Michaelmas Term
[2019] UKPC 47
Privy Council Appeals Nos 0084 and 0089 of 2018

JUDGMENT

Peepul Capital Fund II LLC and another (Respondents) *v* VSoft Holdings LLC (Appellant) (Mauritius)
Peepul Capital Fund II LLC and another (Appellants) *v* VSoft Holdings LLC (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Reed
Lord Carnwath
Lord Lloyd-Jones
Lord Briggs
Lord Sales

JUDGMENT GIVEN ON

19 December 2019

Heard on 4 December 2019

Appellant (VSoft)
Salim Moollan QC
Moorari Gujadhur
Peter Webster
(Instructed by Gujadhur Solicitors)

Respondents (Peepul and another)
Iqbal Rajahbalee SC
Mushtaq Namdarkhan

(Instructed by Fladgate LLP)

LORD BRIGGS:

Introduction

1. This appeal and cross-appeal are mainly concerned with an attempt by VSoft Holdings LLC ("VSoft"), which failed in the Supreme Court of Mauritius, to set aside an arbitration award ("the Award") made in a Mauritian arbitration, under section 39 of the Mauritian International Arbitration Act 2008 (as amended) ("the MIAA"). The matter comes to the Board because, by section 42(2) of the MIAA, an appeal against the exercise of its statutory jurisdiction by the Supreme Court lies as of right to the Judicial Committee.

2. Consistent with the general thrust of the UNCITRAL Model Law on which it is closely but not precisely modelled, the MIAA affords only very limited grounds for challenging an award, all of which are set out in section 39(2). Reciting only the specific grounds relied upon in these proceedings, subsection (2) provides as follows:

> "An arbitral award may be set aside by the Supreme Court only where -
>
> a) The party making the application furnishes proof that -
>
> …
>
> (ii) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
>
> …
>
> b) the Court finds that -
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> …
>
> (ii) the award is in conflict with the public policy of Mauritius;

…

> (iv) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced."

It is common ground that section 39(2) confers a discretion on the Supreme Court whether or not to set aside an arbitral award, even if one or more of the specified conditions for doing so is satisfied.

3. In bare outline, the grounds advanced by VSoft for setting aside the Award arise from a brief exchange between the single arbitrator and counsel for VSoft at the end of a two-day hearing in October 2014, from which the arbitrator came away with the understanding that VSoft had abandoned its defence to the claim, save only as to quantum. VSoft says that its counsel had done no such thing, so that the arbitrator thereafter determined the dispute against VSoft without any ruling upon the substantial matters in issue, in breach of the rules of natural justice within the purview of section 39(2)(b)(iv). Further or alternatively VSoft says that counsel's submission was preceded by an intervention by the arbitrator which amounted to an inappropriate stepping into the arena which had the effect of rendering VSoft unable to present its case, within the meaning of section 39(2)(a)(ii). Both the Supreme Court and the Board received the benefit of an agreed transcript of the oral exchange between the arbitrator and counsel for VSoft. There is, therefore, no dispute about what was said, but the exchange needs to be set in its context in order fully to understand what it meant. Finally it was said that the Award was in conflict with the public policy of Mauritius, within the meaning of section 39(2)(b)(ii).

4. The Supreme Court rejected VSoft's application. It concluded that VSoft had, by counsel, indeed abandoned its defence to the claim and that it had done so without any inappropriate pressure from the arbitrator, or other impediment to the presentation of its case.

5. The Award ordered VSoft to pay US$22,855,741 with interest until payment, together with damages and costs to the claimants in the arbitration, namely Peepul Capital Fund II LLC ("Peepul") and Millenium Strategic Group Limited ("Millenium"), (together "the Investors"). The Supreme Court also continued a freezing injunction against VSoft pending the enforcement of the Award, and an injunction against the Investors, also pending enforcement of the Award, restraining them from "pursuing any action directly or indirectly on the basis that they are shareholders in VSoft …". The Board will refer to this, for convenience but not by way of definition, as "the anti-suit injunction".

6. VSoft appeals to the Board against the dismissal of its application to set aside the Award, and against the continuation of the freezing injunction. It is common ground that the freezing injunction stands or falls with the Award itself. By cross-appeal, the Investors appeal against the continuation by the Supreme Court of the anti-suit injunction. That raises separate issues, to which the Board will return at the end of this judgment.

The facts

7. VSoft is a company incorporated in Mauritius, as a holding company for VSoft Corporation, incorporated in Georgia, USA. Peepul and Millenium are respectively incorporated in Mauritius and the British Virgin Islands. In late 2006 they invested just under $8 million in VSoft in exchange for an approximate one-third equity shareholding, divided as to 31.6% to Peepul and 3.1% to Millenium. Just over 60% of the equity shareholding in VSoft was held by two individuals ("the Promoters"). The relationship between the Promoters, Peepul and VSoft was governed by an agreement dated 29 December 2006 ("the Investment Agreement"). It provided, at clause 12(d), for Peepul to have an option to request a "Promoter Assisted Exit" from its shareholdings in VSoft from and after 1 July 2010, for a minimum return on its investment of the original purchase price plus 30%. It imposed a form of best endeavours obligation on the Promoters to bring about that outcome.

8. Peepul requested a Promoter Assisted Exit on 28 September 2010. Although not a party to the Investment Agreement Millenium requested an exit on the same terms. Following negotiation, VSoft, the Promoters and the Investors agreed revised terms for the Investors' exit from VSoft by two agreements made on 2 May 2012. The first was a Termination Agreement, terminating the Investment Agreement. The second was a Shareholders Agreement providing, in outline, for the surrender by the Investors of their equity shares in VSoft for an aggregate sum of US$17 million, payable in three tranches: by the end of August 2012, by February 2013 and by August 2013 respectively, with interest accruing on the second and third tranches pending payment. The three tranches were US$10 million, US$5 million and US$2 million respectively.

9. Clause 3 of the Shareholders Agreement contained straightforward obligations on VSoft to pay and on the Promoters to procure the payment of the three tranches to the Investors by the specified dates, together with interest on any amounts of them remaining unpaid thereafter.

10. Clause 5 of the Shareholders Agreement, headed "Exit Steps", set out various aspects of the agreed machinery for the turning of the Investors' equity shareholding into cash. Clause 5(a) provided for the Investors to surrender their shares back to VSoft for cancellation free from encumbrances, but contained no express date or time limit for

surrender, although it required VSoft to effect cancellation within three business days from the surrender of the shares, defined as the "Cancellation Date". Clause 5 (b) required the Promoters to cause VSoft to issue, on the Cancellation Date, the following to the Investors:

i) One Convertible Cumulative Preference Share with a nominal face value and dividend rate, but which conferred 51% voting control over VSoft in the event of default in payment of either the First or Second Tranches, and 26% voting rights in the event of default in payment of the Third Tranche.

ii) A promissory note in favour of the Investors in respect of the First Tranche.

iii) A Redeemable Preference Share (in effect) securing payment of the Second Tranche.

iv) A Redeemable Preference Share (in effect) securing payment of the Third Tranche.

By clause 5(c) the Investors agreed that their nominee directors on the board of VSoft would resign with effect from the Cancellation Date, subject to cancellation of the Surrender Shares.

11. Notwithstanding the absence of any express date in clause 5 of the Shareholders Agreement for the surrender of the Investors' shares, the Board is prepared to assume that, as submitted on behalf of VSoft, the shares were to be surrendered by not later than the date for payment of the First Tranche. This is because, under clause 5(b), payment of the First Tranche was to be achieved by the issue by VSoft of an on demand promissory note, after cancellation of the Investors' Equity Shares on the Cancellation Date.

12. The Investors did not in fact surrender their shares for cancellation by the end of August 2012, nor was the First Tranche then paid. No part of any of the three tranches has been paid to date. VSoft had in May 2012 already issued a promissory note in favour of Peepul for its share of the First Tranche, falling due on 31 August 2012, but that has not been paid.

13. By letter dated 8 October 2012 to the Promoters, the Investors surrendered their equity shares for cancellation, notified and requested the issue of the convertible and preference shares provided for by clause 5 of the Shareholders Agreement on the basis

that, because of the default in payment of the First Tranche, the convertible share should carry 51% of the voting rights in VSoft. Although Mauritian company law makes provision in certain circumstances for the automatic cancellation of surrendered shares, it was common ground between counsel, in response to the Board's enquiry, that the Investors' equity shares in VSoft have, in fact, never been cancelled. Nor have the convertible or preference shares provided for in clause 5 of the Shareholders Agreement ever been issued.

14. Nonetheless on 14 November 2012 VSoft notified the Investors by letter that steps were being taken to issue the convertible and preference shares, that 51% of the voting rights in VSoft would thereby be conferred on the Investors, and that the "Company is in process of identifying new equity investors and debt bankers for repayment of agreed amount as per schedule". Since the letter was headed with reference to the Shareholders Agreement, the "schedule" referred to in that quotation was a reference to the three tranche series of payments set out in clause 3.

15. By further letter on 24 May 2013 VSoft by its lawyers wrote:

> "Our Client states that it has all the intentions to honour the terms of the SHA [ie the Shareholders Agreement] and will pay the amount due to your client under the SHA."

Accordingly, although the Investors surrendered their equity shares later than impliedly required by the Shareholders Agreement, VSoft nonetheless affirmed that agreement twice, in writing, before the commencement of the arbitration.

16. On 14 June 2013 Peepul served a statutory demand on VSoft claiming payment of its share of the First Tranche under the promissory note, together with other sums then due pursuant to the Shareholders Agreement, including the Second Tranche. On 12 August 2013 Peepul presented a winding up petition against VSoft in the Supreme Court of Mauritius.

17. By an ad hoc arbitration agreement made on 14 July 2014 VSoft and the Investors agreed to resolve their dispute by arbitration in Mauritius pursuant to the Act, identifying as "matters to be arbitrated upon" (inter alia): whether payment was due to the Investors under either the Investment Agreement or the "Exit Agreements" (ie the Termination Agreement and the Shareholders Agreement), whether the Exit Agreements were still in force, or whether the Investment Agreement had revived. The matters in issue included claims by the Investors either for US$21.71 million plus interest under the Exit Agreements or, alternatively, US$56 million plus interest under the Investment Agreement, together with US$185,000 in damages. Counterclaims by VSoft were stated to include damages for the negligent presentation by the Investors of

a winding up petition against VSoft, running to US$23.3 million. Mr Antoine Domingue SC was identified as the chosen arbitrator. Meanwhile, Peepul's winding up petition against VSoft was withdrawn.

18. There followed a rapid exchange of statements of case in the arbitration. By their Particulars of Claim dated 19 August 2014 the Investors confined themselves to pursuing a claim under the Shareholders Agreement, for US$17 million together with interest, and for US$185,000 as "costs and damages" based upon costs incurred by the Investors in the pursuit of monies owing to them by VSoft. No claim was made under the Investment Agreement.

19. By its Counterclaim dated 2 September 2014, VSoft stated in terms (at para 25) that the Investment Agreement had been terminated, and that there were no accrued rights under it which survived its termination. VSoft persisted in its counterclaim for damages in excess of US$23 million in respect of the Investors' pursuit of the winding up proceedings, contrary to the agreement for arbitrating in clause 14(b) of the Shareholders Agreement. Accordingly VSoft continued to affirm the Shareholders Agreement by its pleading.

20. By its Reply to the Investors' Statement of Case dated 10 September 2014, VSoft pleaded (at para 17) the late surrender by the Investors of their equity shares, alleged (in para 18) that the Investors had failed to complete appropriate share transfer forms and, without any assertion that the Shareholders Agreement had been discharged by breach by the Investors, denied any liability to the Investors thereunder. The pleading took no point about the quantum of the Investors' claim, in the event that the arbitrator found that liability to pay the amounts provided for in the Shareholders Agreement was established.

21. Thus, by the time the arbitration came on for hearing before the arbitrator on 10 and 12 October 2014, and despite the wide terms of the issues to be arbitrated in the Arbitration Agreement, the Investors were only pursuing a claim under the Shareholders Agreement, and both parties were asserting in their statements of case that the Investment Agreement had been terminated.

22. Most of the hearing was taken up with oral evidence. All that needs to be noted about its content is that Mr Murthy Veeraghanta, the chairman and chief executive of VSoft, and one of the Promoters, said more than once during cross-examination that his wish was that VSoft should pay the Investors pursuant to the Investment Agreement rather than the Shareholders Agreement.

23. VSoft was represented at the arbitration by Mr R Chetty SC. The gist of his closing submissions was that, because the steps for achieving the Investors' exit from

VSoft specified in clause 5 of the Shareholders Agreement had not been followed to the letter, a "legal imbroglio" had arisen which required the tribunal to consider which legal document, and which legal regime, governed the Investors' claim for repayment. He submitted that "the Investment Agreement cannot be taken to be abstracted completely from the present matter". Later, he said:

> "It is a further submission that this being the case, we are in a situation of a legal imbroglio, where somehow the prescribed stages, steps are not being followed. So that the claims of the claimants as put forward by them, it is important to situate that claim in accordance with which legal document and more importantly with which legal regime."

And later still:

> "This is where I refer to the term legal imbroglio, and to that extent I have tried to find an answer. I have tried to see whether the investment agreement because of the survival of the accruing rights can help?"

Nonetheless, Mr Chetty acknowledged, more than once in his submissions, that the Investors' claim was being made under the Shareholders Agreement.

24. Eventually, the arbitrator intervened to explain what he described, several times, as his view "for the time being" ie his provisional view. This was, in outline, that Mr Chetty's attempt, for the first time, to suggest that VSoft's liability might arise otherwise than under the Shareholders Agreement appeared to be in conflict with letters from his client VSoft to the contrary, in particular the letters affirming the Shareholders Agreement described above. The arbitrator concluded as follows:

> "The way you are putting it (*VSoft's case)* now has not been put at all to the claimant, the claimant would have reacted to it. And this submission seems to encounter (*run counter to*) the clients' own assertion, two letters, one of which emanated from an advocate who wrote under the instructions and on behalf of the respondent. So that it seems that the question of sincerity, and credibility is very much at the centre. And I do not see any document which sort of supports that submission. Any letter emanating from your client which is issued after 8 October which supports that submission. These letters on the contrary negate the submission, your letters. I personally consider that you should seek further instructions from your client as to whether it will be possible to pursue that strategy.

> Maybe we should have a short recess of 15 mins so that you have ample opportunity to talk to your client so you have the opportunity to seek instructions."

25. After a short adjournment Mr Chetty returned and, after expressing his gratitude to the arbitrator for being given time to take instructions, continued as follows:

> "Our position Mr Arbitrator as regards the observations made by Sir Hamid and as regards the two documents and the Shareholders Agreement, is as follows and has always been as follows, that the respondent does not dispute the claim of the claimants and I personally I would like to dispel any impression if ever there was an impression, that the claim was [not] (*added in error*) in dispute. The claim is not in dispute. I would also like to dispel the impression that I was not putting the case of the claimants to the respondent to the claimants, in as much as we are not disputing the claims of the claimants. My instructions have always been that we are not disputing the claim of the claimants. But the difficulty of the respondent is at this particular stage, where are we in the implementation process and to that extent, the respondent has no objection that you Mr Arbitrator, determines where we are within the process and determines the amount payable according to that particular process which is to be identified by you. I don't know, what is the response on behalf of the claimants."

He continued:

> "As I say the claim is not in dispute but it is the determination of the quantification of that claim, and we would like to seek your assistance, in the present matter. This is our position."

Shortly thereafter, Mr Chetty confirmed that VSoft was not pursuing its counterclaim.

26. Sir Hamid Moollan, counsel for the Investors, responded by saying that, in the light of the apparent abandonment by VSoft of its defence to a claim under the Shareholders Agreement, there was little which he needed to add. Having established that the costs and damages element of the claim did not appear to involve any dispute as to its quantum, he concluded that the only task left for the arbitrator was to calculate interest on the amounts to be paid, pursuant to the Shareholders Agreement. The transcript shows that Mr Chetty did not demur. The main part of the arbitration concluded at this point on the basis that no issue as to VSoft's liability under the

Shareholders Agreement remained in dispute, with the arbitrator leaving it to the parties to present written submissions on the narrow point of quantum which remained in issue between them.

27. Later in October 2014 the Investors submitted their interest calculations. On 14 November VSoft by its lawyers submitted a quantum calculation of US$10.3 million odd, by reference to a schedule which acknowledged a liability of US$8 million (the amount originally invested) together with interest at LIBOR plus 2% from December 2006, making no reference at all to the Shareholders Agreement. The investors disputed that calculation as not being in accordance with the Shareholders Agreement, by letter to the arbitrator dated 1 November 2014.

28. Mr Domingue published his Award on 8 January 2015 identifying the issues originally agreed to be arbitrated, summarising the Investors' claim, and noting Mr Chetty's concession, quoted above, that the claim was not in dispute but only the determination of its quantification. He concluded that, therefore, the issues originally to be arbitrated needed no longer to be determined, since they went to liability rather than quantum. Finally, with reasons the details of which are not of themselves subject to challenge, he accepted the Investors' quantification of its claim, as being consistent with the Shareholders Agreement.

The Supreme Court

29. VSoft applied to the Supreme Court to set aside the Award on 6 April 2015. In August 2016 the Investors obtained an interim freezing order against VSoft, pending the determination of VSoft's application to set aside the Award.

30. In September 2016 VSoft applied for what became the anti-suit injunction, complaining that the Investors had, in proceedings and other steps taken in India, maintained that they remained equity shareholders in VSoft, contrary to the basis upon which they had obtained the Award. The application was made under section 23 of the MIAA, which gives the Supreme Court power to issue interim measures in relation to arbitration proceedings. VSoft obtained interim relief directed to maintaining the status quo until the hearing of its application to set aside the Award.

31. VSoft's application to set aside the Award was heard in late January 2017 and judgment on it was delivered on 13 December 2017, rejecting VSoft's application to set aside the Award, continuing the Investors' freezing injunction pending the enforcement of the Award and continuing VSoft's anti-suit injunction for the same period. In summary, the Supreme Court held that:

i) VSoft was not prevented by the arbitrator's intervention during closing submissions from presenting its case.

ii) VSoft did abandon its defence to the Investors' claim under the Shareholders Agreement, otherwise than in relation to quantum only.

iii) There was no public policy basis for the setting aside of the Award.

iv) The freezing injunction should therefore continue, as a means of protecting the enforcement of the Award.

v) The anti-suit injunction should also continue, pending enforcement of the Award, because of the need to safeguard the interest of VSoft pending payments required to be made in accordance with the Award and the consequential transfer of shareholdings.

The Appeal to the Board

Setting aside the Award

32. VSoft's main submission was that, objectively considered in its context, Mr Chetty's submission following the adjournment which had enabled him to take instructions was merely a continued assertion of VSoft's case, albeit in the briefest summary, rather than an abandonment of it. Further, it was submitted, had there been any doubt about that, VSoft's letter setting out a quantification of the Investors' case in the form of a simple repayment with interest, of the amount originally invested under the Investment Agreement, made that clear beyond doubt. The result was that the arbitrator should have ruled upon those issues, so that it was contrary to the rules of natural justice for him to have failed to do so, and that failure caused VSoft substantial prejudice.

33. The Board respectfully disagrees with every step in that analysis. First, Mr Chetty's submission following the adjournment for the taking of instructions was, objectively construed in its context, an abandonment of VSoft's defence to the Investors' claim under the Shareholders Agreement in all respects save as to quantum. It is true that, in the passage quoted above, Mr Chetty said "our position… is as follows and always has been as follows… and… I would like to dispel any impression if ever there was an impression that the claim was [not] (*added in error*) in dispute… And my instructions have always been that we are not disputing the claim of the claimants". This was, with respect to Mr Chetty, an attempt to dress up a surrender. VSoft's pleaded case

in the arbitration had always been a flat denial that anything was due to the Investors under the Shareholders Agreement. When Mr Chetty said, twice, that the claim was not in dispute, he was referring to the Investors' claim, which had only been pleaded under the Shareholders Agreement, in circumstances where neither side had alleged in its pleadings that the Investment Agreement remained in force, as the basis for any claim. It was Mr Chetty's attempt in his closing submissions before the adjournment to seek to go behind that previous common ground, and to suggest that the Investment Agreement continued to affect the legal relationship between the parties, that prompted the arbitrator's intervention.

34. The meaning of Mr Chetty's submission at the end of the oral hearing cannot be affected by the content of VSoft's letter setting out its case on quantum on 14 November 2014, more than a month later. It is evident from the Award that the arbitrator considered that letter to be wholly inconsistent with the concessions which Mr Chetty had made at the end of the hearing. He regarded it as a "patently misleading computation" and his dim view of it was reflected in his order as to costs. In the Board's view the arbitrator was both entitled and correct to treat VSoft's November letter in that way. The part of the arbitration dealing with issues of liability had been concluded at the end of the oral hearing, and it was not open to VSoft to try to reopen those issues by a letter written later, which was supposed to be directed only to the issue of quantum which remained outstanding.

35. Even if it were arguable that Mr Chetty's oral submission following the adjournment was a reiteration rather than an abandonment of VSoft's case, the arbitrator committed no breach of the rules of natural justice by interpreting it otherwise. He was entitled to give it an objective interpretation, as assessed in the particular context. His interpretation was plainly shared by counsel for the Investors who set out his understanding of what Mr Chetty had conceded in clear terms, without demur from Mr Chetty. The letter from the Investors setting out their calculation of interest with reference to the sum they had claimed was due under the Shareholders Agreement was predicated on the understanding that no issue of liability remained outstanding in relation to that claim. This was, on any view, a reasonable interpretation of what Mr Chetty had said, and nothing in section 39 of the MIAA is designed to enable a party to challenge a decision of the arbitrator purely on its merits, or to enable the Supreme Court or the Board to overrule such a decision, merely because it disagrees with it.

36. Finally, the Board is not persuaded that, even if the arbitrator's understanding of Mr Chetty's submission had been plainly wrong, so that his decision not to address liability issues was a breach of the rules of natural justice, this caused any substantial prejudice to VSoft. Mr Moollan SC for VSoft submitted that there were two heads of substantial prejudice. The first was that VSoft lost the opportunity to limit its liability to repayment of the original investment, together with interest, as set out in its November letter. The second was that VSoft lost the opportunity to argue for a reduced interest liability upon the footing that interest should only run under the Shareholders

Agreement from the date when, belatedly, the Investors tendered their shares by way of surrender.

37. In the Board's view, neither of these supposed heads of prejudice withstands analysis. As to the first, nothing in the pleadings, the evidence or the submissions tendered during the arbitration offered the slightest basis for a conclusion that the Shareholders Agreement had ceased to govern the liability of VSoft to pay for the surrender of the shares under the Shareholders Agreement, namely US$17 million plus interest. The only complaint that the Investors had committed a breach of the Shareholders Agreement lay in their late surrender of their equity shares, but the agreement had thereafter been subsequently affirmed by VSoft twice in correspondence and then again in its pleadings in the arbitration.

38. As to the second head of prejudice, namely a slightly reduced interest liability under the Shareholders Agreement, this was not a claim which VSoft even sought to pursue under the heading of quantum in its November letter, or at any other time, either during or following the end of the arbitration hearing. It must be supposed that the November letter contained everything which VSoft wished to say about quantum, and this point was entirely absent from it.

39. VSoft's second submission to the Board was that, even if Mr Chetty's observations following the adjournment had the effect of abandoning its defence to liability under the Shareholders Agreement, this was the result of being unable properly to present its case, due to the arbitrator's intervention. For this purpose Mr Moollan relied on a well-known passage in Mustill & Boyd's *Law and Practice of Commercial Arbitration in England* (2nd ed), at pp 349-50, about the circumstances in which an arbitrator may legitimately stop counsel. In the present case, however, the arbitrator did not stop counsel. He expressed a clearly provisional view about the course being taken by Mr Chetty in his closing submissions and its apparent inconsistency with his client's previous statements in correspondence, and merely invited Mr Chetty to take instructions before continuing. Mr Chetty remained at liberty to continue to present VSoft's case after that short adjournment. He was placed under no pressure of any kind by the arbitrator to abandon or curtail any part of it. Accordingly the Board finds itself in agreement with the Supreme Court in rejecting this second ground for setting aside the award.

40. There is, finally, no substance in VSoft's third ground, based upon the assertion that the Award was, in some way, in conflict with the public policy of Mauritius, within the meaning of section 39(2)(b)(ii) of the MIAA. The submission was that the Award afforded the Investors a form of double recovery. They were awarded the full sum, together with interest, due for the surrender of their equity shares, without the award containing any provision to ensure that, if and when paid, the Investors would not also be able to continue to enjoy the benefits of being equity shareholders.

41. The Board views this as a hopeless submission. The Investors had surrendered their shares for cancellation in October 2012 and had, by the end of the arbitration two years later, received nothing in return from VSoft. If, as appears probable, the shares had not in fact been cancelled, because VSoft had not taken the administrative steps necessary to do so, such as for example removing the Investors' names from the register of members, this was a matter within VSoft's own control. The shares remain with VSoft for cancellation to this day, and the arbitrator needed to do nothing by way of an order for their delivery up by the Investors as a condition for receiving payment of the amounts due under the Award.

42. Mr Moollan made brief suggestions about the interest rate being penal, and about there being Mauritian company law difficulties in the cancellation of the shares, but these were, sensibly in the Board's view, not pursued in argument. The Board needs to do no more in relation to them than to say that they are without foundation, and that the Supreme Court was correct to rule against them.

43. The result is that the appeal against the Supreme Court's rejection of the application to set aside the Award must be dismissed.

The injunctions

44. It is common ground that the dismissal of the appeal in relation to the setting aside of the Award means that the freezing injunction granted in favour of the Investors should continue pending enforcement of the Award. It is a conventional means by which the court protects and assists the arbitral process, in circumstances where there is a real risk that the debtor may dissipate its assets. It has not been submitted that there is no such risk in the present case.

45. The anti-suit injunction, the subject of the cross-appeal, is less straightforward. The Supreme Court appears to have considered that the continuation of the anti-suit injunction was also a necessary and appropriate means of protecting the parties' interests pending the enforcement of the Award. The Board finds it difficult to follow that analysis. The Investors were the only successful party under the Award, which made no ruling about entitlements in relation to the shares which had been tendered by the Investors for cancellation. It is at least surprising to find an injunction granted to the losing party for the protection of its enforcement. It does not in any real sense secure, protect or support the enforcement of the Award in favour of the Investors. Therefore, as Mr Moollan acknowledged, unlike the original award of interim relief, the injunction could not be based upon section 23 of the MIAA.

46. Mr Moollan submitted nonetheless that the continuation of the anti-suit injunction was a proper exercise of the Supreme Court's inherent jurisdiction to grant

injunctive relief, so as to prevent the Investors continuing to take steps upon the basis that they remain equity shareholders in VSoft, while at the same time seeking to enforce an Award made upon the basis that they had converted their equity into debt. No separate application for injunctive relief based on its inherent jurisdiction was ever presented to the Supreme Court, although reference was made to this in a single paragraph of Mr Moollan's skeleton argument for the hearing before it. The Supreme Court's reasoning in support of the grant of the injunction in favour of VSoft is very short and does not identify that it was seeking to exercise its inherent jurisdiction.

47. In any event, the Board's view is that this alternative basis for supporting the anti-suit injunction does not withstand analysis either. The plain objective of the Shareholders Agreement was not to convert the Investors' equity merely into debt, but into cash. While it is true that payment of the First Tranche was to be supported by a promissory note, it was payable on demand. Payment of all three tranches was to be secured by the issue of convertible and preference shares, which were to carry majority voting control of VSoft in the event of default in payment.

48. In the event, at the time when the anti-suit injunction was first obtained, and then continued by the Supreme Court, and even now, not one cent of the three tranches has been paid, and none of the required security for payment (save only the promissory note, which is not really security at all) has been provided. There was not meant to be a moment during the process of payment to the Investors when they neither had equity shares, nor replacement convertible and preference shares giving them control of VSoft upon default.

49. While it may be said (and has been vigorously asserted by VSoft) that VSoft's non-payment of the price for the equity shares has been involuntary, due to a shortage of available funds, no similar excuse explains VSoft's failure to provide the convertible and preference shares by way of security from October 2012, when the equity shares were tendered by way of surrender and payment of the First Tranche was already in default. This state of affairs amounted to a wholesale breach of the Shareholders Agreement by VSoft, and the failure to provide the clause 5 security was in no sense an involuntary breach.

50. The injunction obtained and continued by VSoft restrains the Investors from "pursuing any action directly or indirectly on the basis that they are shareholders in VSoft… ". In fact, the Investors continue to be registered as equity shareholders in VSoft, due to VSoft's failure to process the cancellation of those shares. The Investors also have a present entitlement to preference and convertible shares giving them voting control over VSoft. While it may be that an assertion by the Investors that they remain beneficial owners of the equity shares may go slightly further than their strict entitlement, they remain shareholders with a right to control the company by virtue of their shareholding.

51. On any view the current injunction goes too far, both because the prohibition against "pursuing any action" is in unacceptably vague terms, and because they both are and are entitled to be shareholders of one kind or another in VSoft.

52. But the Board considers that VSoft has a further difficulty. The grant of an injunction under the court's inherent jurisdiction is a form of discretionary equitable relief. It is not at all clear to the Board why it would be equitable, on the application of a party in long-term, deliberate and flagrant breach of its contractual obligations, to grant an injunction of any kind against the other contracting parties, without the party in default first taking steps to remedy its breach. No such offer has been tendered by VSoft, either to the Supreme Court or to the Board, at any stage.

53. In those circumstances the cross-appeal must be allowed, and the anti-suit injunction discharged.

Postscript

54. The Board cannot help but observe that, in providing for an appeal as of right to the Privy Council from any decision of the Supreme Court under the MIAA, section 42 grants a wider avenue of appeal than almost any comparable jurisdiction with a law of arbitration based on the UNCITRAL Model Law. Some jurisdictions provide that a decision of the supervising court shall be final. Most of the others make any appeal the subject of the grant of permission.

55. In the present case the arbitration itself was carried through to a conclusion with admirable speed. The arbitration agreement was made in July 2014, the hearing took place in October and the Award was delivered early in the following January. It is now five years later. This is an appeal which would, in the Board's view, have been unlikely to have withstood a substantive requirement for permission. This reveals a propensity for the arbitral process to become embroiled in protracted court proceedings which, at least at first sight, appears to run counter to a major objective of the Model Law, and which may be an unfortunate disincentive to commercial parties from agreeing to Mauritian international arbitration in their contracts.

56. The right of appeal to the Board is of course embedded in primary legislation. The Board does not know what factors in the mind of the legislature underlay the conferral of a right of appeal in such unusually broad terms. But the extended chronology of the present litigation might at least be thought sufficient to give pause for thought about some tightening of the appellate process by way of amendment.