A **OPEN TYPE JOINT STOCK COMPANY EFIRNOYE ("EFKO")**

v.

B **ALFA TRADING LTD**

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[ORIGINATING SUMMONS NO: D-24NCC-221-2010]
10 OCTOBER 2011

C ***ARBITRATION:*** *Arbitration clause - Construction of - Plaintiff sought to register and enforce Russian arbitration award against Malaysian defendant - Defendant alleged arbitral procedure in contract not followed - Arbitration clause enabled defendant to file claim in Ukraine tribunal and* D *plaintiff to file in Russian tribunal - Defendant first to file for arbitration - Whether this ousted plaintiff's right to file claim in Moscow tribunal - Whether subject matter before each tribunal different - Whether against public policy to enforce award - Arbitration Act 2005, ss. 38 & 39*

E The plaintiff, a Russian company, entered into a contract with the defendant, a Malaysian company, to buy palm oil products ('goods') from the latter. Clause 6 ('cl. 6') of the contract contained the arbitration clause for resolution of disputes. The parties varied the original cl. 6 to read that if the defendant was F the complainant to the dispute, then the dispute was to be passed for final resolution to the International Commercial Arbitration Court ('ICAC') at the Chamber of Commerce and Industry ('CCI') of Ukraine ('the Ukraine tribunal') whereas if the plaintiff was the complainant, the dispute was to be passed for G final resolution to the ICAC at the CCI of Russia at Moscow ('the Russian tribunal'). Disputes between the parties led to the plaintiff terminating the contract. The plaintiff's complaints related to late delivery of goods while the defendant's complaints concerned late payment for goods supplied. In accordance with H cl. 6, the defendant filed an arbitration claim at the Ukraine tribunal. Subsequently, the plaintiff filed its arbitration claim at the Russian tribunal. The plaintiff did not object to the defendant initiating its claim in the Ukraine tribunal as it regarded the claim filed there as different from the one filed in the Russian tribunal. I The defendant, however, objected to the plaintiff's proceedings saying that the Russian tribunal lacked jurisdiction to hear the

dispute. The defendant contended that since it was the first to exercise its right to arbitration under cl. 6, the Ukraine tribunal had exclusive jurisdiction to hear the disputes between the parties. Later, however, the defendant recognised the jurisdiction of the Russian tribunal by filing a counterclaim against the plaintiff in those proceedings. After considering the arguments of the parties, the Russian tribunal held it had jurisdiction under cl. 6 to hear the plaintiff's claim and granted its award in favour of the plaintiff ('the award'). The defendant's appeal to the Moscow Arbitration Court against the award was dismissed. In the meanwhile, the Ukraine tribunal granted an award in the defendant's favour and steps were taken to register and enforce that award in Ukraine.

By way of the instant Originating Summons, the plaintiff sought to register and enforce the award against the defendant in Malaysia pursuant to s. 38 of the Arbitration Act 2005 ('the Act'). The defendant opposed the application on the grounds that: (i) the arbitral procedure did not accord with the agreement between the parties as stipulated in s. 39(1)(a)(vi) of the Act and (ii) the award conflicted with the public policy of Malaysia as envisaged in s. 39(1)(b)(ii) of the Act. In relation to ground (i), the defendant rehashed its argument that as it was the first to commence arbitration under cl. 6, and as the opposing claims of the parties related to the same contract, the plaintiff should have brought its dispute to the Ukraine tribunal instead of filing separate proceedings at the Russian tribunal. In relation to ground (ii), the defendant said as the Ukraine tribunal had granted an award in its favour and the Russian tribunal in the plaintiff's favour and both awards related to the same contract, it would be against public policy to enforce the award without taking cognizance of the Ukraine tribunal's award.

Held (allowing the application to register and enforce the award as a judgment of the High Court and granting costs to the plaintiff):

(1) The defendant had failed to show that there had been a failure to adhere to arbitral procedure as envisaged in s. 39(1)(a)(vi) of the Act. The parties had complied with cl. 6 without detriment to, or deprivation of, any of their rights. (para 35)

(2) This was not a case where two tribunals had dealt with the same subject matter and arrived at differing decisions. The Ukrainian award dealt with matters different from that of the Russian arbitral proceedings. The counterclaims filed by the parties in both jurisdictions also differed. They may have arisen out of the same contract but different aspects were determined by the two different tribunals. (para 35)

(3) Both the Russian tribunal and the Moscow Arbitration Court dealt with cl. 6 and held that there was express provision allowing the plaintiff to initiate proceedings in Russia notwithstanding the proceedings in Ukraine. They disagreed with the defendant's interpretation of cl. 6. (para 35)

(4) The contention that the enforcement of the award was contrary to public policy was incorrect. There was no lack of fairness of procedure or breach of natural justice or illegality of a fundamental nature. *Res judicata* did not apply and no question of moral and ethical policy arose on the facts of this case. (paras 37 & 50)

Case(s) referred to:
Deutsche Schaachthauund v. Ras Al-Khaimah [1987] 3 WLR 1023 ***(refd)***
Infineon Technologies (M) Sdn Bhd v. Orisoft Technology Sdn Bhd [2010] 1 LNS 889 HC ***(refd)***
Kimberley Construction v. Mermaid Holdings [2004] 1 NZLR 386 ***(refd)***
Ngo Chew Hong Oils & Fats (M) Sdn Bhd v. Karya Rumpun Sdn Bhd [2009] 1 LNS 1321 HC ***(refd)***
Reeves v. One World Challenge LLC [2005] NZCA 314 ***(refd)***
Steel Co Of Canada v. USWA Carsewell Ont 1213 ***(refd)***
Xiamen Xinjingdi Group Ltd v. Eton Properties Ltd & Anor [2006] HKC 287 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 38(1), (2), 39(1)(a)(vi), (1)(b)(ii)

Arbitration Ordinance [HK], s. 2GG

Other source(s) referred to:
Sundra Rajoo, *The Arbitration Act 2005 Perspective* [2009] 2 MLJ cxxxvi

For the plaintiff - Sabarina Samadi; M/s Zaid Ibrahim
For the defendant - R Tharmy; M/s Shook Lin & Bok

Reported by Ashok Kumar

JUDGMENT

Nallini Pathmanathan J:

[1] By these proceedings, the plaintiff seeks to register and enforce, pursuant to the provisions of s. 38 of the Arbitration Act 2005 ('the Act'), an Arbitration Award dated 11 November 2009 ('the Arbitration Award') issued by an arbitration tribunal known as the International Commercial Arbitration Court of the Russian Federation ('ICAC Russia'). The defendant objects to such registration and enforcement maintaining that this court ought to refuse to recognise or enforce the award on some of the grounds set out in s. 39 of the Act. More specifically, the grounds relied upon by the defendant are that:

(a) The arbitral procedure was not in accordance with the agreement of the parties (s. 39(1)(a)(vi) the Act); and/or

(b) The Arbitration Award is in conflict with the public policy of Malaysia.

Salient Background Facts

The Contract

[2] At all material times, the plaintiff, a Russian company was the buyer or purchaser of palm oil products from the defendant, a Malaysian company that was the vendor of the said palm products. Pursuant to a contract No: 020/1006/AT ('the contract') the plaintiff agreed to buy and pay and the defendant agreed to sell and effect the delivery of palm products ('Commodities'). The details of the name, quantity, quality, unit value, payment and delivery of such Commodities were particularised separately in a series of documents known as Contract Specifications which were attached to the contract. There were four different specifications in relation to the contract, namely specifications 1-4. For example, Contract Specification 1 provided that the defendant, the seller was to deliver refined, bleached deodorised palm oil from Malaysia/Indonesia in the amount of 63,038 metric tons for a price of USD1,392.50 per metric tons to the value of USD87,780,415. And the other contract specifications provided for the provision of different quantities of the Commodities at different prices. These contract specifications comprise a part of the contract No: 020/1006/AT.

A **[3]** Further to the contract, the parties effectively varied some of the terms of the contract by signing Additional Agreements nos. 6, 7 and 8 dated 23 April 2008, 24 April 2008 and 9 June 2008 respectively. The entire contract is in both Russian and English.

B **The Arbitration Clause in the contract**

[4] The material clause for the purposes of this application is cl. 6. In its original form it provides as follows:

> 6. Arbitration
>
> C
>
> 6.1 All disputes between Parties in connection with non-fulfilment or improper fulfilment of the conditions of the present contract, Parties will aspire to resolve by means of negotiations.
>
> D 6.2 If the Parties cannot come to mutual agreement, then dispute should be passed for considering and final resolution to international commercial Arbitration Court at the Chamber of Commerce and industry of Moscow city.
>
> Parties are agreed that during considering and resolution of
> E dispute will be used Regulations of international Commercial Arbitration Court at the Chamber of Commerce and Industry of Moscow city.
>
> 6.3 The law which regulates present contract is material law of Russia. The Arbitration court consists of one arbitrator. The
> F place of arbitration is the city of Moscow Russia. The language of arbitration is Russian.

[5] Pursuant to Additional Agreement No. 6, the plaintiff and the defendant agreed that cl. 6 above would be varied to read as
G follows:

> 6. ARBITRATION
>
> 6.1 All disputes between the parties in connection with the non-fulfillment or improper fulfillment of the conditions of the
> H contract shall be resolved by means of negotiation.
>
> 6.2 If the parties cannot come to mutual agreement, *then dispute should be passed for considering and final resolution to international Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine* (the place for legal investigation is Kiev,
> I Ukraine) according to its regulations with three arbitrators present in case *when the plaintiff is the Seller, and the dispute should be passed for considering and final resolution to international*

> *Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation* (the place of legal investigation is Moscow, the Russian Federation) according to its regulations with three arbitrators present in case *when the Plaintiff is the Buyer.*
>
> When the dispute is considered in the given courts, *the norms of the substantive and procedural laws of Ukraine when the Plaintiff is the seller is applied; the norms of the substantive and procedural laws of Russia when the Plaintiff is the Buyer is applied.* (emphasis added).

[6] It is evident from the foregoing varied arbitration clause that the parties contracted expressly to the effect that when the complainant or plaintiff or claimant in respect of the dispute is the seller, ie, the defendant, then the dispute is to be passed for final resolution to the International Commercial Arbitration Court ('ICAC') at the Chamber of Commerce and Industry ('CCI') of Ukraine, whereas if the complainant or plaintiff or claimant in respect of the dispute is the buyer, ie, the plaintiff, then the dispute is to be passed for final resolution to the International Commercial Arbitration Court ('ICAC') at the Chamber of Commerce and Industry ('CCI') of Russia.

Performance And Disputes

[7] The Contract between the plaintiff and the defendant was performed in part when disputes arose. The plaintiff alleged a breach of a series of contractual obligations relating *inter alia*, to late delivery while the defendant complained equally of a breach arising from late payment for the palm products supplied and delivered. On 11 September 2008 the plaintiff wrote to the defendant notifying it that the plaintiff had decided to limit shipment of the products until negotiations could commence between the parties. Thereafter on 25 September 2008 the plaintiff terminated the contract alleging regular delays in the delivery of the commodities and various other breaches.

The Arbitration Proceedings Initiated At ICAC At CCI Ukraine By The Defendant-Seller

[8] On 3 October 2008 the defendant-seller filed an arbitration claim against the plaintiff-buyer in Ukraine. This was consonant with the terms of cl. 6 of the contract as amended and varied above. In this claim the defendant-seller sought against the

plaintiff-buyer the sum of USD8,949,005.40. The arbitration claim was defended by the plaintiff-buyer who filed a counterclaim in these proceedings.

[9] Then on 17 November 2008 the plaintiff-buyer instituted an arbitration claim against the defendant-seller in Moscow at the International Commercial Arbitration Court at the Chamber of Commerce and Industry for recovery of the sum of USD236,555. It is this Arbitration Award that comprises the subject matter of this action. Such institution also appears *ex facie* to be consonant with the terms of cl. 6 of the contract as amended.

[10] It is pertinent that in the course of determining the defendant-seller's claim in ICAC at CCI in Ukraine, the arbitral tribunal stated, *inter alia*, as follows:

> ... In the statement of defense, the Respondent (ie, the Plaintiff-Buyer in the current proceedings) informed that *simultaneously with the Claimant (ie, the Defendant-Seller) it used its right to use the alternative arbitration clause and filed a statement of claim at the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry* for collection of the contractual penalties from the Company "ALFA TRADING LIMITED" because of the multiple violations of the Contract by this Company. *However, given the fact that the subject of the claim presented to the International Commercial Arbitration Court at the Russian Chamber of Commerce and industry is different from the one presented to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, the Respondent does not express any objections to the competence of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry to consider the claim of the Company "ALFA TRADING LIMITED"*, but the Respondent decided to submit counterclaims and a request for set-off within the framework of these proceedings since they are directly connected with the initial claim (as the Claimant substantiates retaining of the prepayments in its Statement of Claim) and considering them within the present proceedings appears to be reasonable. (emphasis added)

[11] It is evident from the foregoing that the plaintiff-buyer did not take objection to the defendant-seller initiating its claim in Ukraine as expressly provided for in the arbitration clause as amended. More significantly neither did the arbitrator in the Ukrainian arbitral proceedings who accepted the plaintiff-buyer's statement that the proceedings in Russia differed from that being determined in Ukraine.

[12] (For completion it must be stated that the arbitral tribunal at ICAC CCI Ukraine handed down a final award holding *inter alia* that: A

(i) Certain clauses of Contract Specifications No. 5932000124, 5932000126, 5932000209 were invalid as they contradicted the provisions of the Civil Code of Ukraine; B

(ii) The Defendant was entitled to set off prepayment made to it in the sum of USD8,634,957.11 from the Plaintiff, as payment for the value of goods supplied;

(iii) The Defendant to pay the sum of USD51,707 to the Plaintiff as expenses for the arbitration fee, while the Plaintiff was directed to pay the sum of USD202,768.15 for supplied goods, penalty for delay in making payment and interest. C

[13] Learned counsel for the defendant confirmed in the course of proceedings that this award was the subject matter of registration and enforcement in Ukraine. D

The Arbitration Proceedings At The ICAC At CCI Russian Federation Initiated By The Plaintiff-Buyer And Forming The Subject-Matter Of This Application E

[14] As stated earlier the plaintiff-buyer had initiated arbitral proceedings in Moscow subsequent to the initiation of proceedings in Ukraine by the defendant-seller. In the Russian proceedings however, the defendant-seller did take what it termed to be 'jurisdictional' objections to the proceedings initiated by the plaintiff-buyer. The defendant submitted at the outset that the Russian arbitral tribunal lacked jurisdiction pursuant to art. 6 of the contract. In essence the defendant maintained that the plaintiff-seller was abusing its procedural rights in bringing the Russian arbitral proceedings despite being aware of the Ukrainian proceedings and participating in the same. The defendant maintained that the alternative venue clause provided in art. 6 could only be 'realised' once, whereby the entitlement for determination of an arbitral tribunal is vested in the party which is the first to initiate arbitration in relation to the dispute arising. And after the party exercises its right to apply to arbitration, the arbitration clause shall be construed as providing for an exclusive jurisdiction of the arbitration tribunal to which the party initiating the arbitration referred the dispute between the parties. In other words, the defendant here maintained that as it was the first to F G H I

A exercise the right to arbitration this resulted in the ICAC at CCI of Ukraine possessing exclusive jurisdiction to consider the dispute of the parties under the rules prevailing there. Accordingly the defendant sought a preliminary award on this issue of jurisdiction.

B **[15]** The Russian arbitral tribunal however confirmed that the issue of 'jurisdiction' and applicable law would be dealt with in the final award. The defendant then sought an adjournment to prepare its case and filed a counterclaim in the Russian proceedings. It is pertinent that the defendant admitted in its C counterclaim that by lodging its counterclaim it had submitted to the jurisdiction of the Russian arbitral tribunal.

The Award Of The ICAC At CCI Of The Russian Federation ('The Arbitration Award')

D **[16]** The Russian arbitral tribunal, or ICAC at CCI at Moscow in handing down its award dealt first with the challenge to its jurisdiction to hear the case. It held, *inter alia*, as follows:

> ... In the first hearing, the Defendant contested the ICAC's E jurisdiction and requested to make a separate decision on the jurisdiction matter as a preliminary one; *however, the Defendant did not contest the ICAC's jurisdiction in the second hearing. The Defendant filed a counterclaim to be considered together with the original claim and recognised the jurisdiction of ICAC at CCI* ... (emphasis added)

F **[17]** Then after referring to art. 6 the tribunal went on to state:

> ... ICAC at CCI has the right to consider disputes if the parties have agreed in writing to refer to it any dispute that has already arisen or is likely to arise, in accordance with section 2 of the Rules. ICAC at CCI relying on section 6 of the Contract has G concluded that there is an agreement between the Claimant and Defendant in writing to refer to it any dispute that has already arisen or is likely to arise.
>
> *These arbitration proceedings at ICAC at CCI were duly initiated by the Buyer subject to the arbitration clause which allows both the Buyer and* H *the Seller to file statements of claim to ICAC at Russian CCI or to ICAC at Ukrainian CCI. The Seller exercised its right and filed its claim to ICAC at CCI of Ukraine, and the Buyer to ICAC at CCI of Russia. ...*
>
> *... Therefore subject to the arbitration clause and in reliance on section 2* I *of article 1 and section 2 of article 7 of the RF Law on International Commercial Arbitration, section 2 of the Regulation on the International Commercial Arbitration court at the Chamber of Commerce and Industry of the Russian Federation, and sections 1, 2 and 4 of its Rules, the*

International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow has jurisdiction to consider this dispute. (emphasis added)

[18] From the foregoing it is evident that the Russian arbitral tribunal considered the issue of jurisdiction and concluded that pursuant to s. 6 of the contract, it had express jurisdiction to hear the plaintiff's claim, notwithstanding the filing of another arbitral claim by the defendant in Ukraine. Apart from this the court considered its jurisdiction under applicable laws.

[19] Further on the Russian arbitral tribunal went on to consider the issue of the applicable law or governing law, given the defendant's contention that after the filing of a claim by either of the parties in the jurisdiction as provided for in cl. 6, only that jurisdiction and accordingly only that law was applicable in determining the entire claim. This is what the Russian tribunal held:

... ICAC addressing the applicable law has found that the parties provided in clause 6.2 of section 6 of Contract 020/1006/AT ... that where a dispute is considered in those courts, the provisions of Ukrainian substantive and procedural ... laws shall apply if the Claimant is the Seller; and the provisions of Russian substantive and procedural laws shall apply if the Claimant is the Buyer". The Claimant is the Buyer and accordingly the applicable law is the law of the Russian Federation in accordance with section 6 of Contract 020/1006/AT (as restated by Additional Agreement dated 6 April 23, 2008).

As the Russian Federation is a party to the UN Convention on Contracts for International Sale of Goods 1980 ('hereinafter referred to as the 'Vienna Convention'), such convention as an integral part of the state party's law shall apply to legal relations of the parties. The parties have not ruled out the application of the Vienna Convention.

[20] Accordingly the tribunal applied the provisions of the Vienna Convention in dealing with the legal relations of the parties. It however recognised the provisions of cl. 6 as being entirely valid.

[21] The ICAC at CCI of the Russian Federation granted an award allowing the plaintiff's claim and holding, *inter alia* that:

(i) The defendant was to pay the plaintiff a penalty in the amount of USD434,333.17 for breach of the terms of the Contract and USD21,443 as indemnity against the expenses associated with its payment of the arbitration fee;

(ii) That the defendant shall reimburse the plaintiff RUR26,976.92 being overpaid arbitration fees;

(iii) Rejected the rest of the plaintiff's claim; and held

(iv) That the plaintiff pay the defendant USD23,807.50 as an indemnity against its damages and USD58.91 as indemnity against expenses associated with its payment of the arbitration fee.

[22] The defendant, after this award had been handed down sought a revision of the award from the arbitral panel, which allowed some minor amendments but did not affect the final decision and conclusions made by the arbitral panel in the Arbitration Award.

The Appeal By The Defendant-Seller To The Moscow Arbitration Court For A Cancellation Of The Arbitration Award

[23] The defendant then applied by way of appeal to the Moscow Arbitration Court for a cancellation of the Arbitration Award. The defendant contended that the Arbitration Award ought to be cancelled as, *inter alia*:

(a) the ICAC had violated the arbitration procedure;

(b) violated the underlying principles of Russian law thereby contravening the public policy of the Russian Federation; and

(c) clause 6 of the Additional Agreement was invalid.

[24] The Moscow Arbitration court rejected the defendant's application to cancel the Arbitration Award, giving reasons in writing for its decision. It held, in relation to the contention that the ICAC had violated arbitration procedure:

> ... As set out in the award being challenged, the dispute was considered in accordance with the RF Federal Law on international Commercial Arbitration and the Rules of the ICAC at CCI of the Russian federation.
>
> *As it follows from the case papers, the Applicant itself recognised the jurisdiction of the international commercial arbitration by filing its counterclaim.*

The court notes that the award being challenged in this case was granted with the application of the provisions of Russian law and is not inconsistent with the RF public policy.

The arbitration procedure was consistent with the parties' agreement and the requirements in RF Federal Law No. 5831-1 on International commercial Arbitration dated July 7, 1993.

As it appears from the applicant's arguments, it believes the arbitration procedure was in fact violated because the arbitrators had failed to determine the governing substantive law correctly and because the arbitrators had neither granted the Applicant's motion nor made a separate award in relation to governing law. However, the arbitration clause in the Contract between the parties determines that RF law shall apply where any dispute concerning a claim of the Buyer is considered in the ICAC at CCI of the Russian Federation ...

Therefore, the court taking into account the terms of the arbitration clause has concluded that the Applicant's arguments that it was deprived of the opportunity to justify its claims subject to the provisions of applicable Russian law are unreasonable and fail to agree with the factual background. The application of Russian law by the ICAC at CCI of the Russian Federation was expressly agreed by the parties in the arbitration clause while signing the Contract(as restated in accordance with the Additional Agreement 6, dated April 23, 2008).

[25] In relation to a contravention of Russian public policy, the arbitration court held:

... As far as the applicant's references to the violation of the public policy are concerned, this court notes as follows.

In the relevant part, the applicant refers to the disproportion of the penalty; in other words, it objects to the merits of the arbitral award which may not be reassessed.

A reference to any violation of the public policy may be accepted where foreign law is applied; if, however, an award is made by application of the provisions of Russian law, then it is only in compliance with the underlying principles of Russian law that can lead to a violation of the public policy of the Russian Federation.

In the arbitration proceedings triggered by its application, the applicant has failed to specify what exactly is disproportionate about the penalty awarded and how the execution of the award violates the public policy of the Russian Federation ...

[26] And after considering the rest of the factual matrix and the defendant's complaints, the arbitration court concluded:

> ... Therefore the award granted by the ICAC at CCI of the Russian Federation does not violate the RF public policy.

[27] And finally in relation to the contention that the arbitration clause was invalid, the arbitration court held:

> ... The applicant's references to the invalidity of the arbitration clause in the contract are also rejected by this court owing to the following circumstances.
>
> *The award of the ICAC at CCI of the Russian Federation states that the Applicant recognised the jurisdiction of the ICAC at CCI of the Russian Federation to consider the dispute. In addition, the applicant has failed to produce arguments for challenging the jurisdiction of the ICAC at CCI of the Russian Federation.*
>
> *The applicant has combined the arbitration clause and the governing law clause. These clauses are different legal concepts and governed by different laws and regulations – the RF Federal Law on International Commercial Arbitration and the RF Civil Code, accordingly. No defect in the governing law clause may affect the validity of the arbitration clause.*
>
> *The Applicant recognised the jurisdiction of the ICAC at CCI of the Russian Federation by filing its counterclaim and, thus, deprived itself of the right to refer to existing invalidity of the arbitration clause as provided by article 4 of the Federal Law on international commercial Arbitration.*
>
> The governing law provisions do not directly constitute an arbitration clause and cannot serve as a ground for holding such arbitration clause invalid ... (emphasis added)

[28] The foregoing therefore provides the factual and legal matrix and background against which the current application for the registration and enforcement of the Arbitration Award in Malaysia is to be considered.

The Registration And Enforcement Of The Arbitration Award In Malaysia

[29] The relevant section of the Arbitration Act is s. 38 which provides that on an application in writing being made to the High Court, an award from a foreign State shall, subject to s. 38 and s. 39 be recognised as binding and be enforced by entry as a

judgment in terms of the award or by action. Section 38(2) requires the applicant to produce a duly authenticated original award or duly certified copy as well as the original arbitration agreement or a duly certified copy, with a translation where it is otherwise than in the national language or the English language. A foreign State is defined as a state which is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on international Commercial Arbitration in 1958.

[30] The plaintiff here has complied with the formal requirements set out in s. 38. The Arbitration Award was made in a state which is a party to the New York Convention as the Russian Federation is one of the signatory states to the convention with effect from 29 December 1958.

[31] Given the foregoing, and the express words of s. 39 of the Act, the onus of proof now shifts to the defendant who opposes the recognition and enforcement of this Arbitration Award to satisfy the court why the award should not be registered and enforced. In *Law, Practice and Procedure of Arbitration – The Arbitration Act 2005 Perspective* [2009] 2 MLJ cxxxvi; [2009] 2 MLJA 135 by Sundra Rajoo the learned author stated:

> Section 39 – Grounds for refusing recognition or enforcement
> This section provides grounds for refusal of recognition of an award. The grounds follow closely the grounds laid down in section 37 for setting aside an award. The applicant has to comply with the formal requirements, after that the onus of providing proof shifts to the party opposing recognition and enforcement.

[32] (see also *Ngo Chew Hong Oils & Fats (M) Sdn Bhd v. Karya Rumpun Sdn Bhd* [2009] 1 LNS 1321 where Hamid Sultan Abu Backer J held:

> ... The burden of proof why the recognition and enforcement of the arbitration award should be refused lies with the defendant. This is a strict requirement as set out in section 39 of AA 2005. The defendant failed to satisfy the said requirement. And real proof is required to be shown, before the court can dismiss the plaintiff's application.

A **The Defendant's Grounds For Opposing The Registration And Enforcement Of The Arbitration Award**

[33] The defendant furnishes two grounds under s. 39 in opposing this application. It states that:

B (a) The arbitral procedure was not in accordance with the agreement of the parties as stipulated in section 39(1)(a)(vi) of the Act; and

(b) The Arbitration Award is in conflict with the public policy of Malaysia as envisaged in section 39(1)(b)(ii) of the Act

C

Each of these grounds will be considered in turn.

Ground (a): The Arbitral Procedure Was Not In Accordance With The Agreement Of The Parties As Envisaged In D **s. 39(1)(a)(vi) Of The Act**

[34] The defendant contends in essence that upon it having filed the Ukrainian claim which invoked the jurisdiction of Ukrainian laws and procedure, any further claim relating to the said contract E should have been brought or maintained under the arbitration conducted in ICAC at CCI Ukraine. Accordingly the defendant maintains that the plaintiff, by subsequently initiating arbitral proceedings in ICAC at CCI Russia has failed to adhere to the procedure stipulated in the contract. This it is contended amounts F to sufficient reason to refuse to recognise or enforce the Arbitration Award under s. 39(1)(a)(vi) of the Act. The defendant further submits that the defendant's claim in Ukraine and the plaintiff's claim in Moscow are in respect of the same, albeit opposing claims in respect of the same contract, ie, 020/1006/AT.

G **[35]** I have outlined in some detail the content of the awards handed down both at ICAC Ukraine as well as ICAC Moscow and the Moscow Arbitration Court. It is clear from a perusal of the same that:

H (i) The ICAC at CCI Russia considered in great detail the defendant's submissions on this point and explained in full, the reasons why it determined, as an arbitral tribunal, that it had the jurisdiction to hear the plaintiff's claim notwithstanding the proceedings in Ukraine. It addressed the very same issue that I the defendant now chooses to raise again in the enforcement jurisdiction, namely that the interpretation of the clause is such that once either of the parties initiates arbitral proceedings in

the forum of its choice under cl. 6, then the other party is bound to submit to that jurisdiction and is precluded effectively from exercising its entitlement o initiate proceedings at the forum of its choice. The Russian arbitral tribunal and the Moscow Arbitration Court (in the course of hearing the defendant's application to have the Arbitration Award cancelled) dealt with this issue holding, as set out above that there was express provision allowing the initiation of proceedings by the plaintiff in Russia notwithstanding the proceedings in Ukraine. Their interpretation of the arbitral clause was that it conferred a right or entitlement on the plaintiff to do so. They disagreed with the interpretation put forward by the defendant. In other words they disagreed that once either of the parties elected to initiate arbitral proceedings first, this effectively amounted to an ouster of the other party's right to initiate proceedings in the jurisdiction of its choice. They went on to hold that the express wording of the arbitral cl. 6 allowed for such choice. In short this issue has been considered at length by not one, but two tribunals who both concluded that the clause was to be given effect as it is read. Given these sound conclusions, it does not appear to this court that the parties failed to adhere to arbitral procedure;

(ii) It is evident from a perusal of not only the Russian Awards but also the Ukrainian Award that these tribunals ascertained that the precise subject matter of dispute between the parties was different. The relevant part of the Ukrainian award is reproduced above at the outset, where it refers to the fact that the plaintiff advised the Ukrainian Court of the Russian proceedings but pointed out that the precise issues for determination were different. There was no rebuttal of this proposition put forward by the plaintiff showing thereby that the defendant accepted this to be the case.

Similarly in the Russian awards there is reference to the fact that the Ukrainian award deals with matters different from that of the Russian arbitral proceedings. In fact the counterclaims filed by the parties in both jurisdictions also differed. They may well have arisen out of the same Contract but different aspects were determined by the two different arbitral tribunals. The plaintiff's claim in Moscow was for late delivery of goods and damages suffered thereby while the defendant's claim in

Ukraine was for late payment of monies for goods supplied and for the right to retain monies prepaid by the plaintiff to the defendant.

Although it concerned me initially that matters arising out of the same Contract were being determined by different tribunals, once I had read the awards it became clear that the arbitrators had addressed their minds to this issue, as had the parties who effectively agreed that the subject matter in terms of adjudication was different. Therefore this is another reason for concluding that there was no failure to comply with arbitral procedure. This is not a case where two tribunals dealt with the same subject matter and arrived at two differing decisions;

(iii) Another relevant fact is the finding of the Russian tribunal that the defendant here effectively submitted to the jurisdiction of the Russian arbitral tribunal after the initial objections taken to jurisdiction when it filed a counterclaim in the Russian proceedings. There is an express finding of the Russian arbitral tribunal that the defendant submitted to its jurisdiction. This was upheld by the arbitration court when the defendant sought to have the award cancelled. Having so submitted to the jurisdiction of the Russian tribunal it ill behoves the defendant to now seek to renege from that position by alleging in this, the enforcement jurisdiction once again, that arbitral procedure was not adhered to;

(iv) Having perused the arbitration cl. 6 as amended and having considered the entirety of the awards in Ukraine and Russia as well as the conduct of parties therein and taking note of the findings of these respective tribunals it appears to this court that arbitral procedure was adhered to. The parties exercised their rights as set out expressly in cl. 6 to have their respective but different issues under the Contract determined by the respective arbitral tribunals. This was in accordance with the consensus of the parties. The alternative construction put forward by the defendant with regards to cl. 6 is not tenable as it effectively allows whichever party that first initiates the arbitral process to impose upon the other party both its choice of jurisdiction as well as choice of law. This would be contrary to the express intention of cl. 6 as objectively assessed. In these circumstances I conclude that

the parties complied with cl. 6 without detriment or deprivation of any parties' rights. The defendant has failed to show that there was a failure to adhere to arbitral procedure as envisaged in s. 39(1)(a)(vi) of the Act.

Ground (b): The Arbitration Award Is In Conflict With The Public Policy Of Malaysia As Envisaged In s. 39(1)(b)(ii) Of The Act

[36] Section 39(1)(b)(ii) of the Arbitration Act stipulates:

... Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:

(c) If the High Court finds that:

(i) ...

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

[37] Under this head the defendant contends that this court ought not to enforce the Russian Award as it would be against the public policy of this country to enforce an award which is contradictory to another existing award between the same parties in respect of the same subject matter.

[38] The defendant, in support of this ground relies on the cases of *Deutsche Schaachthauund v. Ras Al-Khaimah* [1987] 3 WLR 1023 where the English Court of Appeal defined a contravention of public policy as follows:

... there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary, reasonable and fully-informed members of the public on whose behalf the powers of the state are exercised.

[39] And in the Auckland High Court case of *Kimberley Construction v. Mermaid Holdings* [2004] 1 NZLR 386 it was defined thus:

... The reach of public policy was not to be confined to the lawfulness of the arbitration process. The award has been satisfied by the provision of the promises contained in the settlement agreement which could itself be the subject of the judgment if it were not performed. It would be offensive to the ordinary, reasonable and fully informed member of the public and inimical

A to the interests of justice to enter or attempt to execute judgment. As such, recognition or enforcement of the award would be contrary to public policy.

[40] The defendant maintains that there are two conflicting awards between the plaintiff and the defendant in relation to the same contract where the Russian award is in favour of the plaintiff and the Ukranian award is in favour of the defendant. Therefore it is submitted, to enforce the Russian award without taking cognizance of the Ukranian award would be offensive and contrary to the interests of the public.

[41] The defendant also points to the case of *Steel Co Of Canada v. USWA Carsewell Ont* 1213 where Canadian arbitrators were invited to decide on an arbitration where there was already in existence a previous arbitration based on identical facts. They decided that the principle of *res judicata* would apply to preclude the determination of an issue that is identical to one decided by an earlier arbitration board involving the same parties and issues.

[42] It is evident from the foregoing that the proposition put forward by the defendant is that the Arbitration Award ought not to be recognised and enforced by this court given the existence of the Ukrainian award in respect of the same contract which was determined earlier. It is contended that this is contrary to public policy and amounts to *res judicata*.

[43] The crux of the issue that arises is this – Does the Arbitration Award determined in Russia amount to a determination of a dispute identical to that determined in Ukraine, such that its very determination amounted to *res judicata* thereby rendering any recognition of such an award contrary to public policy?

[44] As set out above in para. 5.3, the arbitrators in handing down the Ukrainian award expressly stated and accepted that the arbitral proceedings initiated in Russia by the plaintiff were different from the dispute or issues being dealt with in Ukraine. As stated there, the defendant did not dispute that point at that juncture.

[45] More significantly, although the defendant did take objection to the subsequent filing of proceedings by the plaintiff in Russia, it eventually conceded to, or submitted to the jurisdiction of the Russian arbitral proceedings as expressly stipulated in the Russian award and by the Moscow Arbitration Court. It did so by filing a counterclaim and recognising the court's jurisdiction to adjudicate on the same.

[46] At no point, as is apparent from a perusal of the two awards, was the point raised by the defendant that precisely the same issues were being determined by two different tribunals resulting in two conflicting or inconsistent decisions. Indeed a reading of the awards discloses that the Ukrainian arbitral tribunal dealt with that part of the dispute relating to late payment of monies by the plaintiff-buyer for goods supplied and the right therefore to retain advance monies lodged with it by way of set-off, while in the Russian proceedings, the dispute dealt primarily with late delivery by the defendant-seller, which the buyer contended had caused it loss and damages and in respect of which penalties were sought. Both claimants in each of these proceedings filed counterclaims and these counterclaims too are not in conflict. Certainly such a contention was neither raised nor referred to in either of the awards.

[47] Therefore the factual premise put forward by the defendant in support of its contention that the enforcement of the Russian Award would amount to a contravention of public policy in that it amounts to the recognition and enforcement of an inconsistent decision and amounts to *res judicata* is flawed. The defendant failed to point to these express passages in the awards where each of the tribunals has clearly considered the corresponding arbitral process in the other jurisdiction and accepted that the subject matter of each is different and that more importantly, such choice of arbitral jurisdiction had been consensually agreed upon by the parties themselves expressly in cl. 6 of the contract. To now seek to depart from the express terms of the contract is untenable.

[48] The proposition was also put forward by the defendant that the recognition and enforcement of the Russian award would amount to a breach of the rules of natural justice again on the erroneous premise that the two tribunals flagrantly ignored all propriety and established practice and determined the same issue, effectively twice. This is a far from accurate representation of the facts.

[49] There is in fact no breach of natural justice as at all times both parties were accorded every opportunity to ventilate the very same arguments that are now sought to be re-agitated in the enforcement forum. It is not the function of this court to re-hear or re-assess the Arbitration Award at this juncture. This court is bound to recognise and enforce the same unless one of the grounds in s. 39 is established by the defendant.

A **[50]** As the factual matrix underlying the basis for the defendant's entire argument on this ground is critically flawed, it follows that the contention that the enforcement of the Arbitration Award is contrary to public policy is incorrect. In any event applying the test set out in the *Ras Al-Khaimah* case (above) it can hardly be B said that the enforcement of the Arbitration Award would be wholly offensive to the ordinary, reasonable and fully informed members of the public on whose behalf the powers of the state are exercised. The defendant has failed to show how this is the case. It has not been shown that the identical dispute was C decided by two different tribunals resulting in two inconsistent decisions. In this case, two aspects of a contract comprising a chain of sub contracts was determined by two different tribunals in accordance with the express agreement of the parties as borne out by cl. 6. I have alluded to the different aspects that were D addressed above. Moreover the defendant itself accepted, albeit expressly or by conduct that the disputes were different. It submitted to the jurisdiction of the Russian arbitral tribunal and cannot now seek to resile from the position so adopted.

E **[51]** In relation to the law relating to the invoking of the public policy exception, the decision of the New Zealand Court of Appeal in the case of *Reeves v. One World Challenge LLC* [2005] NZCA 314 supports the position that a higher threshold is required to invoke this exception. In that case the judgment F sought to be enforced was a US court judgment, which by analogy is applicable to foreign arbitral awards. It was contended for the party opposing enforcement that it would be illegal under New Zealand law to enforce the confidentiality agreement on which the US judgment was based, and hence to enforce the G judgment would be an abuse of process of the New Zealand Court, and therefore contrary to public policy. The Court of Appeal in New Zealand rejected this approach and held that the public policy exception was a narrow one that had necessarily to be confined in line with the comity of nations principle. The fact H that a case would have been decided differently under New Zealand law was not sufficient to invoke the exception. The court concluded by quoting from Tamberlin J in the Australian case of *Stern v. National bank of Australia*:

I > The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of the cases involved questions of moral and ethical policy, fairness of procedure, and illegality of a fundamental nature.

[52] It cannot be said in the instant case there has been a lack of fairness of procedure or breach of natural justice or illegality of a fundamental nature. *Res Judicata* does not apply and there is no question of moral and ethical policy that arises on the facts of this case. The function of the court in relation to the enforcement of an Arbitration Award of a foreign State has been well summarised in the Hong Kong case of *Xiamen Xinjingdi Group Ltd v. Eton Properties Ltd & Anor* [2006] HKC 287 where Reyes J held:

> ... The court's role in an application for enforcement of a Mainland arbitral award under s. 2GG of the Arbitration Ordinance (Cap 341) was essentially that of an overseer. This 'overseeing essentially consists in ensuring that an arbitration is conducted fairly and in lending the means at the court's disposal (for example, interlocutory injunctions, orders for security for costs, orders for the enforcement of an award as a Court judgment) to make an award effective.
>
> To that extent, I would wholly accept Gross J's observation that the Court should not second guess an arbitration award. Its role should be, although by no means entirely 'mechanistic', as 'mechanistic as possible'.

[53] Although s. 2GG of the Arbitration Ordinance (Cap 341) is not pair material with ss. 38 and 39 the underlying thread or principle remains the same, namely that the enforcing court ought to undertake any form of review of the arbitration award. The enforcing court should guard against attempts made to go behind the award or to argue or re-argue matters which have been comprehensively dealt with in the course of the arbitration. The provisions of s. 39, particularly the contravention of public policy argument ought not to be utilised as a guise to re-open settled matters in the arbitration. This the court ought to vigilantly guard against.

[54] I also respectfully adopt the reasoning in the Malaysian High Court case of *Infineon Technologies (M) Sdn Bhd v. Orisoft Technology Sdn Bhd* [2010] 1 LNS 889 Mohamad Ariff bin Md Yusoff held, *inter alia* as follows:

> ... I now reproduce below some leading views taken on the issue of public policy in the area of arbitration law. For example in the Hong Kong Court of final appeal decision in *Hebei import & Export Corp v. Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111, Bokhary PJ said: "... there must be compelling reasons before enforcement of the convention award can be refused on public policy grounds. This is not to say that the reasons must be so

A extreme that the award falls to be cursed by bell book and candle. But the reasons must go beyond the minimum which would justify setting aside the domestic judgment award. A point to similar effect was made in a comparable context by the United States Supreme Court in *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc* [1985] 473 US 640 ... the majority said this ... concerns of international comity, respect for the capacities of foreign and Transnational Tribunals, and sensitivity to the needs of the International commercial System for predictability in the resolution of disputes require that we enforce the parties agreement even assuming that a contrary result would be forthcoming in a domestic context ...

... Both leading cases in Hong Kong and Singapore relate to the enforcement of a foreign arbitral award. In both cases, the approach is not to refuse to register on the ground of conflict of public policy unless the most basic notions of morality would be offended.

[55] The defendant has failed to make out this exception and I accordingly allow the plaintiff's application to recognise, register and enforce the Arbitration Award No. 127/2008 between the plaintiff and the defendant by the International Commercial Arbitration Court of the Russian federation as a judgment of this Court pursuant to s. 38(1) of the Arbitration Act 2005. The costs of this application are to be borne by the defendant.