

ARBITRATION

REGISTRATION AND ENFORCEMENT OF ARBITRAL AWARDS IN MALAYSIA: WHICH DO YOU REGISTER – THE ENTIRE AWARD OR JUST THE ‘DISPOSITIVE’ PORTION OF THE AWARD?

In March 2020, the Federal Court in the case of *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) (Malaysia) & Ors [2020] MLJU 363* (the ‘Case’) decided on whether, in an application for registration and enforcement of an arbitral award under section 38 of the Arbitration Act 2005 as a judgement of the High Court of Malaya only relates to the dispositive portions of the award and not the entire award.

THE ISSUE The question before the Federal Court is whether for the purpose of an application made under section 38 of the Arbitration Act 2005 and Order 69 Rule 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?

BACKGROUND FACTS Due to disputes arising from a settlement agreement, an arbitration proceeding was commenced between Siemens Industry Software Gmbh & Co.Kg (‘**Siemens**’) and Jacob and Toralf Consulting Sdn Bhd & Ors (‘**Jacob**’) in 2014 in Singapore. The Arbitral Award was delivered in 2015 where Siemens’ claims against Jacob were dismissed by the Tribunal (‘the **Arbitral Award**’). Thereafter, Jacob filed an originating summons to register the whole of the arbitral award based on the findings made by the Tribunal under Section 38 of the **Arbitration Act 2005** and Order 69 Rule 8 of the **Rules of Court 2012**.

Siemens challenged the Originating Summons to register the whole of the Arbitral Award on the ground that only the ‘dispositive’ section of the Arbitral Award was capable of being registered. The High Court of Malaya agreed with Siemens and only allowed the ‘dispositive’ section of the Arbitral Award to be registered. The High Court held that to include the final award which contains the reasoning of the award would go against the very intention of Section 38 and 39 of the Arbitration Act 2005, which only provide recognition and enforcement to the dispositive portion of the final award.

Jacob then appealed against the High Court decision to the Court of Appeal. The Court of Appeal reversed the finding of the High Court and allowed for the registration of the whole of the Arbitral Award and held that it is pertinent to observe Article 25(2) of the International Chamber of Commerce, International Court of Arbitration Rules 1998, which provides that an award shall state the reasons upon which it is based. This requirement is also found in Section 33(3) of the Arbitration Act 2005.

Siemens then appealed to the Federal Court.

DECISION OF THE FEDERAL COURT

The Federal Court allowed Siemens’ appeal. In doing so, the Federal Court referred to the definition of the word ‘award’ as defined in the Arbitration Act 2005 itself, and held as follows:

“[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 section 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.”

DISPOSITIVE PORTION OF AN

AWARDS The Federal Court also explained what a ‘dispositive’ portion of an arbitral award would encompass. The Federal Court in its analysis drew an analogy to the ‘grounds of judgment’, which is ‘*separate and distinct from the judgment itself*’. The dispositive section of an award would be analogous to a judgment by the Court whilst the entirety of an arbitral award would be akin to the grounds of judgment. The grounds of judgment, or in this case, the whole of an arbitral award would contain the reasoning, analysis and/or findings. The dispositive portion would only contain the decision. The Federal Court found it unnecessary for the whole of the arbitral award to be registered.

CONFIDENTIALITY OF

ARBITRATION PROCEEDINGS The Federal Court further held that to register the whole of the arbitral award would undermine the principle of confidentiality of arbitration proceedings. Disclosure of the entire award must only be made when it is only reasonably necessary, for example to establish or protect rights of parties to the arbitration proceeding(s) against a third party. As such, in the circumstance that such a necessity is absent, the Federal Court found no reason to register the whole of the arbitral award.

CONCLUSION This landmark decision has put an end to the ambiguity that arises vis-à-vis portion(s) of an arbitral award that is registrable for purposes of recognition and enforcement by way of entry as a judgment pursuant to Section 38 of the Arbitration Act 2005. Practitioners would be well guided in future applications for registration of arbitration awards in Malaysia moving forward. Further, parties who have opted for arbitration proceedings as a forum for dispute resolution with a view to keep the goings-on of the dispute confidential can be assured that the portions of the award containing the facts, reasoning, findings and analysis which may impact the parties’ reputation or standing remains confidential.

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7 July 2020