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SUPER SEA CABLE NETWORKS PTE LTD v. SACOFA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG J
[ORIGINATING SUMMONS NO: WA-24NCC(ARB)-25-07-2023]
6 OCTOBER 2023

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Abstract – *An arbitrator faced with a question on construction of a clause in an agreement, is at liberty to give an interpretation which is in favour of or against the parties to the arbitration, having considered the evidence and the arguments of the parties. An error of construction of the agreement by the arbitrator is not a sufficient ground to set aside the arbitrator's award, the arbitrator being the master of facts.*

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ARBITRATION: *Award – Registration – Final award in accordance with Arbitration Rules of Singapore International Arbitration Centre – Application for final award to be binding and enforced by entry as judgment of High Court of Malaya – Whether matters dealt in final award within arbitrator's domain – Whether construction of agreement question of law to be determined by and within remit of arbitrator – Whether court allowed to substitute its interpretation in event arbitrator wrongly interpreted agreement – Whether final award in compliance with public policy – Whether error of fact by arbitrator constitute ground for refusing recognition – Whether final award binding – Arbitration Act 2015, ss. 36(1), 38(2) & 39*

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The applicant, Super Sea Cable Networks Pte Ltd ('SSCN'), a company incorporated under the laws of Singapore and the respondent, Sacofa Sdn Bhd ('Sacofa'), a company incorporated under the laws of Malaysia, entered into a contract known as strategic alliance agreement ('SAA'). The SAA was subsequently amended by three supplemental agreements. Pursuant to cl. 25 of the SAA, SSCN and Sacofa agreed that any dispute, in connection with, or arising out of the agreement or the performance of the obligations of the

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parties, shall be referred to arbitration. When disputes arose between parties, the applicant commenced arbitration proceedings against the respondent. The arbitration was conducted by the arbitrator in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC') and the seat of the arbitration was Singapore. The final award, which was

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issued by the SIAC on 14 July 2023, was to be complied with by 11 August 2023. Following the final award made by the sole arbitrator appointed for the Singapore International Arbitration Centre ('SIAC') on 24 July 2023, SSCN filed an originating summons ('OS') pursuant to s. 38(2) of the Arbitration Act 2015 ('AA') for the said award to be recognised as binding and be enforced by entry as a judgment of the High Court of Malaya. The

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dispositive portion of the final award sought to be registered, *inter alia*, were:

(i) a declaration that SSCN had the right to property namely SSCN's built facilities (as defined in cl. 6.1 of the SAA), including the CCS that is marked with 'SEAX' and all equipment that lay therein per exh 'C-7'; (ii) an order that Sacofa should deliver-up SSCN's built facilities to SSCN or its nominated party within 28 days of 14 July 2023, *ie*, the date of the final award; and (iii) the extraction and delivery up of SSCN's built facilities should be monitored by an independent and qualified third party or such other duly qualified party as shall be appointed by SSCN at its own costs and notified by SSCN to Sacofa. In resisting the registration and enforcement of the final award, Sacofa relied on ss. 39(1)(a)(iv), (v) and/or (vi), and (b)(ii) of the AA and contended, *inter alia*: (i) the Tribunal's decision that SSCN was the beneficial owner of the SSCN's built facilities arising from its interpretation of cl. 6 of the SAA was not in accordance with Malaysian law; (ii) the arbitrator was not empowered, as a matter of Malaysian law, to make a decision that Sacofa had committed the act of conversion of SSCN's built facilities and make an award for the delivery up of SSCN's built facilities. Malaysian law dictates that orders for delivery up could only be granted as a relief in claims for detinue and not conversion. SSCN had not made a claim for detinue; and (iii) SSCN's claim for conversion in the SIAC Arbitration overlapped with that of Sacofa's Johor Bahru High Court Suit ('JBHC Suit') because the claim for conversion was related to the re-entry by Sacofa into Sacofa's landing station and touched on lease agreement related disputes in the JBHC Suit.

Held (allowing application):

(1) The matters dealt with in the final award were matters well within the arbitrator's domain. Whereas, the issues raised by Sacofa did not fall within any of the grounds set out in s. 39 of the AA. Sacofa's objections were in the nature of an impermissible attempt to appeal. The arbitrator had considered the evidence and the arguments of the parties in coming to his findings in rendering the final award. (paras 23-35)

(2) As regards the arbitrator's conclusion on ownership of the SSCN's built facilities, given the construction of the SAA is a question of law to be determined by, and within the remit of the arbitrator, even if the arbitrator had wrongly interpreted the SAA, it does not bring the matter within s. 39 of the AA as this court was not entitled to substitute its own interpretation. Sacofa's contentions that there were overlaps between the SIAC Arbitration and the JBHC Suit and that, under Malaysian law, orders for delivery up can only be granted as relief in claims for detinue and not conversion, were clearly caught by the principle of *res judicata*. (paras 28 & 32)

(3) To succeed on the public policy ground, Sacofa had to contend with a very high threshold and 'demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice.' Sacofa had not demonstrated any such circumstances that violated the most basic notions of morality and justice. There was no risk that registration and/or enforcement of the final award would contravene the Communications and Multimedia Act 1998 as Relief No. 2 of the final award allowed delivery-up to be made to, *inter alia*, SSCN's nominated party, SEAX Malaysia Sdn Bhd, who was in possession of the relevant licences. This was addressed by the arbitrator in the final award and therefore, there was nothing illegal in the award that contravened public policy. (paras 34, 36 & 37)

(4) Sacofa could have availed itself of an application under r. 29.1(b) of the SIAC Rule for early dismissal of the SIAC Arbitration if Sacofa felt that SSCN's claims or reliefs were outside the arbitrator's jurisdiction or the scope of arbitration, but Sacofa did not make such application. The issues culminating in the final award were at all material times submitted to the arbitrator for determination. The arbitrator was vested with jurisdiction to rule on the issues of ownership and/or right to possession of SSCN's built facilities as these matters emanated from the SAA. Hence, there were no procedural irregularities. The arbitrator did not err whether in law or fact in arriving at his conclusions. The arbitrator was the master of facts. Even if he did err, it was not a ground for setting aside or to refuse recognition. (paras 38, 40 & 42)

(5) Once the requirements of s. 38 of the AA are complied with, this court must recognise the final award and enforce the same by entry as a judgment in terms of the final award – unless there is a valid ground to refuse enforcement under s. 39 of the AA. On the factual matrix, no such ground came within the scope of s. 39 of the AA. In this regard, the court's intervention was circumscribed by s. 8 of the AA. In consequence, the final award dated 14 July 2023 was final and binding pursuant to r. 32.11 of the SIAC Rules and s. 36(1) of the AA. Sacofa was therefore bound to comply with the final award by 11 August 2023. (paras 45 & 46)

Case(s) referred to:

Agrovenus LLP v. Pacific Inter-Link Sdn Bhd & Another Appeal [2014] 4 CLJ 525 CA ***(refd)***
AJT v. AJU [2010] 4 SLR 649 ***(refd)***
AKN v. ALC [2015] 3 SLR 488 ***(refd)***
Cairn Energy India Pty Ltd & Anor v. The Government Of India [2010] 2 CLJ 420 CA ***(refd)***
CTI Group Inc v. International Bulk Carriers SPA [2017] 9 CLJ 499 FC ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & Another Case [2013] 4 CLJ 1172 HC ***(refd)***
Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd [2020] 9 CLJ 213 FC ***(refd)***
OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd [2019] 10 CLJ 1 CA ***(refd)***
Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal [2020] 9 CLJ 466 FC ***(refd)***
Perbadanan Kemajuan Negeri Selangor v. Teo Kai Huat Building Contractor [1982] CLJ 352; [1982] CLJ (Rep) 257 FC ***(refd)***
PT Asuransi Jaya Indonesia (Persero) v. Dexia Bank SA [2006] SGCA 41 ***(refd)***
Qingdao Hongdaxinrong International Trade Co Ltd v. Charterwin Trading Sdn Bhd And Other Cases [2023] 1 LNS 1251 HC ***(refd)***
Siemens Industry Software GmbH & Co KG (Germany) v. Jacob And Toralf Consulting Sdn Bhd & Ors [2020] 5 CLJ 143 FC ***(refd)***
Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Stone World Sdn Bhd v. Engareh (M) Sdn Bhd [2020] 9 CLJ 358 FC ***(refd)***
Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd [2010] 3 SLR 1 ***(refd)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***
The Government Of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***
Tridant Engineering (M) Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd [2017] 2 CLJ 393 CA ***(refd)***
Tune Talk Sdn Bhd v. Padda Gurtaj Singh [2019] 1 LNS 85 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 20, 36(1), 38(2), 39(1)(a)(iv), (v), (vi)
Courts of Judicature Act 1964, s. 44
Communications and Multimedia Act 1998, s. 126

Arbitration Rules of the Singapore International Arbitration Centre [Sing], rr. 29.(1b), 32.11, 35, 37

For the plaintiff - Lim Chee Wee, Alvin Oh Seong Yew, Sew Chang Peng & Sarah Chin Yuan Ching; M/s Lim Chee Wee Partnership
For the defendant - Malik Imtiaz, S Muralitharan, Khoo Suk Chyi, Wong Meng Yen & Lai Chun Sheng; M/s Murali Sangaran

Reported by S Barathi

JUDGMENT

Liza Chan Sow Keng J:

Introduction

[1] This originating summons ("OS") was filed by the applicant for the dispositive portion of the final award dated 14 July 2023 made by Mr Peter Godwin, the sole arbitrator appointed for the Singapore International Arbitration Centre ("SIAC") Arbitration Case No. 304 of 2022 between the applicant *ie*, Super Sea Cable Networks Pte Ltd ("SSCN") and the

respondent *ie*, Sacofa Sdn Bhd ("Sacofa"), be recognised as binding and be enforced against Sacofa by entry as a judgment of the High Court of Malaya in terms of the final award pursuant to s. 38(1), Arbitration Act 2005 ("AA").

[2] After having read the cause papers, considered the submissions of the parties and heard their oral arguments, I have allowed the OS with costs on 21 August 2023. This judgment contains the full reasons for my decision.

Background Facts

[3] The background facts are culled from the cause papers and submissions of the parties.

[4] SSCN is a company incorporated under the laws of Singapore with its registered address at 133 New Bridge Road #18-03, Chinatown Point, 059413 Singapore.

[5] Sacofa is a company incorporated under the laws of Malaysia with a registered address at Level 3, Wisma Mahmud, Jalan Sungai Sarawak, 93100 Kuching, Sarawak.

[6] SSCN and Sacofa entered into a contract known as to the strategic alliance agreement dated 20 December 2013 ("SAA"). The SAA was subsequently amended by three supplemental agreements dated 3 March 2016, 7 December 2017 and 14 December 2021.

[7] Pursuant to cl. 25 of the SAA, SSCN and Sacofa agreed that any dispute, in connection with, or arising out of the agreement or the performance of the obligations of the parties, shall be referred to arbitration.

[8] Disputes arose between the applicant and respondent. The applicant commenced arbitration proceedings against the respondent.

[9] The arbitration was conducted by Mr Peter Godwin ("arbitral tribunal, interchangeably the arbitrator"), in accordance with the Arbitration Rules of the SIAC. The seat of the arbitration is Singapore.

[10] The final Award No. 089 of 2023 was issued by the SIAC on 14 July 2023.

[11] The dispositive portion of the final award sought to be registered is produced:

(i) a declaration that SSCN has the right to property namely SSCN's built facilities (as defined in cl. 6.1 of the SAA), including the CCS that is marked with "SEAX" and all equipment that lies therein per exh. "C-7";

(ii) an order that Sacofa shall deliver up SSCN's built facilities (as defined by cl. 6.1 of the SAA) to SSCN or its nominated party within 28 days of 14 July 2023 (*ie*, the date of the final award);

(iii) that the extraction and delivery up of SSCN's built facilities shall be monitored by an independent and qualified third party, namely Leo Cheong Swee (Singapore NRIC No. S8860746E) or such other duly qualified party as shall be appointed by SSCN at its own cost and notified by SSCN to Sacofa;

(iv) each party shall bear its own legal and other costs pursuant to r. 37 of the SIAC Rules;

(v) the costs of the SIAC Arbitration pursuant to r. 35 of the SIAC Rules shall be borne equally as between SSCN (50%) and Socofa (50%); and

(vi) all other claims in this arbitration be dismissed.

[12] The final award was to be complied with by 11 August 2023.

[13] Following the final award, on 24 July 2023, SSCN filed the OS pursuant to s. 38(2) of the AA for the said award to be recognised as binding and be enforced by entry as a judgment.

SSCN's Case For Registration And Enforcement Of The Final Award

[14] SSCN asserts:

(i) that by producing the duly certified copy of the final award and the duly certified copy of the SAA (and the three supplementary agreements), it has fulfilled the requirements for recognition and enforcement of the final award;

(ii) the court should in dealing with an application under s. 38 of the AA adopt a "mechanistic" or formalistic approach and so long as the award and arbitration agreement, whether a certified true copy or original copy, the courts would treat the production of these documents as *prima facie* proof of compliance with s. 38 of the AA – *Agrovenus LLP v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2014] 4 CLJ 525;

(iii) Sacofa bears the burden of establishing why the OS should not be granted;

(iv) Sacofa may only rely on the exhaustive grounds set out in s. 39 of the AA and no other – the Federal Court in *CTI Group Inc v. International Bulk Carriers SPA* [2017] 9 CLJ 499; [2017] 5 MLJ 314 at [106] held that a respondent may only rely on "any one or more of the grounds set out in s. 39 and no other" to challenge recognition and enforcement; and

(v) in view that SSCN has complied with s. 38 of the AA and Sacofa has not discharged its burden of establishing any of the grounds under s. 39 of the AA, the OS should be allowed.

Sacofa's Grounds For Resisting Recognition And Enforcement Of The Final Award

[15] Sacofa relies on ss. 39(1)(a)(iv), (v) and/or (vi), and (b)(ii), AA and in gist contended that:

(i) the tribunal's decision that SSCN was the beneficial owner of the SSCN's built facilities arising from its interpretation of cl. 6 of the SAA was not in accordance with Malaysian law:

(a) such a decision did not fall within the terms of the submission to the SIAC arbitration which required the application of Malaysian law; and/or

(b) such a decision was not in accordance with the agreement of the parties, as they had agreed that the governing law was Malaysian law;

(c) clause 6.1 was clear and unambiguous and did not provide for Sacofa to hold SSCN's built facilities on trust in the manner contended. The arbitrator was obliged to apply a contextual approach and there was no basis under Malaysian law for a term to that effect to be implied into that clause – *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177;

(d) clause 6.1 to 6.3 of the SAA could not be interpreted to the effect that SSCN was the true beneficial owner of SSCN's built facilities so as to countenance a circumvention of or defiance of s. 126, Communications and Multimedia Act 1998 ("CMA"), as SSCN was never licenced to own network facilities, which SSCN's built facilities are; this is a contravention of Malaysian public policy indicated by the licencing framework under the CMA;

(e) the conclusion of the tribunal that SSCN was the beneficial owner of the said facilities rendered the SAA illegal and this court cannot permit the registration and enforcement of an award that is illegal;

(ii) the arbitrator was not empowered, as a matter of Malaysian law to make a decision that Sacofa had committed the act of conversion of SSCN's built facilities and make an award for the delivery up of SSCN's built facilities. Malaysian law dictates that orders for delivery up can only be granted as a relief in claims for detinue and not conversion. SSCN had not made a claim for detinue. In conversion, the relief lies in damages, see *Perbadanan Kemajuan Negeri Selangor v. Teo Kai Huat Building Contractor* [1982] CLJ 352; [1982] CLJ (Rep) 257 at p. 262 and *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 9 CLJ 358 at [54] to [60]. In short, the arbitrator's conclusions:

(a) did not fall within the terms of the submission to the SIAC arbitration, which required the application of Malaysian law; A

(b) went beyond the scope of the submission to the SIAC arbitration as SSCN did not make a claim for detinue; and/or

(c) which applied the Court of Appeal case in *OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd* [2019] 10 CLJ 1; [2020] 3 MLJ 358 over the Federal Court cases failed to apply Malaysian law as the agreed governing law by the parties, and/or failed to adhere to *stare decisis* and therefore contravened public policy; B

(iii) SSCN's claim for conversion in the SIAC arbitration overlaps with that of Sacofa's Johor Bahru High Court Suit No. JA-22NCVC-162-10/2022 ("JBHC Suit") because the claim for conversion relates to the re-entry by Sacofa into Sacofa's landing station and touches on lease agreement related disputes in the JBHC Suit. C

[16] SSCN disagreed, and countered that the grounds advanced by Sacofa to resist registration and enforcement are without basis: D

(i) firstly, the final award dated 14 July 2023 is final and binding pursuant to r. 32.11 of the SIAC Rules and s. 36(1) of the Arbitration Act 2005;

(ii) second, Sacofa's contention that there are purportedly overlaps between the SIAC arbitration and the JBHC Suit is clearly caught by the principle of *res judicata* and Sacofa is estopped from relying on such ground as the contention was raised before and rejected by the High Court, two different Court of Appeal panels, as well as the arbitrator: E

(a) Sacofa's anti-arbitration injunction application which the High Court dismissed on 7 May 2023; F

(b) Sacofa's application to the Court of Appeal J-02(IM)(NCvC)-808-05-2023 pursuant to s. 44 of the Courts of Judicature Act 1964 for interim orders in virtually identical terms of its High Court application which was heard and dismissed on 15 June 2023; G

(c) Sacofa's appeal against the dismissal of its anti-arbitration injunction application which was heard and dismissed by a different panel of the Court of Appeal on 7 July 2023; and

(d) the arbitrator's ruling that he has jurisdiction over the dispute concerning ownership of and/or right to possession of SSCN's built facilities is further an implicit rejection of the respondent's contention that the reamended statement of claim still fundamentally relates to the lease agreement as these are "separate disputes under the SAA which were properly to be determined under the arbitration agreement contained therein" – para. 91 of the final award. H I

(iii) third, the arbitrator is vested with jurisdiction to rule on issues of ownership and/or right to possession of SSCN's built facilities as these are matters governed by and/or emanated from the SAA;

(iv) fourth, the issues raised by Sacofa which have already been adjudicated upon amounts to a challenge on the merits of the final award by "go[ing] behind the award" and "reargue[ing] matters which have been comprehensively dealt with in the course of arbitration" – *Siemens Industry Software GmbH & Co KG (Germany) v. Jacob And Toralf Consulting Sdn Bhd & Ors* [2020] 5 CLJ 143; [2020] 3 MLJ 1 and *Qingdao Hongdaxinrong International Trade Co Ltd v. Charterwin Trading Sdn Bhd And Other Cases* [2023] 1 LNS 1251; [2023] MLJU 1467. Even if the arbitrator has committed any error of law, it is not reviewable;

(v) fifth, there is no risk that registration and/or enforcement of the final award will contravene the Communications and Multimedia Act 1998 as the final award allows delivery-up to be made to SSCN's nominated party, SEAX Malaysia Sdn Bhd who possesses the relevant licences.

Legal Principles

[17] As the enforcement application is made under s. 38 of the AA and the grounds of objection are made under s. 39 of the AA, they are produced for ease of reference:

> 38. Recognition and Enforcement
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> (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 recognised 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-
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> (a) the duly authenticated original award or a duly certified copy of the award; and
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> (b) the original arbitration agreement or a duly certified copy of the agreement.
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> (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.
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> (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

39. Grounds for refusing recognition or enforcement

(1) 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:

(a) where that party provides to the High Court proof that-

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration*;

(v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration*;

(vi) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act*; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

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

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced. (emphasis added)

[18] In this case, it is not disputed that SSCN has complied with the formal requirements by producing the duly certified copy of the final award and the duly certified copy of the SAA (and the three supplementary agreements). The burden then shifts to Sacofa to satisfy the court why recognition and enforcement should not avail SSCN.

[19] Section 39 of the AA restricts the specific grounds upon which recognition or enforcement of an award can be refused by the courts.

[20] In *Tune Talk Sdn Bhd v. Padda Gurtaj Singh* [2019] 1 LNS 85; [2020] 3 MLJ 184, the Court of Appeal held:

> [150] Sections 38-39 of the AA are meant to be **exhaustive.** There is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitration award under the AA.
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> (emphasis added)

[21] I now turn to deal with Sacofa's challenges.

[22] In reading the final award, I am reminded by the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86 at para 65:

> ... it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously.

[23] Reading the award generously in line with *Soh Beng Tee*, I hold that the matters dealt with in the final award were matters well within the arbitrator's domain.

[24] Having considered carefully the submissions of the parties and read the cause papers, in my judgment, the issues raised by Sacofa do not fall within any of the grounds set out in s. 39 of the AA.

[25] I am of the respectful view that Sacofa's objections that:

(i) the arbitrator's interpretation of cl. 6 of the SAA that led to his finding that SSCN is beneficial owner of SSCN's built facilities was inconsistent with Malaysian law and thus fell outside the terms of submission to the arbitration;

(ii) the arbitrator's failure to apply Malaysian law, where orders for delivery up can only be granted as relief in claims for detinue and not conversion;

(iii) the overlap between the conversion claim in SIAC arbitration and the JBHC Suit on the basis that SSCN's claim for conversion relates to Sacofa's re-entry into the demised land are in the nature of an impermissible attempt to appeal. A generous reading of the final award makes clear that the arbitrator had considered the evidence and the

arguments of the parties in coming to his findings in rendering the final award. His findings on the ownership claim are set out at paras. 109 to 126, the findings on conversion, why he applied *OSK Trustees*, and whether the conversion claim in the SIAC arbitration overlaps with the JBHC Suit were comprehensively set out at paras. 90 to 99 of the final award, in particular paras. 94, 95, 96 and 97, also paras. 135, 136, 137 and 142.

[26] In my respectful view, Sacofa's complaints amount to failure on the part of the arbitrator to appreciate evidence, facts and arguments which Sacofa conceive as favourable to it, and in effect, stripped bare of legal niceties, is nothing more than a challenge on the merits of the claim, which is not open for this court to delve into as they do not concern s. 39 of the AA. These matters have been comprehensively dealt with in the course of arbitration. Sacofa, as the losing party in arbitration, is not entitled to relitigate. In this regard, the Chief Justice of Singapore, Menon CJ, in delivering the judgment of the Court of Appeal in *AKN v. ALC* [2015] 3 SLR 488; [2015] SGCA 18 at [39] cautioned the courts against attempts by ingenious counsel to disguise what is substantially an appeal on the legal merits of an arbitral award as a challenge on process failures during the arbitration:

> 39. *In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the real nature of the complaint …* (emphasis added)

[27] The Federal Court in *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 9 CLJ 213 reminded that courts do not review the merits of the arbitral tribunal's decision:

> **As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process**. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), **the courts do not review the merits of the arbitral tribunal's decision**. (emphasis added)

[28] As regards the arbitrator's conclusion on ownership of the SSCN's built facilities, given the construction of the SAA is a question of law to be determined by, and within the remit of the arbitrator, I take the view that EVEN IF the arbitrator had wrongly interpreted the SAA, it does not bring the matter within s. 39 of the AA as this court is not entitled to substitute its own interpretation. In *Cairn Energy India Pty Ltd & Anor v. The Government Of India* [2010] 2 CLJ 420; [2009] 6 MLJ 795, the Court of Appeal:

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> [24] *There was nothing improper for the majority arbitrators to have been persuaded by the construction of the appellants, and could not be said to have acted so erroneously that a court must set aside that finding. It was just a question of the arbitrators choosing one reasonable construction over the other. It cannot be overly emphasized that a difference of opinion in the construction of the facts and provisions, and in light of the majority arbitrators' plausible conclusion, is insufficient ground to conclude that a manifest error of law had been established, which allegedly had caused an error on the face of the award*.
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> ...
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> [45] *There could be no doubt that as against the construction by the arbitral tribunal, the court below had a different construction. So evidently, therefore, the court below had treated the application before it as an appeal*.
>
> [46] *But even if the issue before the court below were a question of mixed fact and law, it was still not open to the court below to reopen the issue, and or to construct the PSC* (see *Pembinaan LCL Sdn Bhd v. SK Styroform and Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority*). The court below had no appellate powers. If it were a question of mixed fact and law, it was only open to the court below to determine whether there was error of law on the face of the award. *The court below identified an error of construction as the error of law. But an error of construction is not a sufficient ground to set aside the award* (*Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* citing *Worsdell v. Holden* 1 LT 14).
> (emphasis added)

[29] In accordance with the spirit of the judicial approach of minimal curial intervention, in dealing with the construction of an agreement, the Federal Court in *The Government Of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 through Richard Malanjum CJ (Sabah and Sarawak) as His Lordship then was, emphasised:

> [52] We note that *the Arbitrators were faced with a question on the construction of a clause in an agreement*. From the reading of it, no doubt it could be given two interpretations – one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. *The fact that the learned Majority Arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge*.
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> [53] And as Scrutton LJ put it '*... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences*; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; *if you choose to go to Caesar you must take Caesar's judgment*'. (See *African and Eastern (Malaya) Ltd v White, Palmer and Co Ltd* [1930] 36 Lloyd's LR 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim v. Dato' Teong Teck Leng* [1996] 2 CLJ 249.) (emphasis added)

B C D E F G H I

[30] Not only that, s. 36 of the AA and r. 32.11 of the SIAC Rules make the final award final, binding and conclusive. Rule 32.11 reads:

> Subject to Rule 33 and Schedule 1, by agreeing to arbitration under these Rules, *the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay*. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made. (emphasis added)

[31] In amplification of the preceding paragraphs, it is apposite to be reminded again of the policy of minimal curial intervention reiterated recently by the Federal Court in *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal* [2020] 9 CLJ 466 where it stated at [7] to [10]:

> [7] *It was submitted that the decision of the High Court and the Court of Appeal to interfere with the arbitration award offends the spirit of ss. 8 and 36 of the Act and the principles of arbitral finality and minimal intervention which if not corrected will undermine the value of the arbitral process and cause litigants to run away from such alternative dispute resolution avenue*.
>
> [8] *Section 8 of the Act enshrines the principle of minimal interference by the court, which is an ingrained aspect of the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration*: see *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 (CA) which was cited with approval by this court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1.
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> [9] This court in the recent case of *Jan De Nul (M) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 made the following observations on the effect of ss. 8-9, 37 and 42 of the Act:
>
> > *The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice*. (see: *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v. Impregilo SpA And Others* [2005] UKHL 43). *In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined*.
>
> [10] *The principle is trite that courts do not exercise appellate jurisdiction over arbitration awards*: see *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113. The only provisions in the Act that provide for the setting aside of domestic awards are s. 37(1) and s. 42(1)-(4) of the Act (before its deletion). (emphasis added)

[32] I agree with SSCN's argument that Sacofa's contentions here that there are overlaps between the SIAC Arbitration and the JBHC Suit and that under Malaysian law, orders for delivery up can only be granted as relief in claims for detinue and not conversion are clearly caught by the principle of *res judicata*; as such this court should not accede to Sacofa's fifth attempt to resuscitate this issue. With the greatest of respect, it smacks of abuse of process. Sacofa is also estopped from relying on such a ground.

[33] I find Sacofa's objections on tribunal's failure to apply Malaysian law as the agreed governing law by the parties, and/or failure to adhere to *stare decisis* in making conclusions that (i) SSCN is the beneficial owner of the said facilities would contravene s. 126, CMA rendered the SAA illegal, (ii) Sacofa had committed the act of conversion of SSCN's built facilities and make an award for the delivery up of SSCN's built facilities, (iii) that there is no overlap between the SIAC Arbitration and the JBHC Suit are in conflict with the public policy of Malaysia, and that this court cannot permit the registration and enforcement of an award that is illegal, have not been made out. Even if the arbitrator had applied the law erroneously (I make no such conclusion), it is not for the court to intervene.

[34] This is because to succeed on the public policy ground, Sacofa has to contend with a very high threshold and 'demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice.' – see *dicta* of Lee Swee Seng JC (now JCA) in *Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & Another Case* [2013] 4 CLJ 1172; [2012] 5 MLJ 809, paras 42 and 44:

> [42] *With respect I fail to see how the award of the arbitrator can be said to be against the public policy of Malaysia*. Surely *if it is against the public policy* of Malaysia then the *respondent should have raised this at the outset of the arbitration and not after the award* had been given against the respondent. *Is the respondent Niche Properties suggesting then that if the award had been in its favour then it would not be against public policy*? There is nothing against public policy for the arbitrator to adjudicate on the rights of the parties under the JVA even though the subject matter has to do with a housing development project. ...
>
> [44] The Singapore decision of *AJT v. AJU* [2010] 4 SLR 649 has this helpful explanation ... as to the substance and scope of 'public policy' ... *it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' ... or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' ... or where it violates the forum's most basic notion of morality and justice ...*
>
> (emphasis added)

[35] *AJT v. AJU* referred by Lee Swee Seng JC (now JCA) quoted Judith Prakash J in *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1:

... The party seeking to challenge an award has to identify the public policy which the award allegedly breaches and to show which part of the award conflicts with that public policy. Prakash J further cited *PT Asuransi* and stated that *in order for a plaintiff to succeed on the public policy argument, it has to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice*. (emphasis added)

[36] Sacofa in my respectful view has not demonstrated any such circumstances here that violate the most basic notions of morality and justice.

[37] I accept and agree with SSCN's argument that there is no risk that registration and/or enforcement of the final award will contravene the CMA as Relief No. 2 of the final award allows delivery-up to be made to, *inter alia*, SSCN's nominated party SEAX Malaysia Sdn Bhd who is in possession of the relevant licences. This was in fact addressed by the arbitrator in the final award. I thus find there is nothing illegal in the award that contravened public policy.

[38] On the complaint by Sacofa that the arbitrator had selectively read the statement of claim that had been amended and reamended, and reformulated the basis of the claim for conversion as being grounded only on the "padlocking of the SSCN's built facilities" and thus not the dispute that was referred to arbitration, in my respectful view, it still boils down to the crux of the dispute which is essentially on who has the right to property in SSCN's built facilities; this is clearly connected to and/or arises out of the SAA, namely cl. 6 of the SAA and thus within the remit of the arbitrator. At any rate, the arbitrator in making a determination of delivery-up without the need for access to Sacofa's land did reason at [94] and [95] of the final award that 'a claim in conversion can arise out of the interference with assets to which a party has a clear and immediate right to possess/ownership' and that such claim 'can arise independently of any questions surrounding access to the specified land which would arise under the lease agreement'. In this context, I agree with SSCN that Sacofa could have availed itself of an application under the r. 29.1(b) of the SIAC Rule for early dismissal of the SIAC arbitration if Sacofa felt that SSCN's claims or reliefs were outside of the arbitrator's jurisdiction or the scope of arbitration, but Sacofa did not make such application. In *Kelana Erat* at [42], the court said such complaints should have been raised 'at the outset of the arbitration and not after the award had been given against the respondent'.

[39] In deciding if a claim that an arbitral award (or part thereof) was not within the scope of the submission to arbitration, there is guidance from the Court of Appeal in *PT Asuransi Jaya Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41, a decision followed on our shores. The court is to ascertain:

(i) the matters which were within the scope of the submission to the arbitral tribunal; and

(ii) whether the arbitral award (or the part being impugned) involved such matters, or whether it was a 'new difference' which would have been 'irrelevant to the issues requiring determination' by the arbitral tribunal.

[40] I find the issues culminating in the final award were at all material times submitted to the arbitrator for determination. With respect, the arbitrator is vested with jurisdiction to rule on the issues of ownership and/or right to possession of SSCN's built facilities as these matters emanated from the SAA. In *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; [2009] MLJU 0793, the court held "it is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters." The Court of Appeal in *Tridant Engineering (M) Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd* [2017] 2 CLJ 393; [2016] 6 MLJ 166 reiterated the *ratio* in *Taman Bandar Baru Masai* and at [35] stated 'As long as there has not been any breach of the rules of natural justice and parties had been given ample opportunity to submit on the issue which was ancillary to the claim or defence, the strict rule of pleadings does not apply in the arbitral regime.' I thus fail to see any procedural irregularities. It appears to me that Sacofa's dissatisfaction with the arbitrator's findings was ingeniously presented by its capable lawyers as a breach of s. 20 of the AA in that Sacofa was not treated equally or that there was a breach of natural justice. This is so as the parties argued, did make submissions and presented their case on the very issue of ownership and/or right to possession of SSCN's built facilities.

[41] The arbitrator, on the documents and arguments before him, took stock of the state of play and did not accept Sacofa's arguments. It is clear to me that Sacofa is effectively challenging the arbitrator's presupposed errors of law.

[42] In my utmost respectful view, the arbitrator did not err whether in law or fact in arriving at his conclusions. It is trite that the arbitrator is the master of facts – see *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 at [153]. Even if he did err, it is not a ground for setting aside or to refuse recognition.

[43] In *Tune Talk Sdn Bhd* (*supra*), the Court of Appeal elucidated:

> [82] The grounds upon which an arbitration award may be refused recognition and enforcement are set out in s. 39(1). These grounds (nine altogether) as stated earlier are exhaustive.
>
> [83] The word 'shall' in s. 38(1) of the AA is, as the word denotes, a mandatory requirement (see *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 MLJ 389 and *Yap Teck Ngian v. Yap Hong Lang @ Yap Fong Mei & Ors* [2006] 6 MLJ 607).

> [84] As the word 'shall' in s. 38 of the AA denotes a mandatory requirement it therefore means that there is no room for the exercise of any discretionary power by the High Court if both substantive requirements in that section are fulfilled (which is the case here) and there are no grounds for refusal of recognition and enforcement under s 39 of the AA.

[44] Tengku Maimun Tuan Mat CJ in *Siemens Industry Software GmbH & Co KG (Germany) v. Jacob And Toralf Consulting Sdn Bhd & Ors* [2020] 5 CLJ 143; [2020] 3 MLJ 1 along the same vein, held:

> [53] ..., *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. (emphasis added)

[45] Thus, once the requirements of s. 38 of the AA are complied with, this court must recognise the final award and enforce the same by entry as a judgment in terms of the final award – unless there is a valid ground to refuse enforcement under s. 39 of the AA. As adverted to earlier, on the factual matrix here, I found no such ground that came within the scope of s. 39 of the AA. In this regard, the court's intervention is circumscribed by s. 8 of the AA which provides:

> 8 Extent of court intervention
>
> No court shall intervene in matters governed by this Act except where so provided in this Act.

[46] In consequence, the final award dated 14 July 2023 is final and binding pursuant to r. 32.11 of the SIAC Rules and s. 36(1) of the AA. Sacofa is therefore bound to comply with the final award by 11 August 2023.

[47] I therefore have no valid reason not to recognise and enforce the final award. Accordingly, I would allow order in terms of the OS, with variation to prayer 2.2 for Sacofa to comply within 14 days from the date of this order, and costs to SSCN subject to allocatur.