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ENFORCEMENT AND CHALLENGING OF ARBITRATION AWARD

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# **ENFORCEMENT AND CHALLENGING OF ARBITRATION AWARD**

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## ABSTRACT



The objective of arbitration is to produce an award that is just, final and enforceable. If an arbitrator has observed the requirement of conclusiveness and completeness, he should have provided the parties with a resolution that either of them could use, defensively to fend off further claims against or positively for enforcement of, his rights acquired under the award. An award, when given, would not be final, but is capable of being challenged or not to be enforced in court. Therefore, this study intends to identify what grounds and situation, which are available to the parties especially the losing or unsatisfied parties to defend their stand in arbitral awards.

The study concentrates on theory from texts, books, articles and past dissertation and also have been carried out mainly through documentary analysis of law journals, such as Malayan Law Journal, The Arbitration Act 2005, etc; as well as court cases from Lexis Nexis and Ipsofactoj.com website. Literature review has shown that, there are at least nine (9) basic grounds for refusing recognition or enforcement arbitral awards. However, the evidence from the profile of court cases shows that, the situation is rather limited which can be linked exactly to the ground where the arbitral award can be enforce as well as not to be enforced.

Since the court cases cannot merely be linked to the grounds in such a way to enforce or not to enforce the arbitral award, it is hoped that this dissertation would act as a guidelines to parties pursuing civil action in enforcing the arbitration award if they resort to it.



## ABSTRAK



Objektif timbangtara adalah untuk menjadikan sesuatu keputusan yang diputuskan olehnya adalah muktamad dan boleh dikuatkuasakan. Jika seseorang timbangtara telah meneliti segala maklumat serta informasi yang lengkap dan menyeluruh kepada keperluan sesuatu keputusan, maka dia haruslah memutuskan satu jalan penyelesaian yang boleh digunakan oleh pihak-pihak yang bertentangan pendapat, sama ada mempertahankan segala tuntutan yang dikemukakan atau memohon menguatkuasakan keputusan yang diberikan oleh timbangtara sekiranya keputusan timbangtara memihak kepada mereka.

Sesuatu keputusan, tidak semestinya muktamad, sebaliknya ia boleh di pertikaikan atau tidak dikuatkuasakan di dalam mahkamah. Justeru itu, kajian ini menjerumus kepada untuk mengenal pasti asas-asas dan situasi yang boleh diguna pakai oleh pihak-pihak yang bertentangan pendapat, terutamanya pihak yang merasakan ketidakpuasan hati untuk mempertahankan prinsip mereka di dalam keputusan yang telah diputuskan oleh timbangtara.

Kajian ini lebih menumpukan kepada teori yang diperolehi daripada buku-buku, lembaran kerja dan pandangan-pandangan daripada kajian-kajian yang terdahulu. Ianya dijalankan dengan analisa dokumentari dari jurnal-jurnal undang-undang, sebagai contoh *Malayan Law Journal*, *The Arbitration Act 20005*, serta juga kes-kes yang telah diputuskan mahkamah; diperolehi daripada laman web Lexis Nexis dan Ipsofactoj.com. Kajian literature menunjukkan, sekurang-kurangnya sembilan (9) asas untuk menidakkan penguatkuasaan keputusan timbangtara. Walaubagaimanapun, bukti daripada profile kes-kes mahkamah menunjukkan situasi tersebut terhad dan boleh terus dikaitkan kepada asas-asas, sama ada untuk menguatkuasakannya atau tidak.

Daripada situasi yang telah dinyatakan, diharapkan kajian ini dapat menjadi satu garis panduan kepada semua pihak didalam menguatkuasakan keputusan timbangtara sekiranya mereka berhak serta layak untuk memperolehinya.



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# CHAPTER 1

## INTRODUCTION

### 1.1 Background Studies

Arbitration is gaining popularity over the traditional courts as an avenue for disputing parties to resolve their differences<sup>1</sup>. Litigation, on the other hand, is defined as bringing a lawsuit against someone to have a dispute settled by a judge in the court of law<sup>2</sup>. Arbitration is becoming increasingly popular in the construction industry as a means of dispute resolution as compared to litigation.<sup>3</sup> One can find many benefits and advantages offered by arbitration. But the decision on whether to arbitrate or litigate is far more complex. Since construction disputes are specialized in nature, arbitration too can be tailored to meet the nature of the dispute. This is possible with the availability of arbitrators with specialist background in construction.

The concept of arbitration is of the resolution of a conflict by resorting to a decision-maker; the classic definition of arbitration is 'the submission of a dispute between two parties for decision to a third party of their own choice'. However, it should assume that any reference to a third party constitutes arbitration. In the development and construction industry, uncertainty has often arisen as to whether a valuation, whether of work, materials or property and others, which then contribute as a source of conflict between the parties.

Before the arrival of the Arbitration Act 1952, litigation has been the form of resolving disputes between the contending parties. The introduction of the new

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<sup>1</sup> Rizal Abdul Kadir Advocate & Solicitor, Messrs Shahrizat, Rashid & Lee, (2008), "Arbitration using English Law-A Relegated Role for the UK Courts?", The Malayan Law Journal Articles.

<sup>2</sup> Collin, P.H. (1986), "Law Dictionary", Universal Book Stall, New Delhi

<sup>3</sup> John Wong, "Construction Dispute Resolution: Litigation or Arbitration", James R Knowles (Malaysia) Sdn Bhd

Act 2005 is the most significant development in the field of arbitration law in Malaysia over several decades<sup>4</sup>. The avenue to refer any dispute to arbitration is mostly incorporated in the standard forms of contract, for example; Clause 34 of the PAM 98 and Clause 30 of the New PAM 2006. Besides, 'adjudication' is introduced in New PAM 2006 in Clause 34.1 to Clause 34.4 for dispute resolution. One can attribute such popularity to a wide array of advantages afforded by arbitration.

No particular form is required for an award, but it should be in writing and should set out in a logical form the reasons for the decisions contained in the award, unless the parties have agreed to dispense with reasons. Although an arbitration agreement is a mutual undertaking by the parties to submit their disputes to arbitration and to abide by arbitrator's award which is declared to be "final", however, there is possibility in certain limited circumstances contribution to a complaint of bias<sup>5</sup>. It is usual to start with recitals and then cover the events leading up to the arbitration. The award should then set out the issues or claims and the arbitrator's reasoning, ending with decisions. In practice, awards without reason are now rare.

In the new Arbitration Act 2005, section 2(1) defines an award collectively to refer to both awards of an international and domestic arbitration. By section 36(1) all awards are declared as final and binding. An award may take one of several forms such as a final award<sup>6</sup>, an interim award<sup>7</sup> or a temporary award. Generally, an award is of practical importance because an accurate classification may determine, for example:

- a) Whether the decision is enforceable by domestic or foreign court.
- b) Whether the decision is susceptible of appeal or other intervention by a court, and if so by what means.
- c) Whether the decision is binding on the parties and the arbitral tribunal.

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<sup>4</sup> Dato' Cyrus Das (2007), "Enforcement of Awards under the the new Arbitration Act 2005", The Malayan Law Journal Article.

<sup>5</sup> Sundra Rajoo, "Law, Practice and Procedure of Arbitration", (Kuala Lumpur, Malayan Law Journal Sdn Bhd, 2003)

<sup>6</sup> The Arbitration Act 1952, s 17; Arbitration Act 2005, s 36

<sup>7</sup> The Arbitration Act 1952, s 15



- d) As regard the later, the categorization of the decision may determine whether and to extent what the arbitral tribunal can validly recall or vary its decision.<sup>8</sup>

Although an arbitration agreement is a mutual undertaking by the parties to submit their disputes to arbitration and to abide by arbitrator's award which is declared 'final', however, there are possibilities in certain circumstances the awards may contribute to a complaint of bias<sup>9</sup>. Generally, the award may not be enforceable and the dissatisfied party may challenge the validity of the award. An arbitration award does not of itself compel the losing party to comply with its terms.<sup>10</sup> The aid of the court must be invoked, and this may be done in two ways. Firstly, the award may, by leave of the High Court, be enforced as a judgement. Secondly, the party seeking enforcement may bring an action on the award as a contract if the award is for a sum of money, the claimant may seek to enter summary judgment for the amount awarded.

## 1.2 Problem Statement

According to Douglas A. Stephenson (1987), 'an award, when given, would not be final, but was capable of being challenge through the courts. Now, however, the rights to appeal are strictly limited and may in some circumstances be eliminated entirely'<sup>11</sup>. In common circumstances, the court has a general discretion to remit or set aside an award on the basis that "something has gone wrong".<sup>12</sup> But it has to be noted that, the High Court has no inherent or statutory power to intervene in arbitration while it is still in progress. A court must comply with a request to enforce an arbitration

<sup>8</sup> Mustill and Boyd, "Commercial Arbitration, Companion." 2<sup>nd</sup> Edition. (2001), pp. 105

<sup>9</sup> Sundra Rajoo, "Law, Practice and Procedure of Arbitration." (Kuala Lumpur, Malaysia: Malayan Law Journal Sdn Bhd., 2003), pp. 245.

<sup>10</sup> John Uff, "Construction Law" (London, Sweet & Maxwell Limited, 2005), pp. 124

<sup>11</sup> Douglas A. Stephenson, "Arbitration for Contractors" 2<sup>nd</sup> Edition. (London: International Thompson Organisation, 1987)

<sup>12</sup> *Re Montgomery, Jones & Co and Liebenthal & Co's Arbitration* [1898] 78 LT 406 at 409, CA (Eng), per Chitty LJ; *CK Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd* [1989] 1 MLJ 389 (balance of convenience by the court); *Gasing Height Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2001] 6 MLJ 727.

award. The grounds upon which a court can refuse to enforce an award are very narrowly defined.<sup>13</sup>

As society becomes more aware of its rights, it is natural for the number of legal disputes to increase. With this increase it is not surprising that if, for various reasons, the traditional courts are seen to be no longer sufficient to cope with the demands of a litigant. Arbitration then becomes an alternative to litigation as a means of dispute resolution as it offers a number of advantages over the latter<sup>14</sup>.

The step that the arbitrator must take after he has closed the proceedings at the reference is to prepare his award in which will embody his decision. The objective of arbitration is to produce an award that is just, final and enforceable.<sup>15</sup> As the award must be in a form capable of being enforced, the Act provides for the enforcement of valid awards. The award must be in a form capable of being enforced. In order to enforce an award by action, it is necessary to prove affirmatively that it is valid, that is to say, that the contract containing the arbitration agreement was made, that a dispute arose which was validly appointed, that he made the award pleaded, and that such award has not been performed.<sup>16</sup>

In common circumstances, the court has a general discretion to remit or set aside an award on the basis that “*something has gone wrong*”<sup>17</sup>. Nevertheless, it has to be noted that, the High Court has no inherent or statutory power to intervene in arbitration while it is still in progress. For that reason, it is necessary for the parties to await the outcome of the award before registering a challenge. Despite the facts that there is no single

<sup>13</sup> Kathryn Helne Nickerson, “International Arbitration” (www.osec.doc.gov/ogc/occic/arb-98,2005)

<sup>14</sup> Sundra Rajoo, “Law, Practice, and Procedure of Arbitration”, (Kuala Lumpur, Malayan Law Journal, 2003)

<sup>15</sup> Sundra Rajoo, “Arbitration Awards”, (Kuala Lumpur, Malayan Law Journal, 2002)

<sup>16</sup> Sundra Rajoo, “Arbitration Awards”, (Kuala Lumpur, Malayan Law Journal, 2002)

<sup>17</sup> *Re Montgomery, Jones & Co and Liebenthal & Co's Arbitration* [1898] 78 LT 406 at 409, CA (Eng), per Chitty LJ; *CK Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd* [1989] 1 MLJ 389 (balance of convenience by the court); *Gasing Height Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2001] 6 MLJ 727



procedure to challenge the award, parties to arbitration may have recourse against an award by applying to set aside or remit it to arbitrator for reconsideration. Nevertheless, what are exactly those features and grounds that are available to the parties involved to enforce or setting aside the award?

The aim of the dissertation is to identify and determine the features and common grounds recognized circumstances and basic grounds that are available to enforce an arbitration awards as well as what are the limited grounds on which the award will not to be enforceable.

### **1.3 Objective of Studies**

From the problem statement, the objective of this study is:

- a) To identify the features for enforcement and the circumstances to challenge the arbitration awards.

### **1.4 Scope of Studies**

The study covers:

- a) Arbitration practices in Malaysia under the Arbitration Act 1952 and New Arbitration Act 2005
- b) Only Malaysian cases related to construction contract will selected for this study, from the period of 1999 to 2008

## **1.5 Significance of Studies**

The significance of this study:

- a) To identify the common grounds for enforcing the award given by arbitrator and relevant matters due to challenge the award.

## **1.6 Research Methodology and Method of Approach**

The following are the methodologies and methods approach that have been applied for this study:

### **1.6.1 Primary Data Collection**

The data collection primarily was derived from personnel and construction team involved in the construction such as Arbitrator, Contractor, Consultant and others. Techniques applied are:

#### **i) Interview**

Interview was carried out with the persons that practice in arbitration. However, the interview was conducted through informal session such as emailing and telephone conversation.

### **1.6.2 Secondary Data Collection**

Secondary data were collected mainly from Malayan Law Journal, Building Law Report and other law journal. They have been collected through the Lexis Nexis law database. All the cases from year 1999 to 2008 relating to the research topic have been collected in order to identify the basic grounds and circumstances that civil

action; certiorari<sup>18</sup> will be available to the construction contract parties.

Secondary data also were retrieved from the information that derived from books, Arbitration Act, journals and articles, seminars papers as well as Internet websites, which were relevant and associated to the scope of study. Titles of the books, publishers, date of publishing and the authors have been stated in the *Bibliography* section. These sources have been important in completing the literature review tasks.

### **1.6.3 Method of Data Analysis**

Method of data analysis will be used as guidelines so that the research could be done in a systematic way to achieve the research objective. The research process generally consists of three main parts i.e.:

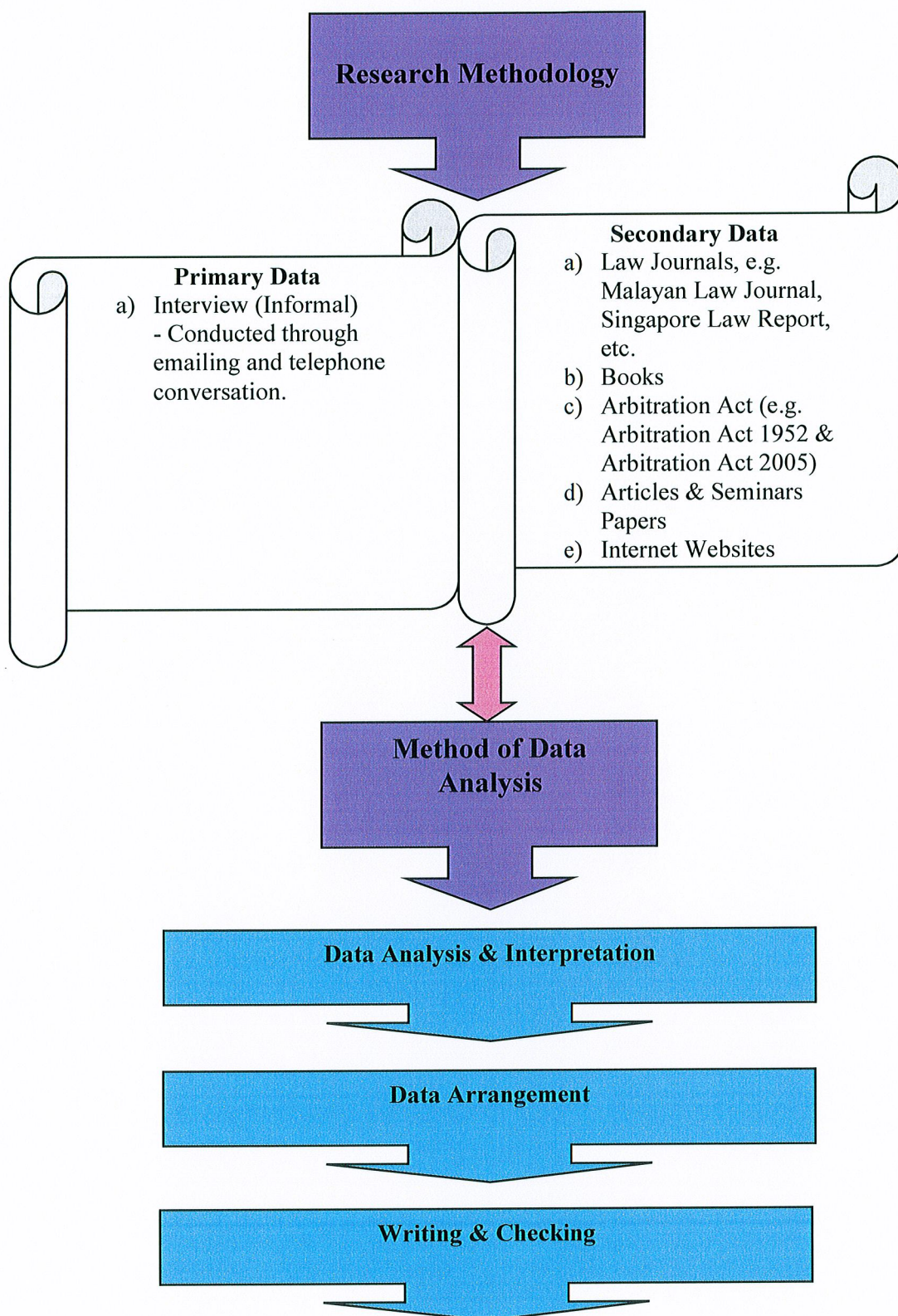
- i) Data collection (secondary data collection)**
- ii) Data analysis (interpretation and arrangement)**
- iii) Writing and checking.**

The following Figure 1.1 will be the research methodology and methods of approach used for this study.

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<sup>18</sup> Is a writ (order) of a higher court to a lower court to send all the documents in a case to it so the higher court can review the lower court's decision.





**Figure 1.1:** Research Methodology and methods of Approach

## **1.7 Structure of Dissertation**

In order to achieve these objectives this dissertation divided into four (4) chapters and each chapter covered different scope of studies. The outlines for each chapter are as follows:

### **1.7.1 Chapter 1: Introduction**

Basically, this chapter includes the introduction, objectives, scope of study, methodology adopted to gain the information and chapter summary to give an overview of the chapters of the dissertation.

### **1.7.2 Chapter 2: Enforcement and Challenging of the Arbitration Award.**

This chapter will explain about the definition of the word ‘award’ including what has been defined by the Arbitration Act. It will also include explanation on the types of arbitration award enforced by the Act and the procedure to be followed if any of the parties refuses to honour the award.

### **1.7.3 Chapter 3: Analysis of Court Cases in Relation to Issues of Enforcement and Challenging the Arbitration Awards in Construction Contract.**

This chapter will focus on the court cases, which have been reviewed and analyzed in order to discuss the features on enforcement of the awards as well as the basic grounds and circumstances to challenge the award.

### **1.7.4 Chapter 4: Conclusion and Recommendation**

The fourth chapter comprises of the discussion on the findings and interpretation of the data collected, conclusion and recommendations. Conclusion for the whole chapter was made. Some recommendations are also laid down in the chapter for reference by the practitioners in the industry.



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