptional cases the English court would intervene but it would not normally re-investigate allegations of procedural defects which had already been considered by the supervisory court.

In the instant cases, in deciding whether to refuse recognition and enforcement under Article V this Court will not look into the merits of the dispute between the parties. Its task is not to sit on appeal and review the decision of the Tribunal on the merits or to substitute its own decision for that of the Tribunal but to consider whether it will refuse recognition and enforcement under any of the grounds that are relied upon and proved by a respondent under Article V of the New York Convention. In that respect, this Court has the power under the ground provided in Article V (1) (c) to undertake a full review of the Tribunal's findings on jurisdiction. It will indeed do so where it considers it appropriate and necessary, bearing in mind the overriding principle that the process of enforcement should be smooth and expedient. In the present cases it is clear that the jurisdictional objection has already been verified by the Supervisory Court of the seat of arbitration chosen by the parties themselves. We do not hold that we would never re-verify the issue of jurisdiction where it has been considered and rejected by the Supervisory Court, but that we would normally not do so unless in presence of exceptional circumstances. In the particular cases before us we do not find it necessary to do so. However, as we have stated above, being given that this is the first such case before this Court as currently constituted with three designated Judges, and considerable time had to be allotted to peruse the substantial amount of material that has been placed before us in that respect, we have considered the factual scope of the jurisdictional challenge.

In the first place, we have taken into account Clause 19 of the KWA which is practically the same as in the SHA. The relevant part of it reads as follows:

> "*19. ARBITRATION. Any dispute arising out of or in connection with the provisions of this Keepwell Agreement, including any question regarding its validity, existence or termination, shall be referred to and finally settled by arbitration under the London Court of International Arbitration Rules ("Rules"), which rules are deemed to be incorporated by reference into this Clause. The number of arbitrators shall be three. The seat or legal place of the arbitration shall be London, England. The language to be used in the arbitral proceedings shall be English. The arbitrators shall submit their determination in writing and such determination shall be binding and conclusive upon the parties. The arbitrators shall award to the prevailing party or parties, if any, as determined by the arbitrators, its costs and expenses, including attorneys' fees….*" [Emphasis added.]

The core issue of the dispute between the parties which they have referred to arbitration for determination was whether the liability of Unitech had accrued under the KWA. By Clause 2(b) of the KWA, Unitech Ltd undertook to [Cruz City] and its successors etc. "*to cause [Burley] to timely make the payments specified in Clause 15.3.3 of the [SHA] (such amounts collectively, the "Obligations"), and (ii) to make sufficient funds available to [Burley], no later than five (5) Business Days after receipt of notice from [Cruz City] requiring payment of any Obligations, to enable [Burley] to timely satisfy the Obligations*".

Clause 10 of the KWA provided for the events of Default. One of them as set out under Clause 10 (a) (i) would happen if "*[Burley] shall fail to pay or perform in full, when due, any of the Obligations or Unitech Ltd shall fail to perform in full, when due, its obligation to make funds available to [Burley] and cause [Burley] to pay all outstanding Obligations*".

We have considered the Arbitration Clauses and the relevant terms under the SHA and the KWA and in particular Clauses 2 (b) and 10 of the KWA, as well as the uncontested facts between the parties as revealed by the affidavit evidence adduced before us. We find no merit in the jurisdictional challenge raised by the respondents. In order to finally determine the dispute referred to it as to whether the liability of Unitech had accrued under the KWA, the Tribunal had necessarily to decide whether the liability of Burley was triggered under the SHA. This was clearly, within the terms submitted to it by the parties, a dispute that arose out of or in connection with the provisions of the KWA. The respondents cannot therefore say that such an issue does not fall within the terms of reference of Clause 19 of KWA or that the Tribunal has acted *ultra petita*, in excess of its authority and dealt with an issue that was not submitted to it.

For us the issue is a factual one which depends on the common intention of the parties. However, it is relevant to point out that before the English High Court the respondents contended that Cruz City's claim against Unitech was premature under Indian law and as such the Tribunal did not

have substantive jurisdiction. Even that proposition was rejected by Mr Justice Andrew Smith who, after considering the expert evidence based on certain Indian cases, was not persuaded that Indian law had such a principle of construction by which the KWA had to be interpreted, that is, he pointed out, as put by the Tribunal in Arbitration 2, that a Tribunal "*may not find a debt is due under another contract until such time as a Court or tribunal with jurisdiction over that contract makes a binding adjudication to that effect*". Mr Justice Andrew Smith went on to say that even if the Tribunal was wrong to have concluded that the liability of Unitech had accrued, for lack of a valid finding that Burley was liable under SHA, he did not find that Cruz City's claim under the KWA went to the Tribunal's substantive jurisdiction.

It is pertinent in this context to refer to the following extract from the judgment of the Supervisory Court at paragraph 62:

> "*I am unable to accept the claimants' argument. As the Tribunal observed, 'there is nothing conceptually difficult about a court or tribunal making a determination that a debt is due under another contract in order to determine whether relief should be granted under the contract before it – this is frequently the case, for instance, under contracts of guarantee' The Tribunal needed to determine whether Burley was liable under the SHA in order to determine whether Unitech was liable under the Keepwell Agreement, and so they had both the jurisdiction and the duty to do so. It was a question that needed to be determined in order to resolve a "dispute arising out of or in connection with the provisions of [the] Keepwell Agreement", that dispute was referred to it and the question was within the Tribunal's substantive jurisdiction"*.

For the reasons given by us after examining the arbitration clause and the relevant facts, we reject the first limb of the objection under Article V (1) (c).

The Second Limb.

The second reason advanced by the respondents under this ground of jurisdictional challenge is that the Tribunal made a global assessment of the costs incurred in the 3 arbitrations conjunctively. It is contended that since Award 1 in Arbitration 1 was overturned on appeal, the costs which Cruz City now seeks to enforce do not reflect the relative success and failure of the arbitration, insofar as

the respondents were victorious in one of them and it would be contrary to the LCIA rules to impose on the respondents the payment of costs which Cruz City should bear. It was urged that the costs were awarded contrary to rule 28.4 of the LCIA rules and the tribunal has accordingly dealt with "*a dispute not contemplated by or falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".*

The submissions made on behalf of Cruz City were that the respondents have not proved their contention pertaining to foreign law as a matter of fact supported by expert evidence in that respect. In relation to Arsanovia's contention that it should not be required to pay costs in respect of Award 3 since Award 1 was annulled, it was pertinently submitted that not only did the respondents not challenge that award before the High Court in England and that their challenge to Award 2 was unsuccessful, but that Awards 2 and 3 remained undisturbed after the High Court ordered that Cruz City be permitted to enforce them in the same manner as a judgment or order of the English Court to the same effect.

Regarding the issue of costs too this Court only has to decide whether the respondents have established that the Tribunal has breached Article V (1) (c), that is both parts of that ground, as formulated by them. This Court is not going to review the decision of the Tribunal on the merits regarding the issue of costs. On the one hand, in their written submissions the respondents rely on rule 28.4 of the LCIA, which they set out, providing that "*Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order".* They submitted that since Award 1 was overturned on appeal, the costs which Cruz City now seeks to enforce do not reflect the relative success and failure of the arbitration, in so far as the respondents

were victorious in one of them. On the other hand, the Arbitration Clause 19 of KWA empowers the Tribunal to award to the prevailing party its costs, as determined by the arbitrators.

It is evident that the issue of costs formed part of the terms of reference of the Tribunal as agreed upon by the parties themselves. Now, it is worthy of note that paragraph 26 of the affidavit dated 5th of April 2013 in support of each application avers that the Tribunal found in favour of Cruz City in each of the three Arbitrations and then sets out the Tribunal's Awards in each of the three Arbitrations. This paragraph has been admitted by the respondents in both applications under paragraphs 30 and 26 respectively of the affidavits dated 17th July 2013. Since it is common ground that the Tribunal awarded costs to Cruz City, the prevailing party, in the three Arbitrations, the respondents have failed to show that the Tribunal awarded costs contrary to rule 28.4 of the LCIA Rules and acted beyond its term of reference in breach of Article V (1) (c).

Further, in paragraph 5.15 of Award 2 the Tribunal explains and gives its reasons for awarding costs as it did. The costs were said to relate to three different arbitrations that were heard simultaneously with respect to the same transaction, and that no attempt was made to allocate the amount payable by one or the other of the Unitech Parties thereunder to an individual arbitration. The Tribunal further considered that for the avoidance of the possibility of double-payment, "*any amounts paid by a Unitech Party under one of the other arbitrations in respect of any line item hereunder shall be credited against the payment obligation of any Unitech Party hereunder*".

The Introductory Notes of Awards 2 and 3 respectively show that the parties gave their consent to the way the Awards were drawn in order for the Tribunal to present a fully comprehensive account of the interrelated Arbitrations. We consider that the parties benefitted from the fact that the three Arbitrations were heard simultaneously and that they have themselves been content to leave the issue of costs to be decided by the Tribunal in the way it was decided since they submitted their costs claims without any attempt to allocate them among the three arbitrations and the Tribunal also found

that it would have been highly impracticable to separate the costs. We find it unacceptable that the respondents should now come and say that the Tribunal's award of costs was not contemplated or did not fall within the terms of reference or that the matter was beyond the scope of the submission to arbitration. It is significant to note also that the respondents did not raise the issue in their challenge of Award 2 before the Supervisory Court.

We therefore, for the reasons given, hold that the respondents' contention under the first and second limbs that the Tribunal acted in breach of Article V (1) (c) of the New York Convention is devoid of merit and is accordingly rejected.

Challenge under Article V (2) (b) - Public Policy Issue

The relevant part of Article V (2) (b) provides as follows:

> "Article V
>
> *2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) …*
>
> (b) *The recognition or enforcement of the award would be contrary to the public policy of that country."* [Emphasis added].

Under Article V (2) (b) this Court has the discretion not to enforce an award, a discretion which it will indeed exercise with rigour, if it considers that doing so would go against the public policy of this country. However, it is the public policy in the international context that will matter and not the public policy that would normally apply when challenging a domestic award.

The respondents advance two limbs for resisting recognition and enforcement under this head:

First Limb:

In their affidavit the respondents purported to rely on the witness statement of Mr Om Prakash Chhabra, which the respondents put before this Court as evidence of Indian law, that the Tribunal

committed a serious illegality by passing an award for damages in violation of Section 74 of the Indian Contract Act. Their submission is grounded on the premise that City Cruz's claim under Clause 3.9.2 of the SHA is in the nature of a penalty and had to satisfy the conditions imposed by Section 74 of the Indian Contract Act, as it stipulates that failure of Arsanovia and Burley to comply with the conditions for starting the construction would entitle Cruz City to exercise its Put Option right and Arsanovia and Burley would have to pay an amount of 15% IRR on the amount advanced by Cruz City. They contended that Cruz City did not even prove losses suffered by it and the Tribunal also did not assess what would be a reasonable sum to compensate for the losses suffered by it so that the award is in violation of the Section 74, and is patently illegal and consequently "*being opposed to Public Policy of India cannot be enforced*."

This submission is misconceived. Firstly, the task of this Court while considering the recognition and enforceability of foreign awards under Article V (2) (b) of the New York Convention is not to see whether the decision of the Tribunal in its application of the law of the country governing the agreement in question was against the public policy of that country but to see whether the enforcement of the award prayed for would be against the public policy of this country. For that reason alone, the respondents were originally patently wrong in their affidavit contention that this Court should not enforce the Awards because they are opposed to the public policy of India. Secondly, we have to add that the respondents eventually even conceded that they were also wrong in their submission that "patent illegality" in the context of an award constitutes an additional ground that violates the public policy of India, relying on the decision of the Indian Supreme Court in **Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd. (2003) 5 SCC 705 (Saw Pipes)**. Mr Om Prakash Chhabra has in his witness statement completely overlooked a recent decision of the Indian Supreme Court in **Shri Lal Mahal v Progetto Grane Spa [2013 Indian SC 413 (Civil Appeal No. 5085 of 2013]** delivered on 3rd July 2013 where the Court said that the decision in **Saw Pipes** which gave an extended interpretation of public policy to cover the ground of "patent illegality" "*does not lay down correct law"*, as such a ground applied only in a case of

challenge of a domestic award. It follows therefore that even in India now "patent illegality" is not a ground to refuse enforcement of a foreign award unless enforcing the award would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality.

It was then submitted that there has been an error of law and a fundamental legal/procedural defect in the Tribunal's assessment of damages which is against "international public policy", and that in line with the recommendations of the International Law Association (ILA) on Public Policy this Court should find that such legal/procedural defect from the standpoint of the applicable law is against the public policy of the Republic of Mauritius inasmuch as the damages awarded by the Tribunal did not satisfy section 74 of the Indian Contract Act.

This second argument advanced on behalf of the respondents relates to the arbitrator's interpretation of Indian law on the merits of the case. We are not in the present application concerned with matters on the merits. It is all the same obvious that Award 2 ordered Unitech Ltd and Burley to pay, jointly and severally, the sum of US$ 298,382,949.34 to Cruz City as the purchase price of the shares and not as damages even if it appears that there was an alternative prayer for damages in that same sum. Further, as rightly submitted on behalf of Cruz City, even on the assumption that it was an award of damages against Unitech and that any award of damages without proof of loss by a party is patently illegal under Indian law, a breach of law in India does not per se amount to a breach of public policy in Mauritius, be it in the domestic or international context.

Regarding international public policy, we consider it pertinent to cite the following extract from **Redfern and Hunter on International Arbitration**, fifth edition, at paragraph 11.117:

> "***In an attempt at harmonisation, the International Law Association's Committee on International Commercial Arbitration has sought to offer***

definitions of the concepts of 'public policy', 'international public policy', and 'transnational public policy' and recommends that '[t]he finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances', such exceptional circumstances being the violation of international public policy. The Committee defined international public policy as that 'part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award'.

In that respect also it is relevant to mention that in France, which is a signatory to the New York Convention, there is statutory provision that with regard to enforcement of awards it is the international public policy that should be looked at. We reproduce the following extract from *Droit de l'arbitrage Interne et International, Christophe Seraglini,Jerome Ortscheidt* at page 815 under the heading «*L'Ordre Public International*»:

> «***Nécessité et limite du respect de l'ordre public international du siège et du lieu d'exécution prévisible de la sentence*****.** *Un juge ne pourra tolérer de donner effet sur son territoire à une sentence qui heurte son ordre public international. La solution est d'ailleurs expressément prévue par le droit français aux articles 1520.5º, 1522, alinéa 2, et 1524, alinéa1er, du Code de procédure civile, dont il résulte que la reconnaissance et l'exécution d'une sentence arbitrale seront refusées si elles sont contraires à l'ordre public international.»*

In our view, a respondent should not raise an objection to the recognition of a foreign award under Article V (2) (b) of the New York Convention injudiciously. Essentially, the respondent has to show with precision and clarity in what way and to what extent enforcement of the award would have an adverse bearing on a particular international public policy of this country. Not only must the nature of the flaw in the arbitration proceedings be unambiguously described but a specific public policy must be identified and established by the party relying on it.

In the instant cases, we are not at all persuaded by the arguments of the respondents which are not only unconvincing but, to say the least, inexplicit and elusive. It has not been shown to what extent this alleged defect in law/procedure in the application of Indian law has affected the public policy of this country where the provision of a penal clause in a contract is also regulated by legislation. In any event, there is nothing so shocking in respect of Awards 2 and 3 that would be contrary to the public policy of this country.

Second Limb

It is again contended by the respondents that since Award 1 was set aside on appeal, Cruz City is imposing on the respondents, in particular Arsanovia, the payment of costs which is over and above the amount owed, thus offending against the fundamental principles of justice and morality, contrary to public policy under Article V (2) (b).

In the written submission filed on behalf of Cruz City mention is made of the content of paragraph 44 of the affidavit in support of the application where it is prayed that certain amounts paid by the respondents in Awards 2 and 3 be set off against the payment obligations of each of the parties to Cruz City under the order made by this Court in the instant applications. No relevant submission and explanation of that prayer were put before us in that respect and since this prayer is not in the motion paper, we do not consider that we should address it.

As we stated above when dealing with this issue on the ground of jurisdictional challenge under Article V (1) (c), the Awards 2 and 3 were dealt with together, in view of the interrelated Arbitrations arising out of the same transaction, with the parties consent and which no doubt benefited them. Further the parties have by their own conduct during the Arbitration proceedings rested content with not having allocating their costs claims among the three arbitrations. The respondents knew that the result might not have been the same in each of the Arbitrations, and that it was possible that they would have to challenge the Award if it went against them. In fact this is what happened, and yet the

respondents chose to leave it to the Tribunal to decide how to award costs in all three Arbitrations which concerned the same transaction and which were heard simultaneously.

It is significant that, as submitted on behalf of Cruz City, the additional objection of Arsanovia under Article V (1) (c) and V (2) (b) that it should not be made to pay costs in respect of Award 3 was not raised before the High Court of Justice in England where they unsuccessfully challenged Award 2. Indeed in all the circumstances relating to this issue as referred to under the jurisdictional objection of the respondents, this is yet another reason that would have militated against this Court exercising its discretion to refuse to enforce the award under the Convention.

In all the circumstances, we consider that the respondents have failed to establish that the issue they are invoking falls within the public policy of Mauritius which if violated would prevent a foreign award from being recognised and enforced. We further find no merit in the arguments of the respondents that the issue of costs in the instant applications is against the public policy of Mauritius and a ground to refuse recognition and enforcement under Article V (2) (b). The objection raised by the respondents on the public policy issue also therefore fails and is accordingly rejected.

For the above reasons, we grant the order in the motion papers in both cases as prayed for by Cruz City. As regards the issue of costs, at the sitting of 26 July 2013 while the affidavits were being exchanged Counsel for Cruz City was questioned about the Supreme Court (International Arbitration Claims) Rules (the Rules) which came into operation on 1 June 2013 and he replied that the present applications were made prior to that date and the Rules were not applicable. When Counsel prayed that the motions in the two cases be granted and simply moved for costs, without more, we take it that he was asking only for the traditional order for costs and not costs in accordance with the Rules, which we would have granted in this case had such a prayer been properly made and supported in order to allow us to make a judicious decision in that respect. We accordingly order the respondents in the respective case to pay costs as asked by Cruz City.

S. Peeroo
Judge

A. Caunhye
Judge

N. Devat
Judge

28 March 2014

Judgment delivered by Hon. S. Peeroo, Judge

For Applicant in both cases	**: Mr Attorney B. Sewraj** **Mr M. Gujadhur, of Counsel**
For Respondents in both cases	**: Mr T. Koenig, Senior Attorney** **: Mr M. Sauzier, S. C. together with Mrs Devaux de Marigny, of Counsel**