

Malaysian Federal Court Decides - Register the Entire Arbitration Award or Only the Dispositive Portion?

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Introduction

In an arbitral award, the tribunal will ordinarily set out the grounds and reasons for its decision separately from its orders and reliefs. The part of the award in which the orders and reliefs are specifically enumerated is usually referred to as the dispositive portion of the award ("**Dispositive Portion**").

Under Malaysian law, for an arbitration award to be enforced in Malaysia, it must first be registered with the courts. However, can the whole award be registered, including the grounds of decision? Or is registration limited to only the Dispositive Portion?

In the recent decision of *Siemens Industry Software GMBH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd & Ors* [2020] 5 CLJ, the respondent sought to register the whole arbitration award. However, the Federal Court of Malaysia found that for the purposes of enforcement, only the Dispositive Portion had to be registered.

Here we explore the reasoning of the Federal Court in limiting the registration of an arbitration award to only its Dispositive Portion, as well as the practical implications of the decision on the enforcement of arbitral awards in Malaysia.

The Facts

The law which governs the registration and enforcement of an arbitration award is set out in section 38 of the Arbitration Act 2005 ("**Arbitration Act**") and Order 69 Rule 8 of the Rules of Court 2012.

In this case, the appellant, Siemens Industry Software GMBH & Co KG (Germany) ("**Appellant**") and the respondent, Jacob Toralf Consulting Sdn Bhd ("**Respondent**") entered into a settlement agreement. The settlement agreement contained an arbitration clause.

Despite the arbitration clause, the Respondent commenced a suit in 2009 in the Malaysian High Court ("**Suit 2009**"). Suit 2009 was stayed in favour of an arbitration initiated by the Appellant at the Singapore International Arbitration Centre ("**SIAC**").

The dispute went through a few rounds of appeal:

1. The High Court agreed with the Appellant's position and held that the function of the High Court was only to enforce the Dispositive Portion of the Award, hence there was no need to register the entire Award. The High Court was wary that registering the entire Award would lead to a re-ventilation before the courts of the merits of the case that were already canvassed during the arbitration proceedings.
2. This decision of the High Court was overturned by the Court of Appeal. Briefly, the Court of Appeal held that there is no provision in law that permitted the Award to be bifurcated.
3. On appeal to the Federal Court, the Court of Appeal's decision was overturned.

The Approach of the Malaysian Federal Court

The Federal Court affirmed the High Court's view that only the Dispositive Portion of a final award is intended to be registered, and thus made binding and enforceable by conferring on it the status and effect of a judgment of the High Court. The Federal Court's decision that only the Dispositive Portion of an arbitral award is to be registered focused largely on the limited role of the court in the enforcement of the award.

1. Tengku Maimun CJ analogised the court's enforcement of an arbitral award with its enforcement of foreign court judgments – a court enforcing a foreign judgment would usually only be concerned with the actual judgment or order, and not the grounds of judgment; similarly, a court enforcing an arbitral award would only need to be concerned with the *Dispositive Portion* of an arbitral award, and not the grounds of the tribunal's decision. In drawing this analogy, the Federal Court relied heavily on comparisons to the regime of the enforcement of foreign judgments provided under the Reciprocal Enforcement of Foreign Judgments Act 1958 ("**REJ Act**").

2. The Federal Court also agreed with the Appellant that the Court of Appeal erred in failing to distinguish between the role of an enforcement court and the role of a court in deciding on the merits of a claim. The High Court was acting in the former role in relation to the registration of the Award.

The Federal Court further considered the proper interpretation of section 38 of the Arbitration Act, holding that while the arbitral tribunal needs to give reasons for its Award, these reasons need not necessarily be registered.

Finally, the Federal Court found that the definition of "award" in section 2 of the Arbitration Act did not support the Respondent's argument that Parliament had intended to enable a party to register an arbitral tribunal's findings as part of its decision.

Analysis

The Federal Court relied heavily on the analogy between the REJ Act and the Arbitration Act in making its decision. However, the strength of the analogy may be questioned in light of the differences between the two Acts.

1. The REJ Act only applies to foreign judgments, whereas the Arbitration Act applies to arbitration awards. This difference was flagged by the Court of Appeal, which took the view that the circumstances did not warrant a like for like comparison.
2. The Acts were promulgated for different purposes. The REJ Act enables judgments from a select few jurisdictions to be registered as judgments within Malaysia for the purposes of enforcement, whereas section 38 of the Arbitration Act provides an avenue for the successful party to register the arbitration award in Malaysia as a judgment of the High Court for the purposes of enforcement.
3. The grounds to challenge the enforcement of judgments under the REJ Act differ from that provided for under section 39 of the Arbitration Act.

The Respondent had raised the concern that, even if the grounds of an arbitral decision were not relevant in *enforcement proceedings*, the reasoning or findings of the arbitral tribunal would be relevant to a Court when considering the merits of the Award in an application to *set aside* the Award.

The Federal Court acknowledged the relevance of the grounds of an Award in such circumstances, but ruled that the admission of such information could be dealt with as and when an application to set aside the registration of the arbitration award was made under section 39 of the Arbitration Act.

In short, it addressed the Respondent's concerns by effectively ruling that there is no bar to disclosing the entire Award by way of affidavit evidence if the registration of the Award is subsequently challenged.

Another aspect of the Federal Court's decision is its focus on confidentiality in arbitral proceedings. The Federal Court's decision seems to have given considerable weight to the element of confidentiality which is to be preserved subject only to when challenges are mounted against the registration of the arbitration award itself.

Furthermore, as the practice of registering only the Dispositive Portion of an arbitration award has been accepted by other Commonwealth jurisdictions, the Federal Court's decision is consistent with the approach adopted in those jurisdictions.

Concluding Remarks

The decision makes clear that a party seeking to register an award is usually better off registering only the Dispositive Portion. It also makes clear that registering more than the Dispositive Portion can create difficulties for the party seeking to enforce the award.

The decision also serves as a reminder of the difficulties that can ensue if the Tribunal does not properly deal with the reliefs and orders sought in a separate section of the award. This highlights the benefits of institutional arbitration. It is standard practice, in the major arbitral institutions, for the institution to scrutinise the award in draft before it is issued. That process of scrutiny will usually extend to checking that the award contains a Dispositive Portion which deals with the remedies and reliefs sought.

Parties are also encouraged to review an award swiftly upon receipt. In the event that the orders and reliefs prayed for by the parties are not dealt with in a specific section of the award, the party concerned should consider whether the rules of the arbitration, or the *lex arbitri*, permits an application to the Tribunal to address the deficiency. Such applications will usually have to be made very promptly.

The decision also highlights that, while arbitral awards will operate as an effective bar to litigation between the parties bound by the award with respect to the subject matter of the dispute, complex issues can arise where a dispute engages multiple parties not all of whom are bound by the same arbitration agreement, or where only part of a dispute is captured by the arbitration agreement. Careful consideration should be given in such circumstances to the formulation of the issues and claims for relief in the arbitration proceedings, and the potential interaction between the arbitration proceedings and parallel dispute resolution processes.

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