

**COURT OF APPEAL ORDERS SECURITY OF US\$300 MILLION IN
ARBITRATION CHALLENGE**

Cruz City 1 Mauritius Holdings v Unitech Ltd & Ors [2013] EWCA Civ 1512

Introduction

On 22 November 2013, the Court of Appeal released its decision in *Cruz City 1 Mauritius Holdings v Unitech Ltd & Ors* [2013] EWCA Civ 1512, ordering the parties appealing against three LCIA awards to pay US\$300 million into court (or secure such payment by a written guarantee) in order to continue with the challenge to the arbitration awards.

Background

The appeal arises out of awards made in three LCIA arbitrations between Cruz City (the “Respondent”) and Unitech Limited, Burley Holdings Limited and Arsanovia Limited (together, the “Appellants”).

The arbitrations concerned a joint venture arrangement between the Respondent and the Appellants for the commercial development, management and operation of certain land in Mumbai. The Respondent issued arbitration proceedings against the Appellants and succeeded in each of the three arbitrations, obtaining awards totaling almost US\$300 million.

The Appellants challenged two of the awards in the English Commercial court on jurisdictional grounds pursuant to section 67 of the Arbitration Act 1996. They succeeded in relation to one award, but failed in relation to the second and made no challenge to the third. Despite two of the arbitration awards thus being final and binding, the Appellants failed to pay anything towards the US\$300 million owed to the Respondent.

In January 2013, Mr Justice Cooke granted orders under section 66(1) of the Arbitration Act 1996 permitting the Respondent to enforce the two awards in the same manner as judgments or orders of the court. The Appellants’ application for the setting aside of service and disclosure was rejected. Leave to appeal against this decision was granted by Lord Justice Moore-Bick on 12 July 2013.

In the present hearing, the Respondent made an application to the Court that the permission to appeal granted by Lord Justice Moore-Bick be made subject to the condition that the Appellants pay the whole or a substantial proportion of sums in excess of US \$300 million, due under certain arbitration awards into court, or alternatively secure such payment by a written guarantee issued by a first-class bank with a place of business within England or Wales.

Decision

Lady Justice Gloster, sitting in the Court of Appeal, held that the Appellants had to pay US\$300 million into court (or secure such payment by a written guarantee) in order to continue with the challenge to the arbitration awards.

Lady Justice Gloster stated that the test under Civil Procedure Rule 59.9(1)(c) involved two questions – firstly, whether there was a compelling reason for making the continued prosecution of the appellants' appeal conditional upon the payment into court of the judgment debt and costs (or those debts being secured in some satisfactory way within the United Kingdom), and the secondly, whether the court should exercise its discretion to make the order.

Compelling reason

In this case, there was a compelling case for making the continued prosecution of the Appellants' appeal conditional –

- The Appellants were clearly in a position to pay the substantial sums which they owed the Respondent under the awards, without undue disruption to their business, or concerns about insolvency, but had deliberately taken the decision not to do so and to disobey orders of the English court requiring payment.
- It was perfectly clear that the Appellants had thwarted, and would continue to thwart, the Respondent's attempts at enforcement, in a variety of different jurisdictions by placing every obstacle in the latter's way.
- There was a real risk that, in the intervening period prior to the hearing of the appeal, the Appellants may attempt to transfer assets to jurisdictions such as India, where enforcement may prove to be more difficult. Given the stay of orders for disclosure of assets worldwide, the delay may well be prejudicial to the Respondent's attempts at enforcement.
- Many of the factors characterised as “compelling” in the other cases to which Lady Justice Gloster referred in the context of Civil Procedure Rules Part 52.9 were present.
- It was the policy of the English court that arbitration awards should be satisfied and executed
- There was no reason to suppose that the appeal would be stifled if a payment condition is attached to the grant of permission.

Exercise of discretion

Lady Justice Gloster also held that the Court's discretion should be exercised to make the order. In the circumstances, such an order was not disproportionate.

Further, there was no justification for drawing an analogy with applications under section 70(7) of the Arbitration Act 1996 and no logical basis for requiring the Respondent, as a condition for obtaining an order for the attachment of conditions, to demonstrate that the Appellants' appeal was "flimsy or otherwise lacks substance."

Nor was there any justification for importing into CPR 52(9) by way of analogy any such general principle that the jurisdiction to order a payment as a condition of any appeal would only be exercised in circumstances where the applicant could demonstrate that the prosecution of the appeal would prejudice its ability to enforce.

A full link to the judgment can be found at

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/1512.html>

4th February 2014