

Bifurcated Arbitral Proceedings : Validity Of Oral Pronouncement On Liability

TELEKOM MALAYSIA BHD V OBNET SDN BHD [2025] 1 CLJ 17

30th December 2024

ISSUES

The arbitral tribunal may determine the disputes of the parties in 2 different tranches, where the first tranche will be a determination on liability and if liability is found, then the arbitral tribunal will proceed to determine the quantum. The process of splitting the proceedings into 2 tranches is known as bifurcation.

Whilst the arbitral tribunal may be the master of the arbitration proceedings and can decide to bifurcate the proceedings or otherwise, is the tribunal required to deliver a written award on liability before proceeding to decide on quantum or would an *oral pronouncement* on liability suffice? Is such oral pronouncement on liability valid under the Arbitration Act 2005 (“**AA 2005**”)?

If the tribunal decline to provide a written award on liability and decides to proceed with determination on quantum without a written award on liability, can either of the party apply to stay the arbitral proceedings or stop the other party from proceeding with assessment of quantum and if so, how?

These questions were answered in the recent Federal Court decision of **Telekom Malaysia Bhd v Obnet Sdn Bhd [2025] 1 CLJ 17**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) In 2003, the Selangor State Government (“**SSG**”) appointed to Obnet Sdn Bhd (“**Obnet**”) to connect all SSG departments, statutory bodies, municipals/local authorities, Government-linked companies and Government agencies via a high-speed broadband network (“**SELNET project**”).
- (b) Thereafter, Obnet appointed Telekom Malaysia Bhd (“**TM**”) as an independent contractor to design and build a network infrastructure for SELNET project in 2007.

- (c) Disputes later arose between Obnet and SSG in 2008, culminating in the termination of the agreements between Obnet and SSG.
- (d) Unhappy with the termination, Obnet commenced arbitration proceedings against TM alleging, amongst others, that TM had caused the termination of the agreements between Obnet and SSG. TM counterclaimed for the sums due and owing by Obnet under their agreement with Obnet.
- (e) The agreement between Obnet and TM contained an arbitration clause and the parties referred the disputes to arbitration. The Arbitrator decided to bifurcate the arbitration proceedings into 2 tranches, i.e. on liability and thereafter, on quantum, if liability is established.
- (f) On 26.06.2020, the Arbitrator orally informed the parties that he allowed Obnet's claim and TM's counterclaim. The Arbitrator gave brief reasons for his decision and notified the parties that he would not publish a written award at this stage.
- (g) TM's solicitors requested for an award to be published in accordance with Sections 2 and 33 of AA 2005, and Article 34 of the UNCITRAL Arbitration Rules (adopted by the AIAC Rules).
- (h) Obnet objected to TM's request and took the following position:-
 - (i) The oral decision was not meant to be an award. It is merely an interlocutory order / ruling made in the course of the arbitration proceedings; and
 - (ii) That the arbitrator, being the master of its procedure, has discretion on whether to issue an interim award with respect to liability or otherwise.
- (i) Thereafter, the Arbitrator notified the parties that there is no requirement for an award to be published at that juncture and that the practice in the High Court should be followed, where a written judgment is only published at the conclusion of the hearing on quantum.
- (j) Obnet's solicitors subsequently wrote to the arbitral tribunal to request for directions in respect of the hearing on the assessment of damages and for hearing dates to be fixed.

PROCEEDINGS BEFORE THE HIGH COURT

Dissatisfied with the approach taken by the Arbitrator, TM commenced an action at the Kuala Lumpur High Court, seeking for, amongst others, the following:-

- (i) A declaration that the oral decision in respect of TM and Obnet's liability is invalid;
- (ii) An order to restrain Obnet from taking any further steps to proceed with the arbitration proceedings between the parties until the arbitral tribunal duly publishes an award on the determination of liability in respect of the claim and counterclaim;
- (iii) An interim injunction to restrain Obnet from taking any further steps to proceed with the arbitration proceedings pending the disposal of the suit; and
- (iv) Alternatively, an order that the arbitration proceedings be stayed pending the issuance of a written award in respect of liability by the arbitral tribunal.

The High Court dismissed TM's action and held, amongst others, that under Section 21 of AA 2005, the Arbitrator is vested with the discretion to determine the manner that the arbitration proceedings are to be conducted. There was no evidence before the court to indicate that, when the Arbitrator decided to bifurcate the proceedings, the Arbitrator must deliver a written award after the hearing on liability was completed.

The High Court also accepted Obnet's submissions that TM could not insist on a written award to be delivered on the issue of liability as there was no complaint that the decision of the Arbitrator to decide on the issue of liability first and thereafter published one final award upon completion of the assessment of damages, tantamounts to a breach of natural justice.

Additionally, the High Court also explained that AA 2005 does not require the arbitrator to immediately publish an award after determining the issue of liability.

PROCEEDINGS BEFORE THE COURT OF APPEAL

The Court of Appeal agreed with the High Court Judge and affirmed the decision. Nevertheless, the Court of Appeal granted an Erinford injunction to restrain Obnet from taking any steps in the arbitral proceedings pending the disposal of TM's application for leave to appeal and the appeal, if leave is granted.

DECISIONS OF THE FEDERAL COURT

The main question before the Federal Court is whether an oral decision by an Arbitral Tribunal on liability is a decision on the substance of the dispute and whether the same is a valid within the meaning of AA 2005 and AIAC Arbitration Rules 2021.

In this regard, the Federal Court held that the Arbitrator's decision on liability is a determination on an issue relating to the substantive disputes:-

“[34] Section 33(1) of the AA 2005 mandates that the award must be made in writing. If the award is not in writing, it cannot be enforced, set aside or even form the basis for reference of law. In this case, on the facts the arbitrator has decided on liability which means that he has decided issues relating to a substantive dispute on liability. As far as liability is concerned, it is final and binding...”

The Federal Court also held that such determination tantamount to an award and must be made in writing and in compliance with the mandatory requirements of section 33 of AA 2005. An oral award is invalid under AA 2005 as there is no express provision to enable the arbitral tribunal to make an oral award on matters which are substance of the dispute:-

[36] Under the model law, there is no concept of an arbitral tribunal delivering a decision on the substance of a dispute, in any form other than an award. It is unarguable that an arbitral tribunal’s decision on liability is a decision on the substance of the dispute as it determines a substantive issue between parties to the arbitration, and the parties’ legal rights and obligations. Any other interpretation would be absurd. The arbitrator’s decision to bifurcate the proceedings does not in any manner absolve him from the provisions of the Act. Thus, he must comply with the provisions of the Act mandating him as an arbitrator that when he delivers his decision on liability that decision is an award under which can be enforced under s. 38 of the Act. The argument that it was not an award as the issue of quantum had yet to be determined is untenable. Article 34 of the UNCITRAL Arbitration Rules provides that the arbitral tribunal may make separate awards on different issues at different times. However, awards must be made in writing and shall be final and binding on the parties. The arbitral tribunal shall state the reasons upon which the award is based unless the parties have agreed that no reasons are to be given. Therefore, any decision of an arbitral tribunal, in this case, the arbitrator on the substance of a dispute which does not comply with the mandatory requirements of s. 33 of the Act must be regarded as being invalid.

[37] Section 33(1) of the AA 2005 excludes the possibility of the arbitrator making an oral award. An award other than in the form prescribed in the section will necessarily be invalid. Once again, we have to examine the provisions of the AA 2005. The AA 2005 does not recognise an oral award as being an award as there is no expressed provision enabling an arbitrator to give an oral decision on matters which are the substance of the dispute. Thus, a decision on matters which are the substance of the dispute must be an award and that award must be in writing and duly signed. The form and contents of the award must satisfy the requirements as provided under s. 33 of the AA 2005 notwithstanding the decision by the arbitrator to bifurcate the proceedings.”

[Emphasis added]

The Federal Court also took a step further in illustrating the difference between an interlocutory order and an award, where the latter is described as a “*final determination of a particular issue or claim in the arbitration*”:-

*“[40] Section 2 of the AA 2005 expressly excludes ‘interlocutory orders’ from the definition of awards. **‘Interlocutory orders’ by the arbitral tribunal deal with procedural issues such as scheduling hearings, security for costs, and discover, etc. An award must be interpreted to mean a final determination of a particular issue or claim in the arbitration and must be contrasted with orders and directions which address the procedural aspects in an arbitration proceeding.** The oral decision by the arbitrator in the appeal before us is clearly not an interlocutory order but a final determination on liability in the dispute between Telekom and Obnet.”*

[Emphasis added]

In view of the same, the Federal Court also granted an interim injunction to restrain Obnet from taking any further steps to proceed with the arbitration proceedings and stayed the arbitration proceedings pending issuance of a written award. The Federal Court reasoned that, without a written award on liability, Telekom would be denied of its rights under the AA 2005 to apply to set aside the award on liability:-

“[50] Learned counsel for Telekom argued that Telekom has a statutory right to immediately apply to set aside an award on liability under s. 37 of the AA 2005 without waiting for the assessment of damages to be heard. Obnet’s insistence on assessing damages without an award of liability is, therefore, a plain denial of Telekom’s rights under the Act...”

*[52] The arbitrator had delivered his decision on liability and must provide as mandated by the Act a written award before commencing the assessment of damages. We agree with the submissions of learned counsel for Telekom that without an award on liability, it would be a plain denial of Telekom’s rights under the AA 2005. **An interim injunction is, therefore, necessary to restrain Obnet from taking any further steps to proceed with the arbitration proceedings and that the arbitration proceedings be stayed pending the issuance of a written award.**”*

[Emphasis added]

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) Where an arbitral tribunal directs proceedings to be bifurcated, an oral pronouncement on liability by the arbitrator is a decision on the “*substance of the dispute*” and would tantamount to an award under AA 2005;
- (b) Such determination on liability must be in writing and in compliance with the mandatory requirements of section 33 of the AA 2005. An oral award or pronouncement on liability is therefore invalid; and
- (c) If the arbitral tribunal declines to provide a written award on liability in the bifurcated proceeding, the aggrieved party may apply to stay the arbitral proceeding and restrain the counter party from proceeding to assess quantum of damages.

If you have any questions or comments on this article, please contact:-

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