Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-115-12 OF 2018(W)

TENGKU MAIMUN CHIEF JUSTICE, ZAWAWI SALLEH, IDRUS HARUN, NALLINI PATHMANATHAN AND ABDUL RAHMAN SEBLI FCJJ

27 MARCH 2020

Arbitration — Award — Foreign award — Registration as judgment of High Court — Respondents filed application to register the entire arbitration award as judgment of High Court — Whether registration limited to dispositive portion of the award and not the entire award — Whether registration of entire award would undermined confidentiality of arbitration proceedings — Arbitration Act 2005 ss 2, 38 & 39 — Rules of Court 2012 O 69 r 8

The respondents had filed an originating summons ('the OS') in the High Court to register the entire arbitration award granted by arbitration tribunal in Singapore as a judgment of the High Court. The appellant opposed the OS on the ground that only the dispositive portion of the award which sets out the orders or the exact reliefs granted by the arbitral tribunal was capable of being registered as a judgment of the High Court. The learned judicial commissioner ('the JC') agreed with the appellant. Dissatisfied with the decision, the respondents filed an appeal to the Court of Appeal. In allowing the appeal, the Court of Appeal found that the JC was plainly wrong in refusing to register the entire award of the arbitral tribunal. The Court of Appeal essentially found that there was no provision in law that allowed the award to be bifurcated and that only the dispositive part of the arbitral award to be registered. The appellant was granted leave to appeal to the Federal Court on the following question of law: whether for the purposes of an application made under s 38 of the Arbitration Act 2005 ('the AA') and O 69 r 8 of the Rules of Court 2012, the recognition and enforcement of an arbitration award by way of entry as a judgment of the High Court of Malaya ought to relate only to the disposition of the said award and not the entire award containing the reasoning, evidentiary and factual findings of the arbitral tribunal ('the question').

Held, allowing the appeal with costs:

(1) An analogy could be drawn between the approach taken by the courts in dealing with an application under the Reciprocal Enforcement of Judgments Act 1958 ('the REJA') and the approach that the courts ought to take in an application under s 38 of the AA. Both the REJA and s 38 of the AA provided an avenue for the successful party to register the judgment in Malaysia as a judgment of the High Court. If one were to look at the REJA, what was being registered in the High Court for enforcement, was the order itself, not the reasoning or findings of the judgment of the foreign courts (see paras 34–35).

(2) On the issue of confidentiality, the court agreed with the appellant that to register the entire award would undermine the confidentiality of the arbitration proceedings which comprise the cornerstone of arbitration (see para 49).

(3) The words 'in terms of the award' referred to in s 38 of the AA did not indicate the entire award but the dispositive portion only which was the decision or summary on what the defendant was required to pay the plaintiff. Taking into consideration the definition of the award in s 2 of the AA which defined an award as a 'decision on the substance of the dispute' between the parties and read together with s 38 of the AA, it would mean that for purposes of recognition and enforcement of the award as a High Court judgment, the material part of the award was the decision (dispositive portion) and it was this decision and not the reasoning or findings of the arbitral tribunal that need to be registered (see paras 36–37, 40 & 50).

(4) The requirement under s 38 of the AA for the respondents to produce a duly authenticated award was purely evidentiary. The production of a duly authenticated award was to enable the enforcing court to be satisfied that there was a valid and duly obtained arbitration award (see para 51).

(5) The court agreed with the appellant that in deciding as it did, the Court of Appeal erred in failing to distinguish the role of a court of enforcement and a court of merits. Having complied with the formal requirements of s 38 of the AA, the registration of the award under s 38 ought to be granted as of right. Subject to s 39 of the AA, in dealing with an application under s 38, a court was thus not required to go behind the award and to understand the arbitral tribunal's reasoning. Based on the above, the court answered the question in the affirmative (see paras 53 & 55).

[Bahasa Malaysia summary

Responden-responden telah memfailkan saman pemula ('SP') di Mahkamah Tinggi untuk mendaftarkan keseluruhan award timbang tara yang diberikan oleh tribunal timbang tara di Singapura sebagai penghakiman Mahkamah Tinggi. Perayu menentang SP dengan alasan bahawa hanya bahagian

A 'dispositive' di dalam award tersebut yang menyatakan perintah atau relif sebenar yang diberikan oleh tribunal timbang tara sahaja yang boleh didaftarkan sebagai penghakiman Mahkamah Tinggi. Pesuruhjaya kehakiman yang bijaksana ('PK') bersetuju dengan perayu. Tidak berpuas hati dengan keputusan tersebut, responden-responden memfailkan rayuan ke Mahkamah
B Rayuan. Dalam membenarkan rayuan tersebut, Mahkamah Rayuan mendapati bahawa PK jelas terkhilaf dalam menolak untuk mendaftarkan keseluruhan award tribunal timbang tara. Mahkamah Rayuan pada hakikatnya mendapati bahawa tidak ada peruntukan dalam undang-undang yang membenarkan award tersebut dibahagikan dan hanya bahagian 'dispositive'
C dari award timbang tara yang perlu didaftarkan. Perayu diberikan keizinan untuk memfailkan rayuan ke Mahkamah Persekutuan mengenai persoalan undang-undang berikut: sama ada bagi tujuan permohonan yang dibuat di bawah s 38 Akta Timbang Tara 2005 ('ATT') dan A 69 k 8 Kaedah-Kaedah
D Mahkamah 2012, pengiktirafan dan penguatkuasaan award timbang tara melalui kemasukan sebagai penghakiman Mahkamah Tinggi Malaya seharusnya hanya berkaitan dengan 'disposition' award tersebut dan bukan keseluruhan award yang mengandungi alasan keputusan, dapatan keterangan dan fakta oleh tribunal timbang tara ('persoalan tersebut').

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Diputuskan, membenarkan rayuan dengan kos:

(1) Analogi boleh dibuat antara pendekatan yang diambil oleh mahkamah-mahkamah dalam menangani permohonan berdasarkan Akta Penguatkuasaan Penghakiman Bersaling 1958 ('APPB') dan
F pendekatan yang harus diambil oleh mahkamah dalam permohonan di bawah s 38 ATT. Kedua-dua APPB dan s 38 ATT memberikan jalan bagi pihak yang menang untuk mendaftarkan penghakiman di Malaysia sebagai penghakiman Mahkamah Tinggi. Berdasarkan APPB, apa yang didaftarkan di Mahkamah Tinggi untuk penguatkuasaan adalah perintah
G itu sendiri, bukan alasan atau dapatan-dapatan di dalam penghakiman mahkamah-mahkamah asing (lihat perenggan 34–35).

(2) Mengenai isu kerahsiaan, mahkamah bersetuju dengan perayu bahawa pendaftaran keseluruhan award akan merosakkan kerahsiaan prosiding
H timbang tara yang merupakan landasan bagi timbang tara (lihat perenggan 49).

(3) Perkataan-perkataan 'mengikut terma award' yang disebut dalam s 38 ATT tidak menunjukkan keseluruhan award tetapi hanya menunjukkan bahagian 'dispositive' yang merupakan keputusan atau ringkasan
I mengenai apa yang perlu dibayar oleh defendan kepada plaintif. Dengan mengambil kira definisi award dalam s 2 ATT yang mendefinisikan award sebagai 'keputusan mengenai isi pertikaian' antara pihak-pihak dan dibaca bersama dengan s 38 ATT, ia bermaksud bahawa untuk tujuan pengiktirafan dan penguatkuasaan award sebagai penghakiman

Mahkamah Tinggi, bahagian penting dari award tersebut adalah keputusan (bahagian 'dispositive') dan keputusan ini yang perlu didaftarkan dan bukannya alasan atau dapatan-dapatan tribunal timbang tara yang perlu didaftarkan (lihat perenggan 36–37, 40 & 50).

(4) Keperluan di bawah s 38 ATT untuk responden-responden mengemukakan award yang disahkan adalah bagi tujuan keterangan semata-mata. Pengemukaan award yang disahkan dengan betul adalah bagi membolehkan mahkamah penguatkuasa berpuas hati bahawa terdapat award timbang tara yang sah dan yang diperoleh dengan betul (lihat perenggan 51).

(5) Mahkamah bersetuju dengan perayu bahawa dalam membuat keputusan, Mahkamah Rayuan terkhilaf kerana gagal membezakan peranan mahkamah penguatkuasa dan mahkamah 'merits'. Setelah memenuhi syarat formal yang dinyatakan di dalam s 38 ATT, pendaftaran award di bawah s 38 harus dibenarkan. Oleh itu, tertakluk kepada s 39 ATT, dalam menangani permohonan di bawah s 38, mahkamah tidak perlu melihat keseluruhan award tersebut dan tidak perlu memahami alasan tribunal timbang tara. Berdasarkan dapatan-dapatan di atas, mahkamah menjawab pesoalan tersebut secara afirmatif (lihat perenggan 53 & 55).]

Cases referred to

AED Oil Ltd v Puffin FPSO Ltd [2010] VSCA 37, SC (refd)

Caucedo Investments Inc v Saipem SA [2013] All ER (D) 127 (Nov); [2013] EWHC 3375 (TCC), QBD (refd)

CTI Group Inc v International Bulk Carrier SPA [2014] 11 MLJ 205, HC (refd)

Denmark Skibstekniske Konsulenter As I Likvidation (formerly known as Knud E Hansen As) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) [2010] 3 SLR 661; [2010] SGHC 108, HC (refd)

Electra Air Conditioning BV v Seeley International Pty Ltd [2008] FCAFC 169, FC (refd)

Enterprise Insurance Company plc v U-Drive Solutions (Gibraltar) Ltd and another [2016] EWHC 1301, QBD (refd)

Kerajaan Negeri Selangor v Triumph City Development Sdn Bhd Civil Suit No 24 ARB-2–08 of 2015 (unreported) (refd)

LR Avionics Technologies Ltd v Federal Republic of Nigeria and another [2016] All ER (D) 76 (Jul); [2016] EWHC 1761, QBD (refd)

Open Type Joint Stock Co Efirnoye ('EFKO') v Alfa Trading Ltd [2012] 1 MLJ 685, HC (distd)

Tridon Australia Pty Ltd v ACD Tridon Inc [2004] NSWCA 146, SC (refd)

Legislation referred to

Arbitration Act 2005 ss 2, 10, 33(3), 38, 38(1), (3), 36, 39
Arbitration Act 1996 [UK] s 102
Commercial Arbitration Act 2010 [AUS] s 33
Reciprocal Enforcement of Judgments Act 1958
Rules of Court 2012 O 42 r 5, Form 75

Appeal from: Civil Appeal No W-02(NCC)(A)-1219-07 of 2017 (Court of Appeal, Putrajaya)

Cecil Abraham (Arif Emran Ariffin, Sunil Abraham and Raymond Tan with him) (Wong & Partners) for the appellant.
R Kengadharan (Magita Hari Mogan with him) (R Kengadharan & Co) for the first, second, third and fourth respondents.
GK Ganesan (GS Saran with him) (GK Ganesan) for the fifth respondent.

Tengku Maimun Chief Justice (delivering jugdment of the court):

INTRODUCTION

[1] The appeal before us arose from an arbitration proceedings between the parties, described below.

[2] The appellant is a company incorporated under the laws of Germany and has a last known business address in Germany. The appellant has no business presence in Malaysia.

[3] The first and the fourth respondents are companies incorporated under the laws of Malaysia. The second and the third respondents are Malaysian citizens and directors of the first and the fourth respondents.

[4] The fifth respondent is a citizen of Germany and is a named party to the arbitration proceedings.

BACKGROUND FACTS

[5] The appellant and the respondents had entered into a settlement agreement where they agreed to submit any disputes in relation to the settlement agreement for arbitration.

[6] Notwithstanding the agreement to arbitrate, the respondents commenced a suit at the Kuala Lumpur High Court No S-22-129 of 2009 ('Suit 2009'). In Suit 2009, the respondents alleged, among others, that there

was fraudulent misrepresentation by the appellant and/or its representatives, thereby inducing the respondents to enter into the settlement agreement.

[7] In view of the arbitration agreement found in the settlement agreement, the appellant applied for and was granted an order by the Court of Appeal to stay Suit 2009 pursuant to s 10 of the Arbitration Act 2005 ('the AA 2005'). The order of the Court of Appeal has been affirmed by this Court. Thus, to date, Suit 2009 has been stayed in favour of arbitration. The appellant thereafter commenced arbitration in Singapore.

[8] During the course of the arbitration proceedings, the respondents filed a counterclaim against the appellant for damages in fraud, deception and misrepresentation in relation to the settlement agreement. However, due to the respondents' failure to provide the required advances on costs, the arbitral tribunal made a finding that the counterclaim was withdrawn. The arbitral tribunal was consequently left to determine the appellant's claim against the respondents which were as follows:

(a) declaration as to the validity and finality of the settlement agreement entered into between the appellant and the respondents, and in the event of an opposite finding; the return to the appellant of the sum of EUR3m plus interests calculated from 8 August 2008;

(b) declaration that this present Tribunal has sole jurisdiction to adjudicate on all disputes arising out of or in connection with the settlement agreement, and grant any reliefs, including reliefs sought by the respondents in Suit 2009;

(c) declaration as to the final and conclusive nature of the waiver of any claims of the respondents under the settlement agreement, and their inability to assert any future claims, including the ones asserted under Suit 2009;

(d) determination as to the absence of valid clause available to the respondents in initiating proceedings under Suit 2009, and a further declaration for the respondents to withdraw Suit 2009;

(e) declaration to the effect that the respondents jointly and severally bear the costs and expenses of the arbitration, and Suit 2009 and respective appeals of the appellant plus interest; and

(f) dismissal of the respondents' counterclaim which now stands withdrawn.

[9] The award on the arbitration proceedings in Singapore was delivered on 8 May 2015. The final award consists of 73 pages and is divided into different parts dealing with the following topics:

A. The Parties
B. The Arbitration Agreement
C. Governing Law and Language
D. Seat
E. Request for Arbitration and Answer
F. Relief Sought
G. Appointment of the Tribunal
H. Procedural Orders and Directions
I. Hearing
J. Issues to be Determined
K. Witness Testimonies
L. Submissions
M. Discussions
N. Summary of Findings
O. Costs
P. Dispositions

[10] The dispositive portion of the award is set out at paras 189–192 of the final award and it states the following:

(i) the Tribunal concludes and holds that the appellant's claim be dismissed in its entirety;

(ii) the Tribunal awards to the respondents their costs of the arbitration, to be taxed pursuant to section 21 of the International Arbitration Act, if not agreed;

(iii) the Tribunal orders that the fees and expenses of the ICC and the arbitral tribunal be borne by the appellant; and

(iv) all other claims and reliefs sought are hereby rejected.

PROCEEDINGS IN THE HIGH COURT

[11] Except for the fifth respondent, all the other respondents filed an originating summons ('OS') in the High Court of Kuala Lumpur to register the entire award, which comprise Parts A–P set out in para 9 above.

[12] The learned judicial commissioner identified the issue before her as follows: In the context of s 38 of the AA 2005, what does 'award' mean? Does it refer to the disposition as set out in paras 189–192 of the final award or does it refer to the entire award?

[13] The appellant opposed the OS on, inter alia, the ground that only the dispositive portion of the award in Part P which sets out the orders or the exact reliefs granted by the arbitral tribunal was capable of being registered as a judgment of the High Court.

[14] The first to the fourth respondents ('the respondents') took the position that:

(a) the only grounds to challenge the registration of the award are contained in s 39 of the AA 2005; and

(b) there were no exceptions stipulated in s 39 of AA 2005 which allows for only the dispositive portion of the award to be registered as a judgment of the High Court.

[15] The respondents' arguments did not find favour with the learned judicial commissioner. Her Ladyship agreed with the appellant that only the dispositive portion of the award was capable of being registered and enforced as a judgment of the High Court. In gist, the findings of the High Court as aptly summarised in the appellant's written submission are as follows:

(a) 'award' is defined under s 2 of the AA 2005 to mean the 'decision of the arbitral tribunal on the substance of the dispute'.

(b) the term 'decision' has been defined to mean either:

(i) *Concise Oxford Dictionary* — 'a conclusion or resolution reached; settlement of a question, a formal judgment';

(ii) *Black's Law Dictionary* — 'A judicial determination after consideration of the facts and the law; especially a ruling, order or judgment pronounced by a court when considering or disposing of a case'.

(c) based on the above definitions, the term 'decision' essentially means the final and ultimate conclusion or resolution or settlement reached after due consideration given to the issue/question to be determined. Since the term relates to the final conclusion or resolution, it would not include the reasoning which led to the conclusion or resolution;

(d) further, an award by an arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties pursuant to s 36 of the AA 2005 and is immediately enforceable at the instant of the party in whose favour the award was made. Section 38 of the same Act is clearly a mechanism for the arbitral award to be made enforceable in the same manner as a judgment of the court, thereby granting the successful party access to the various execution mechanisms provided for under the Rules of Court 2012, which includes, among others, writ of seizure and

sale, garnishee proceedings, committal etc;

(e) taking into account the purpose of s 38 of the AA 2005 and the mandatory formal requirement for an applicant to state to what extent the decision, which is the award, has been or has not been complied with, only the dispositive part of the award, which disposes the arbitration, ought to be given due recognition as binding and enforceable by conferring it with the status and effect of a judgment of the High Court;

(f) the function of the High Court as an enforcing court is to give effect to the decision of the arbitral tribunal as manifested in the dispositive portion of the award and the High Court ought to vigilantly guard against going behind matters which have been comprehensively dealt with in the course of the arbitration;

(g) arbitration is a private means of dispute resolution between disputing parties and due to the private nature of an arbitration, an arbitration award and the reasons which give rise to the final award may only be disclosed when it is reasonably necessary to establish or protect the legal right of a party to the arbitration proceedings as against a third party. The duty of parties to an arbitration proceedings to maintain the confidentiality of the arbitration proceedings, in particular the arbitration award and the reasons thereto, is a compelling ground for the court to decide against the respondents; and

(h) the approach under the Reciprocal Enforcement of Judgments Act 1958 ('the REJA') ought to be adopted for the purpose of determining the issue in the instant case. In this regard, the REJA is concerned with the registration of the operative part of the judgment which refers to the decision of the relevant court for the payment of a certain sum of money, and is not concerned with the finding or reasoning made by a foreign court in arriving at such decision.

[16] Aggrieved by the decision of the High Court, the respondents appealed to the Court of Appeal. The fifth respondent subsequently filed a notice of motion to intervene, which was allowed by the Court of Appeal.

PROCEEDINGS IN THE COURT OF APPEAL

[17] The Court of Appeal considered ss 38 and 39 of the AA 2005 in coming to the following conclusions:

(a) the only requirement for registration, from a plain reading of s 38, was for an 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;

(b) having complied with the formal requirements of s 38 of the AA 2005, the registration of an international arbitration award is granted as of right to an applicant unless the respondent can show any reason under s 38 of the AA 2005 or under any of the specified grounds provided in s 39 of the same Act, to refuse registration and enforcement;

(c) the extensive nature of the list of grounds set out in s 39 of the AA 2005 must mean that it was intended to be exhaustive, in that refusal of recognition or enforcement of an arbitral award can only be allowed on the grounds stated in the aforesaid section;

(d) in the instant appeal, it would appear that none of the grounds in s 39 of the AA 2005 to refuse registration of the award, whether as a whole or in part, was raised by the appellant. It must follow, as a consequence that the learned judicial commissioner could not refuse to register the award as a judgment of the court;

(e) the purpose of the registration of an award is to enable the award to be enforced or challenged and therefore there is merit in the argument that if only the dispositive part of the award is registered, the court tasked with enforcement will be deprived of the advantage of understanding the arbitrator or the tribunal's reasoning;

(f) there is nothing in s 38 or in any other provisions of AA 2005 which allows for only part of the award to be registered except for s 38(3) which allows for part of the award to be recognised and enforced where a decision is made on matters not submitted to arbitration. If indeed it was the intention of the legislature to allow for registration of only the dispositive part, it would have clearly stated in terms similar to how it was provided in s 38(3) for separable decisions;

(g) the learned judicial commissioner had no jurisdiction to refuse the registration of the award on the ground of confidentiality as it is not a ground for refusal provided in s 39 of the AA 2005;

(h) alternatively, the ground of confidentiality cannot be sustained as it was within the contemplation of the parties that the findings of the arbitration would be disclosed for use in the trial of Suit 2009;

(i) the REJA only applies to foreign judgments and not arbitration awards. Consequently the analogy drawn by the learned judicial commissioner was erroneous; and

(j) the English authorities cited by counsel are not of any assistance as they were concerned with different issues and further, the provisions of the United Kingdom Arbitration Act 1996 are different from the AA 2005.

[18] The Court of Appeal thus allowed the respondents' appeal and set aside the order of the High Court.

APPEAL TO THE FEDERAL COURT

[19] The appellant was granted leave to appeal on the following question of law:

> Whether for the purposes of an application made under section 38 of the Arbitration Act 2005 and Order 69 rule 8 of the Rules of Court 2012 ('Recognition and Enforcement Application'), the recognition and enforcement of an arbitration award by way of entry as a judgment of the High Court of Malaya ought to relate only to the disposition of the said award and not the entire award containing the reasoning, evidentiary and factual findings of the arbitral tribunal?

THE PARTIES' CONTENTIONS

[20] The appellant's arguments may be summarised as follows:

(a) the decision of the Court of Appeal is radical and manifestly wrong and is against the practice of all other common law jurisdictions;

(b) if the decision of the Court of Appeal is upheld, the whole 73 page document containing the findings of the arbitral tribunal is annexed for all to see and this defeats the rationale of confidentiality in arbitration;

(c) there was nothing to enforce as the appellant's claim was dismissed by the arbitral tribunal and costs awarded to the respondents have been paid; and

(d) it is only the dispositive portion of the arbitral tribunal that is to be enforced or registered.

[21] In support of his arguments, learned counsel for the appellant relied on cases decided by the English High Court in *Enterprise Insurance Company plc v U-Drive Solutions (Gibraltar) Ltd and another* [2016] EWHC 1301 (QBD), the New South Wales Court of Appeal case of *Tridon Australia Pty Ltd v ACD Tridon Inc* [2004] NSWCA 146 and the case of *Denmark Skibstekniske Konsulenter As I Likvidation (formerly known as Knud E Hansen As) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661; [2010] SGHC 108 decided by the High Court of Singapore.

[22] In opposing the appeal, it was submitted by learned counsel for the fifth respondent that there is no such thing as commonwealth practice, and even if there is, the practice is not binding on us. Learned counsel made reference to ss 38–39 of the AA 2005 and argued that under s 38, the court is to recognise

the entire award of the arbitral tribunal. The fifth respondent therefore took the position that the whole award must be registered. Learned counsel for the fifth respondent contended that if the leave question is answered in the affirmative, it would mean that the court exceeds the legislation.

[23] Learned counsel for the fifth respondent highlighted the wordings used in the AA 2005 and those used in the United Kingdom, Singapore and Australia, ie in the AA 2005, the words are 'recognition and enforcement' whereas in the United Kingdom it is 'enforcement'. Further the AA 2005 uses the word 'shall' while in United Kingdom, Singapore and Australia, the word is 'may'.

[24] In urging the court to dismiss the appeal, learned counsel for the first to the fourth respondents adopted the submission of the fifth respondent. She further argued that the AA 2005 does not allow for bifurcation of the award. The 'award', according to learned counsel for the first to the fourth respondents, include the reasoning of the arbitral tribunal.

OUR DECISION

[25] In reversing the decision of the High Court, the Court of Appeal found that the learned judicial commissioner was plainly wrong in refusing to register the entire award of the arbitral tribunal. The Court of Appeal essentially found that there was no provision in law that allowed the award to be bifurcated and that only the dispositive part of the arbitral award to be registered.

[26] For the reasons that follow, we had unanimously allowed the appeal, having answered the leave question in the affirmative.

[27] The law which governs the registration and enforcement of the arbitral tribunal's award is s 38 of the AA 2005 which reads:

> 38 Recognition and enforcement
>
> (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.
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> (2) In an application under subsection (1) the applicant shall produce —
>
> (a) the duly authenticated original award or a duly certified copy of the award; and
>
> (b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, 'foreign State' means a State which is a 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.

[28] By s 39 of the AA 2005, the recognition and enforcement of an award may be refused only at the request of the party against whom it is invoked. In the instant appeal, the appellant did not take out s 39 application, and it must be emphasised that in the instant appeal, the High Court did not refuse to recognise or register the award. Her Ladyship allowed the recognition and registration, to the extent of the dispositive portion of the award as Her Ladyship opined that under s 38, there was no need to register the entire award.

[29] Reverting to s 38, the whole intent and purpose of the provision is to ensure that the reliefs granted by the arbitral tribunal could be enforced by way of execution proceedings by the successful party to the arbitration. Section 38 stipulates the 'recognition procedure' which enables the successful party to convert an arbitral award into a judgment and, for purposes of enforcement, to seek leave from the High Court to enforce the said arbitral award as a judgment of the High Court. In this regard, the respondents contended that the definition of an 'award' under the AA 2005 allows the entire findings set out in the final award and not just the dispositive portion, to be registered for purposes of enforcement.

[30] The respondents placed much reliance on article 25(2) of the ICC International Court of Arbitration Rules 1998, which states:

The Award shall state the reasons upon which it is based.

[31] The above requirement is also contained in s 33(3) of the AA 2005 which states:

An award shall state the reasons upon which it is based, unless

(a) The parties have agreed that no reasons are to be given; or

(b) The award is an award on agreed terms under section 32.

[32] At this juncture, it is perhaps pertinent to look at the definition of the word 'award'. Section 2 of the AA 2005 defines the term 'award' as follows:

a decision of the arbitral tribunal on the substance of the dispute and includes any final interim or partial award and any award on costs or interest but does not include interlocutory orders.

[33] In this regard, we agreed with the High Court that if the intention is to register the findings as part of the decision of an arbitral tribunal, the definition of 'award' in s 2 of the AA 2005 ought to be 'a decision of the arbitral tribunal *and* the substance of the dispute ...' rather than the present definition 'a decision of the arbitral tribunal *on* the substance of the dispute'.

[34] The award of the arbitral tribunal embodies the totality of the case before it which includes, inter alia, the relief sought, the issues to be tried, witnesses' testimonies, submissions, summary of findings, costs and disposition. By analogy, this is similar to the grounds of judgment delivered by the courts, which are distinct and separate from the judgment or order itself. The dispositive award is the judgment whereas the entire award is the grounds of judgment. It defies logic that the whole award containing the findings and analysis of the arbitral tribunal of the evidence, which is akin to the grounds of judgment be considered as forming the terms of judgment to be registered as a judgment of the High Court. An analogy may also be drawn between the approach taken by the courts in dealing with an application under the REJA and the approach that the courts ought to take in an application under s 38 of the AA 2005. Both the REJA and s 38 provide an avenue for the successful party to register the judgment in Malaysia as a judgment of the High Court.

[35] As a matter of law and practice, quite apart from the grounds of judgment which contains the reasoning or analysis or findings of the court, the successful party in a litigation would file an order or judgment. This order or judgment encompasses only the reliefs or prayers granted by the court. In other words, the whole grounds of judgment need not be stipulated or set out in the judgment or order but only the reliefs granted or allowed which would be stated in the judgment or order (see O 42 r 5 and Form 75 of the Rules of Court 2012). And for purposes of execution, the successful party would not rely on the grounds of judgment which embodies the findings or analysis of the court on the evidence but would simply rely on the order or judgment. Likewise, if one were to look at the REJA, what is being registered in the High Court for enforcement, is the order itself, not the reasoning or findings of the judgment of the foreign courts.

[36] Whilst it is accepted that the arbitral tribunal should give reasons for the award, just like a court should give reasons for every decision made, that does not necessarily mean that the reasons should be incorporated for purposes of registration under s 38 of the AA 2005. Section 38 makes reference to the words 'in terms of the award'. In our judgment, the words 'in terms of the award' indicate not the entire award but the dispositive portion only which is the decision or summary on what the defendant is required to pay the plaintiff. In concluding as such, we are certainly not reading words into s 38 of AA 2005. We are simply giving effect to the words 'in terms of the award'.

[37] In the premises we agreed with the appellant that the material part of the award capable of being registered to be recognised and enforced in the same manner as a judgment is the dispositive portion on its own. The entire award which embodies Part A to Part P and which includes inter alia the issues to be tried, the witnesses testimonies, the submission of the parties, the findings, reasoning and analysis of the arbitral tribunal is not necessary to be registered for enforcement purposes under s 38 of the AA 2005. The issue of bifurcation of the award did not arise and the respondents' argument that the High Court judge had exceeded her jurisdiction in her decision to bifurcate the award is devoid of any merit.

[38] Our view that only the dispositive portion of the award is to be registered for purposes of s 38 of the AA 2005 is consonant with the practice as stated in *Arbitration in Malaysia: A Practical Guide* by the former Chief Justice, Tun Ariffin Zakaria, Datuk Professor Sundra Rajoo and Philip Koh, which reads:

> (xvii) Dispositive section
>
> [11.115] The award should contain, usually at the very end, a dispositive section, which sets out the outcome of the arbitration in simple terms so an enforcing court should be able to give effect to the award without difficulty ...
>
> This excerpt has been adopted from Lloyd, Darmon, Ancel, Dervaid, Leibscher & Verbist, 'Drafting Awards in ICC Arbitrations', ICC International Court of Arbitration Bulletin 16/No 2 — Fall 2005.

[39] Guidance is also found in the *Atkins Court Forms Malaysia in Civil Proceedings*. For ease of reference, an excerpt of the *Atkin's Court Forms Malaysia* in respect of arbitration is reproduced below:

> *JUDGMENT on award: leave given to enforce award as judgment or order*
>
> The [Judge or Registrar] having by order dated ... ordered that the Plaintiff be at liberty to enforce the award of LM [the arbitrator[s]] appointed under the arbitration agreement dated ... in the same manner as a judgment or order to the same effect.
>
> AND that the costs of that application should be paid by ...
>
> AND the said [arbitrator[s]] having by his award dated ... awarded that (*set out the material part of the award*).
>
> IT IS THIS DAY ADJUDGED that the Defendant do pay to the Plaintiff the sum of RM ... and his costs to be taxed by the Registrar ...

[40] The precedent set out above clearly demonstrates that only 'the material part of the award' shall be recognised and enforced as terms of a judgment or order granting leave. What then is 'the material part' of the award? In our view, taking into consideration the definition of the award in s 2 of the Arbitration Act 2005 which defines an award as a 'decision on the substance of the dispute'

between the parties and read together with s 38 of the Arbitration Act 2005, it would mean that for purposes of recognition and enforcement of the award as a High Court judgment, the material part of the award is the decision (dispositive portion) and it is this decision and not the reasoning or findings of the arbitral tribunal that need to be registered.

[41] Indeed, this has been the practice of the courts in the country, ie that only the dispositive portion of the arbitral award has been recognised and registered under s 38 of the AA 2005, as seen from the orders in the following cases cited by the appellant:

(a) *CTI Group Inc v International Bulk Carrier SPA* [2014] 11 MLJ 205; and

(b) *Kerajaan Negeri Selangor v Triumph City Development Sdn Bhd* Civil Suit No 24 ARB-2–08 of 2015 (unreported).

[42] The respondents did not cite any authority to support their contention that under s 38 of the AA 2005, the entire award of the arbitral tribunal which include inter alia the issues to be tried, the testimonies of the witnesses and the reasoning and findings of the arbitral tribunal had been registered for purposes of recognition and enforcement of the arbitration award. As for the case of *Open Type Joint Stock Co Efirnoye ('EFKO') v Alfa Trading Ltd* [2012] 1 MLJ 685 relied upon by the first to the fourth respondents, with respect, we found that the case does not support the proposition that the entire award should be registered.

[43] In *EFKO*, the plaintiff sought to register and enforce an arbitration award pursuant to s 38 of the AA 2005. The defendant objected to such registration and enforcement on some of the grounds set out in s 39 of the AA 2005, specifically that the arbitral procedure was not in accordance with the agreement of the parties and/or the arbitration award is in conflict with the public policy of Malaysia. It was in the context of considering those grounds canvassed by the defendant that the learned judge in *EFKO* set out in some detail the content of the arbitration award before concluding that '... 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 of s 38(1) of the Arbitration Act 2005'.

[44] We found nothing in the reported judgment of *EFKO* to show that the entire award containing the issues, the testimonies of the witnesses and the reasoning of the arbitral award formed part of the application by the plaintiff under s 38 of the AA 2005. Thus, *EFKO* is of no assistance to the respondents.

[45] It was argued by the respondents that the AA 2005 has different wordings from the respective Arbitration Acts in United Kingdom, Australia and Singapore, where in our jurisdiction, the words use in s 38 of the AA 2005 are 'an award ... shall ... be recognised as binding and be enforced by entry as a judgment in terms of the award ...' as opposed to the word 'may' in other jurisdictions. In our judgment, the word 'shall' as opposed to 'may' makes no difference to the issue before us which turns on the expression 'terms of the award' which is the operative or governing word in our provision and in all other jurisdictions.

[46] Therefore, the practice in the other jurisdictions serves as a good guidance and in this regard, suffice if we refer to the English cases of *Caucedo Investments Inc v Saipem SA* [2013] All ER (D) 127 (Nov); [2013] EWHC 3375 (TCC) and *LR Avionics Technologies Ltd v Federal Republic of Nigeria and another* [2016] All ER (D) 76 (Jul); [2016] EWHC 1761. These cases disclosed that the exercise of registering an arbitral award for recognition and enforcement of the same, was aimed only at entering the dispositive portion of the arbitral award. What was recognised and enforced and registered as a judgment of the court was that part of the award ordering the defendant to pay the sums awarded to the plaintiff.

[47] Similarly in Australia. A reading of *Tridon Australia Pty Ltd*; *AED Oil Ltd v Puffin FPSO Ltd* [2010] VSCA 37 and *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169 shows that, in recognising and enforcing an arbitral award, the courts are not concerned with the findings and/or grounds leading to the arbitral award in an application under s 33 of the Australian Commercial Arbitration Act 2010. What the courts were concerned with was whether the dispositive portion of the arbitral award could be translated or converted into a judgment capable of being enforced by the successful litigant in the arbitration.

[48] Our neighbour Singapore follows the same practice. This is apparent from the judgment of Belinda Ang J in *Denmark Skibstekniske Konsulenter A/S Likvidation v Ultrapolis 3000* where, in entering judgment based on the orders made by the arbitral award, the Singapore court did not register the entire arbitral award as a judgment but had only registered the dispositive portion of the arbitral award:

> [53] In summary, the challenge to the enforcement of the Corrected Award is without merit because (a) DSK has satisfied the requirements under s 30(1)(b) of the IAA to produce a certified copy of the Standard Conditions which contained an arbitration clause; and (b) Ultrapolis has failed to establish any of the grounds under s 31(2) sub-paras (b) and (e) of the IAA for setting aside the Corrected Award. Accordingly, leave is granted to DSK to enforce the Corrected Award in Arbitration case file E1001 passed on 16 April 2009 in Copenhagen, Denmark at the Danish

Institute of Arbitration in the same manner as a Judgment of the High Court of Singapore. Further, judgment in terms of the Corrected Award in entered as follows: (a) Ultrapolis 3000 Investments Ltd (formerly Ultrapolis 3000 Theme Park Investments Ltd) is ordered to pay to Denmark Skibsneske Konsulenter A/S I likvidation (formerlt Knud E. Hansen A/S) EUR357,855.00 with interest 1.5% per month of: i. EUR7,892 from 25 March 2006 until payment; ii. EUR100,000 from 14 April 2006 until paymet; iii. EUR863 from 3 May 2006 until payment; iv. EUR249,100 from 30 June 2006 until payment; within 14 days from the award (ie from 16 April 2009).

[49] On the issue of confidentiality, we agreed with the appellant that to register the entire award would undermine the confidentiality of the arbitration proceedings which comprise the cornerstone of arbitration. In our judgment, the High Court did not err in stating that:

> [96] Arbitration is a private means of dispute resolution between disputing parties and the award made binds parties who had consensually submitted to arbitration proceedings. Due to the private nature of an arbitration, it imposes certain implied obligation of confidentiality. In regards to confidentiality of the award, Russell on Arbitration states —
>
> > The duty of confidence is qualified in relation to the award itself, when disclosure is reasonably necessary to establish or protect a party's legal rights as against a third party by founding a cause of action or a defence to a claim. In these circumstances disclosure of the award, including any reason given (but not the materials such as pleadings, witness statement, discovery etc use to give rise to the award) will not be a breach of the duty of confidentiality
>
> ...
>
> [98] It follows that an arbitration award and the reasons which gives rise to the final award may only be disclosed when it is reasonably necessary to establish or protect the legal right of a party to the arbitration proceedings as against third party. However in the instant case there is no issue raised as to the necessity of disclosing the entire Final Award for purpose of protecting the right of either the Applicants or the Respondent.

[50] Having regard to all the above, we therefore agreed with the High Court that only the dispositive portion of the arbitral award ought to be registered for purposes of enforcement of the arbitral award. The reasoning or findings of the arbitral tribunal would be relevant, if at all, to a court which is considering the merits of the award, for example in an application to set aside the arbitral award under s 39 of the AA 2005. And this will be done by way of an affidavit evidence, not by way of registration as a judgment of the High Court. Nevertheless, as stated earlier, there is no application filed by the appellant under s 39 of the AA 2005.

[51] We were mindful of the requirement under s 38 of the AA 2005 for the

respondents to produce a duly authenticated award. We were however of the view that the requirement is purely evidentiary. The production of a duly authenticated award is to enable the enforcing court to be satisfied that there is a valid and duly obtained arbitration award. Guidance may be had to s 102 of the UK Arbitration Act 1996 which deals with recognition or enforcement of a New York Convention Award. From the said section, it is clear that the production of the duly authenticated original award or the duly certified copy of it, is for the purpose of evidence to be produced by the party seeking recognition or enforcement of the same. Therefore, the production of a duly authenticated award, does not necessarily entail the recognition and conversion of the entire award into a judgment of the High Court.

[52] The respondents' insistence in having the entire award being recognised and enforced as a judgment of the High Court is brought about by their intention to use the findings of the arbitral tribunal in Suit 2009. Regardless of the intention of the respondents, the High Court dealing with an application under s 38 is only a court of enforcement. It cannot therefore be expected to allude to the merits of the arbitral tribunal's findings and analysis. In any event, the award is binding on the appellant and by the doctrine of res judicata, the appellant is also bound by the findings of the arbitral tribunal. There is nothing to prohibit the respondents from relying on the findings of the arbitral tribunal despite the fact that the entire findings are not registered and/or enforced as a judgment of the High Court.

CONCLUSION

[53] We agreed with the appellant that in deciding as it did, the Court of Appeal erred in failing to distinguish the role of a court of enforcement and a court of merits. As found by the Court of Appeal, having complied with the formal requirements of s 38 of AA 2005, the registration of the award under s 38 is granted as of right. Subject to s 39 of the AA 2005, in dealing with an application under s 38, a court is thus not required to go behind the award and to understand the arbitral tribunal's reasoning. Hence, the Court of Appeal's conclusion that there was merit in the argument of the respondents that if only the dispositive part of the award is registered, the court tasked with enforcement will be deprived of the advantage of understanding the arbitral tribunal's reasoning, is with respect, misconceived.

[54] In our view, the judicial commissioner did not err in concluding that it is the dispositive portion or the ultimate and final conclusion of the arbitral tribunal which is intended to be given due recognition as binding and enforceable by conferring it with the status and effect of a judgment of the High Court.

[55] The question was therefore answered in the affirmative and the appeal was allowed with costs. **A**

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar **B**

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