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LOW KOH HWA v. PERSATUAN KANAK-KANAK SPASTIK SELANGOR DAN WILAYAH PERSEKUTUAN & ANOTHER CASE

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[ORIGINATING SUMMONS NOS: BA-24C(ARB)-4-05-2020
& BA-24C-87-09-2020]
25 MARCH 2021

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ARBITRATION: *Award – Setting aside – Application for – Whether award dealt with dispute not contemplated by or not falling within terms of submissions – Whether award contained decisions on matters beyond scope of terms – Whether award in conflict with public policy – Arbitrator's disclosure of relationship with interested party in arbitration proceedings – Whether complied with full disclosure and timeous disclosure requirement – Requirements for arbitrator to be impartial as provided in first rule of natural justice and independence – Whether there were serious breaches – Whether entire award ought to be set aside – Arbitration Act 2005, ss. 14, 15, 37, 38 & 39*

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ARBITRATION: *Award – Enforcement – Application for – Whether award dealt with dispute not contemplated by or not falling within terms of submissions – Whether award contained decisions on matters beyond scope of terms – Whether award in conflict with public policy – Arbitrator's disclosure of relationship with interested party in arbitration proceedings – Whether complied with full disclosure and timeous disclosure requirement – Requirements for arbitrator to be impartial as provided in first rule of natural justice and independence – Whether there were serious breaches – Whether entire award ought to be set aside – Arbitration Act 2005, ss. 14, 15, 37, 38 & 39*

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Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan ('the association') appointed one Low Koh Hwa ('Mr Low'), a registered architect practising as a sole proprietor under the name of Messrs Low & Associates, to provide architectural consultancy services ('services') for the redevelopment of the association's Spastic Centre ('project'). Mr Low claimed that he had completed the services but the balance of his professional fees in a sum of RM485,269.33 had yet to be paid by the association ('Mr Low's claim'). Mr Low's claim was referred to arbitration before a sole arbitrator ('the arbitrator'). In the arbitral proceedings before the arbitrator ('arbitration'), the association was represented by its honorary director Datuk Dr Mohinder Singh ('Datuk Mohinder'). The arbitrator delivered a final award ('award') as follows, among others (i) Mr Low was only entitled to claim from the association a sum of RM747,250 as his professional fees for the services; (ii) Mr Low was estopped from claiming from the association for any professional fees in excess of RM747,250; and (iii) the association had overpaid a sum of RM72,750 to Mr Low (overpayment). Hence, Mr Low shall refund the overpayment to the association. Mr Low filed an originating summons under s. 37 of the Arbitration Act 2005 ('AA')

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against the association to, among others, set aside the award ('setting aside OS') while the association filed an originating summons against Mr Low for a court order under s. 38(1) of the AA to recognise the award as binding and enforceable as a judgment in terms of the award ('enforcement OS'). Both the OS raised the following questions, *inter alia* (i) whether the award had dealt with a dispute not contemplated by or not falling within the terms of the submission to the arbitration as understood in s. 37(1)(a)(iv) of the AA; (ii) did the award contain decisions on matters beyond the scope of the terms within the meaning of s. 37(1)(a)(v) of the AA; (iii) if s. 37(1)(a)(v) of the AA applies to the award, whether the court can separate matters submitted to the arbitration from those not submitted to the arbitration; and (iv) should the court set aside the award under s. 37(1)(b)(ii) of the AA on the ground that the award was in conflict with the public policy of Malaysia. In this regard (a) whether s. 14(1) of the AA provides for two different requirements for an arbitrator to be impartial as provided in the first rule of natural justice and the requirement (independence); (b) did s. 14(1) of the AA impose a statutory duty on the arbitrator to disclose to Mr Low and the association the arbitrator's relationship with Datuk Mohinder ('arbitrator's relationship'); (c) did the arbitrator disclose to the parties all the relevant details of the arbitrator's relationship which would enable a 'fair minded and informed observer' to decide objectively on whether there were justifiable doubts on the arbitrator's impartiality and/or independence (full disclosure) and had the arbitrator breached s. 14(2) of the AA by failing to give full disclosure to the parties without delay; (d) whether the court may consider the arbitrator's failure to give full disclosure to the parties without delay, as required by s 14(1) and (2) of the AA, in deciding (1) the arbitrator's breach of the first rule as provided in s. 37(1)(b)(ii) read with s. 37(2)(b)(i) and/or (ii) of the AA; and (2) the arbitrator's contravention of the requirement (independence); (e) in deciding whether the arbitrator had breached the first rule and the requirement (independence), which of the following test should be applied by the court (1) the test of 'reasonable suspicion of bias'; (2) the 'real danger of bias' test; or (3) the test of 'real possibility of bias'; and (f) whether Mr Low was estopped from setting aside the award based on a breach of the first rule and/or the requirement (independence) when he had failed to challenge the arbitrator within 15 days after the arbitrator's disclosure of the arbitrator's relationship as provided in s. 15(1) read with s. 14(3)(a) of the AA. The issue also arose as to whether the court should exercise its discretion to set aside the entire award pursuant to s. 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i) and/or (ii) of the AA.

Held (allowing setting aside OS; dismissing enforcement OS):

(1) According to the terms (submission to arbitration) ('terms'), the association did not counterclaim for the overpayment against Mr Loh. Hence, the overpayment and interest as decided by the arbitrator were not contemplated by the terms within the meaning of s. 37(1)(a)(iv) of the AA. It did not fall within the terms as understood in s. 37(1)(a)(iv)

of the AA and/or were beyond the scope of the terms as stated in s 37(1)(a)(v) of the AA. Regarding the application of s. 37(1)(a)(v) of the AA to the award, this court was not able to exercise its discretion pursuant to s. 37(3) of the AA to set aside only the overpayment and the interest (overpayment) of the award due to the following reasons: (i) the defence had averred that a total of RM868,600 paid by the association to Mr Low was adequate for the services. The defence did not allege that Mr Low was estopped from claiming for professional fees in excess of RM747,250. When the arbitrator went on a frolic of his own by making the award based on the estoppel point, it was difficult, if not impossible, for this court to separate the following matters in the award (a) matters in the award which fell within the terms; and (b) matters in the award which were beyond the terms. This court was unable to exercise its discretion under s. 37(3) of the AA to sever matters (not submitted to arbitration) from matters (submitted to arbitration) in the award. The court should exercise its discretion pursuant to s. 37(1)(a)(iv) of the AA to set aside the award in its entirety. The arbitrator had committed certain breaches, including a contravention of the first rule and the requirement (independence) for which this court had exercised its discretion to set aside the entire award pursuant to s. 37(1)(b)(ii), (2)(b)(i) and/or (ii) of the AA. (paras 14 & 17)

(2) The arbitrator had a s. 14(1) duty to disclose to the parties regarding the arbitrator's relationship. Datuk Mohinder was a material witness in this dispute. Datuk Mohinder participated in meetings with Mr Low and all the consultants for the project and took part in a discussion with Mr Low with respect to Mr Low's claim. As the association's honorary director, Datuk Mohinder signed the association's letters which were sent to Mr Low in this case. The contents of Datuk Mohinder's witness statement clearly showed that he was a material witness for the association in the arbitration; and Datuk Mohinder was the sole witness for the association in the association's resistance of Mr Low's claim; and the circumstances were 'likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence' within the meaning of s. 14(1) of the AA. (para 27)

(3) The arbitrator had merely informed the parties that he knew Dato' Mohinder. The arbitrator had breached the full disclosure requirement in this case. The arbitrator could have but did not provide to the parties all the relevant details of the arbitrator's relationship which would enable a fair-minded and informed observer to decide objectively on whether there were justifiable doubts on the arbitrator's impartiality and/or independence. Even if the arbitrator was doubtful as to what particular aspect of the arbitrator's relationship should be disclosed to the parties, the arbitrator was nonetheless bound by s. 14(1) which was a duty to make a full disclosure. The arbitrator had also breached the timeous disclosure requirement . The arbitrator had actual

knowledge before the hearing that Datuk Mohinder would be the sole witness for the association in the arbitration. Accordingly, the arbitrator should have made a full disclosure of the arbitrator's relationship before the hearing, namely at the preliminary meetings. However, the arbitrator had failed to do so. It was only after Mr Loh had completed his testimony that the arbitrator then disclosed the relationship. Such a belated disclosure by the arbitrator regarding the arbitrator's relationship had clearly contravened the timeous disclosure requirement. Mr Low could thus apply to court to set aside the award pursuant to s. 37(1)(b)(ii) read with s. 37(2)(b)(i) of the AA on the ground that the arbitrator had breached a s. 14(1) duty in respect of his non-compliance with the full disclosure requirement and timeous disclosure requirement. (paras 28, 29 & 31)

(4) In the objective perception of a fair minded and informed observer, there was a real danger that the arbitrator was partial in this case. Datuk Mohinder was a material witness. The arbitrator could have easily disclosed the arbitrator's relationship before the hearing but he delayed such disclosure. The arbitrator did not make a full disclosure. Despite the terms, the arbitrator decided that Mr Low should refund the overpayment and interest in favour of the association. In view of the noble and charitable activities carried out by the association, there was an appearance that the arbitrator had bent backwards to favour the association in the arbitration. A fair minded and informed observer would have an objective perception that (i) there was a real possibility that the arbitrator was biased towards the association; and (ii) there existed a reasonable suspicion that the arbitrator was partial in favour of the association in the arbitration. (paras 40 & 41)

(5) Whether there was a breach of the requirement (independence) by the arbitrator depended on whether in the objective assessment of a fair minded and informed observer, there was a real possibility that there was a presence of a relationship or connection between the arbitrator on the one part and (a) a party or parties in the arbitration; and /or (b) the substance or subject matter of the dispute on the one part would make it inappropriate for the arbitrator to adjudicate the dispute and lead the arbitrator to favour a particular party in the arbitration. As in the case for the first rule, this matter did not involve the arbitrator's lack of independence as a fact. This case merely concerned whether there was a perception that the arbitrator had lacked independence. A fair minded and informed observer would have an objective view that there existed a (i) real danger; (ii) real possibility; and (iii) reasonable suspicion, that there was a presence of a relationship or connection between the arbitrator on the one part and the association (through Datuk Mohinder) on the other part which would make it inappropriate for the arbitrator to decide the arbitration or lead the arbitrator to favour the association in the award. (paras 43-45)

(6) Independent of s. 15(1) read with s. 14(3)(a) of the AA, Mr Low could apply to the court to set aside the award on the ground of the arbitrator's breach of the first rule under s. 37(1)(b)(ii) read with s. 37(2)(b)(i) and/or (ii) of the AA and the requirement (independence) pursuant to s. 37(1)(b)(ii) of the AA. There was no room to apply the case law doctrine of estoppel in the face of express statutory provisions in s. 37(1)(b)(ii), 2(b)(i) and (ii) of the AA. A breach of the first rule can arise at any stage of the proceedings in question. In other words, the application of the first rule was not confined to a challenge of arbitrators under s. 15(1) read with s. 14(3)(a) of the AA. The arbitrator had breached the full disclosure requirement and timeous disclosure requirement. As such, the association could not now rely on an invalid disclosure by the arbitrator regarding the arbitrator's relationship to advance any argument based on estoppel against Mr Low. Estoppel is an equitable doctrine which is applied by the court to achieve justice. The equitable estoppel doctrine should not be a ground for arbitrators to circumvent the full disclosure requirement and timeous disclosure requirement. If otherwise, the application of the equitable estoppel doctrine would cause an injustice or inequity in arbitration. (para 47)

(7) This court exercised its discretion under s. 37(1) of the AA to set aside the entire award because the arbitrator had decided on the overpayment and interest (overpayment) which were not contemplated by the terms (s. 37(1)(a)(iv) of the AA), did not fall within the terms as understood in s. 37(1)(a)(iv) of the AA and/or were beyond the scope of the terms as stated in s. 37(1)(a)(v) of the AA. The arbitrator's non-compliance with the full disclosure requirement and timeous disclosure requirement had led to his breach of the first rule and the requirement (independence). The two breaches arose directly from the arbitration and were closely connected to the making of the award, especially when the arbitrator exceeded the terms by deciding on the overpayment and interest (overpayment). The nature of the two breaches was serious in the following sense (i) the two breaches were material to the outcome of the arbitration; (ii) the two breaches had a real impact on the award; and (iii) the arbitrator would have reached a different decision if not for the two breaches. The two breaches were significant and had affected the award. (para 50)

(8) Once the association had complied with all the procedural requirements regarding the enforcement OS, the burden shifted to Mr Low to satisfy the court of the existence of any one of the circumstances as provided in s. 39(1)(a)(i) to (vii), (b)(i) and (ii) of the AA for the court to refuse the enforcement OS. Mr Low had successfully discharged the onus to persuade this court to dismiss the enforcement OS. (paras 52 & 53)

Case(s) referred to:

Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application [2001] 2 CLJ 253 FC ***(refd)***

AT & T Corporation & Anor v. Saudi Cable Co [2000] 2 All ER (Comm) 625 ***(refd)***

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener) [2018] 10 CLJ 129 FC ***(refd)***

Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd [2012] 6 CLJ 156 HC ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Halliburton Co v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) & Ors (International Court of Arbitration of the International Chamber of Commerce & Others Intervening) [2020] 3 WLR 1474 ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***

Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 1 CLJ 632 HC ***(refd)***

Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd And Another Case [2015] 11 MLJ 841 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Majlis Perbandaran Seremban v. Tenaga Nasional Bhd [2020] 10 CLJ 715 FC ***(refd)***

Menteri Hal Ehwal Dalam Negeri v. Raja Petra Raja Kamarudin & Another Appeal [2009] 3 CLJ 513 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

MMC Engineering Group Bhd & Anor v. Wayss & Freytag (M) Sdn Bhd & Anor [2015] 1 LNS 705 HC ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

Murray & Roberts Australia Pty Ltd v. Earth Support Company (SEA) Sdn Bhd [2015] 6 CLJ 649 HC ***(refd)***

Porter v. Magill [2002] 1 All ER 465 ***(refd)***

Ragawang Corporation Sdn Bhd v. One Amerin Residence Sdn Bhd [2020] 1 LNS 895 HC ***(refd)***

Sundra Rajoo v. Mohamed Abd Majed & Anor [2011] 6 CLJ 923 HC ***(refd)***

Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic [2017] 9 CLJ 273 FC ***(refd)***

Legislation referred to:

Arbitration Act 1952 (repealed), ss. 24, 25

Arbitration Act 2005, ss. 13(8)(b), 14(1), (2), (3)(a), (4), 15(1), (2), (3), (5), 20, 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i), (ii), (3), (4), 38(1), 39(1)(a)(i), (ii), (iii), (iv), (v), (vi), (vii), (b)(i), (ii)

Arbitration Act 1996 [UK], s. 24(1)(a)

For the plaintiff - Steven Wong Chin Fung & James Ng Kean Yip; M/s Arifin & Partners

For the defendant - Ankit R Sanghvi, Thoo Yee Huan & Alycia Chuah Yuin Ting; M/s Halim Hong & Quek

Reported by Suhainah Wahiduddin

A

JUDGMENT

Wong Kian Kheong J:

Background

[1] This case concerns:

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(i) Mr Low Koh Hwa @ Low Kok Hwa (Mr Low), a registered architect who practises as a sole proprietor under the name of Messrs "Low & Associates"; and

(ii) "Persatuan Kanak-kanak Spastik Selangor dan Wilayah Persekutuan" (association).

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[2] The association appointed Mr Low to provide architectural consultancy services (services) for the redevelopment of the association's "Spastic Centre" in Petaling Jaya, Selangor Darul Ehsan (project).

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[3] Mr Low claimed that he had completed the services but the balance of his professional fees in a sum of RM485,269.33 had yet to be paid by the association (Mr Low's claim).

[4] Mr Low's claim was referred to arbitration before a sole arbitrator, Ar Akbal Singh Sandhu (arbitrator).

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[5] In the arbitral proceedings before the arbitrator (arbitration):

(i) on the first day of the arbitration, 28 August 2018:

(a) Mr Low was not legally represented;

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(b) the association was represented by its honorary director [Datuk Dr Mohinder Singh (Datuk Mohinder)] and counsel, Mr Ankit Sanghvi;

(c) Mr Low was cross-examined by Mr Ankit in the presence of Datuk Mohinder (the arbitrator allowed Datuk Mohinder to be present at the arbitration while Mr Low gave evidence);

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(d) after Mr Low's cross-examination and before the commencement of Datuk Mohinder's examination-in-chief by Mr Ankit, the "notes of evidence" of the arbitration (NOE) stated as follows (*verbatim*):

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> *Arbitrator: Datuk [Mohinder], you can take your seat. Low, like I told you, I know Datuk [Mohinder]; I know Datuk [Mohinder], but it is not Spastik. So, it is inevitable that in this field, we know counsels [sic], we know about each other …*
>
> (emphasis added); and

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(e) Mr Low begun cross-examination of Datuk Mohinder; and

(ii) on the second day of the arbitration, 30 August 2019:

(a) Mr Low was represented by learned counsel, Mr Steven Wong Chin Fung; and

(b) Datuk Mohinder was cross-examined and re-examined by Mr Wong and Mr Ankit respectively.

[6] On 12 February 2020, the arbitrator delivered a final award (award) as follows, among others:

(i) Mr Low was only entitled to claim from the association a sum of RM747,250 as his professional fees for the services;

(ii) Mr Low was estopped from claiming from the association for any professional fees in excess of RM747,250;

(iii) the association had overpaid a sum of RM72,750 to Mr Low (overpayment). Hence, Mr Low shall refund the overpayment to the association;

(iv) Mr Low shall pay to the association interest at the rate of 5% per annum on the overpayment from the date of the award until full refund of the overpayment (interest (overpayment)); and

(v) arbitration costs in an amount of RM36,598 (costs sum) shall be paid by Mr Low to the association with interest at the rate of 5% per annum on the costs sum from the date of the award until full settlement of the costs sum.

Two Originating Summonses (OS)

[7] The following two OS have been filed in this court:

(i) Mr Low has filed OS no. BA-24C(ARB)-4-05-2020 under s. 37 of the Arbitration Act 2005 (AA) against the association to, among others, set aside the award (setting aside OS); and

(ii) OS no. BA-24C-87-09-2020 has been filed by the association against Mr Low for a court order under s. 38(1) AA to recognise the award as binding and enforceable as a judgment in terms of the award (enforcement OS).

[8] I will deal with the two OS as follows:

(i) the court will first decide the setting aside OS. If the setting aside OS is allowed, the enforcement OS has to be dismissed; and

(ii) if I dismiss the setting aside OS, I will then determine the enforcement OS.

A **Issues**

[9] These two OS raise the following questions:

(i) whether the award had dealt with a dispute not contemplated by or not falling within the terms of the submission to the arbitration (terms
B (submission to arbitration)) as understood in s. 37(1)(a)(iv) AA;

(ii) did the award contain decisions on matters beyond the scope of the terms (submission to arbitration) (within the meaning of s. 37(1)(a)(v) AA)?;

(iii) if s. 37(1)(a)(v) AA applies to the award, whether the court can separate
C matters submitted to the arbitration from those not so submitted to the arbitration. If the answer to this issue is in the affirmative, should the court exercise its discretion pursuant to s. 37(3) AA to set aside only a part of the award which contains decisions on matters not submitted to the arbitration?;

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(iv) should the court set aside the award under s. 37(1)(b)(ii) AA on the ground that the award is in conflict with the public policy of Malaysia? In this regard:

(a) whether s. 14(1) AA provides for two different requirements for an
E arbitrator to be:

(1) impartial as provided in the first rule of natural justice (first rule); and

(2) independent [requirement (independence)];

F (b) did s. 14(1) AA impose a statutory duty on the arbitrator to disclose to Mr Low and the association (parties) the arbitrator's relationship with Datuk Mohinder (arbitrator's relationship)?;

(c) if the answer to the question in the above sub-para. (b) is "yes":

G (1) did the arbitrator disclose to the parties all the relevant details of the arbitrator's relationship which would enable a "fair-minded and informed observer" to decide objectively on whether there are justifiable doubts on the arbitrator's impartiality and/or independence (full disclosure)?; and

H (2) had the arbitrator breached s. 14(2) AA by failing to give full disclosure to the parties "without delay"?;

(d) whether the court may consider the arbitrator's failure to give full disclosure to the parties without delay (as required by s. 14(1) and (2) AA) in deciding:

I (1) the arbitrator's breach of the first rule as provided in s. 37(1)(b)(ii) read with s. 37(2)(b)(i) and/or (ii) AA; and

(2) the arbitrator's contravention of the requirement (independence);

(e) in deciding whether the arbitrator had breached the first rule and the requirement (independence), which of the following test should be applied by the court:

(1) the test of "reasonable suspicion of bias";

(2) the "real danger of bias" test; or

(3) the test of "real possibility of bias"?; and

(f) whether Mr Low was estopped from setting aside the award based on a breach of the first rule and/or the requirement (independence) when he had failed to challenge the arbitrator within 15 days after the arbitrator's disclosure of the arbitrator's relationship on 28 August 2018 (as provided in s. 15(1) read with s. 14(3)(a) AA); and

(v) whether the court should exercise its discretion to set aside the entire award pursuant to s. 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i) and/or (ii) AA. The answer to this issue will determine the outcome of the enforcement OS.

Did Award Exceed Terms (Submission To Arbitration)?

[10] I reproduce below the relevant part of s. 37 AA:

Application for setting aside

s 37(1) *An award may be set aside by the High Court only if*:

(a) *the party making the application provides proof that*:

…

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

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

(vi) …; or

(b) *the High Court finds that*:

(i) …; or

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

(2) *Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where*:

(a) …; or

(b) *a breach of the rules of natural justice occurred*:

(i) *during the arbitral proceedings; or*

(ii) *in connection with the making of the award*.

A (3) *Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.*

...

(emphasis added)

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[11] The scope of s. 37(1)(a)(iv) and (v) AA has been explained by Jeffrey Tan FCJ in the Federal Court case of *Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic* [2017] 9 CLJ 273; [2017] MLJU 1196, at [197], as follows:

C [197] *In relation to 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' and 'the award contains decisions on matters beyond the scope of the submission to arbitration', William & Kawharu supra at 17.5.4 thus commented on the first limb of art. 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of section 37(1)(a)(iv) and (v) of AA 2005):*

D *This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution ... The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put*
E *in issue ... If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration*

F (emphasis added)

[12] In the High Court case of *Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd And Another Case* [2015] 11 MLJ 841, at [32], Mary Lim J (as she then was) has decided as follows regarding the application of s. 37(1)(a)(v) AA:

G [32] *The tests under sub-para 37(1)(a)(v) require the plaintiff to satisfy the court that the learned arbitrator had exceeded his jurisdiction and had dealt with a matter beyond his jurisdiction. For this, at the very least, the points of claim, defence and reply must be considered as these documents define the limits of the learned arbitrator's jurisdiction.*

H (emphasis added).

[13] Premised on *Thai-Lao Lignite* and *Magna Prima Construction*, the terms (submission to arbitration) are contained in the following documents:

(i) Mr Loh's "statement of case";

I (ii) the association's "defence" (defence) which had been prepared by the association's solicitors (who represented the association in the arbitration and these two OS). The association did not counterclaim anything against Mr Loh; and

(iii) Mr Loh's reply to the defence which was erroneously entitled "claimant's statement of defence to counterclaim" (reply). This error is understandable as Mr Loh was not legally represented at the time of the preparation of the reply.

[14] According to the terms (submission to arbitration), the association did not counterclaim for the overpayment against Mr Loh. Hence, the overpayment and interest (overpayment) as decided by the arbitrator:

(i) were not contemplated by the terms (submission to arbitration) within the meaning of s. 37(1)(a)(iv) AA;

(ii) did not fall within the terms (submission to arbitration) as understood in s. 37(1)(a)(iv) AA; and/or

(iii) were beyond the scope of the terms (submission to arbitration) as stated in s. 37(1)(a)(v) AA.

Should Court Set Aside Only Overpayment And Interest (Overpayment) In Award?

[15] Section 37(3) AA confers a discretionary power on the court to "sever" the award by setting aside only the overpayment and the interest (overpayment). The ambit of s. 37(1)(a)(iv), (v) and (3) AA has been explained in *Magna Prima Construction*, at [29] and [30], as follows:

> *[29] In determining this issue of jurisdiction under s 37, it is also correct to say that where the plaintiff is seeking to set aside only a part of the award, which is the case here, then sub-para 37(1)(a)(iv) is not available to the plaintiff. Where the conditions of sub-para 37(1)(a)(iv) are met, the whole award will be set aside; and not just that part which is challenged; unless of course, if the same complaints can be raised under sub-para 37(1)(a)(v). This is clear from a plain reading of sub-paras 37(1)(a)(iv) and (v).*
>
> *[30] Only sub-para 37(1)(a)(v) provides that it is 'subject to sub-s (3)' while sub-para 37(1)(a)(iv) is silent. As opined earlier, the absence of these critical words in sub-para 37(1)(a)(iv) is deliberate. The court must heed that clear intention of Parliament, especially in view of s 8 which reminds the court of a minimalistic approach in its intervention in arbitration and arbitration related matters.*
>
> (emphasis added)

[16] As explained in *Magna Prima Construction*, this court cannot invoke s. 37(3) AA when Mr Low has relied successfully on s. 37(1)(a)(iv) AA to invalidate the entire award.

[17] Regarding the application of s. 37(1)(a)(v) AA to the award, I am not able to exercise my discretion pursuant to s. 37(3) AA (to set aside only the overpayment and the interest (overpayment) of the award) due to the following reasons:

(i) the defence has averred in paras. 3 to 13 that a total of RM868,600 paid by the association to Mr Low was adequate for the services. The defence did not allege that Mr Low was estopped from claiming for professional fees in excess of RM747,250 (estoppel point). When the arbitrator went on a frolic of his own by making the award based on the estoppel point, it is difficult, if not impossible, for this court to separate the following matters in the award:

(a) matters in the award which fell within the terms (submission to arbitration) (matters (submitted to arbitration) and

(b) matters in the award which are beyond the terms (submission to arbitration) (matters (not submitted to arbitration)).

In view of the above reason, I am unable to exercise my discretion under s. 37(3) AA to sever matters (not submitted to arbitration) from matters (submitted to arbitration) in the award;

(ii) the court should exercise its discretion pursuant to s. 37(1)(a)(iv) AA to set aside the award in its entirety – please refer to the above sub-paras. 14(i) and (ii); and

(iii) as explained in paras [28]-[29] and [39]-[45] below, the arbitrator had committed certain breaches, including a contravention of the first rule and the requirement (independence) for which this court has exercised its discretion to set aside the entire award pursuant to s. 37(1)(b)(ii), (2)(b)(i) and/or (ii) AA.

First Rule And Requirement (Independence)

[18] I reproduce below ss. 13(8)(b), 14, 15 and 20 AA:

Appointment of arbitrators

13(1) ...

...

(8) *In appointing an arbitrator the Director of the Asian International Arbitration Centre (Malaysia) or the High Court, as the case may be, shall have due regard to*:

...

(b) *other considerations that are likely to secure the appointment of an independent and impartial arbitrator; …*

Grounds for challenge

14(1) *A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.*

(2) *An arbitrator shall, without delay, from the time of appointment and throughout the arbitral proceedings, disclose any circumstances referred to in subsection (1) to the parties unless the parties have already been informed of such circumstances by the arbitrator.*

(3) *An arbitrator may be challenged only if*:

(a) *the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or*

(b) that arbitrator does not possess qualifications agreed to by the parties.

(4) *A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made.*

Challenge procedure

15(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

(2) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall make a decision on the challenge.

(3) Where a challenge is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.

(4) While such an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(5) No appeal shall lie against the decision of the High Court under subsection (3).

Equal treatment of parties

20 *The parties shall be treated with equality* and each party shall be given a fair and reasonable opportunity of presenting that party's case.

(emphasis added)

[19] Sections 24 and 25 of the previous Arbitration Act 1952 (previous Act) provided as follows:

Removal of arbitrator and setting aside of award.

24(1) *Where an arbitrator* or umpire *has misconducted himself or the proceedings, the High Court may remove him.*

(2) *Where an arbitrator* or umpire *has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.*

(3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

Power of High Court to give relief where arbitrator is not impartial or the dispute involves question of fraud.

25(1) *Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and, after a dispute has arisen, any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.*

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

(3) In any case where, by virtue of this section, the High Court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke the authority of an arbitrator or umpire, the High Court may refuse to stay any action brought in breach of the agreement.

(emphasis added)

[20] Firstly, ss. 14, 15 and 20 AA are different from ss. 24 and 25 of the previous Act. Hence, cases decided on ss. 24 and 25 of the previous Act should be read with caution in the construction of ss. 14, 15 and 20 AA.

[21] My reading of s. 14(1) AA reveals two distinct requirements for the appointment of arbitrators (two requirements), namely the first rule and the requirement (independence). The reasons for this view are as follows:

(i) Parliament has expressly provided for the two requirements in s. 14(1) AA. These two requirements are also stated in ss. 13(8)(b) and 14(3)(a) AA. It is thus clear that the Legislature's insertion of the requirement (independence) in s. 14(1) AA as a distinct requirement, is deliberate; and

(ii) the two requirements may overlap with each other but nevertheless, these two requirements are different. I rely on the following two cases:

(a) in the High Court case of *MMC Engineering Group Bhd & Anor v. Wayss & Freytag (M) Sdn Bhd & Anor* [2015] 1 LNS 705, at [171], Mary Lim J (as she then was) has decided as follows:

> [171] *The concepts of "impartiality" and "independence" are said to be different but overlapping. As described by the co-authors of "The Arbitration Act 2005, UNCITRAL Model Law As Applied in Malaysia" [2007], Sundra Rajoo and Davidson, these two concepts mean as follow*:
>
> > 14.8. *All arbitrators must be impartial. Impartiality has been described as the 'lack of impermissible bias in the mind of the arbitrator toward a party or toward the subject-matter in dispute' (see Donahey, 'The Independence and Neutrality of arbitrators'* [1992] 4 Journal of International Arbitration 32). *It is 'that quality of the arbitrator's mind which enables him or her to decide the issues without a disposition to favour one side over the other; it is the antonym of bias' (see Mustill and Boyd, Companion Volume, p 96). Impartiality is the mental attitude of the arbitrator who is expected to treat the parties with equality* (see section 20 below).
> >
> > 14.9. *Bias is a predisposition to decide for or against one party without proper regard to the true merits of the dispute (see Secretary to the Government, Transport Department v. Munuswamy Mudalir AIR [1988] SC 2232). Lord Philips MR in Re Medicament & Related Classes of Goods (No 2) [2001] 1 WLR 700 at paragraph 37 explained that bias 'is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to prefer one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist or irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him'.*
> >
> > ...
> >
> > 14.11. *Independence has been described as 'the absence of any degree of relationship between the arbitrator and a party or parties, or between the arbitrator and the substance of the disputes, which would make it inappropriate for him to adjudicate between those parties on that dispute' (see Mustill and Boyd, Companion Volume, p 96). In other words, independence raises questions relating to the existence of a relationship between the arbitrators and one of the parties. It has also been defined as 'the courage to displease, the absence of any*

A

> *desire, especially for the arbitrator appointed by a party, to be appointed again as an arbitrator' (see Lalive, Conclusions in the Arbitral Process and the Independence of arbitrators*, 1991, ICC Publishing, p 121).
>
> (emphasis added); and

B

(b) in United Kingdom's (UK) Court of Appeal case of *AT & T Corporation & Anor v. Saudi Cable Co* [2000] 2 All ER (Comm) 625, at [67], Potter LJ (as he then was) has explained an arbitrator's independence as follows:

C

> [67] *So far as those three articles are concerned, I do not consider that any breach of them has been established. The only matters which they require the arbitrator to declare are matters going to his 'independence' of the parties, or anything which might call that independence into question in the eyes of any of the parties. (Sir Sydney conceded that the word 'reasonably' needed to be read in, as qualifying any calling into question of such independence.) 'Independence' connotes an absence of connection with either of the parties in the sense of an absence of any interest in, or of any present or prospective business or other connection with, one of the parties, which might lead the arbitrator to favour the party concerned. It is the most frequent and obvious ground upon which the court will infer the possibility of antecedent bias, but it is by no means co-extensive with it. The suggestion that, by reason of some other event or circumstance unrelated to independence, the arbitrator has or may have an antecedent predisposition against one of the parties may give rise to a sustainable allegation of bias but it is not one based on absence of independence*.
>
> (emphasis added)

D

E

F

[22] I reproduce below s. 24(1)(a) of UK's Arbitration Act 1996 [AA (UK)]:

> **Power of court to remove arbitrator**
>
> 24(1) **A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds**:
>
> (a) **that circumstances exist that give rise to justifiable doubts as to his impartiality**; ...
>
> (emphasis added)

G

H

[23] Our s. 14(1) AA employs the phrase "any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence" while s. 24(1)(a) AA (UK) applies in cases where "circumstances exist that give rise to justifiable doubts as to his impartiality". I am of the opinion that our s. 14(1) AA is wider than s. 24(1)(a) AA (UK) in respect of the following two matters:

I

(i) Section 14(1) AA provides for the two requirements whereas s. 24(1)(a) AA (UK) only applies to justifiable doubts as to the impartiality (not lack of independence) of a person (X) to be appointed as an arbitrator; and

(ii) Section 14(1) AA may be invoked if there are "any circumstances likely" to give rise to justifiable doubts as to X's impartiality or independence. In other words, s. 14(1) AA does not require proof of actual circumstances which gives rise to justifiable doubts as to X's impartiality or independence. In contradistinction, s. 24(1)(a) AA (UK) only applies where actual "circumstances exist" that give rise to justifiable doubts as to X's impartiality.

Despite the above two differences between our s. 14(1) AA and s. 24(1)(a) AA (UK), UK cases which have construed the phrase "justifiable doubts" in s. 24(1)(a) AA (UK), in my view, may be resorted to in the interpretation of the same phrase (justifiable doubts) in our s. 14(1) AA.

[24] I am of the following view regarding the proposed appointment of X as an arbitrator until the time X delivers a final arbitral award:

(i) the first rule is embodied in:

(a) s. 13(8)(b) AA;

(b) s. 14(1) AA; and

(c) s. 20 AA (X "shall" treat parties with equality). X is not impartial, either in fact or in appearance, when X does not treat parties equally;

(ii) the first rule requires X to be impartial and free from bias:

(a) as a matter of fact; and

(b) as perceived objectively by a "fair-minded and informed observer". In this respect, I adopt the objective test of a "fair-minded and informed observer" as decided by Lord Hodge DPSC (concurred by Lord Reed, Lady Black, Lord Lloyd-Jones and Lady Arden) in UK's Supreme Court in *Halliburton Co v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) & Ors (International Court of Arbitration of the International Chamber of Commerce & Others Intervening)* [2020] 3 WLR 1474, at [52] (*Halliburton*'s test). As explained in the above para. 23, *Halliburton*'s test applies with regard to the application of the first rule in s. 14(1) AA;

(iii) in addition to the first rule, the requirement (independence) in s. 14(1) AA requires X to be independent:

(a) in fact; and

(b) in the objective perception of a "fair-minded and informed observer". I have applied *Halliburton*'s test (regarding X's impartiality) to decide whether the requirement (independence) has been fulfilled or otherwise. This is due to the following reasons:

(1) the first rule and requirement (independence) overlap with each other. Hence, *Halliburton*'s test should apply to both the first rule and requirement (independence); and

(2) I am not aware of any principle or policy consideration which bars the application of *Halliburton*'s test to ascertain whether the requirement (independence) has been complied with;

(iv) X has a statutory duty under s. 14(1) AA to disclose to the parties in the arbitration "any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence" (s. 14(1) duty). It is clear from Parliament's employment of a mandatory term "shall" in s. 14(1) AA that s. 14(1) duty is imperative. The following High Court cases are relevant regarding the mandatory s. 14(1) duty:

(a) in *Sundra Rajoo v. Mohamed Abd Majed & Anor* [2011] 6 CLJ 923, at [10(a)], Hamid Sultan Abu Backer J (as he then was) has decided as follows:

> [10(a)] *It is trite that duty of arbitrators to disclose facts likely to be biased is well established jurisprudence in the International arena as well as in Malaysia, and the court has a coercive power to revoke the authority of an arbitrator. ...*
>
> (emphasis added); and

(b) according to Lee Swee Seng JC (as he then was) in *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* [2012] 6 CLJ 156; [2012] 3 MLJ 737, at [31] to [34] CLJ; [27], [28] and [30] MLJ:

> [31] *The arbitrator, not just at the commencement of the arbitration but also through the continuation of the arbitration proceeding up to its conclusion with the handing or recording of an award and indeed 'from time to time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence*'.
>
> [32] *In other words, the arbitrator has a continuing duty of disclosure until the conclusion or termination of the arbitral proceedings to disclose any such circumstance. ...*
>
> ...
>
> [34] *The defendant's version was that the consent award and the award on costs were arrived at by consent of the parties and were recorded as such before the arbitrator who did not influence the parties at all.* I take

> the view that there is no need to determine how much of what the arbitrator said went into influencing the plaintiffs to withdraw their action and to pay the defendant costs. *The question that must be asked is: Should the arbitrator have disclosed his appointment as a director to the parties? The answer is a resounding 'Yes'! The bank may not be a party to the arbitration but the fact that the bank is a financier of the project is sufficient nexus constraining and indeed compelling disclosure. It is a nexus that raises the likelihood of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality and independence. What is important is how the parties and in this case, more particularly the plaintiffs would have perceived the impartiality and independence of the arbitrator. It is not for us to second guess whether or not the plaintiffs would have perceived it differently. It is often said that perception is reality and though that may not be true, it certainly cannot be brushed aside as being totally irrelevant or unreasonable. What is necessary to trigger disclosure is a mere 'justifiable doubt' and not a finding of the lack of impartiality and independence. Elsewhere the expression 'reasonable suspicion' is being used. In other words there is no need for certainty but a mere likelihood or justifiable doubt or reasonable suspicion as to a lack of impartiality or independence on the part of the arbitrator. ...*
>
> (emphasis added);

(v) after the appointment of X as an arbitrator, according to s. 14(2) AA (throughout the arbitral proceedings), X has a "continuous" s. 14(1) duty until the end of the arbitration – *Dato Dr Muhammad Ridzuan*;

(vi) Section 14(1) duty is only fulfilled by X if:

(a) there is a full disclosure by X to all the parties in the arbitration (full disclosure requirement); and

(b) the full disclosure "shall" be made "without delay" as stipulated in s. 14(2) AA (timeous disclosure requirement).

The following two cases have explained the full disclosure requirement and timeous disclosure requirement:

(i) according to *Sundra Rajoo*, at [10(d)]:

> [10(d)] *It must also be noted that the courts in India have gone to the extent of saying the doctrine of uberrimae fides is applicable to arbitrators. [See Satyendra Kumar v. Hind Constructions Ltd, AIR 1952, Bom. 227]. I am inclined to say that the jurisprudence relating to fiduciary may be applicable to arbitrators; as ultimately in consideration of a fee they are entrusted to deliver an award.*
>
> (emphasis added); and

(ii) it is decided in *Dato Dr Muhammad Ridzuan*, at [38] to [45] CLJ; [34] and [41] MLJ, as follows:

> [38] *The whole system and structure of arbitration flourish best when there is confidence and trust in the arbitrator as an impartial and independent adjudicator in handing down an award that is fair and just. Trust once lost is difficult to restore. Arbitrators are drawn from a pool of professionals who are experts in their own particular field of expertise. They are people very much in the industry and unlike judges who have to resign from all directorships and involvement in businesses, professional bodies and associations upon assuming office, arbitrators have mainly both their feet planted in business, commerce and profession. They may have a past or present business relationship with the parties to the arbitration or have an interest in the outcome of the arbitration. Hence the need for a thorough, truthful and timely disclosure of any circumstance that may give rise to a 'justifiable doubt' as to their impartiality and independence. Like Caesar's wife, he or she must be above suspicion. It is said to be in breach of the rules of natural justice that a man is to be judge in his own cause, if such a disclosure is not made. …*
>
> …
>
> [45] *Surely it must have crossed his mind that even if he should think he has no problem with the adjudication of the dispute and is confident of his own impartiality and independence, the parties before him might not be comfortable with that or might not think so and they are entitled to have a right to make a choice as to whether they want to continue the arbitration proceedings before him. The golden rule for an arbitrator caught in such a circumstance is 'When in doubt, disclose*!.
>
> (emphasis added); and

(vii) if X is appointed as an arbitrator without complying with the full disclosure requirement and/or timeous disclosure requirement (X's breach):

(a) any party in the arbitration (Y) may challenge X under s. 14(3)(a) and (4) read with s. 15(1) AA based on X's breach (Y's challenge);

(b) if X does not withdraw as an arbitrator or if the other party in the arbitration (Z) disagrees with Y's challenge, X "shall" decide on Y's challenge pursuant to s. 15(2) AA;

(c) if X accepts Y's challenge and recuses as an arbitrator, Z cannot apply to court to compel X to arbitrate a dispute – please refer to *Ragawang Corporation Sdn Bhd v. One Amerin Residence Sdn Bhd* [2020] 1 LNS 895; [2020] 7 AMR 365, at [24(b)]; and

(d) if X dismisses Y's challenge (X's decision), Y may appeal under s. 15(3) AA to the High Court against X's decision premised on X's breach (Y's appeal) and the High Court's decision on Y's appeal shall be final by reason of s. 15(5) AA.

[25] If X has made a final arbitral award (X's award), Y or Z may apply to the High Court to set aside X's award on the ground of X's breach. My reasons are as follows:

(i) if X's breach involves a contravention of the first rule, X's award is therefore in conflict with Malaysian public policy under s. 37(1)(b)(ii) read with s. 37(2)(b)(i) and/or (ii) AA. I rely on the following cases:

(a) in *Dato Dr Muhammad Ridzuan*, at [34], the High Court set aside a consent arbitral award [which had been recognised by the High Court to be binding and enforceable under s. 38(1) AA] on the ground of the arbitrator's breach of s. 14(1) and (2) AA (arbitrator's failure to disclose to the parties in the arbitration that subsequent to the appointment of the arbitrator and before the recording of the consent award, the arbitrator had been appointed as a director of a bank which had given credit facilities to a party in the arbitration); and

(b) Lord Hodge has decided in *Halliburton*, that an arbitrator's failure to disclose the existence of circumstances which gives rise to justifiable doubts as to the arbitrator's impartiality under s. 24(1)(a) AA (UK), is relevant in deciding whether the arbitrator is perceived to be partial or otherwise. I cite the following judgment of Lord Hodge in *Halliburton*, at [117] and [155]:

(iii) *Whether a failure to make disclosure can demonstrate a lack of impartiality*

[117] *Is disclosure relevant to apparent bias? … but a failure of that arbitrator to disclose the other references could give rise to justifiable doubts as to his or her impartiality. I agree with the dicta of Cockerill J in PAO Tatneft v. Ukraine* [2019] EWHC 3740 (Ch) at [57] that:

the obligation of disclosure extends … to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of disclosure may then be a factor in the latter exercise.

…

[155] *A failure of an arbitrator to make disclosure in the circumstances described in para 153 above is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias* (paras 117-118).

(emphasis added); and

(ii) independent of the first rule, Y or Z may challenge the validity of X's award if there is evidence of non-compliance with the requirement (independence), namely, X lacks independence, either actual or perceived. This is because X's award is contrary to the public policy of

this country under s. 37(1)(b)(ii) AA on the ground of lack of independence on X's part. The scope of public policy in s. 37(1)(b)(ii) AA has been explained by Ramly Ali FCJ in the Federal Court case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413, at [49], [53], [55] and [58], as follows:

> [49] *The term 'public policy' is not defined in the [AA]. However, the term appears in three different sections, namely of ss 4, 37 and 39 [AA]. As commonly used, the term 'public policy' signifies some matter which concerns public good and public interest. It is a fundamental principle of justice in substantive and procedural aspects.*
>
> …
>
> [53] *The decision of the Singapore Court of Appeal in PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR 597, provides a good guidance on the interpretation of the term 'public policy' in an application to set aside an arbitral award made by a tribunal, on the ground of a breach of the rule of natural justice for being in conflict with the public policy. In that case Chan Sek Keong CJ (delivering the judgment of the court) ruled*:
>
> > *Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see Downer Connect (58) at (136), or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' (see Deutsche Schachbau v Shell International Petroleum Co Ltd [1987] 2 Lloyds Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see Parsons & Whittemore Overseas Co Inc v. Societe Generalede L'Industrie du Papier* (RAKTA) 508 F 2d 969 (second Cir, 1974) at 974.
>
> …
>
> [55] *Section 37(2)(b)(ii) [AA] provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the making of the award. The circumstances stated in s 37(2) are by no means exhaustive. Other appropriate circumstances may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of sub-para (1)(b)(ii)' as appears in s. 37(2) [AA]. However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of setting aside an award under s. 37 [AA], the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in Sigur Ros (with which we agree): 'The concept of public policy must be one taken in the higher sense where some fundamental*

principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused'.

…

[58] *The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. Thus, instances such as 'patent injustice', 'manifestly unlawful and unconscionable', substantial injustice', 'serious irregularity' and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s. 37(1)(b)(ii) [AA] when proven, can be a ground for the court to exercise its discretion to set aside the award (see: Ajwa for Food Industries). Such instances fall within 'the basic and fundamental notions or principles of justice'. The court must adopt the principle as laid down by Howard M Holtzmann and Joseph E Neuhans as found in their commentary in A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary 'that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'. The terms 'patent injustice' or 'substantial injustice' or 'manifestly unlawful and unconscionable' as often used by the court in setting aside arbitral awards, do not mean injustice which is more than de minimis; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant* (see: *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86).

(emphasis added)

Premised on *Jan De Nul*, if X is not independent, either in fact or appearance:

(i) X has violated "the most basic notions of morality and justice";

(ii) the upholding of X's award will "shock the conscience";

(iii) X's award is "clearly injurious to the public good";

(iv) X's award is "wholly offensive to the ordinary reasonable and fully informed member of the public";

(v) there is a "patent injustice" in the arbitral proceedings (conducted by X) and/or X's award;

(vi) the arbitral proceedings and/or X's award are "manifestly unlawful and unconscionable"; and/or

(vii) there is "substantial injustice", "serious irregularity" and/or other "similar serious flaws" in the arbitral proceedings and/or X's award.

If the court has no power to set aside X's award merely based on a breach of the requirement (independence):

(i) this will defeat Parliament's intention in providing expressly for the requirement (independence) in ss. 13(8)(b) and 14(1) AA;

(ii) the rule of harmonious construction of statutory provisions as applied by Zaleha Yusof FCJ in the Federal Court case of *Majlis Perbandaran Seremban v. Tenaga Nasional Bhd* [2020] 10 CLJ 715; [2020] 12 MLJ 1, at [32], requires ss. 13(8)(b), 14(1), (2), (3)(a) and 37(1)(b)(ii) AA to be construed in harmony with each other; and

(iii) there will be an unjust and undesirable dichotomy in the law regarding arbitrators as follows – Y and Z may challenge the appointment of X under s. 14(1) and (2) AA on the ground of non-compliance with the requirement (independence) but they cannot set aside X's award pursuant to s. 37(1)(b)(ii) AA on the same ground.

[26] In my opinion, whether the first rule or the requirement (independence) applies to X and/or X's award is a question of fact and degree. Accordingly, cases on the application of the first rule and/or the requirement (independence) do not constitute binding precedents from the viewpoint of the *stare decisis* doctrine as each case ultimately depends on its own particular factual matrix.

Whether Arbitrator Had Duty To Disclose Arbitrator's Relationship

[27] I decide that the arbitrator had a s. 14(1) duty to disclose to the parties regarding the arbitrator's relationship. This decision is premised on the following reasons:

(i) Datuk Mohinder was a material witness in this dispute. This is clear from the following evidence:

(a) Datuk Mohinder participated in meetings with Mr Low and all the consultants for the project on 23 July 2015 and 29 January 2016 (please refer to the minutes of these meetings);

(b) Datuk Mohinder took part in a discussion with Mr Low on 16 August 2016 with respect to Mr Low's claim (please refer to Mr Low's letter dated 20 September 2016 to the association);

(c) as the association's Honorary Director, Datuk Mohinder signed the association's letters dated 21 September 2016, 4 January 2017, 1 February 2017 and 9 May 2017 which were sent to Mr Low in this case (association's letters);

(d) the contents of Datuk Mohinder's witness statement (Datuk Mohinder's WS) clearly showed that he was a material witness for the association in the arbitration; and

(e) Datuk Mohinder was the sole witness for the association in the association's resistance of Mr Low's claim; and

(ii) the circumstances elaborated in the above sub-para. (i) are "likely to give rise to justifiable doubts as to (the arbitrator's) impartiality or independence" within the meaning of s. 14(1) AA.

Was There Full Disclosure By Arbitrator In This Case?

[28] The arbitrator had merely informed the parties that he knew Dato' Mohinder – please refer to the arbitrator's disclosure of the arbitrator's relationship on 28 August 2018 (produced *verbatim* from the NOE in the above sub-para. 5(i)(d)). I have no hesitation to decide that the arbitrator had breached the full disclosure requirement in this case. This is because the arbitrator could have but did not provide to the parties all the relevant details of the arbitrator's relationship which would enable a "fair-minded and informed observer" to decide objectively on whether there were justifiable doubts on the arbitrator's impartiality and/or independence. The arbitrator did not inform the parties regarding the following relevant matters:

(i) how did the arbitrator know Datuk Mohinder?;

(ii) what was the nature of the arbitrator's relationship? Was the arbitrator's relationship:

(a) a family relationship;

(b) a "professional relationship"; or

(c) a "mere acquaintance relationship"?;

(iii) how long was the arbitrator's relationship?; and

(iv) how "close" was the arbitrator with Datuk Mohinder?

As decided in *Dato Dr Muhammad Ridzuan*, at [41], "When in doubt, disclose!". Hence, even if the arbitrator was doubtful as to what particular aspect of the arbitrator's relationship should be disclosed to the parties, the arbitrator was nonetheless bound by s. 14(1) duty to make a full disclosure.

Did Arbitrator Comply With Timeous Disclosure Requirement?

[29] I am of the view that the arbitrator had breached the timeous disclosure requirement due to the following reasons:

(i) before the commencement of hearing of the arbitration (hearing), Mr Loh had provided to the arbitrator, among others, the association's letters which were signed by Datuk Mohinder. Furthermore, Datuk Mohinder's WS had been given to the arbitrator before the hearing. It is clear that the arbitrator had actual knowledge before the hearing that Datuk Mohinder would be the sole witness for the association in the

arbitration. Accordingly, the arbitrator should have made a full disclosure of the arbitrator's relationship before the hearing, namely at the "preliminary meetings". However, the arbitrator had failed to do so;

(ii) on the first day of the hearing (28 August 2019), Datuk Mohinder was present when Mr Loh gave evidence before the arbitrator. The arbitrator could have made a belated full disclosure of the arbitrator's relationship on the first day of the hearing. Inexplicably, the arbitrator did not do so; and

(iii) only after Mr Loh had completed his testimony, the arbitrator then disclosed what was stated in the above sub-para. 5(i)(d). Such a belated disclosure by the arbitrator the arbitrator's relationship had clearly contravened the timeous disclosure requirement.

Relationship Between Section 14(1) Duty And First Rule

[30] In *Dato Dr Muhammad Ridzuan*, the High Court has set aside a final consent arbitral award on the sole ground regarding a breach of s. 14(1) duty despite the following facts:

(i) the parties in the arbitration had consented to the award on 2 April 2010;

(ii) on 18 April 2011, the High Court had granted an order under s. 38(1) AA to recognise the consent award as binding and enforceable as a judgment (enforcement order); and

(iii) an application to set aside the consent award and enforcement order (setting aside application) was only made after a lapse of the 90 days' period as stipulated in s. 37(4) AA and yet, the High Court granted an extension of time for the setting aside application.

It is to be emphasised that the High Court has set aside both the consent award and the enforcement order in *Dato Dr Muhammad Ridzuan*.

[31] Based on *Dato Dr Muhammad Ridzuan*, Mr Low can apply to court to set aside the award pursuant to s. 37(1)(b)(ii) read with s. 37(2)(b)(i) and/or (ii) AA on the ground that the arbitrator has breached s. 14(1) duty in respect of his non-compliance with the full disclosure requirement and timeous disclosure requirement. This position is fortified by Lord Hodge's judgment in *Halliburton*, at [117] and [155].

What Is Applicable Test For First Rule?

[32] The question that now arises is what test should be applied with regard to the first rule.

[33] The following cases have applied the test of "reasonable suspicion of bias" (reasonable suspicion test): A

(i) *Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 1 CLJ 632 was a High Court case regarding ss. 24 and 25 of the previous Act. Nik Hashim J (as he then was) has applied the reasonable suspicion test in *Kuala Ibai Development*, pp. 641 to 642, as follows: B

> *From the reading of the section, I find that the meaning of the word "impartial" in s. 25(1) is not restricted to the "relationship" of the arbitrator to any other parties to the agreement or "connection" of the arbitrator to the subject referred. To my mind, if an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred. An arbitrator can be or perceived to be impartial arising out of his conduct (as in Turner (East Asia) Pte Ltd. v. Builders Federal (Hong Kong) Ltd. & Anor. (No. 2) [1988] 2 CLJ 367; [1988] 2 MLJ 502) or arising out of his racial prejudice (as in Catalina v. Norma* [1938] 61 LI L Rep. 360). C D

He then continued at p. 228 and stated:

> *To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence*. E
>
> (emphasis added)

…

On the issue of bias against a judge, Yang Arif NH Chan JCA in Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors [1995] 2 MLJ 213, at p. 223 observed: F

> Other than an interest which is pecuniary or proprietary in the subject matter of the proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity.

At p. 226 the learned judge said: G

> *There must be circumstances which would lead a reasonable and fair-minded person sitting in court to have reasonable ground to suspect that the judge would appear to be biased … The proper test on the appearance of bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible*. H

He then continued at p. 228 and stated:

> *To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence*. I
>
> (emphasis added).

It would appear from the above passages that the learned Judge of the Court of Appeal is inclined more towards the "reasonable suspicion" test rather than the "real likelihood" test. Although Hock Hua Bank, supra, has reference to a judge, the position of law enunciated by the Court of Appeal, in my view, is also applicable to an arbitrator.

However, in Progressive Insurance Sdn. Bhd. v. Gaya Underwriting Services Sdn.Bhd. [1998] 1 CLJ 235; [1997] 3 MLJ 524, where it was alleged that the arbitrator had a personal interest in the subject matter of the suit which disqualified him from acting, the Court of Appeal (comprising NH Chan, Mahadev Shanker and Ahmad Fairuz, JJCA) held that:

> *... a real* ***likelihood of bias*** *must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries* (emphasis added).

The Findings Of The Court

For my part, I accept both the tests as being the law at present, though the trend is towards the application of the "reasonable suspicion" test, as in essence, the "reasonable suspicion" test seems to be somewhat broader than the "real likelihood" test. (See Prof. M.P. Jain in his book, Administrative Law of Malaysia and Singapore, 2nd Edn. 1989 p. 207).

(emphasis added); and

(ii) the reasonable suspicion test was also applied in *Dato Dr Muhammad Ridzuan*, at [30]. In fact, the High Court in *Dato Dr Muhammad Ridzuan*, at [31], has followed *Kuala Ibai Development*.

[34] Our Federal Court has applied the "real danger of bias" test (real danger test) in the following six cases:

(i) the decision of Edgar Joseph Jr FCJ in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, at 128-129;

(ii) Mohtar Abdullah FCJ's judgment in *Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application* [2001] 2 CLJ 253, at 259;

(iii) Mohd Dzaiddin CJ's decision in *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701, at 706;

(iv) the judgments of Steve Shim CJ (Sabah and Sarawak) and Abdul Hamid FCJ (as he then was) in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577, at [2] and [31];

(v) the decision of Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501, at [70]; and

(vi) Nik Hashim FCJ's judgment in *Menteri Hal Ehwal Dalam Negeri v. Raja Petra Raja Kamarudin & Another Appeal* [2009] 3 CLJ 513; [2009] MLJU 229.

[35] The real danger test has been modified in UK by Lord Hope in the House of Lords in *Porter v. Magill* [2002] 1 All ER 465. Lord Hope has applied the test of "real possibility of bias" (real possibility test) in *Porter*, at [102] and [103], as follows:

> [102] *In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, [2001] ICR 564, to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p. 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded universal approval. At p. 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review R v. Gough to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp. 726H-727C:*
>
> > [85] *When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v. Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.*
>
> [103] *I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v. Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*
>
> (emphasis added).

[36] Lord Hodge has applied the real possibility test in *Halliburton*, at [52].

[37] In the latest Federal Court case of *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129; [2018] 10 CLJ 129; [2020] 4 MLJ 773, at [35] (*Bar Council*'s case), Hasan Lah FCJ has applied the real

possibility test. It is to be noted that the Bar Council's case did not discuss the real danger test as propounded by the earlier Federal Court decisions (please refer to the above para. 34).

[38] I am of the respectful view that the test for the invocation of the first rule for arbitrators should be the real possibility test. My reasons are as follows:

(i) Parliament has expressly provided in s. 14(1) AA for X to "disclose any circumstances likely to give rise to justifiable doubts as to [X's] impartiality or independence". Subject to the two differences between our s. 14(1) and s. 24(1)(a) AA (UK), UK cases on s. 24(1)(a) AA (UK) may be resorted to in the construction of our s. 14(1) AA – please refer to the above para. 23.

The real possibility test has been applied in *Halliburton* regarding s. 24(1)(a) AA (UK). Firstly, I am not able to find any principle which militates against the application of the real possibility test for the first rule in s. 14(1) AA. Nor is there any reason or public policy consideration why the real possibility test cannot be invoked for the first rule in s. 14(1) AA. Lastly, the application of the real possibility test in s. 14(1) AA will eliminate any difference between the application of the first rule in Malaysia and UK for arbitrators; and

(ii) the real danger test as applied in a series of our Federal Court decisions in the above para. 34, does not concern s. 14(1) AA and arbitrators.

Whether Arbitrator Had Breached First Rule When He Did Not Comply With Section 14(1) Duty

[39] Firstly, the application of the first rule in this case concerns the appearance of biasness on the part of the arbitrator in this case. There is no actual bias alleged against the arbitrator.

[40] Despite my personal view expressed in the above para. 38, I will first apply the real danger test as decided in a preponderance of Federal Court cases (listed in the above para. 34). The question to be decided is whether in the objective perception of a "fair-minded and informed observer", there was a real danger that the arbitrator was partial in this case. My answer is a resounding "yes" for the following reasons:

(i) as explained in the above sub-para. 27(i), Datuk Mohinder was a material witness in this dispute;

(ii) the arbitrator could have easily disclosed the arbitrator's relationship before the hearing but he had delayed such a disclosure until after the completion of Mr Low's testimony (please refer to the above para. 29);

(iii) as explained in the above para. 28, the arbitrator did not make a full disclosure. Worse still, the arbitrator stated that, among others, he had previously informed Mr Low of the arbitrator's relationship and he

knew learned counsel. There was no evidence of the arbitrator's earlier disclosure of the arbitrator's relationship to Mr Low. More importantly, there should not be any *ex parte* communication between the arbitrator and Mr Low alone (without involving the association and its learned counsel, Mr Ankit). The arbitrator did not name the learned counsel whom he knew; and

(iv) despite the terms (submission to arbitration), the arbitrator decided that Mr Low should refund the overpayment and interest (overpayment) in favour of the association (please see the above para. 14). In view of the noble and charitable activities carried out by the association, there was an appearance that the arbitrator had bent backwards to favour the association in the arbitration.

[41] For the reasons expressed in the above para. 40, I decide that a fair-minded and informed observer would have an objective perception of the following:

(i) there was a real possibility that the arbitrator was biased towards the association in this case; and/or

(ii) there existed a reasonable suspicion that the arbitrator was partial in favour of the association in the arbitration.

Did Arbitrator Breach Requirement (Independence) In This Case?

[42] Despite the fact that the requirement (independence) overlaps with the first rule, I have opined in the above para. 21 that the two requirements are different. I have also expressed the view in the above sub-paras. 24(iii) and 25(ii) that the appointment of X and X's award may be impugned solely on the ground of a contravention of the requirement (independence).

[43] Based on:

(i) *MMC Engineering Group*;

(ii) Potter LJ's judgment in *AT & T Corporation*;

(iii) *Halliburton*; and

(iv) my preference for the real possibility test (please refer to the above para. 38)

I am of the view that whether there is a breach of the requirement (independence) by X depends on whether in the objective assessment of a "fair-minded and informed observer", there is a real possibility that there is a presence of a relationship or connection between X on the one part and

(a) a party or parties in the arbitration; and/or

(b) the substance or subject matter of the dispute on the other part which would:

(1) make it inappropriate for X to adjudicate the dispute; and/or

(2) lead X to favour a particular party in the arbitration.

[44] As in the case for the first rule, this matter does not involve the arbitrator's lack of independence as a fact. This case merely concerns whether there was a perception that the arbitrator had lacked independence.

[45] Due to the reasons elaborated in the above para. 40, a "fair-minded and informed observer" would have an objective view that there existed a:

(i) real danger;

(ii) real possibility; and/or

(iii) reasonable suspicion

there was a presence of a relationship or connection between the arbitrator on the one part and the association (through Datuk Mohinder) on the other part which would:

(a) make it inappropriate for the arbitrator to decide the arbitration; and/or

(b) lead the arbitrator to favour the association in the award.

Whether Mr Low Is Estopped From Relying On Arbitrator's Failure To Comply With Two Requirements

[46] Mr Ankit has contended that after the arbitrator's disclosure of the arbitrator's relationship on 28 August 2018, Mr Low had failed to challenge the arbitrator in a manner as provided in s. 15(1) read with s. 14(3)(a) AA. Hence, according to Mr Ankit, Mr Low is now estopped from applying to court to set aside the award.

[47] I am not able to accede to the aforesaid submission by Mr Ankit. My reasons are as follows:

(i) independent of s. 15(1) read with s. 14(3)(a) AA, Mr Low can apply to court to set aside the award on the ground of the arbitrator's breach of:

(a) the first rule under s. 37(1)(b)(ii) read with s. 37(2)(b)(i) and/or (ii) AA – please refer to *Dato Dr Muhammad Ridzuan*, *Halliburton* and the above sub-para. 25(i); and/or

(b) the requirement (independence) pursuant to s. 37(1)(b)(ii) AA – please see the above sub-para. 25(ii).

As explained above, there is no room to apply the case law doctrine of estoppel in the face of express statutory provisions in s. 37(1)(b)(ii), (2)(b)(i) and (ii) AA. I rely on a judgment of the Supreme Court

delivered by Hashim Yeop Sani CJ (Malaya) in *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174; [1991] 1 MLJ 404, at p. 179 (CLJ); 407 (MLJ), as follows:

> *On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions.*
>
> (emphasis added)

(ii) the Federal Court has decided as follows in *Metramac Corporation*, at [70] and [71]:

> *[70] We are therefore of the opinion that the stage at which bias is said to have arisen is quite immaterial. The real danger of bias can arise at any stage in a judicial or quasi-judicial proceeding or even in administrative tribunal.*
>
> *[71] Further, we do not think there is any good reason to limit any finding of real danger of bias in a judicial proceeding only up to the stage of pre-delivery of judgment. …*
>
> (emphasis added)

As decided in *Metramac Corporation*, a breach of the first rule can arise at any stage of the proceedings in question. In other words, the application of the first rule is not confined to a challenge of arbitrators under s. 15(1) read with s. 14(3)(a) AA; and

(iii) as explained in the above paras. 28 and 29, the arbitrator had breached the full disclosure requirement and timeous disclosure requirement. As such, the association cannot now rely on an invalid disclosure by the arbitrator regarding the arbitrator's relationship to advance any argument based on estoppel against Mr Low. Estoppel is an equitable doctrine which is applied by the court to achieve justice. The equitable estoppel doctrine should not be a ground for arbitrators to circumvent the full disclosure requirement and timeous disclosure requirement. If otherwise, the application of the equitable estoppel doctrine will cause an injustice or inequity in arbitration.

Whether Court Should Exercise Discretion To Set Aside Award

[48] It is not disputed that the court has a discretion to affirm or set aside an arbitral award under s. 37(1) AA. This is clear from the Federal Court's judgment in *Jan De Nul*, at [56] and [57], as follows:

> [56] *Even though the court finds that a breach of the rules of natural justice has been established or that an arbitral award is in conflict with the public policy under s. 37 [AA], it does not necessarily mean that the award must be set aside as a matter*

of course. The power of the court to set aside an award under s. 37 is discretionary and will not be exercised automatically in every case where the complaints are established (see: Kyburn Investments Ltd v. Beca Corporate Holdings Ltd [2015] 3 NZLR 644; Sigur Ros Sdn Bhd).

[57] *The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s. 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice (see: Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & Another Appeal [2011] MLJU 1537; [2013] 2 CLJ 395; Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83; and Lesotho Highlands Development Authority v. Impregilo SpA and others [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.*

(emphasis added)

[49] In the Federal Court case of *Master Mulia Sdn Bhd v. Sigur Ros Sdn Bhd* [2020] MLJU 1329, at [53] and [58], Vernon Ong FCJ has decided as follows:

[53] *In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:*

First, the Court must consider (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;

Second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;

Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;

Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;

Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;

Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;

Seventh, the discretion given the Court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the Court; and

Eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

…

[58] *This reading is supported by the case law in New Zealand where the setting aside provision on the NZ Act mirrors s. 37 [AA]. Like s. 37(2)(b) [AA], Article 34(6)(b), Schedule 1 of the NZ Act does not stipulate the requirement of prejudice (Kyburn (supra); Trustees of Rotoaira Forest Trust v Attorney General [1999] 2 NZLR 452). To reiterate, these decisions make the following points. First, the imposition of a requirement of prejudice narrows down what is intended to be a wide discretion (Kyburn (supra) at p 564); Second, provisions allowing for the setting aside of arbitral awards can be said to vest in the court a wide discretion to set aside awards. The question of whether an award ought to be set aside for breach of natural justice therefore does not turn on prejudice. It turns, instead, on amongst other things, the significance of the breach and the extent to which it might or may have affected the outcome of the arbitration. It is not necessary to show that the breach did in fact affect the outcome (Kyburn (supra) at p 653). Procedural prejudice would be sufficient to ground an application to set aside (Rotaoira (supra) at p 462). Fourth, there is no basis on which it can be said that the onus is on the applicant to show that the consequences of the breach are sufficiently material to warrant setting aside an award. The ordinary burden on an applicant cannot be elevated to a legal requirement to show that the outcome would be different had the breach not occurred (Kyburn (supra) at p 654). Fifthly, materiality of the breach and the possible effect on the outcome are treated as relevant factors going to the exercise of the discretion, such as the likely costs of holding a re-hearing (Kyburn (supra) at p 654). Lastly, prejudice, if it can be shown, would be material. However, no single factor is decisive or necessary for an award to be set aside (Kyburn (supra) at p 654). Kyburn (supra) was cited with approval by this Court in Jan De Nul (M) Sdn Bhd (supra)). We are in agreement with the view expressed by the Court of Appeal that the threshold under s. 37 is very low as compared to that under s. 42 [AA] (see para. [38] of the Court of Appeal's written judgment).*

(emphasis added)

[50] Based on *Master Mulia*, I exercise my discretion under s. 37(1) AA to set aside the entire award because:

(i) the arbitrator had decided on the overpayment and interest (overpayment) which:

(a) were not contemplated by the terms (submission to arbitration) – please refer to s. 37(1)(a)(iv) AA;

(b) did not fall within the terms (submission to arbitration) as understood in s. 37(1)(a)(iv) AA; and/or

(c) were beyond the scope of the terms (submission to arbitration) as stated in s. 37(1)(a)(v) AA;

(ii) the arbitrator's non-compliance with the full disclosure requirement and timeous disclosure requirement had led to his breach of the first rule and the requirement (independence) (two breaches);

(iii) the two breaches arose directly from the arbitration and were closely connected to the making of the award, especially when the arbitrator exceeded the terms (submission to arbitration) by deciding on the overpayment and interest (overpayment); and

(iv) the nature of the two breaches was serious in the following sense:

(a) the two breaches were material to the outcome of the arbitration;

(b) the two breaches had real impact on the award;

(c) the arbitrator would have reached a different decision if not for the two breaches; and/or

(d) the two breaches were significant and had affected the award.

Outcome Of Enforcement OS

[51] I reproduce below the relevant parts of ss. 38(1) and 39(1) AA:

Recognition and enforcement

38(1) *On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia* or an award from a foreign State *shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.*

…

Grounds for refusing recognition or enforcement

39(1) *Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked*:

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

…

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

(v) *subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration*;

…

(vii) …; or

(b) *if the High Court finds that*:

…

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

(emphasis added)

[52] It is decided in *Murray & Roberts Australia Pty Ltd v. Earth Support Company (SEA) Sdn Bhd* [2015] 6 CLJ 649; [2015] 3 AMR 152, at [63]-[65], that once the association has complied with all the procedural requirements regarding the enforcement OS, the burden then shifts to Mr Low to satisfy the court of the existence of any one of the circumstances provided in s. 39(1)(a)(i) to (vii), (b)(i) and (ii) AA for the court to refuse the enforcement OS.

[53] I am satisfied that Mr Low has discharged the onus to persuade me to dismiss the enforcement OS on one or more of the following grounds:

(i) as explained in the above paras. [10]-[14], parts of the award regarding the overpayment and interest (overpayment):

(a) were not contemplated by the terms (submission to arbitration) within the meaning of s. 39(1)(a)(iv) AA;

(b) did not fall within the terms (submission to arbitration) – please refer to s. 39(1)(a)(iv) AA; and/or

(c) were beyond the scope of the terms (submission to arbitration) – please refer to s. 39(1)(a)(v) AA; and/or

(ii) the commission of the two breaches (please refer to the above paras. [18]-[45] has attracted the application of s. 39(1)(b)(ii) AA.

Court's Decision

[54] A summary of the above decision is as follows:

(i) the overpayment and interest (overpayment) as decided by the arbitrator attracted the application of s. 37(1)(a)(iv) and/or (v) AA;

(ii) as explained in the above para. 17, this court cannot exercise its discretion under s. 37(3) AA to set aside only the overpayment and interest (overpayment) in the award;

(iii) the arbitrator's disclosure of the arbitrator's relationship had breached the s. 14(1) duty when the arbitrator did not comply with the:

(a) full disclosure requirement; and/or

(b) timeous disclosure requirement;

A (iv) a "fair-minded and informed observer" would have an objective perception that there existed a:

(a) real danger;

(b) real possibility; and/or

B (c) reasonable suspicion

that the arbitrator had breached the first rule and/or the requirement (independence); and

(v) the court has exercised its discretion to set aside the entire award based C on the reasons stated in the above para. 50. Consequently, the enforcement OS is dismissed on the same grounds for this court to allow the setting aside OS.

[55] Premised on the above evidence and reasons:

D (i) the setting aside OS is allowed;

(ii) the enforcement OS is dismissed; and

(iii) one set of costs for the two OS shall be paid by the association to Mr Low.

E **[56]** This judgment serves as a reminder that arbitrators should comply with s. 14(1) duty and the two requirements, both in fact and appearance, so as to safeguard the integrity of the arbitral proceedings and their awards.

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