[2024] JMCC Comm 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2021CD00543

BETWEEN	**ASTOR ASSET MANAGEMENT 3 LIMITED**	**CLAIMANT**
AND	**ZS CAPITAL FUND SPC**	**1st DEFENDANT**
AND	**MA DANYU**	**2nd DEFENDANT**
AND	**ZHANG NINGNING**	**3rd DEFENDANT**
AND	**ZHOU YIHUI**	**4th DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mrs. Trudy - Ann Dixon - Frith & Ms. Samantha Grant instructed by DunnCox Attorneys-at-Law for the Respondent/Claimant

Mrs. Tana'ania Small Davis KC & Ms. Analiese Minott instructed by Livingston Alexander & Levy for Applicants/Defendants

Heard: 18th December 2023 and 9th May 2024

Arbitration Act – Jurisdiction of Court to intervene in Arbitral proceedings – Whether S. 55 is a mandatory provision – Setting aside Arbitral Award– Summary Judgment

BROWN BECKFORD J

INTRODUCTION

Oh, what a journey, full of strife,

As the lender fights for their presumed rights.

Will they succeed? Only time will tell,

In this legal dance, where twists compel.

What a curfuffle!

[1] The dispute in this claim arose from a story as old as time, a loan agreement gone south. The parties, as businesses are wont to do in the modern era, made their own arrangements for the settlement of any dispute arising between them. They chose arbitration, with the seat of arbitration being in Jamaica, to resolve their disputes. In due

course, a dispute having arisen, arbitral proceedings were commenced. The Arbitral Tribunal decided against the lender, which has sought the aid of the Court with a view, it seems, to a more amenable decision. The borrowers have given short shrift to the claim by the lender and by this application seeks to bring an end to this venture. The lender and the borrowers will be referred to herein as the "Claimant" and "the Defendants" respectively.

[2] The Claimant, Astor Asset Management 3 Limited, instituted its claim by Claim Form filed 13th December 2021 as amended 18th March 2022 against ZS Capital Fund Spc, Ma Danyu, Zhang Ningning, Zhou Yihui, the 1st, 2nd, 3rd and 4th Defendants, respectively, for the setting aside of arbitral proceedings. The Claimant sought the following declarations:

1. The Final Award and or the Costs Award deals with a dispute 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; and or
2. The subject matter of the dispute between the parties was not capable of settlement by arbitration under the laws of Jamaica; and or
3. The Final Award and or the Cost Award is in conflict with the public policy of Jamaica.

[3] The Defendants have by way of Notice of Application for Court Orders sought the following orders:

1. A declaration that the Court has no jurisdiction [for alternatively, declines to exercise its jurisdiction] with respect to the Claim.
2. An order striking out the Claim.
3. Alternatively, summary judgement in favour of the Defendants.
4. If the court permits the claim to stand, an order that the Claimant provide security for the Defendants' cost of and occasioned by these proceedings and this Application in the sum of Fifty-Seven Thousand One Hundred United States Dollars ($57,100.00) within fourteen days of the date of this Order.
5. The abovementioned sum shall be paid into an interest-bearing account at a licensed financial institution in the joint names of DunnCox and Livingston, Alexander & Levy, the Attorneys-at-Law for the parties, and held in escrow as security for the Defendants' costs of this action until the determination of the claim herein or further order of this Honourable Court.
6. The Claimant's claim shall be stayed until such time as the security for costs as ordered above is provided in accordance with paragraphs 4 and 5.
7. In the event the said sum of Fifty-Seven Thousand One Hundred United States Dollars (US $57,100.00) is not paid by the Claimant in accordance with the terms of

this Order, this claim against the Defendants shall stand as struck out, with costs to the Defendants.

8. Costs to the Defendants to be taxed if not agreed.
9. Such further and other relief as this Honourable Court deems just.

BACKGROUND

[4] On 12th May 2020, the Defendants contracted with the Claimant, to borrow in total the sum of Thirty-One Million Eight Hundred Thousand United States Dollars **(USD $31,800,000.00)**. The Defendants each executed identical Stock Loan Agreements **("SLAs")**, save for the name of the borrower and the sum agreed to be advanced to that Defendant. Pursuant to the SLAs, the Defendants offered security and collateral for the loan in the form of shares in a company called Zhejiang Cangnan Instrument Group Limited **("Cangnan Shares")**, a company incorporated in China.

[5] Subsequently, the parties executed four Collateral Management Agreements **("CMAs")** which permitted the Cangnan Shares to be held within the custody of a Depository (Custodian) Broker, Zundiao Securities Limited, **("Zundiao")** a licensee of the Securities and Futures Commission in Hong Kong. The respective Cangnan Shares were deposited by the Defendants with Zundiao on 25th May 2020. Clause VI of the CMAs provides for the forfeiture of the Cangnan Shares in the event of an incurable default of the terms by the Defendants.

[6] The Claimant disbursed the loan to each Defendant in tranches. However, before the full amount of the loan was disbursed, a dispute arose between the parties. To date, the aggregate sum advanced to the Defendants is Two Million Seven Hundred and Fifty Thousand United States Dollars **(USD$2,750,000.00)**.

[7] Following checks conducted by the Defendants at the Central Clearing and Settlement System **("CCASS")** of the Hong Kong Stock Exchange, the Defendants discovered that between 1st June 2020 and 17th June 2020, a total of 926,800 of the Cagnan shares were transferred to Phillip Securities (Hong Kong) Ltd., DBS Vickers (Hong Kong) Ltd. and Citibank N.A. Consequently, the Defendants applied successfully for an *ex parte* injunction to restrain the Claimant from disposing of the Cangnan Shares.

[8] Pursuant to Clause VII of the SLAs, on 4th July 2020, the Claimant issued Notices of Arbitration to the Defendants referring the matter to arbitration. On 15th November 2021, the Arbitral tribunal, M. Georgia Gibson Henlin KC, handed down her Final Award in respect to the dispute between the parties, and on 21st February 2022 delivered her final award in respect of costs. The Claimant seeks to set aside both awards in the instant claim.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS/APPLICANTS

[9] Counsel on behalf of the Defendants, Mrs. Tana'ania Small Davis KC, argued that the Court has no jurisdiction to hear the Claimant's challenge to the arbitral awards, as the parties agreed that the arbitration is final and conclusive. She asserted that similarly to **Article 34 of the UNCITRAL Model Law on International Commercial Arbitration**, **S. 55 of the Arbitration Act** was not manadatory; therefore the parties, by virture of Clause VII of the Stock Loan Agreement, could contract out of **S. 55**. She drew support from the writers of the *Handbook of UNICITRAL Arbitration, Sweet & Maxwell* and the case of **Noble China Inc. v Lei** 1998 42 OR (3d) 69.

[10] On that basis it was contented that the claim is an abuse of process, and should be struck out. She also submitted that the grounds for challenging the award was a mere disguise for a second attempt to argue the issues determined in the arbitration. To this end, she relied on **Johnson v Gore Wood & Co** 2 A.C. 1.

[11] Counsel further submitted that the application for Summary Judgment ought to be granted on the basis that **S. 55 of the Act** gives a limited scope for challenging an arbitral award, and such scope does not include recourse against an award on the ground of errors of law. She relied on, in support of this argument, **S. 103 of the 1996 UK Arbitration Act**, **Swain and Hillman** *(supra)*, **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright** [2018] UKPC 12, **Somerset Enterprises Limited and anor v National Export Import Bank** [2021] JMCA Civ 12, **Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)** [2021] UKSC 48.

[12] Counsel submitted in the alternative, that if it is found that the Court has jurisdiction to hear the claim and/or does not strike out the claim, the Defendants should be awarded security for costs. Counsel mounted this argument on the inference that the Claimant is impecunious, owing to the fact that the Claimant was struck off the register of companies in Nevis for failing to pay its annual fees. Further, the Claimant has not identified its assets, therefore neither the Defendants nor the Court has any material to assess obstacles to enforcement against those assets. This argument was supported by **Part 24 of the CPR**, **Symsure Limited v Kevin Moore** *(supra)* and **Pisante and others v Logothetis and others** [2020] EWHC 332 (Comm).

SUBMISSIONS ON BEHALF OF THE CLAIMANT/RESPONDENT

[13] Counsel on behalf of the Claimant, Mrs. Dixon-Frith, contended that the Acknowledgment of Service filed 30th August 2022, which did not indicate that the jurisdiction of the Court was being challenged, in conjunction with the letter dated 20th September 2022, seeking security for costs, and the filling of the application seeking summary judgment and striking out, all constitute the Defendants' submission to the jurisdiction of the Court. To this end, Counsel relied on **Rules 9.5 and 9.6 of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)**, **Global**

Multimedia International Limited v Ara Media Services and Another [2007] 1 ALL ER (COMM) 1160, **Hoddinot & Others v Persimmon Homes (Wessex) Limited** [2008] 1 WLR 806, **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 and **Hunter v Richards & Anor** [2020] JMCA Civ 17.

[14] Mrs. Dixon-Frith accepted that arbitral awards are unappealable, but held the view that this does not mean they are immune to challenge on prescribed statutory grounds as posited by the writers in *Butterworth's Challenges in Arbitration: a Guide to Challenges against Arbitrators, Awards and Enforcement*. She submitted that in accordance with **S. 2 of the Arbitration Act**, the seat of arbitration is in Jamaica, therefore the **Arbitration Act** is applicable to these proceedings. The Claimant's application to set aside the arbitral award, being grounded on **S. 55 of the Arbitration Act**, overrides the provision of the SLAs relative to the decision of the Arbitral Tribunal being final and not capable of being challenged. She argued that, **S. 55 of the Act** is mandatory and cannot be waived by the parties. Reliance was placed on **Universal Petrochemicals Limited v Rajasthan State Electricity** (2001) 2 CALLT 417 HC.

[15] It was also submitted that the Court not only derives it jurisdiction from statute, but also has a common law and inherent jurisdiction to set aside the final award of the Arbitral Tribunal. The cases of **National Transport Co-operative Society Limited v Attorney General of Jamaica** [2010] JMCA Civ 48, **Construction Developers Associates Limited v Attorney General of Jamaica et al** [2014] JMCC Com 3 and **Josa Investments Limited v Promotions and Print Essentials Limited** [2018] JMCC Comm 37. Further, Mrs. Dixon-Frith argued that if the Court finds that it has jurisdiction to try the claim, it should not decline to exercise its jurisdiction as the Defendants have not pleaded forum non conveniens or lis alibi pendens. She relied on **IMS SA & Others v Capital Oil & Gas Industries Ltd** [2016] 4 WLR 163.

[16] It was also Counsel's contention that Clause VII of the Stock Loan Agreements, which precludes the Court from reviewing the decision of the Arbitral Tribunal, amounts to an ouster clause. On this basis it was submitted that Clause VII is void and contrary to public policy. She relied on the cases of **Scott Avery** [1843-60] All ER Rep 1, **Doleman and Sons v Ossette Corporation** [1912] 3 KB 257**, Jack Bradley Maritimes Limited v Modern Construction Limited** [1966] NBJ No. 8, **Ford v Clarkson Holiday Limited** [1971] 1 WLR 1412, **CLLS Power System Sdn Bhd v Sara Timer Sdn Bhd** [2015] 11 MLJ 455 and **Uber Technologies Inc and others v Heller (Attorney General of Ontario and others intervening)** 2020 SCC 16.

[17] Mrs. Dixon-Frith's advanced the argument that the Arbitral Tribunal made the Final Award without any appreciation that the issue of jurisdiction by virtue of Preliminary Award No. 3 was *res judicata* between the parties, and/or that an issue of estoppel arose in favour of the Claimant. Therefore evidence on the issue was inadmissible at the

substantive hearing. This argument was buttressed by reference to the cases of **Gbangbola and another v Smith & Sherriff Ltd.** [1998] 3 All ER 730, **PJSC National Bank Trust and another v Mints and others** [2022] 1 WLR 3099, **Western Australia of CBI Constructors Pty Ltd. V Chevron Australia Pty Ltd** [2023] BC202300111.

[18] Further, she submitted, the Arbitral Tribunal, in finding that the Claimant was a *"money lender"*, failed to consider whether the Claimant is entitled to benefit from an exemption under the Money Lending Ordinance of Hong Kong. This failure, Counsel sumitted, was a breach of natural justice as found in **Front Row Investments v Daimler South East Asia** [2010] SGHC 80, **AKN & Anor v ALC & Others** [2015] SGCA 15 and **Oil & Natural Gas Corpn. Ltd vs Western Geco International Ltd.** AIR 2015 Supreme Court 363.

[19] Counsel also argued that the Arbitral Tribunal acted ultra vires to **S. 49(1) of the Arbitration Act** when it ruled that costs were payable by the losing party at arbitration, the Claimant. She bolstered this argument on the cases of **Fitzsimmons v Lord Mostyn** [1904] AC 46 and **Mansfield v Robinson** [1928] 2 KB 353.

[20] On these premises, she urged the Court that the Defendants have not demonstrated that the statutory grounds have not been engaged. Therefore, the Claimant does have a reasonable prospect of succeeding on the claim. Support was drawn from the cases of **Cecelia Laird v Critchlow & Anor** [2012] JMSC Civ 157.

[21] Consequently, Counsel submitted that Summary Judgment would be inappropriate in these circumstances as the Court would be conducting a mini-trial and forming preliminary views of evidence which is incomplete before the Court. In furtherance of this Counsel relied on **Cammock (Deceased and substituted by Nephew, Fitzroy Phillips) and Another v Hemmings and another** [2014] JMSC Civ 184 and **Lewis & Others v NCB Ja Ltd** [2018] JMSC Civ 40.

[22] Mrs. Dixon-Frith's position was also that the Defendants' orders seeking striking out of the claim ought not to be granted on the basis that the Claimant is exercising a statutory right of action granted by the **Arbitration Act**. Accordingly, the claim is neither frivolous nor vexatious as the claim would not bring the administration of justice into disrepute. She relied on **Civil Court Practice (The Green Book)**, **Douglas et al v National Commercial Bank Jamaica Limited** [2013] JMSC Civ 85, **West Indies Petroleum Limited v Wilkinson and Levy** [2023] JMCA Civ 2. In this light Counsel argued that it cannot be said that the cause of action, on the face of the pleadings, is unsustainable or does not plead a complete claim. To this end, she relied on **Trillian Dougals v the Commissioner of Police** [2017] JMSC Civ. Further, a striking out order should not be granted in an area of developing jurisprudence as noted in **Farah v British Airways PLC and another PLC and another [2000] Times, 26th of January CA** and **Equitable Life Assurance Society v Ernst Young** [2003] 2 BCLC 603.

[23] Lastly, Counsel contended that in light of the fact that the Defendants have displayed no intention to repay the disbursements, the order for security for costs should not be granted. To bolster this argument, Counsel relied on **Rule 24.2 (1) of the CPR**, **White Book 2004**, **Leyvand v Barasch**, **The Times, March 23, 2000**, **Symsure Limited v Kevin Moore** [2016] JMCA Civ. 8 and **Ras Al Khaimah Investment Authority v Farhad Azima and others** [2022] EWHC 1295 (Ch). However, if the Court is minded to find in the contrary, Counsel urged the Court to reduce the sum being claimed for security for costs. Reliance was placed on **Blackstone's Civil Practice 2005** and **Carey – Hazell v Getz Bros & Co (Aus) Pty Ltd** [2004] FCA 1334.

ISSUES

[24] The issues raised in this application are reflected in the questions posed below:

(1) What is the jurisdiction of the court to intervene in an arbitral award?

(2) Whether **S.55 of the Arbitration Act** is a mandatory provision from which the parties may not by agreement derogate?

(3) Whether the Claimant can successfully invoke any of the grounds under **S.55 of the Arbitration Act** to set aside the arbitral award?

LAW AND ANALYSIS

JURISDICTION

[25] Contrary to the submissions of Counsel for the Claimant, this matter does not engage **CPR Rule 9.6**, and the usual discourse involved in disputing the court's jurisdiction. Rather, the matter is centred around the court's jurisdiction to review an award made by an arbitral tribunal. **The Arbitration Act 2017 ("the Act")** incorporates the **UNCITRAL Model Law on International Commercial Arbitration (1985)**, with amendments as adopted in 2006 (**UNCITRAL Model Law)** into domestic law. A central feature of the **UNCITRAL Model Law** is the limit placed on the court's ability to intervene in arbitral disputes. **Article 5** of the **Model Law**, dealing with the extent of the court's intervention, states, *"no court shall intervene except where so provided in this Law."* In the **Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006**, limiting a court's intervention in arbitral proceedings is said to be a salient feature of the **Model Law**. It says:[1]

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[1] UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para 17

> *Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).*

The Claimant argued that the Court has inherent and or common law jurisdiction to review arbitral awards. The cases relied on by Counsel all predate the **Arbitration Act** which came into effect in 2017. With respect, this argument can be shortly answered by reference to **S.8 of the Act**. It follows **Article 5 of the Model Law**. It provides that:

> **8.** In matters governed by this Act, no court shall intervene except where so provided in this Act.

Consequently, since **the Act** came into effect, the court's jurisdiction to intervene in arbitral awards is solely conferred by **the Act.**

SECTION 55 OF THE ARBITRATION ACT

[26] The claim invokes **S.55 of the Act** which mirrors **Article 34 of the UNCITRAL Model Law**. **S. 55** gives the court jurisdiction to set aside an arbitral award in specific circumstances. (There are other provisions in **the Act** giving the court jurisdiction which are not relevant to this judgment.)[2] The relevant portions read as follows:

> 55.- (1) Recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).
>
> (2) An arbitral award may be set aside by the Court only
>
> If-
>
> (a) the party making the application furnishes proof that-
>
> (i) a party to the arbitration agreement referred to in section 10 was 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 Jamaica;
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

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[2] **S.9 of the Arbitration Act**

(iii) the award deals with a dispute 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Jamaica; or

(ii) the award is in conflict with the public policy of Jamaica.

[27] Underpinning **S.55** are some underlying principles found in **S.4(1)** and **(2)**; **S.5(a)**,**(b)** and **(c)** and **S.8** of **the Act**. The relevant sections read as follows:

4.– (1) In the interpretation of this Act, regard shall be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the principles set out in section 3(5).

5. The objects of this Act are to-

(a) facilitate domestic and international trade and commerce by encouraging the use of arbitration as a method of resolving disputes;

(b) facilitate and obtain the fair and speedy resolution of disputes by arbitration without unnecessary delay and expense;

(c) facilitate the use of arbitration agreements made in relation to domestic and international trade and commerce;

…

8.– In matters governed by this Act, no court shall intervene except where so provided in this Act.

[28] These principles were elucidated in **Betamax Ltd v State Trading Corp (Mauritius)** [2021] UKPC 14 **("Betamax")** by the Privy Counsel, which stated:[3]

> *18. A number of principles relevant to the issue in the appeal are clearly set out in the International Arbitration Act:*
>
> *(1) **Very limited court intervention.** Section 2A enacts the principle of very limited court intervention as set out in article 5 of the Model Law:*
>
> > *"In matters governed by this Act, no Court shall intervene except where so provided in this Act."*
>
> *(2) **Finality**. Section 36(7), modelled on section 19B of Singapore's International Arbitration Act and reflecting discussions within the UNCITRAL working group, provides:*
>
> > *"An award shall be final and binding on the parties and on any person claiming through or under them with respect to the matters determined therein, and may be relied upon by any of the parties in any proceedings before any arbitral tribunal or in any Court of competent jurisdiction."*
>
> *This provision is reinforced by section 39(1) (enacting part of article 34 of the Model Law) which makes clear that **applications to set aside the award are strictly confined:***
>
> > *"Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section."*
>
> *(3) **Exclusion of appeals on questions of law.** The International Arbitration Act requires specific consent for an appeal on a question of law. Under section 3B, the parties must expressly agree to opt in to such an appeal under provisions made in the First Schedule to the International Arbitration Act.*
>
> *(4) **Jurisdiction and Separability**. In accordance with modern international arbitration law, section 20, enacting article 16 of the Model Law with one change not material to the present appeal, provides for **the arbitral tribunal's ability to rule on its own jurisdiction** (referred to in the Travaux Préparatoires as "competence competence") and for **the separability of the arbitration clause:***
>
> > *"(1) An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement.*
> >
> > *(2) An arbitration clause which forms part of a contract shall be treated for the purposes of subsection (1) as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*
>
> *Procedural provisions for these issues are set out in the Act.*

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[3] 2021] UKPC 14, paras 18-21

19. Section 2B of the International Arbitration Act sets out the applicable ***principles of interpretation****. It provides that in interpreting the Act and in developing the law applicable to international arbitration in Mauritius:*

> *"(a) regard shall be had to the origin of the Amended Model Law, the corresponding provisions of which are set out in the Third Schedule, and to the need to promote uniformity in the application of the Model Law and the observance of good faith;*
>
> *(b) any question concerning matters governed by the Amended Model Law which is not expressly settled in that Law shall be settled in conformity with the general principles on which that Law is based; and*
>
> *(c) recourse may be had to international materials relating to the Amended Model Law and to its interpretation, including –*
>
> > *(i) relevant reports of UNCITRAL;*
> >
> > *(ii) relevant reports and analytical commentaries of the UNCITRAL Secretariat;*
> >
> > *(iii) relevant case law from other Model Law jurisdictions, including the case law reported by UNCITRAL in its CLOUT database; and*
> >
> > *(iv) textbooks, articles and doctrinal commentaries on the Amended Model Law."*

20. The Travaux Préparatoires made clear at para 17(a) that:

> *"First and foremost, the success of Mauritius as a jurisdiction of choice for international arbitration will be largely dependent on the uniform and consistent application by the Mauritian Courts of modern international arbitration law, and (in particular) on their* ***strong adhesion to the principles of non-interventionism which is at the heart thereof****. To this end:*
>
> > *(i) The Act strictly adopts the Amended Model Law's very limited voie de recours against arbitral awards: see section 39, which reproduces article 34 of the Amended Model Law…"*

Section 39 is described as enacting "the all-important provisions of article 34 of the Amended Model Law without any significant modifications". The modifications are effected by the addition of the provisions in section 39(2)(b)(iii) and (iv) (fraud or corruption, and breach of the rules of natural justice). These provisions are akin to those enacted in Singapore in section 24 of Singapore's International Arbitration Act.

21. Article 34 of the Model Law, as the UNCITRAL Explanatory Note to the Model Law makes clear, contains ***an exclusive list of grounds for setting aside an award.*** *This is essentially the same list as that contained in the provision in article 36 of the Model Law for the recognition and enforcement of arbitral awards which was itself taken from article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). As "public policy" is determined in the courts of the state before which proceedings are brought, there may well be differences in the view taken as to the nature and scope of the public policy between a supervisory court which is considering setting aside the award and a court enforcing the award in a different state. However, there is no reason for difference as to the extent of a court's right of intervention in respect of public policy under articles 34 and 36 and the decisions in this respect on enforcement are applicable in respect of applications to set aside. (Emphases mine)*

[29] The first attack on the claim by the Defendants is that the Court has no jurisdiction to entertain the claim. This was as the parties to the SLAs themselves chose to exclude any intervention by a court into an arbitral award by virtue of Clause VII of the agreements. Clause VII states:

> *There will be no appeal from the decision of the Arbitral Tribunal on questions of fact, error, public policy, impartiality, process, jurisdiction, or law, nor will any court deviate from this paragraph, it's (sic) provisions and wish of the Parties. The arbitration award will be final and binding in resolving any controversy.*

The question which thus arises first for the Court's determination is whether the parties could contract out of **S. 55 of the Act**. If a valid term of the contract, then it is a complete answer to the Claimant's claim. If it is a mandatory provision which the parties could not contract out of, then the provisions of **S.55** are applicable.

*Is **S.55 of the Arbitration Act** a mandatory provision?*

[30] **S. 4 of the Act** specifically stipulates that it should be interpreted in accordance with its international origin, with one objective being to give effect to the **UNCITRAL Model Law**[4]. There being no decided cases in this jurisdiction on this issue, it is useful to look to the interpretation of **Article 34 of the UNCITRAL Model Law** or its equivalent in model law jurisdictions in the interpretation **of S.55**.

[31] The Defendants referred the Court to the Canadian case of **Noble China Inc. v Lei** 1998 42 OR (3d) 69 **("Noble China")** in support of their argument that parties to an arbitration agreement can contract out of **Article 34 of Model Law**. In **Noble China**, the Ontario Superior Court of Justice had before it for determination, inter alia, an application to dismiss the setting aside of an arbitral award. This application was grounded on the premise that the parties had limited the grounds for review of the award through the inclusion of an exclusion clause in the arbitration agreement. Justice Lax upheld the exclusion clause on the basis that the parties could agree to contract out of **Article 34** so long as the agreement did not conflict with a mandatory provision of **Model Law** or is contrary to public policy. Justice Lax noted that arbitral proceedings were a consensual process which was designed with the intention of the parties in mind, and that a court should give effect to such intentions. She stated:[5]

> *In summary, art. 34 is not a mandatory provision of the Model Law. Parties may therefore agree to exclude any rights they may otherwise have to apply to set aside an award under this article. They may do so as long as their agreement does not conflict with a mandatory provision of the Model Law. The arbitration agreement here does not conflict with any mandatory provision of the Model Law, nor does it confer powers on the arbitration tribunal which is in conflict with Ontario public policy.*

Justice Lax made it known that her interpretation of **Article 34** was being made obiter.

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[4] **S.5(e) of the Arbitration Act**
[5] 1998 42 OR (3d) 69, para 98

[32] The decision in **Noble China** was considered, and it appears rejected, in **Popack v Lipszyc** 2015 Carswell Ont 8001, 2015 ONSC 3460 **("Popack")**, another Canadian case from a court of equal jurisdiction. In **Popack**, the parties also attempted to contract out of **Article 34**. In **Popack** Justice Matheson concluded that **Article 34** was a mandatory provision which the parties could not contract out of. She reasoned that if **Article 34** could be derogated from, then there would be no remedy for the breach of any of the mandatory provisions of the Model Law. In considering **Noble China**, she said:[6]

> *The respondents rely on the decision in Noble China Inc. v. Cheong (1998), 42 O.R. (3d) 69 (Gen. Div.) in support of their position that Article 34 is not a mandatory provision of the Model Law and therefore can be excluded by agreement. In that case, in self-described obiter, the Court did say that Article 34 is not mandatory. However, to focus on that statement in isolation mis-describes the Court's findings. The Court identified a number of circumstances in which an attempt to exclude Article 34 by agreement would be ineffective. The Court found that Article 34(2)(a)(i)(ii) and (iii) are "independent grounds" to bring an application to set aside an award "without regard to the effect of any agreement." Next, the Court found that if the parties purported to agree in a manner that derogated from a mandatory provision of the ICAA such as Article 18, that agreement would be "ineffective" and not stand in the way of an application under Article 34. Similarly, with respect to the second part of Article 34, the Court concluded that an arbitration agreement may not confer powers on a tribunal to conduct an arbitration in a manner contrary to public policy. These findings are all different ways of showing that parties cannot effectively contract out of Article 34 for all purposes.*

The finding of Justice Matheson in **Popack** was that **Article 34** is immune from contractual opt-out. She stated:[7]

> *46. … if parties can contract out of Article 34 for all purposes, there would be no jurisdiction for a court to set aside an award as a remedy for breach of these admittedly mandatory provisions. Noble China illustrates that this is not the case.*
>
> *47. I conclude that the proper approach is to consider to what extent the Arbitration Agreement seeks to exclude Article 34, and if it does, to what extent it is effective in doing so given the specific matters at issue.*

[33] This approach is not unheard of in our jurisprudence. In **Peterkin, Arlene v Natural Resources Conservation Authority, Town and Country Planning Authority and National Housing Trust** [2022] JMSC Civ. 153 Anderson K. J posited:[8]

> *In Matthews v The State [2000] 60 WIR 390, a decision of Trinidad and Tobago's Court of Appeal, which has been consistently applied in our jurisdiction, the court considered the use of the word 'shall' in a statutory context. It is cited at page 403 as follows: 'Turning to the argument based on the language of s 18, courts no longer accept that it is possible merely by looking at the language used by the legislature, to distinguish between mandatory or imperative provisions, the penalty for breach of which is nullification, and provisions that are merely directory for breach of which the legislation is deemed to have intended a less drastic consequence. The fact of the matter is that most directions given by the legislature in statutes are in a form that is mandatory. It is now accepted that in order to determine what is the result of failure to comply with something prescribed by a statute, one has to look beyond the language and consider such matters*

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[6] 2015 Carswell Ont 8001, 2015 ONSC 3460, para 44
[7] Ibid. paras 46 - 47
[8] [2022] JMSC Civ. 153, paras 57-58

> *as the consequences of the breach and the implications of nullification in the circumstances of the particular case.'*
>
> *[58] The word 'may' does not always connote a discretionary scenario, but may also, be an imperative.*

[34] **Popack** was followed and **Noble China** was rejected by the Supreme Court of British Columbia in **lululemon athletica canada Inc v Industrial Color Productions Inc** 2021 BCSC 15. The introduction is sufficient for these purposes to establish the relevance of the case.[9]

> *1. lululemon athetica canada inc. ("lululemon") seeks an order pursuant to s. 34(2)(a)(iv) of the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 [ICA Act] to set aside the portion of a commercial arbitration award requiring it to pay Industrial Color Productions Inc. ("ICP") $1,081,967 (USD) plus interest.*
>
> *2. In particular, lululemon claims the arbitrator went beyond the scope of the submission to arbitration in making an award that it says was not pleaded by ICP.*

After referring to paragraphs 44 to 47 of **Popack**, the chambers judge concluded that,[10] *"In short, a party cannot waive the statutory right to apply to set aside an arbitral award."* On appeal, in upholding the decision of the chambers judge, this issue was not addressed.[11]

[35] **Article 34** distinguishes itself from other provisions that influence ongoing arbitral proceedings, as its operational scope is exclusively post-award. The importance of **Article 34** lies in its provision of the supervisory jurisdiction of the Court on the grounds enumerated. In my estimation, **Article 34** must in most, if not in all, circumstances, be construed as a mandatory provision, indispensable to the integrity of the arbitral process.

[36] I find support for these conclusions from the fact that the drafters of the Model Law included certain provisions which gave parties the ability to derogate from them. Commentary was made on this observation by Thomas G. Heintzman O.C., Q.C., FCIArb in an article titled, **Can The Parties Contract Out Of The UNCITRAL Model Law?**. There Mr. Heintzman stated:

> *… the Model Law does expressly state in numerous articles that the parties can otherwise agree. Thus, Articles 3(1), 10(1), 11(2), 13(1), 17, 19(1), 21, 23(2), 24(1), 25, 28(1)-(3), 29, 31(2), 33(1). 33(1)(b) and 33(32) expressly state that the Article applies "unless the parties agree otherwise" or that the "parties are free to agree upon" other provisions, or words to the same effect. Article 4 refers to ''a provision of this Law from which the parties may derogate", and requires a party to make a timely complaint about the non-compliance, failing which that party is deemed to waive the objection. The words ''unless the parties agree otherwise", "the parties are free to agree" and "may derogate" imply that the parties may not agree otherwise or derogate from other provisions. Having stated in about 18 separate Article and sub-Articles that the parties may "otherwise agree" or are "free to agree upon" other provisions, it seems that the drafters thought they had stated*

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[9] 2021 BCSC 15, paras 1-2
[10] Ibid., para 54
[11] **lululemon athletica canada inc. v. Industrial Color Productions Inc**. 2021 BCCA 428

> *which Articles and sub-Articles were non-mandatory and had thereby delineated between the mandatory and non-mandatory sections, and most unlikely they would have intended that the parties could contract out of the other provisions. If that is not so, and if the line between the two is not drawn by reference to those Articles and sub-Articles, then no clear line between the mandatory and non-mandatory Articles is apparent.*

[37] On closer examination, in addressing whether the provisions of **S.55** are mandatory, there is no real difference between **Noble China** and **Popack**, in that what is sought to be excluded determines whether the provisions of **S.55** are mandatory or discretionary. The Court must look to the Arbitration Agreement to see to what extent it purports to exclude **S.55**. The relevant section of the agreement reads:[12]

> *There will be no appeal from the decision of the arbitral tribunal on questions of fact, error, public policy, impartiality, process, jurisdiction, or law, nor will any court deviate from this paragraph, its provisions and wish of the Parties. The arbitration award will be final and binding in resolving any controversy.*

Though this Court has a preference for the reasoning in **Popack**[13], if the Court were to adopt either the approach of Justice Lax in **Noble China** or Justice Matheson in **Popack**, the result would be the same. The wide-sweeping attempt to exclude the court's statutory jurisdiction, which may include breaches of the mandatory provisions, including public policy, must be ineffective. In **Betamax**, it was held that the determination of the nature and extent of public policy was a question of law (of Singapore) for determination by the courts (of Singapore).

Clause VII: Ouster of court's jurisdiction

[38] Counsel for the Claimant argued that Clause VII of the SLA amounted to an ouster clause and was illegal, void and contrary to public policy and therefore could not serve to oust the Court's jurisdiction to set aside the award. Having regard to the Court's finding in respect of **S. 55**, it is not necessary to deliberate further on this issue. In any event, the agreement provided that such a clause could be severed from the agreement.

Whether statutory grounds to set aside award were made out?

[39] On this premise, the Court is now free to consider the bases on which the Claimant seeks to set aside the arbitral award.

[40] The threshold requirement to bring an application under **S. 55** is that it is time bound. **S.55(3)** mandates the time by which the application to set aside the arbitral award must be made. The section reads:

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[12] Clause VII of the SLAs

[13] Justice Matheson also found that what was excluded was an appeal and not as was before her an application to set aside the award.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 48, from the date on which that request had been disposed of by the arbitral tribunal.

In the case at bar, there is no dispute that the application to set aside the arbitral award was made in time.

[41] The bases on which the Claimant seeks to set aside the arbitral award are set out in the three grounds adumbrated in the Claim Form which will form the subheadings for the discussion below.

(a) The Final Award and or the Costs Award deals with a the dispute 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.

[42] The Particulars of Claim discloses that challenged under this ground is the Arbitrator's failure to make findings of fact on matters in dispute; failure to make findings on the substantive merits of the issues in the proceedings; acting in excess of jurisdiction in granting the cost award and acting ultra vires **S49(1) of the Act** in granting the cost award.

[43] S.55(2)(a)(iii) of the Arbitration Act mirrors **Article 34(2)(a)(iii) of the UNCITRAL Model Law**. This article concerns the setting aside of an arbitral award on the basis that the arbitrator acted in excess of his jurisdiction. In interpreting what is meant by exceeding jurisdiction in the context of arbitration proceedings, I refer to the case of **Lesotho Highlands Development Authority v Impregilo SpA and others** [2005] UKHL 43 **("Lesotho")**. In that case the provision in question was S.68(2)(B) of the Arbitration Act which provided for the setting aside of an arbitral award on the ground that the arbitrator had exceeded his jurisdiction. S.68(2)(B) also mirrored **Article 34 of the UNCITRAL Model Law**. In **Lesotho**, the House of Lords had to determine whether the arbitral tribunal exceeded its jurisdiction when it concluded that it had the power to order payment in any currency it deemed appropriate. This ground was also raised by the respondents in relation to the tribunal's conclusion that the "otherwise" agreed provisions in the agreement, which concerned interest, did not exclude the tribunal's powers to award interest. In coming to the determination of the court, Lord Steyn stated:

> *[29] It will be observed that the list of irregularities under s 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in s 68 is there any hint that a failure by the tribunal to arrive at the "correct decision" could afford a ground for challenge under s 68. On the other hand, s 68 has a meaningful role to play. An example of an excess of power under s 68(2)(b) may be where, in conflict with an agreement in writing of the parties under s 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement*

> *awarded compound interest. There is a close affinity between s 68(2)(b) and s 68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator.*
>
> *…*
>
> *[31] By its very terms s 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal exceeding its powers under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in s 69 be appealed unless the parties have excluded that right by agreement. In cases where the right of appeal has by agreement, sanctioned by the Act, been excluded, it would be curious to allow a challenge under s 68(2)(b) to be based on a mistaken interpretation of the underlying contract. Moreover, it would be strange where there is no exclusion agreement, to allow parallel challenges under s 68(2)(b) and s 69.*
>
> *[32] In order to decide whether s 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under s 68(2)(b).*
>
> *[33] For these reasons the Court of Appeal erred in concluding that the tribunal exceeded its powers on the currency point. If the tribunal erred in any way, it was an error within its power. [emphasis mine]*

This decision also makes it clear that **Article 34(2)(a)(iii)** must be construed restrictively so as not to re-examine the merits of the award.

(i) Did the Arbitrator's failure to determine several issues amount to a failure to arbitrate?

[44] The Claimant's assertion that the Arbitrator's failure to arbitrate and exceeding her jurisdiction by failing to render factual findings on contested issues that precipitated the arbitration, failing to consider numerous issues and showing a lack of regard for the party's submissions amounted to a breach of natural justice, and was accordingly a breach of public policy is misconceived. The Arbitrator is not required to determine every issue between the parties.

[45] I find guidance on this from the case of **Secretary of State for the Home Department v Raytheon Systems Ltd** [2014] Bus LR 626, where the court, in determining whether to set aside an arbitral award, reviewed several authorities and distilled the following principles:[14]

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[14] [2014] Bus LR 626, para 33

> *(iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (World Trade Corporation v C Czarnikow Sugar Ltd [2005] 1 Lloyd's Rep 422 at paragraph 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (Weldon Plan Ltd v The Commission for the New Towns [2000] BLR 496 at paragraph 21).*
>
> *…*
>
> ***(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise…***
>
> *(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. [Emphasis mine]*

[46] In the present case, the dispute central to the case concerned the Claimant's status as a money lender pursuant to the MLO. That question having been found in the affirmative, the Arbitral Tribunal went on to conclude that it lacked jurisdiction to grant the reliefs sought as any relief could only be granted by the Hong Kong High Court pursuant to the proviso of the MLO. Thus, further factual and legal findings became moot. The issues not addressed in the arbitration were matters relevant to the consideration of the question of whether the Claimant is entitled to relief pursuant to the proviso.

[47] The Particulars of the Failure to Arbitrate and Acting in Excess of Jurisdiction in the Particulars of Claim do not disclose in any way that there was a failure by the Arbitral Tribunal to decide on the relevant issues. What is contended is that the arbitral tribunal came to an incorrect decision which as shown above would not engage **S.55(2)(a)(iii)** of the **Arbitration Act.**

(ii) <u>Did the Arbitrator exceed her jurisdiction when she awarded Costs to the Defendants?</u>

[48] The Claimant argued that the Arbitrator acted in excess of her jurisdiction when she ruled that costs were payable to the losing party contrary to **S.49 of the Arbitration Act** and the terms of the SLAs. **S. 49 of the Act** conferred upon the parties the autonomy to negotiate and determine their own costs arrangments. Pursuant to the section, the SLAs provided for all costs to be borne by the Defendants irrespective of the party who was successful at the arbitration.

[49] The Claimant relied on the cases of **Mansfield v Robinson** [1928] 2 K.B. 353 **("Mansfield")** and **Fitzsimmons And Lord Mostyn** [1904] A.C. 46 **("Fitzsimmons")** to support its argument that the agreed terms in the SLAs in relation to costs should supersede the discretion of the arbitrator to grant costs. However, these cases are

distinguishable from the case at bar. In both cases the parties maintained their position in relation to their prior agreements as to the costs of proceedings.

[50] In **Mansfield**, the parties had previously agreed that the prevailing party would be entitled to costs on the High Court scale. However, this agreement was not disclosed to the arbitrator. Consequently, the arbitrator ruled in favor of the claimant but ordered each party to bear its own costs. On appeal, the Claimant sought to enforce the original agreement, and the court ultimately upheld the appeal, deeming the agreement valid and enforceable, notwithstanding the arbitrator's discretion under the Act. Noteworthy, the court in that case referenced the case of **Walter v. Bewicke, Moreing & Co**. 90 L. T. 410 in stating that costs orders could be overridden by the agreement of the parties.

[51] In **Fitzsimmons v Lord Mostyn** [1904] A.C. 46 **("Fitzsimmons")** the subject of the dispute between the parties involved a lease which included a renewal covenant requiring the lessor to renew at the lessee's request and expense, with a fine based on the term's remaining years and property value. When the parties disagreed on the fine, they referred the issue to arbitration. The court held that the lessee must pay the arbitration costs as part of the renewal expenses.

[52] In **Mansfield and Fitzsimmons** none of the parties opted to deviate from or modify the terms of the prior agreed cost arrangements. In the case at bar, following a preliminary meeting on 13th August 2021, the subsequent order was made with the consent of the parties, *"Costs are to be awarded by the Tribunal to the successful party."* The arbitrator commented on this by stating:[15]

> *This award was sent to the parties by email of the 18th of August 2021. There was no application for correction on the basis now indicated. As indicated the order was made with the consent of the parties. The Tribunal found itself bound by the terms of this order coming as it did, after the agreement evidenced by the SLAs. The Claimant's motion for costs is therefore refused.*

[53] The Arbitrator's commentary aligns with the obiter of the court in **Mansfield**, which established that prior cost arrangements can be superseded by the mutual agreement of the parties. In accordance with this, I find that the Claimant explicitly waived its right under the prior cost arrangements stipulated in the SLAs. Consequently, the Claimant is now precluded from taking a position that the Arbitrator's ruling, based on the subsequent agreement as to costs, was in excess of the arbitrator's jurisdiction.

(b) The subject matter of the dispute between the parties was not capable of settlement by arbitration under the laws of Jamaica

[54] Under this ground, the Claimant takes issue that contravention of the criminal law was a matter of the public forum for a court of law. The Claimant also contended that

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[15] Reasons for Award on Counerclaim and Costs, paras 25-26

issues of fraud and fraud related acts are criminal offences and are matters of the public forum and one for a court of law.

[55] The Claimant asserted that the dispute was not capable of arbitration as the determination of a breach of the MLO was exclusive to the criminal jurisdiction of Hong Kong and thus outside of the jurisdiction of the Arbitrator. The Defendants are on good ground when they argue that the Arbitrator was not exercising criminal jurisdiction. A similar issue arose in **London Steamship Owners' Mutual Insurance Association Ltd v Kingdom of Spain and another** [2015] EWCA Civ 333. The dissertation on the issue is comprehensive and I adopt it.[16]

> *E. Are the claims arbitrable?*
>
> *[77] Mr Smouha submitted that the claims made by the Appellants in the Spanish proceedings were inherently incapable of being determined by arbitration because a conviction in the proceedings was an essential element of the cause of action against the insurer. Since an arbitrator cannot convict a person of a criminal offence, the claim cannot be constituted in arbitration proceedings.*
>
> *[78] It was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed. As the judge pointed out, however, it is necessary to distinguish between a finding of criminal conduct and a conviction which provides the basis for a penal sanction. It may also be important in this context to distinguish between a claim and a dispute or difference.*
>
> *[79] Before the judge, as before us, the central plank of the Appellants' argument was that liability under art 117 depends on a conviction. The text of arts 109, 116 and 117, to which I have already referred, suggests that the liability is civil in nature and that a conviction is merely a precondition to the right to pursue such claims in criminal proceedings. Any doubt about that, however, is in my view removed by paras 106 and 107 of the judgment below. In para 106 the judge found that although claims of this kind are brought under the Penal Code, the relevant provisions are civil in nature and are construed according to civil principles of law. Although the Public Prosecutor has a right to bring claims on behalf of third parties, they remain the third parties' claims, with the result that any judgment is rendered in favour of the third party.*
>
> *[80] The judge dealt with the Appellants' argument in the following way:*
>
> > *"107 . . . whether the claim is brought under Article 76 or Article 117, the right to recover from the insurer depends on proof of an insured liability under the insurance contract and does not require a finding of criminal liability. Even if it did, it would not be a finding involving criminal responsibility or criminal penal consequences. It would simply be a step towards establishment of a civil law monetary claim. Further, it would be remarkable if civil claims advanced in criminal proceedings were inarbitrable, whereas if the same claims had been advanced in civil proceedings they would not have been, so that arbitrability would effectively be at the option of the Claimant."*

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[16] [2015] EWCA Civ 333, paras 77-82

> *[81] In my view this passage amounts to a finding that a conviction is not an integral element of the cause of action. The distinction is important, because even if a conviction were a pre-condition to the right to recover against the insurer, there would be no reason why an arbitrator should not determine a claim of this kind, taking into account whether the condition has or has not been satisfied. He cannot, on the other hand, formally convict any person of a criminal offence.*
>
> *[82] The argument does not end there, however, because the arbitration agreement is not concerned with claims as such but with differences and disputes. The principal disputes between the Appellants and the Club were whether the Appellants were bound by the arbitration clause in the Club's rules and whether the "pay to be paid" clause was effective to defeat their claims. Those were the disputes which the Club referred to arbitration and the grounds on which it sought declaratory awards confirming that it was under no liability. They could be determined by the arbitrator without having to decide whether any of the accused in the Spanish criminal proceedings had committed any offences, since in those proceedings neither of the Appellants was seeking to enforce any right against the Club. In my view the matters referred to the arbitrator were capable of being the subject of an award, although the court is entitled to have the final word on jurisdiction. I would grant the Appellants permission to appeal on this additional ground, but in my view it does not provide a basis for allowing the appeal.*

[56] The instant case is even clearer. The Arbitrator found, as she was entitled to, that the SLAs were in breach of the MLO, and that though a criminal offence, the Hong Kong courts have the power to grant relief to the lender. The Arbitrator did not make a finding of criminal responsibility. Put another way, if the possibility of relief was not given to the lender in the MLO, the Arbitrator could have made a finding that the loans were in breach of the MLO, and deny the relief sought, which would have in effect settled the dispute between the parties without any finding of criminal liability by the lender.

(c) The Final Award and or the Cost Award is in conflict with the Public Policy of Jamaica

[57] It was contended by the Claimant that the Final Award was in breach of the principles of natural justice. The purported breaches were a regurgitation of the allegations of the failure to arbitrate. In the alternative, it was argued that they were errors of law. For the reasons previously given, this argument is without merit

[58] It was also submitted that in granting the Costs Award, the Arbitral Tribunal acted in breach of the principles of natural justice when she failed to apply the terms of the arbitration agreement contained in the SLAs. Again for reasons given earlier, this submission cannot succeed.

[59] I refer to the decision of the court in **Betamax**. In this case, Betamax Ltd**,** the appellant, entered into a contract with the State Trading Corporation, the respondent, for the supply of petroleum products. The Government of Mauritius announced that it would terminate the agreement on the basis that the agreement was in contravention with the country's public procurement laws and was therefore illegal and unenforceable. Betamax Ltd. referred the matter to arbitration. The arbitral tribunal ruled in Betamax Ltd's favour,

on the premise that the agreement did not breach the procurement laws. On the State Trading Corporation's application to the Supreme Court to set aside the award, the Supreme Court found that the agreement was illegal and on that premise, the award of the arbitral tribunal should be set aside as it conflicted with Mauritian public policy. On appeal to the Privy Council, the Board found that the interpretation of the procurement laws did not give rise to an issue of public policy. On this premise the appeal was allowed. The Privy Council after reviewing cases referred to it stated:[17]

> *The intervention of the court is specifically limited to setting aside the award on the grounds set out in section 39(2) of the International Arbitration Act. In relation to the issue of whether the award conflicts with public policy, the court's intervention proceeds on the court's application of public policy to the findings (whether of fact or law) made in the award. To read section 39(2)(b) more widely would be contrary to the clear provisions as to the finality of awards. The provision can be given full application by respecting the finality of the matters determined by the award and confining the ambit of the section to the public policy of the state in relation to the award.* ***The question for the court under section 39(2)(b)(ii) is whether, on the findings of law and fact made in the award, there is any conflict between the award and public policy. For example, if the Arbitrator had held that the COA had been concluded in breach of the PP Act, but the contract was enforceable as it was not contrary to public policy, the court would be entitled to determine under section 39(2)(b)(ii) whether that decision by the Arbitrator conflicted with the public policy of Mauritius. The effect of section 39(2)(b)(ii) is simply to reserve to the court this limited supervisory role which requires the court to respect the finality of the award. It cannot, under the guise of public policy, reopen issues relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme.*** *[Emphasis mine]*

[60] The case of **Betamax** serves to affirm the paramountcy of upholding arbitral awards, maintaining their finality and the enforceability of arbitration decisions. Moreover, it provides valuable insight as to the scope of the public policy ground to set aside an award. Notably, the case also makes strikingly clear that public policy and errors of law are two distinct concepts in the context of arbitration. The key difference between them is that public policy refers to the principles and values that underscore the legal system and society as a whole. It is concerned with ensuring that awards do not offend against fundamental principles of illegality, immorality, or unconscionability. Errors of law refer to mistakes made by the arbitrator in the interpretation and application of the law. It is concerned with ensuring that the arbitrator has correctly applied the relevant legal principles. It is clear that there is no issue that the award is in conflict with the public policy of Jamaica.

STRIKE OUT

[61] **Rule 26.3 (1) of the CPR** provides the circumstances in which the court may strike out a litigant's statement of case. The rule provides:

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[17] [2021] UKPC 14, para 49

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.'*

[62] As the Court has found in favour of the Claimant on the jurisdiction issue, it is only ground c that would be applicable. This is the same basis on which the Court will consider the application for summary judgment.

SUMMARY JUDGMENT

[63] **Part 15 of the CPR** empowers the court to grant summary judgment on a claim, or on a particular issue, where the court considers that the claimant, or the defendant, has no real prospect of successfully defending the claim or issue. The relevant law is well trod in several cases so it is sufficient to set out the applicable principles here. In the oft-cited case of **Swain v Hillman and another** [2001] 1 All ER 91, Lord Woolf MR defined what is meant by *"no real prospect of succeeding*" as:[18]

> *… The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success … they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.*

The burden of proof lies on the applicant to prove that the respondent has no real prospect of successfully defending the claim. In **Howell (Delroy) v Royal Bank of Canada et al and Ocean Chimo Ltd v Royal Bank of Canada et al** [2021] JMCA Civ 19 **("Howell")**, Phillips JA said:[19]

> *It appears to be well settled now that the burden of proof on an application for summary judgment rests on the applicant to prove that the respondent's case has no real prospect of success. However, once the applicant asserts their belief on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case that is better than merely arguable (**ED&F Man Liquid Products Ltd v Patel and another [2003] EWCA Civ 472**).*

The respondent is not required to prove the certainty of success.

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[18] [2001] 1 All ER 91 at pg 92
[19] [2021] JMCA Civ 19, para 114

[64] In **Somerset Enterprises Limited and anor v National Export Import Bank** [2021] JMCA Civ 12 **("Somerset")**, Brooks P, summed up these requirements and gave guidance for a court considering an application for summary judgment. He stated: [20]

> *[25] The party that seeks the summary judgment must assert that the respondent's case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable". In order to successfully resist the other party's assertion, the respondent must prove that its case has "a 'realistic' as opposed to a 'fanciful' prospect of success" (see paragraphs [14] and [15] of* ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** *[2013] JMCA Civ 37).* ***In determining whether there is any real prospect of succeeding, the judge should not conduct a mini-trial.***
>
> *[26] The Privy Council has also offered guidance on the matter, in* ***Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright*** *[2018] UKPC 12. Lord Briggs stated that summary judgment allows the court to determine whether the matter requires a trial.* ***He added that if a trial of the issues between the parties does not affect the claimant's entitlement to the relief sought then the trial is unnecessary*** *(see paragraphs 16-21).*
>
> *[27]* ***Although the judge considering a summary judgment application is not to conduct a mini-trial, he must carefully examine each party's statement of case and the supporting documents, in order to determine the merits.*** *It is against this background that this matter is to be viewed.* (Emphasis mine)

[65] Despite the Court not finding favour with the Defendants' submissions that the jurisdiction of the Court to set aside the arbitral award is ousted by Clause VII of the Arbitration Agreement, the Defendants' assertion that the claim has no real prospect of success is sound. The Claimant has failed to show that it can establish any of the grounds under **S.55** for the Court to exercise its jurisdiction to set aside the arbitral award. The Claimant therefore has no real prospect of succeeding on the claim.

ORDERS

1. Summary judgment is hereby granted in favour of the Applicants/Defendants against the Respondent/Claimant on the basis that it has no real prospect of succeeding on the claim.
2. Verbal Notice of Leave to Appeal given.
3. Parties to file and serve written submissions in respect of the notice of leave to appeal by 24th May 2024
4. Parties to file and serve written submissions on Costs by 24th May 2024
5. Applicant's attorney to prepare, file and serve Orders.

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Judge

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[20] [2021] JMCA Civ 12, paras 25-27