IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2019CD00447

IN THE MATTER OF section 4 of the Arbitration (Recognition and Enforcement of Foreign Awards) Act, 2001

AND

IN THE MATTER of Section 56 and 57 of the Arbitration Act 2017

AND

IN THE MATTER of the enforcement of an arbitral award dated May 29, 2019 made by the Korean Arbitration Board in the matter of KCAB/IA No. 17112-0028 Key Motors Limited (Claimant) v Hyundai Motor Company (Respondent)

BETWEEN	**HYUNDAI MOTOR COMPANY**	**CLAIMANT**
AND	**KEY MOTORS LIMITED**	**DEFENDANT**

IN OPEN COURT

Ms Amanda Montague and Ms Maliaca Wong instructed by Myers Fletcher & Gordon, Attorneys-at-Law for the Claimant

Mr Ransford Braham QC and Mr Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co., Attorneys-at-Law for the Defendant

Arbitration – Foreign arbitration – Enforcement - Principles applicable Evidence – Affidavit – Execution abroad - Whether absence of certificate confirming status of notary public is fatal

Heard: 22nd June and 23rd September 2020

LAING, J

The Claim

[1] The Claimant by Fixed Date Claim Form filed 25th October 2019, seeks the following orders against the Defendant, Key Motors Limited (hereinafter referred to as the Defendant or Key Motors).

> *1. The Award of Korean Commercial Arbitration Board dated May 29, 2029 in the matter of KCAB/IA No. 7112-0028 Key Motors Limited (Claimant) v Hyundai Motor Company (respondent) (the Award") is recognized and enforceable in its entirety in the Supreme Court of Jamaica and the Defendant is hereby bound by the terms thereof.*
>
> *2. Judgment is given in the terms of paragraph 132(ii) of the Award as follows:*
>
> *"Key Motors Limited shall forthwith reimburse Hyundai Motor Company the following amounts:*
>
> *(a) KRW 4,230,000, representing Hyundai Motor Company's costs of the arbitration; and*
>
> *(b) KRW 505,904,190 plus USD 57,835.02 plus EUR 3,445.69, representing Hyundai Motor Company's reasonable legal costs and other necessary expenses incurred by the parties in connection with the arbitration."*

> *3. Interest on the Award from the date of this Court's judgment to the date of payment of the sums due under the Award at the rate of 3% per annum.*
>
> *4. Costs to be taxed if not agreed."*

[2] The Fixed Date Claim Form was supported by an affidavit of Erick Guitierrez sworn to on 11th October 2019 before a Justice of the Peace for the parish of Saint Catherine, Jamaica and filed on 25th October 2019 (the Gutierrez Affidavit"). Exhibited to the Guitierrez Affidavit was a power of attorney dated 23rd September 2019, between the Claimant and Magna Motors (Dealership) Limited, registered in the Record Office on the 16th day of October 2019. Paragraph 1 of the power of attorney indicates that the Claimant has authorized Mr. Gutierrez as follows:

> *"1. To bring or defend any action and make any claim or counter-claim or appeal on its behalf in any court or tribunal to have the Award of the Korean Commercial Arbitration Board ("KCAB") dated May 29, 2019 in the matter KCAB/1A No. 7112 – 0028 Key Motors Limited (Claimant) vs Hyundai Motor Company (Respondent) ("the Award") recognised and enforced, and for this purpose may instruct Solicitors and Counsel and accept service on its behalf."*

[3] The Defendant has also filed a Notice of Application on 3rd April 2020 requesting that the Court strike out the Fixed Date Claim Form and the Gutierrez Affidavit by utilizing its powers pursuant to part 26.3(1) of the Civil Procedure Rules 2002 ("CPR") and under its inherent jurisdiction. The grounds relied on are that:

(i) the Claimant contrary to CPR 8.8(2) (as amended) failed to file an affidavit in its name upon which the Claimant intends to rely;

(ii) alternatively, that the Guiterrez Affidavit contains hearsay material contrary to CPR 30.3.;

(iii) the claim amounts to an abuse of the process of the Court and is likely to obstruct the just disposal of the proceedings; and

(iv) the Statement of Case does not disclose any reasonable ground for bringing the claim.

[4] CPR 8.8(2) does not require an affidavit in the Claimants name but requires a Claimant who is utilizing a fixed date claim form, to provide an affidavit containing the evidence on which the Claimant intends to rely. The Guiterrez Affidavit was filed by the Claimant in support of the claim and therefore the first ground of application does not have any merit.

[5] The Defendant's challenge as expressed in the alternative second ground is that the Gutierrez Affidavit is not in compliance with CPR 30.3(1) and (2) which provide as follows:

> *"30.3(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.*
>
> *(2) However an affidavit may contain statements of information and belief –*
>
> *(a) where any of these Rules so allows; and*
>
> *(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –*
>
> *(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and*
>
> *(ii) the source for any matters of information and belief."*

[6] The Defendant submitted that it is disclosed in the Gutierrez Affidavit that he is the Managing Director of Magna Motors Dealership Limited, however he does not assert that he is an employee of the Claimant. Furthermore, contrary to CPR 30.3(1) he does not confirm that he has any personal knowledge of the matters to which he is deponing in the Affidavit.

[7] Ms Montague appears to have tacitly conceded that there is merit in Mr Braham's submissions that any matters of information and belief in the Gutierrez Affidavit would be impermissible because this is not an application for summary judgment or a procedural or interlocutory application.

[8] The Claimant also sought to adduce evidence of foreign law through an affidavit of Youngrong Kim sworn on 11th May 2020. A copy of this affidavit was initially filed on 12th May 2020 and the original was subsequently filed on 19th June 2020. Ms Montague submitted that this affidavit contains substantially the same evidence as that which is contained in the Gutierrez Affidavit.

[9] Mr Braham QC submitted that the Youngrong Kim Affidavit suffers from the same defect as that of the Gutierrez Affidavit insofar as it purports to provide factual information in support of the claim. Mr Braham highlighted the fact that although Mr. Youngrong Kim declares himself to be Senior Counsel for the Claimant, he does not go further to indicate that he participated in the Arbitration in Korea, nor has he identified any other basis on which it could be concluded that he has personal knowledge of the factual matters that he has deponed to.

[10] Mr Braham also identified a number of technical breaches in relation to the Affidavit of YoungRong Kim. He submitted that the Affidavit was not sworn before the Notary Public or any other certifying officer and the signature section of the jurat provided for the signature of the Notary is left blank. Learned Queen's Counsel referred to specific provisions of Section 22 of the Judicature (Supreme Court) Act as follows:

> *"22(1) Every Justice may administer oaths and take affidavits, declarations and affirmations concerning any matter or proceeding in any Court in this Island and where the matter or proceeding shall be in the Supreme Court such Justice shall for such purpose be deemed to be an officer of the Court.*
>
> *(2) Affidavits, declarations and affirmations concerning matters or proceedings in any Court in this Island may be sworn or taken –*
>
> *(a) …*
>
> *(b) in any foreign state or country before any Jamaican or British Ambassador, Envoy, Minister, Charge d'Affaires or Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or*

> *Consular Agent exercising his function in such foreign State or country; or*
>
> *(c) in any foreign state or country before any person having authority by the law of such state or country to administer an oath in such state or country.*
>
> *(3) …*
>
> *(4) where any affidavit, declaration or affirmation is sworn or taken in any foreign state or country before any person authorized by paragraph (c) of subsection (2) the signature or seal of such person and his authority to administer an oath in such State or country shall be verified by a certificate of one of the officers set out in paragraph (b) of subsection (2) or by a certificate under the Seal of the appropriate person having such power of verification in such State or country."*

[11] Mr Braham submitted that there is no signature or seal affixed to either Affidavit of Youngrong Kim. Counsel acknowledged that there is a Notarial Certificate attached to the Affidavit where the Notary declared that Mr. Youngrong Kim appeared before him:

> "Youngrong Kim --------
>
> *Personally appeared before me and admitted his (her) subscription to the attached AFFIDAVIT OF YOUNGRONG KIM."*

Counsel submitted that this declaration does not represent a positive indication that the Affidavit was sworn before the Notary, but is only an indication that Mr. Youngrong Kim had signed the Affidavit, that is to say, it was a declaration by the Notary that Youngrong Kim admitted before him to the subscription (of which subscription there is no evidence that the Notary himself witnessed).

[12] I find that this interpretation of the declaration proffered by Mr Braham is, without more, unreasonable in the circumstances and does not provide a sufficient basis for the Court to find that Mr Youngrong Kim did not swear to the affidavit before the Notary Public in the usual correct manner of persons who have their signatures witnessed by a Notary.

[13] Mr Braham submitted further, that because the affidavit was sworn in a foreign state the signature or seal and the authority of the Notary to administer an oath in that country is to be verified by a Certificate of one of the persons set out in Section 22(2)(b) of the Judicature (Supreme Court) Act (i.e. Jamaican or British Ambassador, Envoy, Minister Charge de Affaires, Consul or Vice Consul etc.) or by a Certificate under the Seal of a person having the power of verification in that foreign state. He submitted that there is no evidence of this and that this omission constitutes a fatal defect.

[14] On a strict interpretation of section 22 (2) (b) of the Judicature (Supreme Court) Act, it does appear that Mr Braham is indeed correct that the Notarial Certificate of the Notary Park Sung Koo is not sufficient. I accept that the assertion that "*this office has been authorised by the Minister of Justice, The Republic of Korea, to act as Notary Public Since 7, Feb. 2020 under Law No. 60*" may not be adopted at face value without further verification or proof by a certificate under the seal of a person having the power of verification of the Notary's status in the Republic of Korea, (assuming of course that there is provision for such a verification in that jurisdiction). It is my opinion that section 22 (2) (b) does not affect the validity of an affidavit which on its face appears to have been duly made in accordance with the laws of the Republic of Korea. The requirement for an additional level of verification of the Notary's status goes to the admissibility of the affidavit for purposes of Jamaican Law, however its omission is a mere procedural irregularity which can be cured by the Claimant providing this further authentication of the authority of the Notary.

[15] I have considered whether I should simply make an order for this certificate to be provided before conducting any further analysis however I have concluded that there is a better option. The parties agreed that the Fixed Date Claim Form and the application to strike out should be heard together, with the appreciation that the Application may not wholly succeed. Accordingly, the Court has therefore spent considerable judicial time on the hearing of the Fixed Date Claim Form and the substantive issues raised therein. I propose to admit the affidavit of Youngrong

Kim *de bene esse*, subject to the required additional proof of the Notary's status to which I have already referred. I will also analyse the issues raised on the Fixed Date Claim Form on the assumption that the principle of relation back will apply to the affidavit as at its date of filing and therefore the affidavit contained therein would have been properly considered by this Court on the hearing of the Fixed Date Claim Form.

Conclusion on the Defendant's application to strike out

[16] For the reasons expressed above I will reserve my ultimate conclusion on the Defendant's Application to Strike Out the claim and make it subject to the provision of an addition certificate of the Notary's status in accordance with section 22(2) (b) of the Judicature (Supreme Court) Act.

THE SUBSTANTIVE CLAIM

The Fixed Date Claim Form - The applicable legislation

[17] There are two applicable pieces of legislation to be considered. The first is the relatively recent Arbitration Act which was assented to on the 21st June 2017 and came into operation on 7th July 2017 by notice ("the Arbitration Act"). It repealed and replaces the former Arbitration Act 1900. The second is the Arbitration (Recognition and Enforcement of Foreign Awards) Act, 2001 (the "AREFA") which by section 3(1) gives effect to the Convention on The Recognition and Enforcement of Foreign Awards ("the Convention"). Section 3(1) of the AREFA provides that "*Subject to subsection (2), the Convention shall have the force of law in Jamaica.*"

[18] It was submitted by Mr Braham that in circumstances where it is being sought to recognise and enforce foreign arbitration awards in Jamaica, the primary legislation is the Arbitration (Recognition and Enforcement of Foreign Awards) Act. He submitted that where the Arbitration Act makes provisions that conflict with the provisions of the AREFA, those provisions of the Arbitration Act will not apply.

[19] These submissions are founded on Section 2 (1) of the Arbitration Act which states as follows:

> *"This Act applies to domestic arbitration and international commercial arbitration, subject to any agreement in force between Jamaica and any other State or States."*

Learned Queen's Counsel submitted that implicit in this provision is an acknowledgment that the AREFA which was already in existence, takes precedence in circumstances of a conflict with the Arbitration Act.

[20] Mr Braham developed his submission by arguing that because the AREFA is the primary legislation, the conditions precedent which it requires must be satisfied by the Claimant. The first of these being the requirement for reciprocity which is engaged by the operation of Section 3(2)(a) of the AREFA. This section provides that the provisions of the Convention shall apply …"*to any award where reciprocal provisions have been made in relation to the recognition and enforcement of such an award made in the territory of a State party to the Convention…*".

[21] Learned Queen's Counsel argued that the overarching theme of the Convention which demands reciprocity is stated in Article 1(1) is as follows:

> *"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal…"*

He submitted that the requirement of reciprocity is also evident in Articles 1(3) and XIV of the Convention which state:

> *"1(3) When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.*

> *XIV A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention."*

[22] Learned Queen's Counsel submitted that in accordance with the provisions of Section 3(2) of the AREFA Act the Claimant was obliged to establish to the court's satisfaction that Korea has reciprocal provisions similar to those of the Convention and had failed to do so. Accordingly, he submitted, that the claim must fail.

[23] Ms Montague highlighted the fact that section 66 of the Arbitration Act amended section 4 of the AREFA by deleting the words "*section 13*" and substituting therefor the words "*section 56*". Section 4(1) of the AREFA now reads as follows:

> *A foreign award shall, subject to the provisions of this Act, be enforceable in Jamaica either by action or under the provisions of section 56 of the Arbitration Act.*

Section 56 of the Arbitration Act, which is now the operative section is in the following terms:

> *Part IX- Recognition and Enforcement of Awards*
>
> *56-(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the Court, shall be enforced, subject to the provisions of this section and section 57.*

[24] Ms Montague submitted that that there is no conflict between both pieces of legislation insofar as the procedure for enforcement is concerned, and in this case the Claimant is proceeding pursuant to the operative section which is section 56 of the Arbitration Act.

Court's finding on the reciprocity point

[25] The previous Arbitration Act 1900, as amended, applied exclusively to domestic arbitrations. The scheme of the AREFA was to provide a means for the recognition and enforcement of what is sometimes referred to as "convention awards", that is, awards made in other states which are parties to the Convention. This explains

the inclusion of the Convention as a schedule to the AREFA. An integral part of the recognition and enforcement of the regime introduced by the Convention was, therefore, of necessity, the element of reciprocity.

[26] The Arbitration Act adopts the approach of the UNCITRAL model law on International Commercial Arbitration. The United Nations document 40/17 as adopted by the United Nations Commission on International Trade Law on 21st June 1985, in the explanatory note at page 24 (paragraph 45) notes that the provisions of the model law in respect of recognition and enforcement are aimed at ensuring that the same rules should apply whether the arbitral award is made in the country of enforcement or abroad and that those rules should follow the convention. It is further noted in paragraph 47 that:

> *47. By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention.* ***The Model law supplements, without conflicting with, the regime of recognition and enforcement created by that successful convention.****(Emphasis added)*

[27] Paragraph 48 is also instructive and provides as follows:

> *(b)Procedural conditions of recognition and enforcement*
>
> *48. Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused).* ***Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition of recognition and enforcement.*** *(Emphasis supplied)*

[28] It is beyond challenge that the regime created by the Arbitration Act is consistent with the model law in many respects, particularly as it relates to recognition and enforcement. This is evidenced in section 56 (1) of the Arbitration Act which makes reference to an arbitral award "*irrespective of the country in which it was made*". This has particular significance for purposes of analysing this claim. For the avoidance of any doubt, I am not using the explanatory notes to which I have referred as an aid to interpretation of the Arbitration Act. I have referred to them

simply to provide context and a point of comparison. The terms and effect of the Arbitration Act are clear on its face and those terms require no assistance in their interpretation.

[29] It is clear that the Arbitration Act supplements the AREFA and does not conflict with it. The amendment to section 4 of the AREFA by the Arbitration Act now creates a uniform procedure for recognition and enforcement. This is because as it relates to recognition and enforcement, the AREFA is now governed by section 56 of the Arbitration Act in the same manner as a domestic arbitration under the Arbitration Act.

[30] However, it must be acknowledged that there exists, in some respects, a real distinction between recognition and enforcement of a Convention award pursuant to the AREFA on the one hand, which arguably still has an element of reciprocity and on the other hand, recognition and enforcement under section 56 of the Arbitration Act which has no such requirement. We are here only concerned with the latter.

[31] I am therefore unable to accept the submissions of Mr Braham that the effect of the words "*subject to subsection (2)*" in paragraph 3 of the AERFA has created a position of conflict with the Arbitration Act, the effect of which is to impose a precondition of reciprocity for the recognition and enforcement of the arbitral award which is the subject of this claim.

[32] In any event, it is a fact which is incapable of challenge as evidenced by Chapter XXII of the Convention that the Republic of Korea acceded to the Convention on 8th February 1973, much earlier than Jamaica did, which was on 10th July 2002. The proof of this is not dependent on affidavit evidence. Mr Braham's submissions as to there being no evidence of reciprocity are without merit.

[33] As far as the restriction on enforcement is concerned, Ms Montague submitted that emphasis must be placed on section 57 of the Arbitration Act. This section in the

same terms as Article V of the Convention which is annexed to the AREFA. Section 57 provides as follows:

> *"57.-(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only-*
>
> *(a) at the request of the party against whom it is invoked, if that party furnishes to the Court where recognition or enforcement is sought proof that-*
>
> *(i) a party to the arbitration agreement referred to in section 10 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;*
>
> *(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;*
>
> *(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, however, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;*
>
> *(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the laws of the country where the arbitration took place; or*
>
> *(v) 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 Court finds that-*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the Laws of Jamaica; or*

(ii) the recognition or enforcement of the award would be contrary to the

public policy of Jamaica."

The form of the award

[34] Article IV(1) of AREFA provides as follows:

> *"To obtain the recognition and enforcement mentioned in the preceding Article, the party applying for recognition and enforcement shall, at the time of the application supply:*
>
> *(a) the duly authenticated original award or a duly certified copy thereof;*
>
> *(b) the original agreement referred to in Article II or a duly certified copy thereof."*

Mr Braham submitted that the Claimant has not satisfied this requirement because it has failed to place before the Court a duly authenticated original award or a duly certified copy thereof and that the Claimant has also failed to place before the court the original agreement or a duly certified copy thereof. He submitted that the Court is not entitled to ignore this statutory requirement which is given the force of law by Section 3 of the AREFA.

[35] I have previously found that enforcement under the Arbitration Act is a distinct mode of enforcement and I find that Article IV(1) of the AREFA does not directly apply to this Claim where the Claimant is seeking enforcement under the Arbitration Act. This Article is clearly aimed at safeguarding the integrity of the enforcement process by ensuring the authenticity of the Award of which enforcement is being sought, but it is in essence a technical requirement which bolsters the usual rules of evidence and in particular the best evidence rule. It is inconceivable, that a Claimant could seek the enforcement of an award without producing what purports to be a copy thereof. Although section 57 of the Arbitration Act does not expressly so state, it is implicit that recognition or enforcement of an arbitral award may be refused where the party against whom enforcement is being sought provides proof that the copy of the award provided by the Claimant to the

Court is inaccurate and/or is not a true copy. In this case, the Claimant has provided a copy of the Award and the Defendant is not asserting that it is not accurate or that it is not a true copy. In these circumstances, I find that the authenticity of the Award presented to the Court is not in issue and the fact that it is not duly authenticated is not a sufficient ground on which the Court should disregard it.

The nature of the award being for costs only

[36] Mr Braham submitted that the claims made by Key Motors were dismissed in their entirety and there was no order on any counterclaim made by the Claimants. The only award made was as to costs and since the issue of costs was not a matter of substance before the arbitrators, an award purely for costs cannot be recognized or enforced in Jamaica. Counsel sought to support his submission by relying on the wording of Article I of the Convention which provides that:

> *"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons whether physical or legal."*

[37] A useful starting point in examining this issue is the Agreement, which provides as follows:

> *"18.00 GOVERNING LAW AND ARBITRATION*
>
> *This Agreement shall be governed by and construed, in accordance with the laws of the Republic of Korea without reference to its conflicts of law principles and as if fully performed therein and will bind the successions and assigns of each Party. The United Nations Convention on Contracts for the International Sale of Goods shall be inapplicable to this Agreement.*
>
> *[…] All disputes, controversies or differences, out of, or in relation to, or in connection with this Agreement and all amendments thereto, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under the auspices of the Korean Commercial Arbitration Board in accordance*

> *with the International Arbitration Rules of the Korean Commercial Arbitration Board. 'The seat of the arbitration shall be Seoul, Korea. The number of arbitrators shall be three (3). The arbitration proceedings and resulting decision shall be made in English, and its decision shall be final and binding on both Parties."*

[38] The substantive claim was in respect of a difference arising out of the validity and termination of the Agreement. It is not in dispute that the award of costs was an incidental order. At paragraphs 122 the Tribunal noted that both parties requested an award of their costs in the arbitration, including the fees and expenses of the arbitrators, the Korean Commercial Arbitration Board ("KCAB") administrative fees and legal costs.

[39] The Tribunal noted that articles 52 and 53 of the KCAB Rules address arbitration costs and legal costs and although Article 52 provides that the arbitration costs including the administrative fee, shall in principle be borne by the unsuccessful party, the absence of a similar provision in relation to legal fees in article 53 was not restrictive. This was stated to be so because Article 53 gives the tribunal complete discretion in allocating these costs in the absence of agreement between the parties and the general principle in international arbitrations is that "*the costs follow the event*". This is not an unusual position. In fact, section 49 of the Arbitration Act provides that unless a contrary intention is expressed, every arbitration shall be deemed to include a provision that the costs shall be in the discretion of the arbitral tribunal. The Tribunal indicated that it saw no reason to depart from the general principle in this case.

[40] I am unable to see why as a matter of principle, an order for costs only, following an arbitration on an issue which was properly within the terms of the arbitration clause of the relevant Agreement, should not be capable of recognition and enforcement in this jurisdiction. It was an incidental award which was so closely connected to the arbitration itself and an important part of the arbitration process. I have not been provided with, nor have I identified any binding legal authority which supports the submissions of Mr Braham in this regard and therefore, I do not accept these submissions.

Defences to the claim

[41] In the Privy Council in the case of **Cukurova Holding AS vs Sonera Holding BVI** [2015] 1 All ER (Comm) 1087, the court made the following observations at pages 1100-1101:

> ***[34]*** *The general approach to enforcement of an award should be pro-enforcement. See eg* ***Parsons & Whittemore Overseas Co Inc v Socieìteì Geìneìrale*** *(1974) 508 F 2d 969 at 973:*
>
> > *'The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards … [it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V.'*
>
> *In* ***IPCO (Nigeria) v Nigerian National Petroleum Corp*** *[2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326 Gross J said at para [11], when considering the equivalent provision of the English Arbitration Act 1996:*
>
> > *'… there can be no realistic doubt that s.103 of the Act embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself …'*
>
> *The Board agrees. There must therefore be good reasons for refusing to enforce a New York Convention award.*

[42] The same basic thrust has been adopted by the Arbitration Act and this is evidenced by section 57 of the Arbitration Act, which I have previously indicated is in the same terms as and derived from Article V of the Convention. This section provides the possible defences to a claim for recognition and enforcement. It is not disputed that implicit in these defences are the concepts of fairness and natural justice and it is also settled law that the grounds for refusal or enforcement are to be construed narrowly.

Breach of Natural Justice

[43] Mr Braham submitted as a general proposition that it is a breach of the principles of natural justice for an arbitration tribunal to disregard the submissions, arguments and issues raised by one of the parties. In support of this submission he relied on the case of **Front Row Investment Holdings (Singapore) Pte Ltd V Diamler South East Asia Pte Ltd** [2010] SGHC 80 as follows:

> *"31. In **Pacific Recreation Pte Ltd vs SY Technology Inc** [2008] 2 SLR (R) 491 the Court of Appeal held that a court or tribunal would be in breach of natural justice if it decided a case on a basis not raised or contemplated by the parties, since the affected party would have been deprived of its opportunity to be heard or to address the issues upon which the case was decided: at [30]. The corollary is plainly also true – that a court or tribunal will be in breach of natural justice if in the course of reaching its decision, it disregarded the submissions and arguments made by the parties on the issues (without considering the merits thereof). Otherwise, the requirement to comply with the maxim **audi alteram partem** would be hollow and futile, satisfied by the mere formality of allowing a party to say whatever it wanted without the tribunal having to address or even understand and consider whatever had been said."*

[44] Mr Braham submitted that the Defendant in the arbitration proceedings raised issues of estoppel and fraud. Critical to these issues was the assertion that the Claimant represented to the Defendant that the Distribution Agreement would continue beyond December 2014 and that these representations were untrue and therefore fraudulent. The Defendant asserted that as a consequence of these representations it expended money to retrofit new facilities to accommodate the Claimant's motor vehicles. Furthermore, that the Claimant expressly requested it to carry out the renovation and retrofitting.

[45] Mr Braham referred to paragraph 58 of the Award where the Arbitral Tribunal decided on the basis of an entire agreement clause and concluded as follows:

> *The Tribunal concludes in accordance with the plain language of Section 20.06 of the Agreement that the Agreement represents the only and entire Agreement between the Parties with respect to the matters contemplated therein, to the exclusion of any prior oral or written agreements,*

> *understandings or arrangements between the Parties relating thereto. As such, any reference to the existence of a contract on the basis of an oral agreement or understanding is without foundation. The Agreement represents the "only and entire agreement" between the Parties with respect to their business relationship. The Tribunal further notes that any amendment to the Agreement must be in writing and signed by both parties."*

[46] Queen's Counsel referred to the findings of the Tribunal at paragraph 106, which I reproduce in full hereunder:

> *The Tribunal finds Claimant's tort claims to be without merit, for several reasons. Most importantly, as noted above, Respondent did not terminate the Agreement, unilaterally or otherwise. The Agreement expired by its terms as of 1 January 2015, and Respondent was not required to renew it. There was therefore no unlawful act by Respondent which could be the basis for a tort claim. In addition, Claimant has failed to prove that Respondent requested or demanded that Claimant make the investments it made in 2013 and 2014, in land, buildings or otherwise. The Tribunal notes that these allegations are denied by Respondent. Moreover, even if respondent had made such requests or demands, it was in no position to force Claimant to purchase land or buildings. Finally, even if Clamant has purchased real estate or made any other large investments, it would retain the value of such investments.*

[47] Queen's Counsel relied on the fact that the Tribunal found that the Defendant "*failed to prove that Respondent requested or demanded that the Claimant make the investment it made in 2013 and 2014, in land, buildings and otherwise.*" to support his submission that the Tribunal failed to appreciate that the issue of fraud related to two separate representations, either of which if proved to be false could give rise to the cause of action of deceit or fraud. One was the Claimant's request made to the Defendant to make certain expenditure for renovation of the property, in respect of which the Tribunal made a finding. The other, was the Claimant's assurance that the contract would continue after the expiry of the last written contract in 2014 and there was no finding by the Arbitral Tribunal as to whether or not the Claimant had made such a representation.

[48] Learned Queen's Counsel also submitted that the Arbitral Tribunal failed to consider and/or grapple with the issue of estoppel. The essence of this point was that the parties had been in contractual relationship for twenty seven (27) years or

more starting in 1988, governed by five (5) written contracts and five (5) oral contracts. At the expiry of the last contract (2013/2014), there was no reason for the Defendant to believe that the contract would not have continued as usual. This was the practice over the prior twenty seven (27) years which constituted an estoppel that the Arbitral Tribunal failed to take into account, because as Counsel expressed it in his written submissions:

> *"…it failed to appreciate that the principle of estoppel raised had nothing to do with the contract and rights accruing by virtue of estoppel were not generated by the terms of any written or oral contract but the conduct of the parties outside of the contract."*

[49] In summary, learned Queen's Counsel submitted that the treatment of estoppel and fraud by the Arbitral Tribunal demonstrates a clear failure to understand the Defendant's case that was placed before it. Because of this failure to understand the case, the Claimant's case was not considered on its merit.

[50] Ms Montague has submitted that the Court should be guided by the observations of **Cukurova Holding AS** (supra) at page 1101 paragraph 35 where the court observed as follows:

> *[35] As to reasons, it is common ground that a judge owes a duty to give reasons for his decisions:* ***English v Emery Reimbold & Strick Ltd*** *[2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409. The same is in general true of arbitrators:* ***Irvani v Irvani*** *[2000] 1 Lloyd's Rep 412 at 426 per Buxton LJ. However, s 36 does not include a free-standing rule to the effect that a court must refuse to enforce an award for absence of reasons. After all, there is no duty upon an arbitral tribunal to address every point in a case:* ***English v Emery Reimbold & Strick Ltd*** *[2002] 3 All ER 385, [2002] 1 WLR 2409 (at [17]–[18]). As the Swiss Federal Supreme Court put it in Ferrotitanium para 3.3, 'It does not mean that the arbitral tribunal must expressly examine every argument the parties present.' See also IPCO per Gross J at para [49]: 'No arbitration tribunal should be criticised for succinctness; nor is a tribunal required to set out every point raised before it, still less at length.' All depends upon the circumstances.*

The Court's analysis of the Defences

[51] In analysing the submission of learned Queen's Counsel on this issue, it is paramount that one appreciates that the authorities support the proposition that an arbitral award is not invalid merely because in the opinion of the court hearing the application to recognize or enforce the award, the arbitral tribunal wrongly decided a point of fact or law. As it relates to the estoppel point, it is patently clear to me, that the Tribunal understood the point which was being made by the Defendant Key Motors but accepted that the entire agreement clause was determinative of the issue. That finding is one with which this Court is unable to interfere.

[52] There must therefore be good reasons for refusing to enforce the Award. I have rejected the defence of the Defendant and I can see no basis upon which I should refuse to enforce the award. The Claimant has produced extensive written and oral submissions to show that the Defendant would not be able to deploy any of the permissible defences in response to its application for enforcement. Since the other defences were not raised or pursued, it is unnecessary for me to reproduce and address those submissions for purposes of this judgment.

[53] As it relates to the complaint that the Tribunal did not make a specific finding as to whether Hyundai Motor Company had falsely represented that the agreement would have been extended beyond the last contractual term which ended, there is insufficient evidence from which this Court can conclude that the Tribunal did not understand the case presented by Key Motors. There is insufficient ground on which this Court can refuse to recognize the Award. By way of comment I would add that, it can be reasonably argued that implicit in the Tribunal's finding that the Agreement expired by effluxion of time, taken together with its finding that Hyundai never "*requested or demanded that Claimant make the investments it made in 2013 and 2014, in land, buildings or otherwise*", is an acceptance by the Tribunal that there was no representation by Hyundai that the Agreement would have been extended. In any event, I am not required to come to a conclusion as to whether such a representation was made. This is not an appeal of the Award. My finding is

that the Award in its totality does not support a finding of breach of natural justice in the manner submitted by learned Queen's Counsel.

Conclusion and Disposition

[54] For the aforementioned reasons the Court makes the following orders:

> 1. The Award of Korean Commercial Arbitration Board dated May 29, 2029 in the matter of KCAB/IA No. 7112-0028 Key Motors Limited (Claimant) v Hyundai Motor Company (respondent) (the Award") is recognized and enforceable in its entirety in the Supreme Court of Jamaica and the Defendant is hereby bound by the terms thereof.
>
> 2. Judgment is given in the terms of paragraph 132(ii) of the Award as follows:
>
> "Key Motors Limited shall forthwith reimburse Hyundai Motor Company the following amounts:
>
> (a) KRW 4,230,000, representing Hyundai Motor Company's costs of the arbitration; and
>
> (b) KRW 505,904,190 plus USD 57,835.02 plus EUR 3,445.69, representing Hyundai Motor Company's reasonable legal costs and other necessary expenses incurred by the parties in connection with the arbitration."
>
> 3. Interest on the Award from the date of this Court's judgment to the date of payment of the sums due under the Award at the rate of 3% per annum.
>
> 4. The Defendant's Notice of Application filed on 3rd April 2020 requesting that the Court strike out the Fixed Date Claim Form is refused.
>
> 5. The Claimant is to file within 60 days of the date of this judgment, a Certificate under the seal of the appropriate person having such power of verification in the Republic of South Korea, verifying that the Notary Park Sung Koo has been authorised by the Minister of Justice, The Republic of Korea, to act as Notary Public Since 7, Feb. 2020 to administer an oath in that state.

6. The orders at paragraphs 1-5 and 8 herein are stayed and are to have no effect before 60 days of the date of this judgment and thereafter only upon a further order of this Court.

7. Liberty to apply within 60 days of the date of this judgment.

8. Leave to appeal is granted.

9. Costs of the Claim to include costs of the Defendant's Notice of Application to strike out referred to herein, are awarded to the Claimant to be taxed of not agreed.