BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.30 OF 2006

IN THE MATTER of Part VII and Part IX of the Arbitration Act, Cap. 6

AND

IN THE APPLICATION FOR LEAVE to enforce an Arbitration Award and for Entry of Judgment

BETWEEN:

IPOC INTERNATIONAL GROWTH FUND LIMITED
Defendant/Appellant

and

LV FINANCE GROUP LIMITED
Claimant/Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Peter McDonald Eggers for the Defendant/Appellant
Mr. Richard Millett, QC, with him Mr. Jeffrey Elkinson and Mr. Richard Evans for the Claimant/Respondent

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2007: January 18; 19;
June 7;
June 18.

JUDGMENT

[1] RAWLINS, J.A.: The defendant/appellant, IPOC, is an international Business Company incorporated in Bermuda. The claimant/respondent, LV Finance, is also an

international Business Company. It is incorporated in the British Virgin Islands ("the BVI). Both companies are allegedly owned by Russian nationals. LV Finance was granted 2 Partial Convention Awards against IPOC in arbitration proceedings in Zurich, Switzerland. The arbitration proceedings were instituted by IPOC under an option agreement between the parties dated 10th April 2001 ("the April Option Agreement"). The shares in OAO Megafon, a Pan-Russian mobile telecommunications company, are the subject of the agreement. In LV Finance Group Limited v IPOC International Growth Fund Limited,[1] LV Finance obtained an order that permitted the registration and enforcement of those Convention Awards in Bermuda.

[2] LV Finance applied, ex parte, to the High Court in the BVI, for an order to register and enforce the Convention Awards pursuant to section 35 of the Arbitration Act[2] and rule 43.10 of CPR 2000. In a judgment dated 13th October Joseph-Olivetti J granted the application. The order stated as follows:

> "(1) The awards made by the Arbitral Tribunal consisting of Dr. Daniel Wehrli, Chairman, Ian L. Meakin and Dr. Boris O. Kojevnikov at Zurich, Switzerland on the 19th day of October 2004 ('the First Partial Award') and on the 16th May 2006 ('the Second Partial Award) (collectively 'the Awards') together with their findings are hereby recognized by this court;
>
> (2) The Claimant has leave to enforce the following declaratory judgments in the Awards by entering the following declaratory judgment:
>
> (i) The defendant has not validly exercised the April Option under the April Option Agreement (as defined in the Awards);
>
> (ii) The April Option Agreement (as defined in the Awards) is an illegal transaction; its purpose and performance are illegal, and it is therefore unenforceable."
>
> (3) The costs of this application and of any judgment entered hereunder is summarily assessed at $3,500 to the Claimant.

[1] Commercial Court of the Supreme Court of Bermuda Suit No. 176 of 2006 (31st August 2006).
[2] Cap. 6 of the Revised Laws of the British Virgin Islands, 1991.

[3] IPOC applied for an order setting aside the ex parte order. The application was supported by the affidavit of J. Danvers Baillieu. It was scheduled for hearing on 26th September 2006. On 22nd September 2006, IPOC filed another affidavit deposed by Ricardo E. Ugarte, one of the principal advocates in the Zurich arbitration. On the same date, IPOC applied to adjourn the hearing of its own application to set aside the ex parte order pending the decision on its appeal against the second Convention Award to the Swiss Supreme Court. The judge dismissed that application and heard the application to set aside as scheduled on 26th September 2006. At that hearing, on a preliminary point, the learned judge refused to admit or to rely on the Ugarte affidavit. After a full hearing, she also dismissed the application to set aside the ex parte enforcement order and issued the following order:

(i) IPOC's application to set aside the order dated 25th July 2006 is dismissed with prescribed costs to LV Finance in accordance with CPR Part 65.5(2)(iii).

(ii) The said order of 25th July 2006 is amended by deleting paragraph 1 thereof and making the consequential changes to the remaining paragraphs.

(iii) By adding at the end of the existing paragraph 2(i) the words "by its purported option notices of July 29 2003 and August 12, 2003".

(iv) LV Finance to draw up a formal order reflecting this conclusion.

[4] The order was entered and filed on 24th October 2006 and states as follows:

(1) 9 and 31 of the affidavit of J Danvers Baillieu sworn on 11 August 2006 are struck out pursuant to CPR rule 30.3(3).

(2) IPOC's Application to set aside the order dated 25th July 2006 ("the July Order") is dismissed with prescribed costs to LV Finance in accordance with CPR Part 65.5(2)(iii).

(3) The July Order is amended so that:

  (a) Paragraph (1) thereof is deleted, and consequential numbering amendments are made to the remaining paragraphs of the July Order; and

  (b) The following words are added at the end of the existing paragraph 2(i) thereof: "by its purported option notices of July 29 2003 and August 12, 2003".

  (c) The operative orders of the amended July Order will therefore read as follows:

    (1) The Claimant has leave to enforce the following declaratory judgments in the Awards by entering the following declaratory judgment:

(i) The defendant has not validly exercised the April Option under the April Option Agreement (as defined in the Awards);

(ii) The April Option Agreement (as defined in the Awards) is an illegal transaction; its purpose and performance are illegal, and it is therefore unenforceable."

(2) The costs of this application and of any judgment entered hereunder is summarily assessed at $3,500 to the Claimant.

(4) IPOC shall pay LVFG's costs of IPOC's said Notice of Application.

The appeal

[5] IPOC appealed on 5 grounds. The first ground states, in effect, that the learned judge erred when she dismissed the application to admit or to rely on the Ugarte affidavit. The second ground states that the judge erred by refusing to hold that the partial awards were unenforceable. IPOC's main contention on this ground is that the judge should have found the Awards unenforceable because they are declaratory in nature and because they are Convention awards, which are not amenable to the enforcement of compliance procedures. The third ground of appeal states that the judge erred when she refused to set aside her *ex parte* order because the Awards are unenforceable on account of public policy. IPOC's main contention on this ground is that the judge should have found the Awards unenforceable on the ground that they were tainted by illegality since the Arbitration Tribunal stated that there was illegal conduct by both parties. The fourth ground of the appeal states that the judge erred by not holding that the Awards should not be enforced because they were affected by act of state which renders the Agreements non-arbitrable.

[6] The fifth ground of appeal is stated in the alternative. It states that if this court does not allow the appeal on any of the other grounds, it should find that the judge erred when she refused to grant IPOC's application to adjourn the hearing. However, as the parties agree, this ground was rendered redundant because the Swiss Supreme Court dismissed IPOC's appeal which challenged the Second

Partial Arbitration Award. The parties informed this court of the decision of the Swiss court in February 2007. That court subsequently handed down the written decision on 19th February 2007. The parties also informed this court that the decision of the Swiss Supreme Court makes it necessary for them to make submissions on whether that decision also affects other issues that were canvassed in this appeal. They therefore prayed for an opportunity to make submissions on this during the June sitting of this court in the BVI.

[7] The decision of the Swiss Supreme Court confirms the Second Convention Award. Had that court set aside the award, the appeal would have fallen away altogether because there would be no Award that could be the subject of enforcement proceedings. When submissions were heard on 7th June 2007, learned counsel for the parties informed this court that they were in agreement that the decision of the Swiss Supreme Court does not affect the appeals on the grounds of enforceability and public policy. Learned counsel for IPOC insisted that that decision does not affect the appeal as it relates to natural justice/the Ugarte affidavit and arbitrability/act of state because this court must determine all of the grounds in accordance with the law of this forum. On the other hand, learned counsel for LV Finance contended that the Swiss decision means that the appeal has fallen away on these 2 grounds.

[8] I think that I should first consider these 2 latter grounds of appeal. In so doing, if it is determined that the decision of the curial court affects the appeal on any of these grounds I shall not go on to consider whether the learned judge fell into error on the particular ground. Having considered those grounds, I shall then determine the appeal on the grounds of non-justiciability because of public policy and enforceability. First, however, in order to put this appeal into proper legal context, I shall set out the basis for the enforcement of Convention Awards in this Territory.

The legal basis for enforcement of Convention Awards

[9] The primary basis for the enforcement of Convention Awards in this Territory is the Arbitration Act. It provides for domestic arbitration and the enforcement of the orders issued on such arbitration. The Act also provides for the enforcement of Convention Awards with which the present case is concerned. The Act defines a Convention award as an award that is made in pursuance of an arbitration agreement in the Territory or a State, other than the Territory or the United Kingdom, which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.[3] This is usually referred to as "the New York Convention." As the learned judge observed,[4] it is noteworthy that Parliament set out the whole of the New York Convention in the schedule to the Act. The scheme of the Act, which accords with the intention of the New York Convention, is to facilitate the recognition and enforcement of Convention Awards.

[10] Part IX of the Act, which contains sections 33-37, is under the rubric "Enforcement of Convention Awards". As the learned judge observed,[5] the general scheme of this Part is to give effect to the New York Convention by a simple, straightforward method of enforcement of Convention Awards. Section 34(1) provides that a Convention Award shall, subject to the provisions of Part IX, be enforced either by action or in the same manner as an arbitration award is enforceable under section 28. Section 28 of the Act, which is in that Part that provides for the enforcement of domestic awards, states that an arbitration award may, by leave of a judge, be enforced in the same manner as a judgment or order of the High Court. Section 28 also states that where leave is given that judgment may be entered in terms of the award. Counsel for the parties embarked upon a debate as to the meaning

[3] In section 2.
[4] In paragraph 26 of the judgment.
[5] At paragraph 27 of the judgment.

and purport of these provisions. In my view, they speak to the enforcement procedure that follows the grant of an order to enforce a Convention Award here.

[11] Section 34(2), which provides for recognition of a Convention Award, states that in the Act the term enforcement shall include recognition. Section 35 of the Act requires a party seeking to enforce a Convention Award to produce the original award and the original arbitration agreement.

[12] Section 36 of the Arbitration Act provides the guidelines which a court in the Territory must follow when faced with an application for the enforcement of a Convention Award. It is noteworthy that section 36(1) of the Act states, in effect, that the court may only refuse to grant the application for enforcement of a Convention Award on grounds set out in section 36. The section is therefore critically important in determining whether the judge erred in granting LV Finance's application to enforce the Awards in this Territory. I think that this makes it necessary to set it out fully.

[13] Section 36 provides as follows:

> "36 (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
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> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –
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> (a) that a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
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> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
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> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
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> (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
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> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of

(f) that 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, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

[14] In seems clear then, that the question whether to grant an application for the enforcement of a Convention Award revolves around the interpretation of this provision. However, learned counsel for IPOC insisted that there are other considerations which arise from the operation of common law principles. Thus, learned counsel submitted that the partial awards were purely declaratory, and such awards cannot be enforced under the Act. Counsel relied in particular on the decision of the English Court of Appeal in Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd[6] and Tongyuan (USA) International Trading Group v Uni-Clan Limited[7] to support this submission. Alternatively, learned counsel submitted that even if purely declaratory awards are enforceable, the Awards cannot be enforced by giving judgment in terms of the award as they confer no material benefit or utility on LV Finance. Counsel relied on Tridon Australia Pty Ltd. v ACD Tridon Inc.[8] as authority for this statement. I shall determine whether these statements operate to provide further grounds on which the court may

[6] [1958] 1 Lloyd's Rep 205
[7] Unreported 19th January 2001; Bick-Moore J.
[8] [2004] NSWCA 146

refuse to grant the application for leave to enforce a Convention Awards when the appeal is considered on the ground of enforceability.

Natural justice and the refusal to admit the Ugarte affidavit

[15] The learned judge dismissed the oral application to admit the Ugarte affidavit upon which IPOC sought to rely to persuade the court to set aside its order to enforce pursuant to subsections 36(2)(c) and/or 36(2)(d). For the purpose of this case, subsection 36(2)(c) permits a judge to refuse to enforce a Convention award if the person against whom it is invoked proves that he was not given proper notice of the arbitration proceedings or was otherwise unable to present his case. Subsection 36(2)(d) permits a judge to refuse to enforce a Convention award if the person against whom it is invoked proves that the award deals with a matter not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.

[16] Counsel for IPOC contended that the Ugarte affidavit was intended to establish that the Tribunal arrived at its decision to grant the Convention awards to LV Finance in breach of natural justice. Learned counsel noted that the Tribunal decided that the April Option Agreement between the parties was unenforceable due to its illegal performance by reason of Minister Reiman's omission to act as opposed to the pleaded allegations of positive conduct by the Minister. Counsel submitted that this was in breach of subsections 36(2)(c) and/or 36(2)(d) of the Arbitration Act because the Tribunal did not notify IPOC of its intention to rely on omission and did not afford IPOC an opportunity to make submissions and adduce evidence on this new theory or ground.

[17] These submissions tend to remove the focus of attention from the reasons that the judge gave in refusing to admit the affidavit. Whether she erred in not admitting it is first a function of this forum's own rules on admissibility. The judge set out the

reasons for the decision in her judgment.[9] She noted that LV Finance objected to IPOC's oral application to admit and to rely on the Ugarte affidavit on the ground that IPOC sought by it to bring in and to argue additional grounds on its application to set aside. Counsel for LV Finance contended that IPOC had already set out the grounds which Solicitors for LV Finance were given notice that they had to meet on the application. The judge stated that LV Finance had no duty to raise an objection to the admission of the affidavit at the prior adjournment hearing where its admission was not in issue.[10]

[18] The judge dismissed the oral application on the ground that IPOC had sufficient time to prepare its case. Additionally, she stated that the grounds of the application were in clear terms and LV Finance was entitled to accept those grounds and to prepare its case on that basis. The judge stated, further, that the affidavit was filed just 4 days prior to the hearing, which straddled the weekend. She noted that it contained volumes of evidence amounting to approximately 704 pages but no application was made prior to the scheduled hearing of the application to set aside to admit it or to amend the grounds relied on in the Notice of Application. She noted that rules 11.6, 11.7 and 11.11(4) (b) of CPR 2000 require an application in writing stating the grounds, as well as the service of evidence in support. The judge further observed that IPOC did not formally apply for leave to amend the notice of application and advanced no good reasons for it. She insisted that a party could not seek leave at the hearing of the substantive application to argue substantial grounds which would involve wading through reams of evidence without giving cogent reasons for not doing so earlier.[11]

[19] Finally, the judge reasoned that to grant the oral application would inevitably have resulted in an adjournment of the hearing. She decided that an adjournment would not have been in the interests of justice since counsel and instructing solicitors for both parties came in from Bermuda and London for the hearing.

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[9] From paragraphs 9 to 15 of the judgment.
[10] See paragraph 11 of the judgment.
[11] See paragraph 13 of the judgment.

The submissions in this court

[20] Before this court, Counsel for IPOC contended that by not permitting IPOC to use the new ground and the evidence of Mr. Ugarte, the court undermined the structural integrity of the Second Partial Award that was given in breach of the rules of natural justice. Learned counsel contended, in particular, that they were deprived of an opportunity to present submissions and evidence on a ground or theory critical to the Arbitral Tribunal's decision. Counsel for IPOC cited a number of cases in authority, including Irvani v Irvani;[12] Cameroon Airlines v Transet Limited;[13] and Vee Networks Ltd v Econet Wireless International Ltd.[14]

[21] Learned counsel for IPOC further contended that the judge was wrong to hold that IPOC did not apply to have the affidavit admitted because they effectively made such an application on Friday 22nd September 2006 by applying for an adjournment of the hearing of the application to set aside. According to counsel, the adjournment would have allowed LV Finance time to reply to the evidence since it was obvious that IPOC intended to rely on the evidence to support its application to set aside. Alternatively, counsel for IPOC contended, IPOC made such an application at the hearing on 26th September 2006. Counsel contended, further, that in refusing to admit the affidavit, the judge failed to give any adequate consideration to the fact that the court had refused the adjournment sought on 22nd September 2006. LV Finance did not raise an objection to the admission of the affidavit prior to the hearing on 26th September 2006 and did not notify IPOC of any such objection when the affidavit was served, when the application for an adjournment was heard on 22nd September 2006, when it served the skeleton argument on 25th September 2006, or at any other time before the hearing of the application.

[12] [2000] 1 Lloyds Rep 412, at page 426
[13] [2004] EWHC 1829 (Comm).
[14] [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep 192, paras. 82-87.

[22] Counsel for IPOC insisted that the judge should have held that whenever a party makes it clear that it wished to rely on evidence, it is incumbent on the opposing party to make its objections clear at the earliest opportunity, failing which the opposing party will have lost its right to object. This, contended counsel, is so particularly where not making objection clear at an early stage the party applying to admit the evidence will be surprised by the objection when it is eventually made. Learned counsel for IPOC insisted that LV Finance had a duty to assist the court in furthering the overriding objective expressed in CPR rule 1.3, and, having not objected, LV Finance was in breach of this duty. Accordingly, insisted counsel, LV Finance lost the right to object and could have been prejudiced by that evidence.

[23] Learned counsel for IPOC further contended that the judge failed to identify any prejudice that the admission of the affidavit would have caused to LV Finance, and also failed to consider that any prejudice could have been compensated by an order for costs. Finally, submitted counsel for IPOC, the judge erred when she failed to consider that the new ground that the Ugarte affidavit raised was known to counsel for LV Finance because IPOC relied on the same ground in the appeal to the Swiss Supreme Court from the Second Partial Award.

Decision and reasons

[24] This ground of appeal is concerned with the control of evidence. Rule 29.1 of CPR 2000 provides that the court may control the evidence that is to be given at a trial or hearing, by giving appropriate directions as to the issues on which it requires evidence and the way in which the matter is to be proved. This rule places the control of the evidence and the evidentiary process in the discretion of the judge. The judge's dismissal of IPOC's oral application to admit the Ugarte affidavit was a decision which was made in the exercise of that discretion.

[25] It is trite principle, which this court has repeated, for example, in Bank of Antigua v Williams,[15] Peters v Superintendent of Prisons,[16] St. Kitts Development Corporation Ltd. v Golfview Development Ltd. and another[17] and Emanuel Rock v Theresa Jolly,[18] that an appellate court will only interfere with the exercise of such a discretion if it is clear that that exercise was clearly wrong or exceeded the judge's discretionary remit. In the words of Lord Fraser in G v G:[19]

> "… the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[26] In my view IPOC has advanced nothing that impeaches the reasons that the judge gave for her decision to dismiss the oral application. Inasmuch as solicitors for IPOC raised the issue of natural justice, which the affidavit sought to raise, in the proceedings in the Swiss Supreme Court, it would have been within the knowledge of solicitors for IPOC. They had the opportunity to raise the issue as a ground in a proper application, as rule 29.1 of CPR 2000 requires, in the proceedings to set aside. They should have served the application, with supporting evidence, at a time which would not have required the inconvenience of an adjournment.

[27] I think, however, that this issue also highlights a wider concern which I have expressed on prior occasions. The concern relates to an emerging practice in which, contrary to the rules, the grounds on which applications are premised are not stated in the application. Rather, as is evidenced in the present case, there are applications which contain a statement that the grounds are contained in the affidavit in support.

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[15] [2003] E.C.S.C.J. No. 58, Civil Appeal No. 23 of 2001 paragraph 28.
[16] [2000] E.C.S.C.J No. 36, Civil Appeal No. 9 of 1999.
[17] St. Kitts Civil Appeal No. 15 of 2004 (31st March 2005).
[18] Commonwealth of Dominica Civil Appeal No. 10 of 2006 (17th May 2007).
[19] [1985] 2 All E.R. 225, at page 229.

[28] The rules require grounds to be stated clearly and briefly in applications. This is intended to alert the court and the contra-parties of the grounds and the issues which they raise. An application should contain the grounds, not evidence or submissions. Affidavit(s) should contain the evidence to support the stated grounds. The inconvenience which would invariably result from the practice of referring to grounds purportedly raised in affidavits is reflected in the present case. Solicitors for IPOC were plainly wrong to seek to introduce new evidence and to seek to introduce and to rely on a new ground, purportedly raised by that evidence, at the time when they did, without applying to amend the application. In the circumstances, the judge correctly dismissed their oral application to admit it.

[29] I do not think that it is necessary to consider whether there was any merit in the contents of the Ugarte affidavit, although counsel for LV Finance contended that the judge correctly exercised her discretion to dismiss the application to admit it on that ground as well. I think that it is sufficient to observe that the decision of the Swiss Supreme Court accorded no merit to the issue of the failure of the Arbitration Tribunal to observe natural justice, which the affidavit seeks to raise.[20]

[30] The Swiss Supreme court noted IPOC's appeal on the ground of denial of natural justice. That ground of appeal in the Swiss Court was made on the basis that the Tribunal gave its decision "on grounds which were unforeseeable for the parties … and ruled beyond the request made to it". The court further noted that the ground concerned the possibility of certain offences committed against Russian criminal law which the Tribunal's award imputed to the Minister either by active behaviour or by simple omission. The Swiss court also noted that IPOC did not take a position about the way in which the provision applied. The Swiss court insisted that IPOC should have foreseen that the offences in question might have been founded on omission alone.

[20] See section 7 of the written decision of the Swiss Supreme Court.

[31] The Swiss court further noted that the Tribunal realized that neither party had referred to Article 14 of the Russian Criminal Code concerning a general definition of the crime. The court stated that since the Tribunal was of the view that the word "deyanye" in Article 14 includes a passive attitude or omission, the Tribunal questioned the parties on its translation. IPOC disputed the Tribunal's view that the translation included omissions. The Tribunal determined that the word includes omissions found that the omission by the Minister vitiated the agreement. The Swiss court noted IPOC's contention that its right to be heard required the Tribunal to state clearly that it might have considered that an omission constituted the offences and the court should then have invited the parties to make specific submissions on the issue. The Swiss court found no merit in IPOC's contention on the ground that the Tribunal had sufficiently raised the issue when it invited discussions on the meaning of "deyanye".

[32] The statement of the Swiss court on this issue is instructive. The court stated as follows in the concluding paragraph of section 7.1 of its written decision:

> "Contrary to what [IPOC] asserts in its reply, it could not reasonably consider the translation to be just a linguistic exercise; on the contrary, it should have been aware of the need to discuss and refute, not only the simple translation, but of the way of interpreting and applying the Russian criminal law. It is in vain that [IPOC] criticizes the Arbitration Tribunal for having wished to dissimulate its intention to find that offences were committed by omission. It simply says, in substance, that it failed to notice the significance of this discussion or that it did not pay all the necessary attention to it. It does not seriously put in doubt that it could have developed its point of view on the subject of the interpretation of the Russian provisions in question and, considering the hypothesis in which the offence in question could also be committed by omission, [could have] alleged relevant facts and produced the corresponding evidence. It argues the short times for reply set by the Arbitration Tribunal, but it does not claim that it would have been objectively impossible for it to take its position in time. In these conditions, the complaint derived from the right to be heard also proves not to be well founded."

[33] Learned counsel for IPOC submitted that notwithstanding the decision of the Swiss Supreme Court, this court must, as the forum in which enforcement is pursued, apply sub-sections 36(2)(c) and (d) of the Arbitration Act. Learned

counsel noted the statement by the Swiss court that the right to be heard in Switzerland relates to statements of fact and that a party's right to be examined on legal matters is recognized only to a limited degree. Counsel submitted that this is contrary to the manner in which the right to be heard is applied in this court. He insisted that this court should apply its own rules to determine whether there the Tribunal failed to observe natural justice so as to render the awards unenforceable here pursuant to sub-sections 36(2)(c) and (d) of the Arbitration Act.

[34] In the first place, as Colman J reminds us in Minmetals Germany v Ferco Steel,[21] where, on an enforcement application, a forum court of supervisory jurisdiction (in this case the Swiss Supreme Court) makes a decision on a particular issue under the law of the seat of the arbitration, a foreign court should not reinvestigate allegations of substantial injustice, procedural defects and the conduct of the arbitration which the supervisory court already considered, save in very exceptional cases. Exceptional cases are those cases in which the powers of the supervisory court are so limited that the court cannot intervene even where there has been serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they disregard such principles. This approach is intended to accord weight to the policy of sustaining the finality of international awards. This principle is also premised on the fact that parties who agree to arbitrate in a particular jurisdiction are bound by the arbitration procedure and the supervisory jurisdiction of the seat of the arbitration jurisdiction.

[35] In my view, there is nothing in the decision of the Swiss Supreme court that suggests that either the Arbitration Tribunal or that court disregarded basic principles of justice. There is nothing to suggest that the powers of the supervisory court were so limited in relation to the issue of natural justice that it could not have properly intervened to resolve the issue. In fact, that court very dispassionately determined the issue of natural justice.

[21] [1999] 1 All E.R. (Comm) 316, at page 331.

[36] In the second place, I do not think that the application of sub-sections 36(2)(c) and (d) of the Arbitration Act leads to a conclusion that the Awards were not enforceable because IPOC was "unable [otherwise] to present its case" or that the Tribunal did not notify IPOC of its intention to rely on omission and did not afford IPOC an opportunity to make submissions and adduce evidence on this new theory or ground. The Tribunal invited IPOC to consider the effect of Article 14 of the Russian Criminal Code. In any event, IPOC's Russian experts should have known the legal implications and take the necessary steps to meet the issue when the opportunity was provided by the Tribunal's invitation. This, in my view, distinguishes the present case from Kanoria v Guinness[22] in which the English Court of Appeal found as a fact that Mr. Guinness was not able to present his case.[23]

[37] In the foregoing premises, I would dismiss the appeal on the ground that the learned judge erred when she dismissed IPOC's application to admit and to rely on the Ugarte affidavit.

Non-arbitrability on grounds of act of state

[38] In my view, this ground is so unmeritorious that it is not necessary to consider the issue whether the ground is affected by the decision of the Swiss Supreme court. The applicable local provision is section 36(3) of the Arbitration Act, which provides that enforcement of a Convention award may be refused if the award is in respect of a matter which is not capable of settlement by arbitration.

[39] Before the High Court, learned counsel for IPOC submitted that the Tribunal made certain adverse findings against Minister Reiman of the Russian Government acting in his ministerial capacity on Russian soil in its pronouncements on the Second Partial Award. According to counsel, the Tribunal found that Minister

[22] [2006] 1 Loyds Report 701.
[23] See particularly paragraphs 22 and 32 of the judgment.

Reiman was the beneficial owner of IPOC and that he misappropriated Russian state property, abused his office in not preventing the grant or refusal of GSM 900 licenses and gave preferential treatment to IPOC which amounted to criminal acts under Russian Law. Counsel contended that these are the very matters that the courts have held to be non-justiciable, namely, illegal acts undertaken by a Minister of a foreign, friendly government on its own soil. In other words, learned counsel contended, these are acts of state because Mr. Reiman acted in his official capacity as a Minister of the Russian government. Counsel insisted that as such, neither the tribunal nor the courts can inquire as to the legality of his acts. Learned counsel relied particularly on Empresa Exportadora De Azucar v Industria Azucarara Nacional S.A. ("The Playa Larga Case").[24]

[40] The learned High Court judge agreed that under the law of the British Virgin Islands, acts of state cannot be the subject matter of an inquiry by the courts or by an arbitral tribunal established by private parties. She noted that the law concerning what constitutes an act of state is well settled. She cited as authority Lonrho Plc. v Tebbit [25] in which Sir Nicolas Browne-Wilkinson V.C. stated:[26]

> "In my judgment, it is well established that in cases where the exercise of a statutory discretion involves the weighing of competing public interests, particularly financial or economic interests, no private law duty of care arises because the matter is not justiciable by the courts. It is for the body to whom Parliament has committed that discretion to weigh the competing public interest factors: the courts cannot undertake that task."

[41] The judge concluded that the acts which the Tribunal found that the Minister engaged in cannot be ground on which to invoke the act of state doctrine. In arriving at this conclusion, she noted that the Tribunals' conclusions at paragraph 484 of the Award indicate that the Tribunal was very alive to the fact that the Minister was not on trial before them. According to the judge, the Tribunal was simply determining the purpose for which the parties had entered into the April Option Agreement and the intended manner of its performance in order to

[24] [1983] 2 Lloyd's Rep. 171
[25] [1992] 4 All E.R. 161.
[26] At page 981A.

determine whether it was illegal or not and thus unenforceable under the public policy of England (the governing law of the contract). They were not questioning any decision of the Russian State or its policy.

[42] In my view, the learned judge correctly applied the principles on the act of state doctrine and the relevant facts. It is clear that the question which the Tribunal considered was whether Mr. Reiman, the beneficiary of IPOC, had personally done anything illegal that tainted the April Option Agreement in which he had a personal interest. The Tribunal was not sitting in judgment on the validity of acts done by an official of the Russian government in his official capacity within Russia. The Tribunal was not sitting in judgment on the acts of the Russian state in it sovereign or governmental capacity. The Tribunal found that the Minister's omission to act was an illegality that had so tainted the Agreement that it was unenforceable.[27]

[43] I agree with the submission by learned counsel for LV Finance that the present case is not the same as Luther v Sagor[28] or Princess Paley Olga v Weisz,[29] which are about the validity of acts of expropriation by a foreign friendly sovereign state in accordance with its law. Rather, the present case is about the validity of contracts entered into by a foreign government official in breach of law to further his personal interests. Moreover, as counsel for LV Finance noted, IPOC did not raise this issue before the tribunal, either by way of jurisdiction objection or by way of substantive defence.

[44] Act of state doctrine therefore has no application in this matter. Accordingly, I shall dismiss the appeal on this ground, and now consider the appeal on the ground of illegality, which in my view is similarly unmeritorious.

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[27] At paragraph 483 of the Award.
[28] [1921] 2 AC 262.
[29] [1929] 1 KB 718

Illegality

[45] Before the High Court, learned counsel for IPOC submitted that where an award is based on a contract which is illegal, as a matter of BVI public policy, recognition and enforcement should be refused under section 36(3) of the Arbitration Act. Accordingly, he submitted that the ex parte order should be set aside. Section 36(3) provides that the enforcement of a Convention Award may be refused if it would be contrary to public policy to enforce the Award.

[46] The gravamen of IPOC's contention was that while the Tribunal did not allow IPOC's claim, it allowed LV Finance's claim for a declaration that the April Option Agreement was illegal, and, additionally, the Tribunal found that LV Finance was complicit in the illegality. Learned counsel insisted that it would be contrary to public policy to allow LV Finance to benefit from its own wrongdoing by recognizing and enforcing the Award. Counsel relied on Soleimany v Soleimany.[30] On the other hand, learned counsel for LV Finance contended that no public policy considerations are involved here because LV Finance was seeking to enforce an Award but not to enforce or exercise any rights or to obtain money under the April Option Agreement.[31]

[47] The learned trial judge referred to a number of cases, including Schachtbau v Shell International Petroleum Co. Ltd,[32] Brostrom Tankers AB v Factorias Vulcano SA,[33] and Westacre Investments Inc v Jugoimport-SDPR Holding Co.[34] She noted that in the latter case, the English Court of Appeal held that it was not contrary to public policy to enforce a foreign award, notwithstanding that it was argued that the underlying contract involved a conspiracy to break the laws of a foreign state.

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[30] [1999] QB 785
[31] See paragraphs 52 and 53 of the Judgment.
[32] [1990] 1 A. C. 295
[33] [2004] IEHC 198
[34] [1999] Q.B. 740

[48] The judge noted that Soleimany involved a foreign award for the payment of money made by the Beth Din under Jewish law which on its face purported to enforce an illicit enterprise for the smuggling of carpets out of Iran which was contrary to the laws of Iran, a friendly, foreign state. She stated that the court took the view that at the enforcement stage the function of the court was to see that its powers of enforcement were not abused, and that the proper law to consider on that issue was English law as part of the *lex fori*. The court refused to enforce the award as it would have been contrary to English public policy to do so. The judge noted, however, that the present case was not on all fours with Soleimany because the application in Soleimany was for enforcement to recover monies under an illegal contract, whereas in the present case, LV Finance's enforcement application is to prevent IPOC from in the future relying on an illegal agreement. She said that LV Finance was not seeking to benefit from its own complicity by seeking to extract money or any other pecuniary benefits from IPOC under the illegal April Option Agreement.

[49] The judge concluded that case law and textbook writers make it clear that the public policy defence to an enforcement application is one which has a narrow scope and extends only to a breach of the most basic notions of morality and justice. She therefore held that IPOC failed to satisfy the court that LV Finance was seeking to benefit materially from an illegal contract or that enforcing the Award would be wholly offensive to the ordinary reasonable man in the BVI or that it would breach some basic notion of morality and justice.

[50] Before this court, counsel for IPOC basically repeated the submissions made before the High Court. He contended that the judge was wrong to ignore the Tribunal's finding that LV Finance was complicit in the illegality affecting the April Option Agreement. He insisted that it was clear on the face of the Second Partial Award that the Tribunal held that LV Finance was complicit in an illegal enterprise. Counsel further contended that the Tribunal acted contrary to the public policy of the BVI by granting declaratory relief to LV Finance. This, according to counsel,

was because the declaration was equitable in nature and LV Finance did not come to equity with clean hands. The Tribunal, contended learned counsel, ignored LV Finance's illegal conduct. Counsel insisted that these considerations should have precluded the enforcement of the Awards on the ground that they were contrary to the public policy of the BVI.

[51] It seems clear that while the Tribunal declared that the April Option Agreement was tainted with illegal conduct by both parties, the Second Partial Award was not tainted by that illegality. It may be that had LV Finance relied on the agreement to enforce contractual rights or benefits under it the principles in Soleimany v Soleimany would have precluded enforcement on the ground of public policy. By the enforcement application, LV Finance sought to enforce the conclusion in the Second Partial Award that the April Option Agreement is unenforceable. This cannot be contrary to public policy under section 36(3) of the Arbitration Act. To paraphrase the words of Kawaley J in LV Finance v IPOC,[35] LV Finance was merely seeking to uphold the finality of the Tribunal's decision that the April Option Agreement is not enforceable by IPOC, in circumstances where it is not contended that the arbitration agreement was itself vitiated by the illegality in question. LV Finance sought to enforce the benefits of the agreement to arbitrate.

[52] In the premises, the learned judge correctly refused to set aside her ex parte order on the ground of illegality. I shall therefore dismiss the appeal on this ground.

Are the awards unenforceable?

[53] In construing section 36 of the Arbitration Act, the learned judge noted the use of the words "shall not be refused" in section 36(1) and "may be refused" in section 36(2). She concluded, correctly, in my view, that the court only has a discretion to refuse to enforce Convention awards in the circumstances set out on section 36(2). She also concluded, correctly, in my view, that the opening words of

[35] See paragraph 37-39 of the judgment.

section 36(2) mean that the grounds on which enforcement may be refused are exhaustive and that the burden lies on IPOC, as the party seeking to resist enforcement, to raise and prove a clear case for refusal. She stated that the court takes a very narrow and pro-enforcement approach to New York Convention awards. For this she adopted and relied on the statement of Gross J in IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn,[36] which Kawaley J restated in LV Finance v IPOC[37] as follows:

> "For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that section 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: Mustill & Boyd, Commercial Arbitration, 2nd edn, 2001 Companion, at page 87.

[54] The learned judge found, quite correctly, in my view, that there is nothing in section 36(2) which indicates that purely declaratory Convention awards are excluded from the terms of the subsection and the Partial Awards are therefore enforceable. This, she noted, was in contradistinction to the provisions of the Reciprocal Enforcement of Foreign Judgments Act,[38] which, in section 2(1), provides only for the registration and enforcement of money orders.[39] The judge also concluded that the New York Convention itself does not exclude the enforcement of purely declaratory awards and imposes no restrictions as to the nature and form of an award that is enforceable.[40] In this regard she noted that Article III of the Convention provides, inter alia:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are

[36] [2005] 2 L1 Rep 326, paragraphs 6-16.
[37] At paragraph II.
[38] Cap. 65 of the Revised Laws, 1991, of the British Virgin Islands.
[39] See paragraph 30 of the judgment.
[40] See paragraphs 30 and 31 of the judgment.

imposed on the recognition or enforcement of domestic arbitral awards." (Emphasis added)

[55] The foregoing findings would have been sufficient, in my view, to dispose of IPOC's application on the ground of enforceability. However, the judge went on to consider[41] the main authorities raised by counsel for the parties. She noted that Margulies, in which the dispute was based on a contract for the sale and purchase of Ghanaian cocoa, was concerned with the enforcement of a domestic rather than with a Convention award. She observed that the dispute in Margulies was referred to domestic arbitration in London pursuant to the contract and the arbitrator's award in favour of Margulies was varied by the Board of Appeal of Cocoa Association of London. She further noted that Margulies then applied to the English Court for an order to enforce the award under section 26 of the Arbitration Act 1950 (which is equivalent to section 28 of the Arbitration Act of the British Virgin Islands), but the English Court of Appeal eventually refused to issue an order permitting the enforcement of the award. The refusal, stated the judge, was not because the award was in declaratory terms but because, in the words of Lord Evershed, MR, the Court of Appeal was concerned that on the face of the award there was no subject matter capable of enforcement. The terms of the award were too uncertain or imprecise.[42]

[56] The judge distinguished Tongyuan, which was concerned with a contract for the sale, installation and satisfactory inspection of two sachet-filling machines, from Margulies. In so doing she noted that, in Tongyuan, the application was to set aside an order to enforce a Convention award made by an arbitral tribunal in Beijing under the English Arbitration Act 1996. She further noted that the defendant sought to set aside that order on the ground that the award was a nullity because the proceedings had been conducted in Beijing rather than in Shenzhen

[41] In See paragraphs 33 and 42 of the judgment.

[42] The learned judge noted that it was clear from the penultimate paragraph of the judgment of the Master of the Rolls that that Marguiles' counsel was aware of the difficulties relating to the form of the award and was making an application which if successful would put "that rather technical matter right." She further noted that the application was duly made and the award was remitted to the arbitrator to put into a proper form.

or Shanghai. She also noted that the defendant had also sought to set aside the enforcement order on the ground that it was not expressed in a form which was capable of being enforced as a judgment in that it was in some respects a declaratory award. The learned judge observed that Moore-Bick J stated in Tongyuan, that Margulies is authority for the proposition that an arbitration award couched in purely declaratory terms cannot be enforced as a judgment. She found, correctly, in my view, that the true principle which Margulies decided was that no award which is uncertain and unintelligible is enforceable. I agree with the finding of the learned judge that Moore-Bick J in fact saw this as the statement of the principle from Margulies when he stated:[43]

> "The Court of Appeal concluded that the award was not an award for a certain sum, nor was it an award which could be enforced as a judgment, because it did not make its effect sufficiently clear. It was impossible to ascertain what had to be paid without indulging in a certain amount of arithmetic." (Emphasis added).

[57] The learned judge therefore held, correctly, in my view,[44] that since the Awards in the present case meet the certainty and intelligibility criteria and the Act does not prohibit enforcement of declaratory judgments, IPOC's application to set aside failed on the ground of unenforceability. She buttressed this finding by adopting the statement of Kawaley J in LV Finance v IPOC:[45]

> "The restrictive interpretation contended for would, in any event, potentially drive a coach and horses through the entire edifice of reciprocal enforcement of arbitral awards, because declarations of liability and/or non-liability and declarations on points of construction are an important feature of commercial arbitration law, particularly in the field of insurance and reinsurance law. And the reciprocal enforcement regime is intended to provide a summary mechanism for enforcing awards, with a strong policy bias against refusing enforcement. It is also noteworthy, in terms of appreciating the mischief which could result from excluding declaratory Convention awards from recognition and enforcement, that such awards are more likely today than in the past."

[43] At paragraph 8 of the judgment.
[44] At paragraph 43 of the judgment.
[45] At page 25 of the judgment.

[58] The learned judge also held[46] that LV Finance does not have to show any utility in enforcing the Awards because this is not a criterion for enforcement under the Act. She observed, however, that the court has a discretion whether to give leave to enter judgment under section 28 of the Act and that LV Finance would no doubt be interested in seeking to ensure that IPOC does not benefit in any way from the April Option Agreements. In her view this was sufficient reason for seeking judgment in terms of the declarations contained in the Awards. She stated that IPOC had not shown any good reason why leave to enter judgment should not be given.

[59] Finally, on the issue of enforceability, the judge conceded,[47] on IPOC's submission, that if the judgment in terms of the declarations were granted that aspect of the ex parte order that deals with the exercise of the April Option needed to be amended to reflect the actual declaration contained in the Second Partial Award. The judge accordingly amended paragraph 2(i) of the order by adding the words "by its purported option notices of July 29 2003 and August 12, 2003".

[60] IPOC also took issue with paragraph 1 of the ex parte order, which directed that the Awards together with their findings "are hereby recognized and registered by this Court." The gravamen of IPOC's contention was that no such order was necessary to obtain recognition or an order to enforce a Convention award. The judge noted[48] that counsel for IPOC submitted that the Arbitration Act makes a clear distinction between the recognition and the enforcement of a Convention award. Learned counsel also submitted that sections 34(1) and 28 of the Act make specific provision for enforcement by stipulating that judgment may be entered in terms of the award. The judge noted that the submissions by learned counsel for LV Finance who contended, in essence, that the court can by order recognize a Convention award without enforcing it.

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[46] At paragraph 44 of the judgment.
[47] At paragraph 45 of the judgment.
[48] At paragraph 47 of the judgment.

[61] The learned judge agreed with the submissions by counsel for IPOC and held that the clear words of section 34(2) indicate that a person does not require an order declaring that a Convention award is recognized in order for the award to be relied on in any legal proceedings here. In her view, it was redundant to make such an order. She found support for this finding in the words of Kawaley J who held, in LV Finance v IPOC, that section 40(2) of the Bermuda Arbitration Act (which is equivalent to section 34(2) of the British Virgin Islands Act) did not empower the Court to make an order declaring that the Awards are recognized. She therefore accepted IPOC's submissions on this issue. She however thought that this was not a ground for setting aside the entire order. She therefore deleted paragraph 1 of the ex parte order.

Submissions before this court

[62] In this court, learned counsel for IPOC submitted that the judge erred when she held that the Partial Convention awards were capable of enforcement. According to counsel, she was wrong to hold that the Court only has discretion to refuse to enforce a Convention award in the circumstances set out in section 36(2) of the Arbitration Act. This, contended counsel, was because the discretion to refuse to enforce a Convention award goes beyond section 36(2) in at least 2 other respects.

[63] Counsel for IPOC submitted that one consideration outside of section 32 on which the court may refuse to grant an order to enforce a Convention award arises because section 34 of the Arbitration Act expressly contemplates that the court has a discretion to refuse an application to enforce if the award is not enforceable in the same manner as provided for in section 28. In my view, however, there is nothing in this submission that renders the decision of Joseph-Olivetti J wrong. This is because, as I indicated earlier, "enforceable" in the context of section 28 is referable to enforcement procedure that is to be followed after an order to enforce is granted, rather than to the grant or refusal of an application to enforce an award.

Rather, it refers to post enforcement order procedure. In my view, the misapprehension of the context of enforcement referred to in section 28 is the basis for the error in the submission by counsel for IPOC that purely declaratory awards are not enforceable because they cannot be subject to execution and are therefore not amenable to compliance by the parties.[49]

[64] According to learned counsel for IPOC, a second consideration, outside of section 32, on which an enforcement order may be refused, arises because the Court has a residual discretion to refuse enforcement where the court's enforcement machinery does not lend itself to enforcement. An example, said counsel, was the acknowledgement by the judge[50] that a Convention award which is uncertain in its terms is not enforceable. In my view, Tongyuan and Margulies have not created uncertainty or unintelligibility of a Convention award as a criterion for refusal to grant an order to enforce. It is clear from these cases that even where an award is uncertain or unintelligible, the court may grant an application for the enforcement of a Convention award once the award is made certain. In any event, these cases are not authority for a principle that a Convention award is rendered uncertain and unintelligible and therefore unenforceable because it is stated in declaratory form.

[65] Learned counsel for IPOC also submitted that the judge was wrong to place any reliance on Article III of the New York Convention to justify her conclusion that the court could enforce a declaratory award. According to counsel, that provision merely states that a Contracting State cannot impose more onerous (administrative) conditions for the enforcement of a Convention award than apply to the enforcement of domestic awards. Counsel further submitted that the judge should have held that the enforcement of an award pursuant to section 34(1) of the Arbitration Act involves only enforcement by action or by entry of judgment in terms of the award because there is no other means of enforcement provided for

[49] In my view, therein also lies the error in counsel's submission that the judge failed to give adequate consideration to the decision in Tridon which held (at paragraphs 10 and 11) that the enforcement procedure set out in the equivalent of section 34(1) of the Arbitration Act could not be applied to declaratory awards because merely translating a declaratory award into a judgment is not enforcement.
[50] At paragraph 42 of her judgment.

by the Act. He insisted that the judge should have held that the entry of a judgment in terms of a declaratory award does not constitute recognition or enforcement of the award. In my view, these submissions do not impeach the judge's finding that the declaratory Convention awards are enforceable. The judge could have exercised her discretion to grant the application for enforcement because none of the grounds for the refusal of such an application stated in section 36 of the Arbitration Act was operative.

[66] Alternatively, counsel submitted that even if a declaratory award is capable of enforcement, the judge was wrong to hold that LV Finance did not have to show any utility in enforcing the Awards. Counsel insisted that the judge failed to give adequate consideration to the decision in Tridon which held that there must be a "material benefit" before a declaratory award could be enforced. He insisted that the judge erred in failing to take account of the fact that LV Finance failed to identify any utility or practical reason for the entry of a judgment in the terms of the Partial Awards. He said that the judge acknowledged[51] that the "enforcement application is … not to themselves benefit from their own complicity by seeking to extract money or any other pecuniary benefits" from IPOC, the extraction of money or other benefits being the hallmark of enforcement. Counsel contended, further, the judge acknowledged[52] that the enforcement of the Partial Awards is of little use because IPOC is not required to pay money or have its property attached. Counsel contended that the judge erred in holding[53] that because LV Finance "is interested in seeking to ensure that [the Appellant] does not benefit in any way from the [April Option Agreement]", this was "sufficient reason for seeking judgment in terms of the declarations in the Awards". Counsel referred to this as a "speculative prospect of a benefit" and insisted that this is no good reason for the court to make an order in terms of the Partial Awards.

[51] In paragraph 58 of her judgment.
[52] At paragraph 95 of the judgment.
[53] At paragraph 44 of her judgment.

[67] It is still my view that, as a matter of construction, a court in this Territory may only refuse to grant an order to enforce a Convention award if a requirement of section 32 of the Arbitration Act is not met. If I am wrong and the court may, in addition, out of concern that it should not lend its discretion to make an order that is in vain, require an applicant for an order to enforce a Convention award to prove materiality and utility, IPOC will nevertheless fail on this ground. It must be material and of some utility that an order permitting LV Finance to enforce the awards in this Territory would preclude IPOC from relying on the illegal April Option Agreement to claim any benefits thereunder or to seek to impose any obligations under it upon LV Finance, which is a company that is registered here. The result is that I would dismiss IPOC's appeal on the ground of enforceability.

[68] In the foregoing premises, IPOC's appeal against the order in which Joseph-Olivetti J refused to set aside the ex parte order, as amended, is dismissed, and I so order. IPOC shall pay the costs of LV Finance on this appeal, to be assessed, if not agreed.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal