Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) [2010] SGHC 108

Suit No:	Originating Summons No 807 of 2009
Decision Date:	9 April 2010
Court:	High Court
Coram:	Belinda Ang Saw Ean J
Counsel:	Herman Jeremiah, Loh Jen Wei and Wendy Goh (Rodyk & Davidson LLP) for the plaintiff; Sarbjit Singh and Cheryl Monteiro (Lim & Lim) for the defendant.

Subject Area / Catchwords
Arbitration

Enforcement – Foreign award

9 April 2010 Judgment reserved.

Belinda Ang Saw Ean J:

1 The plaintiff, Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S)("DSK") took out this Originating Summons No 807 of 2009 ("OS 807") to obtain leave under s 29 of the International Arbitration Act (Cap 143A, 2002 Rev Ed)("IAA") to enforce a final award made by the Danish Arbitration Institute ("the Tribunal") on 16 April 2009 against the defendant, Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) ("Ultrapolis"). In the arbitration before the Tribunal, DSK was the claimant and Ultrapolis was the respondent.

Background facts

2 DSK is a Danish company specialising in providing consultant services for ship design. Ultrapolis engaged DSK to provide professional design services for a 90m mega yacht by entering into a written agreement dated 29 August 2005 ("First Agreement"). Enclosed in the First Agreement was DSK's Standard Conditions of Sale, Work and Delivery (July 2001 version) which Ultrapolis signed on all pages of the printed standard conditions.

3 Thereafter, the parties mutually rescinded the First Agreement in favour of a new agreement for design services for a 100m mega yacht ("New Agreement"). It is not in dispute that both parties signed the New Agreement. Counsel for DSK, Mr Herman Jeremiah, informed the court that the contract was concluded on 21 December 2005. I interpose here to mention that a preliminary issue in dispute before the Tribunal was whether the November 2005 version of the Standard Conditions of Sale, Work and Delivery ("the Standard Conditions"), which included the arbitration clause, formed part of the New Agreement. It is an issue that has surfaced as a ground in opposition to OS 807.

4 DSK said it completed and delivered 95% of the contracted work to Ultrapolis. DSK duly claimed for 95% of the remuneration but Ultrapolis refused to pay. DSK then referred the matter to arbitration before three members of the Tribunal on 24 November 2006, namely Professor Vibe Ulfbeck(chairman), Attorney Peter Bang and Attorney Lars M. Hareskov. Ultrapolis challenged the Tribunal's jurisdiction on the ground that there was no agreement to arbitrate as the New Agreement did not incorporate the arbitration clause in the Standard Conditions. After a contested hearing on the preliminary issue of jurisdiction, the Tribunal held that it had jurisdiction to hear the dispute having found that the Standard Conditions, including the arbitration clause, formed part of the New Agreement, and that the wording of the arbitration clause clearly referred to the Tribunal, the

Danish Arbitration Institute. Ultrapolis did not challenge the Tribunal's decision on jurisdiction in the Danish Court (as it was entitled to do). Ultrapolis also chose to be absent from the main oral hearing of the substantive dispute before the Tribunal which took place on 5 December 2008. The Tribunal then passed its award on 11 February 2009 ("First Award") and subsequently, a corrected award on 16 April 2009 ("Corrected Award"). The explanation for the Corrected Award is found in **[51]** below.

OS 807

5 DSK is applying for leave to enforce the Corrected Award (it being the final award of the Tribunal) under s 29 of the IAA. Such an application is usually made *ex-parte*, but on this occasion, DSK asked for OS 807 to be fixed for hearing on an *inter partes* basis. The Duty Registrar acceded to DSK's request on 15 July 2009.

6 Ultrapolis is resisting the enforcement of the Corrected Award on the grounds that:

> (a) DSK is not able to produce the original arbitration agreement and the copy that has been produced does not constitute an arbitration agreement as required under s 30(1)(*b*) of the IAA;
>
> (b) the award which DSK seeks to enforce is founded on a non-existent arbitration agreement and so enforcement should be refused under s 31(2)(*b*) of the IAA;
>
> (c) if there was an arbitration agreement as claimed by DSK, the composition of the arbitral authority was not in accordance with it and, therefore, enforcement of the Corrected Award should be refused under s 31(2)(*e*) of the IAA; and
>
> (d) the Corrected Award was made and passed at a time when the Tribunal was *functus officio* with the consequence that the enforcement of the Corrected Award should be refused under s 31(2)(*e*) of the IAA.

7 Before I consider each of the objections (which are, for expediency, formulated as issues) in turn, I should mention the case advanced by Ultrapolis was initially limited to issues (a), (c) and (d). Issue (b) was introduced in the course of argument and that necessitated an adjournment for further affidavits to be filed by experts on Danish law.

The issues opposing enforcement

First issue: whether DSK has satisfied s 30(1)(b) of the IAA to produce a certified true copy of the arbitration agreement

8 Section 30(1)(*b*) of the IAA requires the production of the "original arbitration agreement" under which the award purports to have been made. The provision reads as follows:

> Evidence
>
> 30. —(1) In any proceedings in which a person seeks to enforce a foreign award by virtue of this Part, he shall produce to the court —
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> ...
>
> (b) the original arbitration agreement under which the award purports to have been made, or a duly certified copy thereof; ...

9 The manner of complying with the statutory provision is prescribed by O 69A r 6 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC") which requires the applicant to exhibit the arbitration agreement, among other documents, in an affidavit. Order 69A r 6(*a*) of the ROC also allows for production of duly certified copies of the relevant documents. The affidavit in support of OS 807 was deposed by DSK's Danish lawyer, Mr Carsten Pedersen. Mr Pedersen had the conduct of the Danish arbitration on behalf of DSK. In his affidavit, he exhibited a copy of the New Agreement that was executed by the parties and a certified true copy of the Standard Conditions. I must mention at the outset that the dispute was not with the propriety of the certification of the Standard Conditions. The dispute centred on the absence of an "arbitration agreement".

10 I start with the New Agreement. It is common ground that the New Agreement was entered into between the parties. Counsel for Ultrapolis, Mr Sarbit Singh, in the course of argument, accepted that DSK would not have the original of the signed New Agreement as the original signed copy was couriered by DSK to Ultrapolis and its whereabouts thereafter is unclear. The copy of the New Agreement exhibited in Mr Pedersen's affidavit is affirmed to be a true a copy of the original signed New Agreement. On at least three occasions, Ultrapolis had admitted that the copy of the signed New Agreement is a true copy of the original signed New Agreement, namely:

> (a) Mr Christopher Bridges, a Singapore advocate and solicitor, who previously represented Ultrapolis had confirmed in a letter dated 16 January 2007 to the Tribunal that the copy of the signed New Agreement produced by DSK was a true copy;
>
> (b) The Managing Director of Ultrapolis, Mr Rinaldo Romani, had confirmed to the Tribunal that he had signed the New Agreement produced by DSK when giving evidence at the preliminary hearing on 18 January 2008; and
>
> (c) In written submissions tendered on behalf of Ultrapolis to the High Court on 12 June 2009 in relation to Summons No 1654 of 2009/S filed in Suit No 300 of 2008, Mr Singh's firm, M/s Lim & Lim, confirmed that the copy of the New Agreement produced by DSK was duly executed by Ultrapolis.

11 The real issue before me is whether the Standard Conditions which contained the arbitration clause formed part of the New Agreement. This issue is considered in two contexts: (a) the first stage of enforcement under s 30(1)(*b*) of the IAA, and (b) the second stage is the refusal of enforcement under s 31(2) of the IAA. For now, the discussions concern the first stage of enforcement under s 30(1)(*b*) of the IAA.

12 Section 27(1) of the IAA defines an "arbitration agreement" as an agreement in writing of the kind referred to in Article II.1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded at New York on 10 June 1958 ("New York Convention"). An "agreement in writing" includes an agreement contained in an exchange of letters, telegrams, telefacsimile or in a communication by teleprinter.

13 In the present case, the existence of an arbitration agreement in writing is disputed. Ultrapolis argues that the arbitration clause in the Standard Conditions did not form part of the New Agreement because Ultrapolis executed the New Agreement without signing the Standard Conditions. The omission is significant, so the argument develops, because in the case of the First Agreement, Ultrapolis had signed on all pages of the Standard Conditions of Sale, Work and Delivery (July 2001 version) to signify its acceptance of the printed standard conditions as forming part of the First Agreement. As such, in the absence of a duly signed copy of the Standard Conditions, there was no agreement to arbitrate disputes arising in connection with the New Agreement. In addition, Mr Singh submits that cl 13 of the New Agreement was not deleted by an oversight, and further points out that the Standard Conditions were not enclosed together with the signed original copy of the New Agreement. In any case, Mr Singh argues that cl 13 in itself is insufficient in law to incorporate the arbitration clause in the Standard Conditions. Clause 13 of the New Agreement reads:

> The clauses of this contract prevail on the enclosed standard conditions that are applicable only if the matters are not regulated between the Parties by this contract.

14 Putting Mr Singh's argument in perspective, the question is whether at the first stage of enforcement the court has to determine if the arbitration clause in the Standard Conditions formed part of the New Agreement *before* it can be satisfied that an arbitration agreement has been produced, as required by s 30(1)(*b*) of the IAA and O 69A r 6(*a*) of the ROC.

15 In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 ("*Aloe Vera*") the plaintiff had entered into an agreement with the first defendant ("the Agreement"). The second defendant, Chiew Chee Boon ("Mr Chiew"), had signed the Agreement on the first defendant's behalf as its manager, but was not expressly stated to be a contracting party to the Agreement. The Agreement provided for disputes between the parties to be mediated, and if mediation was unsuccessful, to be arbitrated in accordance with the rules of the American Arbitration Association. The Agreement provided for the law of Arizona, USA to be the governing law. Following the termination of the Agreement, the plaintiff commenced arbitration proceedings and

obtained a Final Arbitration Award against both the first defendant and Mr Chiew ("the Award"). The plaintiff successfully took out an originating summons, on an ex parte basis, to obtain leave to enforce the Award against the defendants in Singapore. Mr Chiew applied to set aside the order granting leave, but this was dismissed by an Assistant Registrar. Mr Chiew then appealed against the Assistant Registrar's decision. His grounds for setting aside the order granting leave were that the plaintiff had not crossed the preliminary hurdle of establishing that there was an arbitration agreement between the parties. It was also argued that the question whether an arbitration agreement existed had to be decided on the basis of Singapore law. Alternatively, enforcement should have been refused because Mr Chiew was able to satisfy one or more of the grounds set out in s 31(2) and/or s 31(4) of the IAA.

16 *Aloe Vera* adopted a mechanistic approach to the first stage of enforcement. At para [27], Prakash J held:

> This case [a Norwegian case, a decision of the Hålogaland Court of Appeal in August 1999 reported at Yearbook Comm Arb'n XXVII (2002) p 519 ("the Hålogaland case")] was used by [counsel for Mr Chiew] to substantiate the proposition that whether an arbitration agreement existed had to be decided on the basis of Singapore law. This reliance does not, however, take him very far. The court in the Hålogaland case held that "the contents of the E-mails appear obscure and incomplete and reflect just fragments of an agreement". Obviously, these documents did not even satisfy the formalities for the enforcement of an award as they did not constitute an arbitration agreement in writing as required by Arts II and IV of the Convention. *The Singapore court too would look at the document produced as the arbitration agreement under which the award had been made and consider whether under our law such document is capable of constituting an arbitration agreement. This would be a fairly formalistic examination as stated in* [39] *below.* Applying the Hålogaland case would not require me to undertake a re-examination of the Arbitrator's decision on its merits. [emphasis added]

17 Praskash J declined to follow the appellate decision of the US Court of Appeal for the Second Circuit in the Sarhank Group v Oracle Corporation 404 F 3d 657 (2nd Cir, 2005)("the Sarhank case") where the court held it was American federal arbitration law that controlled the issue [of whether the parties had agreed to submit the issue of arbitrability to the arbitrators] and "an American nonsignatory [could] not be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law". In rejecting the approach of the US Court of Appeal in the Sarhank case (at [38]), Prakash J reasoned:

> The approach taken by the appellate court was antithetical to that enshrined in the Convention. It demonstrated an insular attitude to the decisions of foreign tribunals involving American nationals without regard to the fact that the American parties had chosen to do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration. It runs counter to international comity and is an attitude that, if followed widely in the US, would adversely affect the enforcement of US arbitration awards abroad since the Convention implements a system that enjoins mutuality and reciprocity so that there is a danger of non-US jurisdictions refusing to enforce US awards when their own awards are not recognised in the US.

18 In *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 ("*Dardana* "), Mance LJ was of the view that all that was required at the first stage was the production of a record of an arbitration agreement made in writing with (allegedly) the authority of the parties to it. Mance LJ (at [9]) rejected counsel's argument that the English equivalent of O69A r 6 could be used to resist the enforcement of the award on the grounds that it would lead to a curious duplication and inconsistency in onus. Mance LJ held at [10] and [12]:

> I consider that the scheme of the Act is reasonably clear. A successful party to a New York Convention award, as defined in s. 100(1) [of the Arbitration Act 1996] has a prima facie right to recognition and enforcement. *At the first stage, a party seeking recognition or enforcement must, under s.102 (1) produce the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy. ... Once such documents have been produced,*

> *recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads set out in s 103(2)* [of the Arbitration Act 1996].
>
> ...
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> One cannot produce an agreement made otherwise than in writing. However, one can produce terms in writing, containing an arbitration clause, by reference to which agreement was (allegedly) reached, and one can produce a record of an arbitration agreement made in writing with (allegedly) the authority of the parties to it. That, it seems to me, is all that is probably therefore required at the first stage. That conclusion supports, rather than undermines the further conclusion that, *at the first stage, all that is required by way of an arbitration agreement is apparently valid documentation, containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority. On that basis, it is at the second stage, under s. 103(2)* [of the Arbitration Act 1996], *that the other party has to prove that no such agreement was ever made or validly made.*
>
> [emphasis added]

19 Citing Mann LJ at [10] and [12] of *Dardana*, Prakash J came to the conclusion that the examination that the court must make of the documents under O 69A r 6 is a formalistic one and not a substantive one (at [42]). The court held (at [41]) that there was a contract between Asianic and Aloe Vera of America, Inc that contained an arbitration clause. Prakash J further referred to Robert Merkin, *Arbitration Law* (LLP, 1991) (Service Issue No 42: 5 December 2005) at para 19.48 which stated "This wording [of s 101(3) of the English Act 1996] makes it clear that the enforcement process is a mechanistic one, and that the court may simply give a judgment which implements the award itself" for the proposition that the idea that the enforcement process is a mechanistic one which does not require judicial investigation by the court of the jurisdiction in which enforcement is sought.

20 On Mance LJ's view that the dispute as to the arbitration agreement should be dealt with at the second stage of enforcement, Prakash J is of a same view when she stated (at [47]):

> ...I do not think that it is correct for a court that is asked to enforce an award under the Convention to go behind the holding on the merits on this aspect that has been made by the Arbitrator except to the extent that this is permitted by the Convention grounds during the second stage of the enforcement process.

21 Further (at [56]), Prakash J stated as follows:

> ...He [Mr Chiew] may be able to resist enforcement here if he can establish that the arbitration agreement was "not valid under the law to which the parties have subjected it" within the meaning of that phrase in s 31(2)(*b*) [of the IAA]. He is not, however, entitled to object to the initial grant of leave to enforce on the basis that the Arbitrator erred in holding that he was a party to the arbitration. As the enforcement court, I can only permit Mr Chiew to resist enforcement if he is able to establish one of the grounds set out in s 31(2) of the Act [IAA]. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court.

22 I accept the basis of the mechanistic approach at the first stage of enforcement as reasoned by Prakash J in *Aloe Vera*. Applying *Aloe Vera* and for the following reasons here, I am persuaded that DSK has satisfied s 30(1)(*b*) of the IAA having produced a copy of the New Agreement and a certified true copy of the Standard Conditions. *Firstly*, s 30(2) of the IAA provides that a document produced to a court in accordance with this section shall, upon mere production, be received by the court as *prima facie* evidence of the matters to which it relates. On the present facts, cl 13 of the New Agreement provides that the Standard Conditions are applicable so long as they are not inconsistent with the clauses in the New Agreement. The last page of the New Agreement carried the signature of Finn Wollese, Managing Director of DSK, and the signature of Yap Soon Kiat, a director of Ultrapolis. Below the signature of Mr Yap were the following typed written words:

Encl:

-Standard Conditions of Sale, Work and Delivery [*i.e.*, the Standard Conditions]

-Appendix A Scope of Work

23 Although factually the Standard Conditions were not enclosed with the signed original copy of the New Agreement, it is common ground that a copy of the Standard Conditions together with the draft New Agreement and Appendix A were *earlier* emailed on 2 December 2005 to Mr Romani. Mr Romani in his affidavit of 7 September 2009 also referred to this email and the same attachments. Mr Pedersen in his affidavit of 10 July 2009 filed in support of OS 807 produced a certified true copy of the Standard Conditions. This certified true copy and the Standard Conditions emailed to Mr Romani on 2 December 2005 are of the same printed version. The same Standard Conditions were raised, argued and decided by the Tribunal on the preliminary question concerning the Tribunal's jurisdiction. Mr Pedersen has produced in OS 807, the New Agreement and the certified true copy of the Standard Conditions (in particular cl 13 of the New Agreement and cl 19 of the Standard Conditions) as the arbitration clause under which the Corrected Award had been made. For purposes of s 30(1)(*b*) of the IAA, all the applicant needs to produce is the arbitration agreement under which the award "*purports to have been made*".

24 *Secondly*, an agreement in writing within the meaning of s 27(1) of the IAA together with Article II.2 of the New York Convention is not limited to a document between the parties that had been signed by the parties as such. As a reminder, Mr Singh has stressed in argument that the certified true copy of the Standard Conditions was not initialled by Ultrapolis to signify acceptance of the printed standard conditions including the arbitration clause. Prakash J in the *Aloe Vera* quoted the Court of Appeal of Manitoba, Canada, in the case of *Proctor v Schellenberg* [2003] 2 WWR 621 where Hamilton JA stated at [18] that "[w]hat is important is that there be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process". Agreeing with the attitude taken by the Court of Appeal of Manitoba in the above judgment and adopting the view that one must take a pragmatic approach towards the definitions in the New York Convention and the IAA in order to give effect to arbitral awards granted outside Singapore, Prakash J held at [17] that Article II.1 of the New York Convention required a written agreement but it did not require a signature. As to Article II.2 of the New York Convention, it was an illustrative and inclusive clause and not an exhaustive list of what constituted an agreement in writing. Prakash J held that it was more difficult to argue in the context of this definition that an arbitration agreement only existed when there was a signed document between the parties. Applying *Aloe Vera*, the fact that the Standard Conditions were not signed does not mean that there was no arbitration agreement.

25 In conclusion, for the reasons stated above, DSK satisfied s 30(1)(*b*) of the IAA by producing a certified true copy of the Standard Conditions which included the arbitration clause as constituting the agreement to arbitrate disputes in connection with the New Agreement. In short, it was the arbitration agreement under which the Corrected Award "purports to have been made."

Second issue: whether there was an arbitration agreement between the parties under s 31(2)(b) of the IAA

26 As I have alluded to in **[20]** and **[21]** above, the challenge to the existence of the arbitration agreement should be dealt with under s 31(2) of the IAA rather than at stage 1 (see also Mance LJ in *Dardana* at [10]) and [12]). In opposing enforceability, Ultrapolis is first and foremost relying on s 31(2)(*b*) of the IAA. Mr Singh argues that the English Court of Appeal decision in *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 ("*Dallah Estate*") and *Aloe Vera* are inconsistent decisions and Mr Singh urges me to follow *Dallah Estate*. Mr Singh's contention is wrong for three reasons. First, *Dallah Estate* does not deal with the first stage of enforcement, and Mr Jeremiah is correct on this point. There, therefore, is no conflict between *Dallah Estate* and *Aloe Vera* in relation to Prakash J's holding in *Aloe Vera* that the examination that the court must make of the documents under O 69A r 6(1)(*a*) is a formalistic one and not a substantive one (at [41] & [42] of the report). Second, Mr Singh seemingly drew support for his arguments on s 31(2)(*b*) from passages in *Aloe Vera* that relate to the first stage of enforcement, and that is clearly a misapplication of the ratio of the decision. Third, in relation to the second stage of enforcement based on the grounds for refusal to enforce an award, *Aloe Vera* may be read consistently with *Dallah Estate*. Before dealing with the second issue, it is necessary to first examine the two authorities.

27 In *Dallah Estate*, Dallah Real Estate and Tourism Holding Company ("Dallah"), a Saudi Arabian company, was engaged in the provision of services to Muslims who performed Hajj at Mecca. In December 1994, the Pakistani cabinet approved in principle

a proposal to establish the "Awami Hajj Trust" for the purpose of mobilising savings from intending Hajj pilgrims and for the investment of those savings in Sharia-approved schemes. The trust came into existence on 14 February 1996 and ceased to exist on 12 December 1996. Negotiations between Dallah and the Government of Pakistan ("GoP") continued well into 1996 culminating in an agreement dated 10 September 1996 which was expressed to be made between Dallah and the Trust. It contained an arbitration clause. The GoP was not expressed to be a party to the agreement, nor did it sign it in any capacity. Subsequently, there was a change of government in Pakistan and the relationship between the GoP, the Trust and Dallah broke down so much so that the Ministry of Religious Affairs ("MORA") wrote to Dallah accusing it of having repudiated the agreement and stated that the agreement was therefore discharged.

28 On 19 May 1998, Dallah purported to commence arbitration against the MORA under the rules of the ICC claiming damages for breach of the agreement. On 16 September 1998, the ICC appointed an arbitrator for the GoP because it had not nominated one, and the MORA denied that it was a party to the arbitration. On 26 June 2001, the tribunal rendered a first partial award in Paris, dealing solely with jurisdiction. The tribunal held that the MORA was bound by the arbitration clause in the agreement, and that the dispute fell within the terms of the arbitration clause. In the final award rendered on 23 June 2006 in Paris, the tribunal ordered the GoP to pay Dallah US$18,907,603 by way of damages for breach of the agreement, plus costs and fees, a total of US$20,588,040.

29 On 9 October 2006, Christopher Clarke J made an order under s 101(2) of the English Arbitration Act 1996 ("English Act 1996"), on a without notice application, giving Dallah permission to enforce the final award in the same manner as a judgment of the court. On 28 March 2008, the GoP applied to set aside the order, arguing that the court should refuse enforcement on the basis that there was no valid arbitration agreement within the meaning of s 103(2)(*b*) of the English Act 1996.

30 At first instance, Aikens J set aside the order made by Christopher Clarke J. Aikens J held that under s 103(2)(*b*) of the English Act 1996, the proceedings were to take the form of a full rehearing. Applying French law as the law of the country where the award was made, it was not the subjective intention of all the parties that the GoP should be bound by the agreement or the arbitration clause. Accordingly, the GoP had satisfied the burden of proving, for the purposes of s 103(2)(*b*) of the English Act 1996, that the arbitration agreement in clause 23 was invalid.

31 On appeal to the Court of Appeal, one issue raised was whether in circumstances where the issue was the same as that which had been before the tribunal, proceedings under s 103(2) of the English Act 1996 should take the form of a full rehearing or a more limited review. Miss Hilary Heilbron QC for Dallah submitted that the court when considering a challenge to the enforcement of a foreign arbitration award under s 103(2)(*b*) of the English Act 1996 should not conduct a full trial of the issues of fact and law to which the application gave rise, but should limit itself to an enquiry more in the nature of a review, accepting any relevant findings of fact and decisions of the tribunal unless they could be shown to be clearly wrong. Moore Bick LJ rejected Miss Heilbron's submission that there should be a limited review on the ground that the language of Article V.1 of the New York Convention itself, which required the party against whom enforcement was sought to furnish proof of the matters to which it referred (an expression accurately reflected in the more modern language of s 103(2) of the English Act 1996 which states that "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves..."). Moore Bick LJ found it very difficult to interpret the expression "furnish proof" as meaning anything other than requiring proof in the manner and to the standard ordinarily required in proceedings before the enforcing court. What he did accept was that the court should have regard to the tribunal's reasoning in reaching its own conclusion, and a statutory provision which gave effect to an international convention of this kind should be construed with due regard to the purpose of the convention and with a view to ensuring consistency of interpretation and application.

32 In *Aloe Vera*, the second defendant, Mr Chiew, applied to set aside the order granting leave on the grounds that the plaintiff had not crossed the preliminary hurdle of establishing that there was an arbitration agreement between the parties. Alternatively, enforcement should have been refused because the second defendant was able to satisfy one or more of the grounds set out in s 31(2) and/or s 31(4) of the IAA.

33 In relation to establishing a ground for refusal of recognition under s 31(2) of the IAA, Prakash J agreed with the observations of Batts J even though the latter in the US District Court in *Sarhank* case was overruled on appeal, in that:

> [T]he court has been asked to enforce an international arbitral award in which arbitrability has already been established under the laws of Egypt. ...
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> ...
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> [T]he Convention ... does not sanction second-guessing the arbitrator's construction of the parties' agreement. ... It is well-settled that absent "extraordinary circumstances", a confirming court is not to reconsider the arbitrators' findings. ...
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> ...
>
> [The arbitrators'] conclusion of partnership under the contract is one of "construction of the parties' agreement" and will not be reviewed by the Court, absent extraordinary circumstances. In the instant case, no such extraordinary circumstances exist.

34 It is possible to reconcile *Dallah Estate* and *Aloe Vera*. First, it must be remembered that *Dallah Estate* only dealt with the second stage, *i.e.* the grounds for refusal to enforce the award whereas *Aloe Vera* was a case dealing with both stages. Second, in relation to the second stage of enforcement, the two decisions may be reconciled. Moore Bick LJ in *Dallah Estate* found it very difficult to interpret the expression "furnish proof" as meaning anything other than requiring proof in the manner and to the standard ordinarily required in proceedings before the enforcing court. He was of the view that the grounds raised required a full rehearing of the issues and not a mere review of the arbitrator's decision. Prakash J in *Aloe Vera* (at [62]) seemed to give more deference to a tribunal's decision when she agreed with Batts J's dicta in *Sarhank* case and *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 *("Hebei* case*")* that the approach towards the decisions of foreign arbitral tribunals in Convention countries was to recognise the validity of the same and give effect to them subject to basic notions of morality and justice. As a side point, Prakash J's reference to *Hebei*'s case for the proposition that the approach towards the decisions of foreign arbitral tribunals in Convention countries was to recognise the validity of the same and give effect to them subject to basic notions of morality and justice, is in my view, with respect, misplaced since the ground proceeded in *Hebei* case to resist enforcement of the award was that it was contrary to the public policy of the forum, thereby explaining the test of whether it was contrary to the fundamental conceptions of morality and justice of the forum.

35 Returning to how *Aloe Vera* and *Dallah Estate* can be reconciled, I refer to Prakash J's first point at [61] that the burden is on the party who wishes the court to refuse enforcement of the award to establish one of the grounds for refusal exists. Earlier at [47], Prakash J held that the Singapore courts would not go behind the holding on the merits of the foreign award except to the extent permitted by the New York Convention. In *Aloe Vera*, the arbitration agreement was subject to the law of Arizona. It was not correct to say that the enforcing court has to construe the clauses of the Agreement in the same way as the enforcing court would be able to if it were subject to Singapore law in order to establish whether there was a valid arbitration agreement binding Mr Chiew. It was for Mr Chiew to establish that under the law of Arizona, the clauses could not have any application to him.

36 In evaluating the evidence, Prakash J held at [63] that:

> The only evidence that Mr Chiew adduced of the law of Arizona was contained in an affidavit filed by one Mr Steven Sullivan. Mr Sullivan was Mr Chiew's attorney in Arizona and, at the hearing below, it was conceded that Mr Sullivan was not as an expert but as an advocate for Mr Chiew, There was therefore no independent expert evidence from Mr Chiew on the law of Arizona as it applied to the Award. Also, as the assistant registrar found, Mr Sullivan's affidavit essentially contained a rehash of the arguments (based on Arizona laws, Arizona Rules of Civil Procedure and AAA rules) which were raised before the Arbitrator and, subsequently, adjudicated and rejected by the Arbitrator. Since Mr Chiew had not adduced expert evidence to show that the Arbitrator's findings are incorrect under Arizona law, I agree with the submission made by the plaintiff that there are no extraordinary circumstances warranting a review of the Award. I am not the supervisory court and cannot review the Arbitrator's decision in the same way that an Arizona court could. *For me to refuse to enforce the Award on this ground, I would need to be satisfied that, under the law of Arizona, the arbitration agreement was invalid vis-à-vis Mr Chiew and that the Arbitrator was not*

> *entitled to find that Mr Chiew was a party to the Agreement and the arbitration. No basis has been given to me for such a finding.* [emphasis added]

37 Read in this context, one extraordinary circumstance in which Prakash J would have set the decision aside was if it could be proven on a balance of probabilities that the arbitration agreement under the law of Arizona was invalid vis-à-vis Mr Chiew and the arbitrator was not entitled to find that Mr Chiew was a party to the agreement and the arbitration under s 31(2) of the IAA.

38 Although Prakash J at [63] uses the phrase "review" of the arbitrator's decision rather than a "rehearing", the specific point in issue in *Dallah Estate* as to whether the review is a limited review or a full rehearing was not in issue and therefore not specifically decided in *Aloe Vera*. However, there is indication that where one of the grounds under s 31(2) of the IAA has been properly raised, then a rehearing on that specific issue would be allowed because Prakash J at [56] held

> Except to the extent permitted by those grounds [s 31(2) of the IAA], I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court.

39 Read in this light, *Dallah Estate* and *Aloe Vera* may be read consistently with each other, and the court is entitled to conduct a rehearing based of the grounds prescribed in s 31(2) of the IAA. The party opposing enforcement has the burden of proving to the satisfaction of the court one of the grounds prescribed by s 31(2) of the IAA. As I will explain shortly, the problem that beset Ultrapolis is one of proof.

40 Returning to the second issue proper, an appropriate starting point is the preliminary issue of whether Ultrapolis is estopped from challenging the enforceability of the Corrected Award given that it did not challenge the Corrected Award in the supervisory courts of Denmark. *Dallah Estate* considered whether a failure to seek curial relief in the supervisory court but established a good defence before the recognising court gave rise to an issue estoppel. In *Dallah Estate*, an award was given in favour of the applicant against the respondent in France. The respondent chose not to challenge the award in France even though the time limits for such a challenge had not expired and raised before the English enforcing court the argument that it was not a party to the arbitration agreement. The Court of Appeal held that the defendant's failure to pursue an appeal in France did not create an estoppel which precluded reliance on the defence in the English enforcement proceedings by relying on Kaplan J in *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] HKLR 39 where the court held that the failure to seek an annulment in the curial court did not in any way affect the independent and alternative right of the respondent to defend enforcement proceedings.

41 Turning to the position under Singapore law, in *Aloe Vera*, the arbitrator made a preliminary order that Mr Chiew, the second defendant, was a proper party to the arbitration. Mr Chiew disagreed with the arbitrator's order and took no further part in the arbitration proceedings. Subsequently, he sought to challenge the enforcement of the foreign award on the ground that there was no arbitration agreement because he was not a proper party to the arbitration. Mr Chiew had two alternatives: to challenge the foreign award in the foreign supervisory court, or to challenge enforcement of the foreign award in Singapore. In the latter case, the challenge to enforcement was limited to the extent permitted by the New York Convention. Prakash J held at [56]:

> The fact that the Award may be final in Arizona does not therefore mean that Mr Chiew is excluded or precluded from resisting enforcement in Singapore. He may still resist enforcement of the Award provided that he is able to satisfy one of the Convention grounds under s 31(2) of the Act. The grounds on which enforcement of an award may be resisted under the Act, however, are not the same grounds that would entitle Mr Chiew to set aside the Award in the jurisdiction of the supervisory court. … *He may be able to resist enforcement here if he can establish that the arbitration agreement was "not valid under the law to which the parties have subjected it" within the meaning of that phrase in s 31(2)(b). He is not, however, entitled to object to the initial grant of leave to enforce on the basis that the Arbitrator erred in holding that he was a party to the arbitration. As the enforcement court, I can only permit Mr Chiew to resist enforcement if he is able to establish one of the grounds set out in s 31(2) of the Act. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court.* … This is because failure to raise such a point may amount to an estoppel or a want of *bona fides* such as to justify the court of enforcement

> in enforcing an award. This, in fact, is what happened to the Government of Lithuania in the *Svenska Petroleum* case. [emphasis added]

42 In light of *Dallah Estate* and *Aloe Vera*, Ultrapolis is not estopped from challenging the enforcement of the Corrected Award but it can only succeed on its submission that there was no valid arbitration agreement if it can discharge its burden of establishing that s 31(2)(*b*) of the IAA applies. Section 31(2)(*b*) of the IAA provides:

> Refusal of enforcement
>
> 31. — (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —
>
> ...
>
> (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;...

43 Under s 31(2)(*b*) of the IAA, the issue of whether there was a valid arbitration agreement has to be determined based on foreign law (not under Singapore law: see the clear wording of s 31(2)(*b*) of the IAA and *Aloe Vera* at [61]). The English Court of Appeal in *Dallah Estate* held that although the court would bear in mind the purpose of the English Act 1996 and should have regard to the tribunal's reasoning in reaching its own conclusion, in determining whether the grounds for refusal of enforcement of an award had been made out, the party who wishes the enforcing court to refuse enforcement of the award must prove the existence of the relevant matters on a balance of probabilities.

44 On the present facts, Ultrapolis alleges that the arbitration agreement did not form part of the New Agreement. As I have alluded to in **[39]** above, Ultrapolis's problem was one of proof. The expert's affidavit filed on behalf of Ultrapolis was from Mr Andersen, the same Danish lawyer who had represented Ultrapolis at the hearing before the Tribunal on the question of jurisdiction. In his affidavit evidence, in which he did not cite any Danish law, Mr Andersen concludes that the Standard Conditions did not form part of the New Agreement. He opines that cl 13 of the New Agreement is not sufficient to incorporate the arbitration clause in the Standard Conditions having taken into account the issues, compared the wording of cl 13, the email of 7 December 2005 from Ultrapolis and the undisputed facts.**[note: 1]** There was reference to Mr Romani's email, but there was no mention of DSK's answer by way of Mr Christian Bursche's reply email of the same day on Mr Romani's proposed changes to the contract which DSK did not fully accept. Mr Jeremiah explained that the email of 7 December 2005 from Ultrapolis dealt with technical matters and the terms the company had raised for discussion. Clause 13 of the draft New Agreement was acceptable to both parties and it was naturally not featured in the emails. Mr Jeremiah submits that the exchange of emails were on the terms that parties disagreed with. The Standard Conditions and cl 13 of the draft New Agreement were not discussed in the emails as there was no objection to them. Like Mr Sullivan in *AloeVera*, Mr Andersen's affidavit appears to be a rehash of his arguments before the Tribunal albeit on this occasion he had confirmed his duty to the court as an expert on Danish law.

45 In contrast to Mr Andersen's affidavit evidence, DSK's expert is Mr Jens Rostock-Jensen, a partner in the Danish law firm Kromann Reumert. Mr Rostock-Jensen's qualifications as an expert were not challenged, and hence, were accepted by Ultrapolis. In addition, unlike Mr Andersen, Mr Rostock-Jensen is independent of the proceedings before the Tribunal. Furthermore, in his expert's report exhibited to his affidavit filed on 22 December 2009, Mr Rostock-Jensen explained Danish law on the subject and identified the three basic requirements that must be satisfied in order for standard terms to apply to a contract. He then explained how in his opinion a Danish court would interpret the email communications between the parties and the facts to determine if the three requirements were met. He went through the evidence in relation to each requirement to arrive at the conclusion that in his opinion, applying Danish law, a general reference to standard terms in an agreement (like cl 13) can incorporate an arbitration clause in the Standard Conditions.**[note: 2]** On the evidence, Mr Rostock-Jensen was clear that Ultrapolis was provided with a copy of the Standard Conditions on 2 December 2005 *before* the New Agreement was signed. He further highlighted in paras 2.13 to 2.17 of his expert's report the specific circumstances of the case which would persuade a Danish court to apply the Standard Conditions, and in particular cl 19. Mr Rostock-Jensen opined that an arbitration clause and governing law clause (as in cl 19) are common in international business, especially shipping, and there would have been no need

to highlight the arbitration clause to the other party (for example an entity like Ultrapolis who was a "professional" party being a investment company who in 2004 started to invest in the yacht business) for it to apply to the contract. It follows that Ultrapolis would have to reject the clauses in order not to be bound by them, and there was no such rejection in its email of 7 December 2005. Being satisfied that all three requirements were met, Mr Rostock-Jensen concluded that under Danish law, both the governing law clause and the arbitration clause in the Standard Conditions would have been incorporated into the contract by reference in cl 13 and the Danish court would come to the same decision (see para 2.19 of report). For these reasons, I prefer DSK's expert evidence and in doing so conclude that on a balance of probabilities no basis has been given by Ultrapolis that the Tribunal was not entitled to find under Danish law that cl 19 of the Standard Conditions formed part of the New Agreement. Accordingly, Ultrapolis has failed to discharge its burden in satisfying the court that s 31(2)(*b*) of the IAA on the refusal to enforcement a foreign award applies.

Third issue: whether the composition of the arbitral authority was in accordance with the arbitration agreement

46 This third issue is the first of two fallback arguments raised by Mr Singh. Ultrapolis in seeking to argue that the court should refuse enforcement of the Corrected Award relied on s 31(2)(*e*) of the IAA because of two related arguments. First, Ultrapolis argues that cl 19.3 instead of cl 19.2 of the Standard Conditions applies to the dispute between the parties so the dispute should have been determined by the Danish Engineers' Association, and not the Tribunal (the Danish Arbitration Institute). Second, Ultrapolis argues that even if cl 19.2 of the Standard Conditions applies, it does not clearly state that the Tribunal should determine the dispute on fees. Section 31(2)(*e*) of the IAA provides:

> Refusal of enforcement
>
> 31. — (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —
>
> ...
>
> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;...

47 DSK's Standard Conditions provide:

> Clause 19.1
>
> The contract shall be subject to Danish Law.
>
> Clause 19.2
>
> An effort shall be made to settle amicably all and any dispute arising in connection with the contracts between the parties, if necessary by third-party conciliation. Disputes that cannot be settled amicably shall be settled in accordance with the Rules of the General Court of Arbitration in Denmark.
>
> Clause 19.3
>
> However, disputes concerning only the amount of the fee charged by KEH which cannot be settled amicably shall be settled by the Laws & Opinions Committee of the Danish Engineers' Association, whose decision may be appealed to the General Court of Arbitration in Denmark.

48 In relation to the first argument, Mr Andersen in his affidavit evidence was of the view that cl 19.2 did not make a clear reference to the Tribunal. However, he did not provide any affidavit evidence of which tribunal the parties were in fact referring to. On the other hand, DSK's expert, Mr Rostock-Jensen, explained in his affidavit that pursuant to Danish contract law, the General Court of Arbitration in Denmark (in cl 19.2 of the Standard Conditions) refers to the Tribunal. As it is for Ultrapolis to establish that

s 31(2)(*e*) of the IAA applies, Ultrapolis has failed through its expert, Mr Andersen, to establish that the Tribunal was not the proper tribunal to hear the dispute in Denmark.

49 In relation to Mr Singh's second argument that cl 19.3 applies instead of cl 19.2 of the Standard Conditions, it is noteworthy that Mr Andersen did not cover this point in his affidavit. DSK's expert on the other hand is of the opinion that as cl 19.2 was the general rule and cl 19.3 of the Standard Conditions was the exception, cl 19.3 had to be interpreted restrictively. Under Danish law such a claim for fixed fees in a fixed price contract would be outside the scope of cl 19.3 of the Standard Conditions and instead be governed by cl 19.2. Mr Rostock-Jensen explained that cl 19.3 is meant for cases where there is a challenge to the amount of hourly fees charged and the Danish Engineers' Association referred to in cl 19.3 is equipped to assess the reasonableness of the hourly rate that is being charged. In his opinion, under Danish law, cl 19.2 is the correct provision governing the dispute which was not only on the amount of the fees charged but also the performance of DSK under the contract. **[note: 3]** In the circumstances, Ultrapolis has undoubtedly failed to discharge its burden in showing that the arbitration was not in accordance with Danish law under s 31(2)(*e*) of the IAA. In reaching this conclusion, it is not necessary to deal with s 3 of the Danish Arbitration Act 2005, which Mr Jeremiah referred me to on the question of waiver, since Ultrapolis did not raise cl 19.3 at the hearing of the preliminary issue before the Tribunal.

Fourth issue: whether the Tribunal was functus officio when it issued the Corrected Award

50 Ultrapolis argues that enforcement of the Corrected Award should be refused under s 31(2)(*e*) of the IAA because the Tribunal was *functus officio* when it issued the Corrected Award (by inserting the dates when such interest accrued and changing the name of the claimant in the arbitration on account of its voluntary liquidation).

51 The Tribunal passed the First Award on 11 February 2009 where it found for the claimant in the arbitration, DSK, and ordered that Ultrapolis pay EUR 357,855 with interest of 1.5% per month as well as costs of the arbitration case of EUR 23,406 to the claimant, DSK, within 14 days of the award. On 20 February 2009, the claimant in the arbitration wrote to the Tribunal seeking to correct the First Award on the ground that (a) there was no reference to the dates on which interest started to accrue and (b) the claimant was named as Knud E. Hansen A/S in the award which was not its present name. It is noteworthy that the dates on which interest started to run was already before the Tribunal as it was set out in the claimant's statement of claim. The Tribunal issued a Corrected Award dated 16 April 2009 which specified the date from which interest started to accrue and it also reflected the change in the claimant's name from Knud E. Hansen A/S to DSK. Mr Singh is aware that the question of whether the Tribunal was *functus officio* is determined by Danish law, but having not produced evidence of Danish law on the matter, he relies on Singapore law to argue that the Corrected Award may only be amended to correct clerical mistakes on the basis that Danish law is not different from Singapore law on the topic.

52 Under s 31(2)(*e*) of the IAA, the agreement of the parties is that Danish law would apply to the agreement between them. Whether the Tribunal was *functus officio* should be decided in accordance with Danish law. Mr Pedersen in para 16 of his affidavit stated that it was within the Tribunal's power to issue the Corrected Award in that pursuant to s 33 of the Danish Arbitration Act 2005 (Act No. 553 of 24 June 2005 on Arbitration), the Tribunal may correct any clerical or typographical error of a similar nature within 30 days of the receipt of a request from a party to the arbitration. It is for Ultrapolis to rebut DSK's position advanced by Mr Pedersen by adducing Danish law which it has not done. By not doing so, it is not proper to ask the court to presume that Danish law and Singapore law are the same (or not necessarily different) on the issue of whether the Tribunal was *functus officio* when it issued the Corrected Award. In the circumstances, para 16 of Mr Pedersen's affidavit setting out the position under Danish law is not rebutted in the absence of evidence of Danish law to the contrary. The Tribunal considered the request justified and agreed to exercise its powers to correct what were errors arising from clerical or typographical errors since the start dates of interest were already specified in the claimant's statement of claim. Equally, the change of name of the claimant happened after arbitration commenced and the correction of the error in the name would clarify or remove any ambiguity in the Final Award. Both corrections were not tantamount to corrections of mistakes in the Tribunal's findings whether those mistakes were mistakes of fact or mistakes of law. Accordingly, for the reasons stated, the Tribunal was not *functus officio* when it issued the Corrected Award.

Conclusion

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 E-1001 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 is entered as follows:

(a) Ultrapolis 3000 Investments Ltd (formerly Ultrapolis 3000 Theme Park Investments Ltd.) is ordered to pay to Denmark Skibstekniske Konsulenter A/S i likvidation (formerly Knud E. Hansen A/S) EUR 357,855.00 with interest 1.5% per month of:-

i. EUR 7,892 from 25 March 2006 until payment;

ii. EUR 100,000 from 14 April 2006 until payment;

iii. EUR 863 from 3 May 2006 until payment;

iv. EUR 249,100 from 30 June 2006 until payment;

within 14 days from the award (i.e. from 16 April 2009).

(b) Ultrapolis 3000 Investments Ltd. (formerly Ultrapolis 3000 Theme Park Investments Ltd.) is ordered to refund EUR 23,406 to Denmark Skibstekniske Konsulenter A/S i likvidation (formerly Knud E Hanswen A/S) as costs of the arbitration case within 14 days from the date of the award (i.e. from 16 April 2009).

(c) Ultrapolis 3000 Investments Ltd. (formerly Ultrapolis 3000 Theme Park Investments Ltd.) is ordered to refund EUR 12,000 to Denmark Skibstekniske Konsulenter A/S i likvidation (formerly Knud E Hansen A/S) as costs of Denmark Skibstekniske Konsulenter A/S i likvidation (formerly Knud E Hansen A/S) within 14 days from the date of the award (i.e. from 16 April 2009).

54 Finally, Ultrapolis is to pay DSK the costs of the OS.

[note: 1] Affidavit of Tomas Andersen dated 23 November 2009 para 24

[note: 2] Affidavit of Jens Rostock-Jensen dated 22 December 2009 pp107-111

[note: 3] Affidavit of Jen Rostock-Jensen dated 22 December 2009 p112 at paras 4.5-4.7