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Seychelles Law Journal, 18th December 2012

LEGAL AND POLICY CONSIDERATIONS FOR EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION IN SEYCHELLES

18 Dec 2012

Presented by Mr Divino Sabino on the 29th August 2012 at the Symposium on Access to Justice & Alternative Dispute Resolution held at the Kempinki Resort, Mahe, Seychelles.

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INTRODUCTION

In a Civil Case Management workshop that was organized by the Judiciary with the assistance of the Commonwealth Institute in September 2011 in Victoria, Mahé, both judges and lawyers agreed that in order to alleviate the caseload of the Courts, it was vital that Alternative Dispute Resolution ("**ADR**"), primarily in the form of mediation was encouraged if not made a mandatory process before litigation is used or even after the commencement of litigation, that a process be carved out so that mediation may be used to settle the differences of the litigation parties prior to the hearing of the case.

Although mediation was what was discussed at that workshop, it is by no means the only form of ADR mechanism that can be used by stakeholders in alleviating the caseload of the courts.

The zeitgeist to move away from settling disputes through the courts is now visible in the latest agreements that are being drafted. There is now a tendency for contracting parties to include clauses so that agreements are carried out in good faith and that extends to the situation when differences between the contracting parties arise. These dispute resolution clauses often provide for the parties to attempt to negotiate towards settling their differences before any party to the agreement may take things further, either by litigation through the courts or by arbitration.

And so, parties may, by agreement, decide to engage the ADR process to resolve their differences. But this is not always the case, in certain specified circumstances, such as disputes between an employer and employee with regards to the issue of termination of employment, the initiation of a claim or a grievance as the employment law refers to it, leads to the parties having to go through a mediation process and, only if that process fails can the parties then proceed to have their dispute heard before the Employment Tribunal. Therefore, we can see that in specific circumstances, the law can compel the parties to go through the ADR process.

Therefore, in order to bring about effective ADR in Seychelles, is it only necessary to have regard to the above 2 factors, do we only need to ensure that the parties agree to submit their dispute to ADR or for the law to compels them to do so. What if the parties agree to mediate a contractual dispute over a Seychelles immovable property right and use English law as the Governing law? Is there anything wrong with that? In another scenario, what if one of the parties intend to enforce an arbitral award pronounced and conducted in Seychelles in another country? Is that something that should concern us. If one of the parties to ADR later decide that they will not honour what was a mediated settlement or an

arbitral decision, what then?

It is therefore imperative that we look into policy and legal issues that may affect how effective ADR may be in Seychelles.

The Law
Article 110 of the Commercial Code of Seychelles states that "***any dispute which has arisen or may arise out of a specific legal relationship, and in respect of which it is permissible to resort to arbitration, may be subject to an arbitration agreement***". The same article goes on to state that it is subject to certain rules regarding compromises as laid down in Articles 2044 to 2058 of the Civil Code of Seychelles.

So we can already see from this provision of the law that parties may not refer any dispute of any nature to arbitration but only to those that are permissible. And then, with regards to permissible areas of arbitration, parties are bound to follow the rules set out in the Civil Code regarding compromises. These rules on compromises would also apply to other ADR mechanisms such as mediation.

A few of the most notable of these rules for example are that: (i) Public Bodies may not compromise "***except with the express consent of the Republic unless they are authorized by law.***" (Article 2045-1 of the Civil Code); (ii) That "***matters regarding the capacity of persons, the grounds of divorce and judicial separation and generally matters tending to contravene public policy may not be the subject of compromise***" (Article 2045-2 of the Civil Code); (iii) Reaching a compromise with regards to civil liability arising from a criminal offence is permitted but it shall not bar any criminal proceedings by the Attorney General (Article 2046 of the Civil Code); and (iv) Compromises shall have the authority of a judgment against which there is no further appeal. Its validity may not be disputed on grounds of error of law or lesion (Article 2052 of the Civil Code).

I will now wish to address the issue of Public Policy, the law on compromises state that matters tending to contravene public policy may not be the subject of compromise. Accordingly, it follows that the end result of mediated settlements and arbitral awards cannot contravene public policy. According to the Jurist Friedrich Carl von Savigny, the notion of public policy is perhaps one of the most difficult topics, if not the most difficult, within legal theory[1]. In the continental system of laws, the concept of public policy, as an impediment to the principle of freedom of contract, has its roots in the French Civil Code of 1804, hitherto often referred to as the Code Napoleon[2], of which the Seychelles' Civil Code is based. The drafters of the Code Napoleon were four of the most distinguished jurists of that period, i.e. Tronchet, Bigot de Préameneu, Maleville and Portalis, it was they would incorporated the notion of public policy into the civil law system[3]. The meaning of this concept continues to be controversial, probably because the term is not defined under the Code, however, it has evolved into 2 somewhat identifiable branches, the notion of acts contrary to public order and acts contrary to morals.

In the realm of acts contrary to Public Order, it is in the case when an agreement is clearly incompatible with the interests of society that it becomes illicit and unenforceable under the law. In relation to the State, according to Amos & Walton[4], it is clear that all agreements are null which interfere with good governance, public order and the administration of justice, public services and national economic policy. Agreements which are designed to circumvent the revenue laws of the State are also null and so too are agreements which are

prejudicial to the institution of the family.

In the domain of morality, an agreement may be said to be contrary to good morals when it offends general sentiments of duty, propriety and public decency[5]. Restrictive covenants which impose unnecessary restraints on the employment or business of a party are generally unenforceable if unreasonable (Article 1781 of the Civil Code). The French Courts have generally annulled restrictive covenants which make it difficult for a party to earn a living. Liability for negligent or intentional harm may never be excluded by agreement (Article 1382 of the Civil Code).

Nowadays, we also often see Governing Law provisions, wherein the parties to an agreement choose which jurisdiction's law will govern the agreement. Although this in itself is not contrary to Seychelles law, Article 3 of the Civil Code states that Seychelles immovable property shall be governed by Seychelles law. Any ADR outcome that confers Seychelles immovable property rights under the laws of any other country other than Seychelles is therefore contrary to public policy and such an outcome may be challenged on that ground alone.

And at the risk of stating the obvious, no ADR outcome can result in any unlawful or unconstitutional outcome.

The law also provides for particular circumstances which allow a party to refer a dispute to arbitration even if there is no arbitration agreement. For example, where a contract is still capable of being performed but due to a complete change of circumstances, the performance of the agreement no longer fulfills the common design of the parties, Article 1148 of the Civil Code allows the party that stands to lose out under the agreement to apply to court for the appointment of an arbitrator (the parties may also agree to nominate their own arbitrator) who may modify the terms of the agreement.

The Courts are empowered under section 205 of the Seychelles Code of Civil Procedure to refer litigating parties to arbitration, either with their consent or not. However, the law does not give the Courts the power to compel litigating parties to resolve their dispute through other forms of ADR such as mediation or conciliation. Therefore, in order for a formal process of mediation to be introduced into the civil litigation process laws will have to be promulgated to address this.

The law also states that there are certain matters that must be referred to the Attorney General as the *Ministere Public*, section 151 of the Seychelles Code of Civil Procedure lists these as (i) matters relating to the guardianship of children; (ii) matters in which a party is represented by the Curator; (iii) matters concerning presumed absentees or matters in which such absentees are interested; and (iv) matters relating to the interdiction of or persons or the appointment of advisers (*conseils judiciaries*). These matters are handled by Petitions presented to the court and cannot be decided upon by parties outside of the court process. However, any moves to introduce mediation into the court litigation process must bear in mind the role of the Attorney General as the*Ministere Public*.

Our laws on arbitration do not bind the parties to follow any set process for how the arbitral proceedings will be conducted or on how the arbitrator or arbitrators will be appointed, but there are several rules on issues which may lead to an arbitral award being void or unenforceable. Therefore, in order for arbitration to be effective in Seychelles, in the sense of arbitral awards being legally binding on the parties to arbitration by being enforceable, it is necessary for the parties

involved in arbitration to be aware of the issues that may render an arbitral award unenforceable. Section 207 of the Seychelles Code of Civil Procedure states that an arbitral award may be set aside on any of the following grounds: (i) corruption or misconduct on the part of the arbitrator; or (ii) either party being found guilty of fraudulent concealment of any matter which ought to have been disclosed, or willfully misleading or deceiving the arbitrator. In addition to the above, Article 134 of the Commercial Code lists out numerous circumstances which may allow a party to apply to court to set aside an arbitral award. Some of the grounds are that the arbitral award is (i) contrary to public policy; (ii) the arbitral tribunal exceeded its jurisdiction or powers; (iii) the arbitral tribunal omitted to make an award on one of the points in dispute; (iv) the award was made by an irregularly constituted arbitral tribunal; (v) reasons for the award have not been stated; (vi) the award contains conflicting provisions; or (vi) if the award was obtained by fraud. This list is not exhaustive, there are a handful more circumstances which allow a party to challenge an arbitral award. Therefore, in order for arbitration to be effective in Seychelles, arbitrators must be aware of the grounds which may cause their arbitral award to be subject to attack.

Enforceability of Arbitral Awards or Mediated Settlements

With regards to mediated settlements outside of the court process, as stated earlier, Article 2052 of the Civil Code states that such compromises shall have the authority of a judgment of which there is no further appeal. In the same vein, a judgment by consent presented and affirmed by the court has the force of a judgment of the court.

With regards to arbitral awards, Article 138 of the Commercial Codes provides that arbitral awards may be registered before the Supreme Court of Seychelles and be enforced as though it were a judgment of the Supreme Court.

But what about the enforcement of mediated settlements or arbitral awards in foreign jurisdictions. Mediated settlements will at least have the force of a legally binding contract and a party may seek to enforce that agreement in a foreign jurisdiction through a normal civil action in a foreign jurisdiction.

However, arbitral awards pronounced in Seychelles may not be easily enforceable in foreign jurisdictions. Seychelles is not a party to the New York Convention on the Enforcement of Foreign Arbitral Awards and therefore arbitral awards pronounced in Seychelles cannot benefit from the ease of recognition and consequent enforceability in foreign jurisdictions as provided for under the New York Convention. The enforceability of Seychelles arbitral awards will therefore be at the mercy of the rules of each jurisdiction. As a consequence, parties which may wish to litigate in Seychelles, but which may seek to enforce any outcome outside of Seychelles, may therefore find it more practical to submit to the jurisdiction of the Seychelles courts of law rather than that of a Seychelles arbitral tribunal simply on the mere fact that a judgment of a court of law is more easily enforced in a foreign jurisdiction compared to that of an arbitral award. Therefore, in order to persuade more parties to submit to the jurisdiction of an arbitral award Seychelles must seriously consider adopting the New York Convention.

Conclusion

To conclude, although the general sentiment is to encourage the use of ADR mechanisms in Seychelles, in order for it to be effective we cannot ignore the various rules in place with regards to what can be resolved by ADR, we cannot ignore the rules on public policy, we cannot ignore the rules on the setting aside

of ADR outcomes, and we must also look at the laws in place with regards to the enforcement of ADR outcomes. The failure to adhere to and pay attention to any of these issues can lead to parties being exposed to great expense and time in going through the ADR process only to result in unenforceable outcomes, which will undermine the legitimacy of ADR in Seychelles.

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[1] Marks, T., & Betancourt, J.C., *Rethinking Public Policy and Alternative Dispute Resolution: Negotiability, Mediability and Arbitrability*, **The International Journal of Arbitration, Mediation and Dispute Management**, Vol 78 No 1, Feb 2012, page 19, Sweet & Maxwell.
[2] Ibid.
[3] Ibid.
[4] Lawson, F.H., Anton, A.E., & Neville Brown, L., Amos and Walton's Introduction to French Law, 1967, 3rd edn, Oxford University Press.
[5]Ibid.