

**ARBITRATOR'S MISCONDUCT IN RECEIVING EVIDENCE
IN ARBITRATION PROCEEDINGS**

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....Especially dedicated to my husband, Mohamad Hussaini B. Harun and my little daughter, Nur Aliya Alisya and my beloved parent Mohd Subha B. Ri and Nor Rizan Bt. Mohamad Yussof for their endless love, care and support.....

Thanks for every single thing....

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ABSTRACT

In arbitration, an arbitrator is the sole judge of the quantity and quality of evidence. He has to verify the admissibility and weight of the evidence. Besides, an award will normally be set aside, rather than remitted where there has been a serious miscarriage of justice affecting the evidence and the arbitrator cannot reasonably be expected to be able to approach the matter afresh. However the mere fact that the arbitrator has decided the case on undisclosed evidence is not enough. His award must be based on the evidence adduced at the hearing. It is part of his duty to determine matters of both of fact and of law. When conducting arbitration proceedings, an arbitrator must evaluate all the evidence before him when deciding on the issues that have been put before him. Failure by arbitrator to hear properly admissible evidence during proceeding will amount to misconduct and it is one of the basic grounds to challenge the arbitral award. Misconduct covers any action contrary to the principles of natural justice, which require that no man may be a judge in his own cause, and that every party has a right to be heard and to challenge any statement or document prejudicial to his case. Thus, this study intends to identify the circumstances that lead to misconduct by arbitrator in receiving admissible evidence which can be challenged in arbitral award. This study is carried out mainly through literature review and documentary analysis of law journals, such as Malayan Law Journal, Building Law Report, etc. The analysis showed that there were five main circumstances on arbitrator's misconduct in receiving admissible evidence which include failure to analyse and appraise material and relevant evidence, misconstrued some relevant provision that were material, ignored material and relevant evidence, matters of public policy and hearing evidence of one party in the absence of the other. Most of the factors interpreted arbitrator's misconduct where he failed to act fairly and impartially, failed to decide all issues and make the award, lack of understanding basic principles of evidence and lack of understanding the rules of evidence. Therefore, this study will be able provide a better guideline for the disputant parties in construction industries to be given a fair and judgement during the arbitration proceedings.

ABSTRAK

Dalam timbangtara, penimbangtara adalah satu-satunya pengadil yang mengadili kuantiti dan kualiti sesuatu bukti. Penimbangtara harus menentukan bukti-bukti yang boleh diterima dan juga beban bukti itu sendiri. Di samping itu, biasanya award akan diketepikan daripada ditarik balik untuk diperbetulkan apabila terdapatnya kegagalan didalam pengadilan yang melibatkan bukti, dan penimbangtara tidak boleh menggap ianya akan diberi semula untuk pembaikan. Walaubagaimanapun, secara faktanya, sekiranya penimbangtara mengadili sesuatu perkara dengan tidak mendedahkan bukti ianya adalah tidak mencukupi untuk diadili. Award yang dikemukakan mestilah berdasarkan bukti yang diberikan semasa perbicaraan. Ia adalah sebahagian daripada kerjanya untuk menentukan perkara yang berkaitan fakta dan undang-undang. Semasa menjalankan perbicaraan timbangtara, penimbangtara mestilah menilai kesemua bukti terlebih dahulu sebelum ianya membuat sesuatu keputusan terhadap isu yang dibicarakan. Kegagalan penimbangtara mendengar kesemua bukti yang boleh diterima semasa perbicaraan akan menyebabkan salah laku terhadap penimbangtara itu sendiri dan ia merupakan salah satu cara untuk mencabar award yang dikemukakan. Salah laku merupakan perbuatan yang bertentangan dengan prinsip natural justice, dimana setiap pemohon mempunyai hak untuk didengari dan mencabari apa sahaja keputusan dan dokumen yang menjatuhkan kesnya. Oleh itu, penyelidikan ini dilakukan untuk mengenalpasti situasi-situasi yang menyebabkan penimbangtara salah laku di dalam mengadili bukti-bukti yang boleh diterima. Kajian ini dijalankan melalui kajian literatur dan analisis dokumen dari jurnal undang-undang dan sebagainya. Analisis menunjukkan terdapat lima situasi utama yang menyebabkan penimbangtara salah laku di dalam mengadili bukti yang boleh diterima dimana ianya gagal menganalisa dan menilai bukti yang relevan dan kebendaan, tidak memahami syarat-syarat relevan yang wujud, mengendahkan bukti yang ada, perkara yang berkaitan polisi awam dan mendengar bukti sebelah pihak tanpa kehadiran pihak yang satu lagi. Kebanyakan faktor yang menyebabkan salah laku penimbangtara itu sendiri adalah kerana kegagalan untuk bertindak adil dan saksama, gagal mengadili isu yang dibicarakan, kurang memahami prinsip asas bukti i dan juga kurang memahami undang-undang bukti itu sendiri. Oleh itu, penyelidikan ini amat bernilai dan berguna dan juga sebagai garis panduan untuk pihak-pihak yang berselisih dalam industri pembinaan untuk mendapatkan proses penimbangtara yang adil dan wajar.

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LIST OF ABBREVIATIONS

AC	-	Appeal Cases
ADR	-	Alternative Dispute Resolution
ADRLJ	-	Arbitration and Dispute Resolution Law Journal
ADRLN	-	Arbitration and Dispute Resolution Law Newsletter
All	-	Australian Law Librarian
All ER	-	All England Law Reports
BLR	-	British Law Reports
CB	-	Common Bench Reports
CIDB	-	Construction Industry Development Board
CILL	-	Construction Industry Law Letter
CLR	-	Commonwealth Law Reports
ConLR	-	Construction Law Reports
EG	-	Estates Gazette (UK)
ER	-	English Reports
EWHC	-	High Court of England and Wales Decisions
H&N	-	Hurlstone & Norman's Exchequer Reports
I.L.R	-	International Law Reports
IBID	-	Ibiden (in the same)
ICC	-	International Chamber of Commerce
IEM	-	Institution of Engineers Malaysia
JCT	-	Joint Contracts Tribunal
KB	-	King's (or Queen's) Bench
KLRCA	-	Kuala Lumpur Regional Centre for Arbitration
LiL Rep	-	Lloyd's List Law Reports
Lloyd's Rep	-	Lloyd's Law Reports
LJQB	-	Law Journal Reports, Queen's Bench
LT	-	Law Times Reports
MLJ	-	Malayan Law Journal
PAM	-	Pertubuhan Arkitek Malaysia /Malaysian Institute of Architects
PWD/JKR	-	Public Works Department/Jabatan Kerja Raya
QB	-	Queen's Bench Reports
QBD	-	Queen's Bench Division
SCR	-	Supreme Court Reports
SGHC	-	Singapore High Court (unreported judgments)
SLR	-	Singapore Law Reports
TCC	-	Technology Construction Courts
TLR	-	Times Law Reports
UNCITRAL	-	United Nations Commission on International Trade Law
UTM	-	Universiti Teknologi Malaysia
WLR	-	Weekly Law Reports



CHAPTER 1

INTRODUCTION

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INTRODUCTION

1.1 Background of Study

The arbitrator's award must be based on the evidence adduced at the hearing. It is part of his duty to determine matters both of fact and law. It is now usual for the arbitrator to give reasons for his award as provided in the various arbitration rules. In making his award the arbitrator's primary objective is to define clearly, justly and enforceably, what the parties are to do and when they are to do it in order to resolve the matters in dispute. His secondary objective is to satisfy the parties, and in particular, the losing party, that he has done justice in accordance to the law. Once he has made the award the arbitrator is *functus officio* meaning that he has discharged his duties and has no further function to perform. His authority as arbitrator has ended and he cannot rescind his award and hear the case again.¹ Besides that, the finality of the award can also be tested when the losing party fails to honour the award, and the other party applies to the High Court under s 27 of the Act for judgment in the terms of the award.²

¹ Sundra Rajoo (2003). *The Process Of Arbitration In Resolving Sport Disputes*. 4 MLJ 148.

² The Arbitration Act 1952. s 27.

In considering whether an award should be set aside, generally the court will not conduct a rehearing of the arbitration proceedings. Under Section 37 of Arbitration Act 2005 sets out the 8 jurisdictional and substantive grounds which may be relied upon by the High Court in setting aside an award. The court is not entitled to draw any inferences as to the finding by the arbitrator of facts supporting the award, it must take the award at its face value.³ The question whether there was evidence upon which an arbitrator could reach a conclusion of fact is one of law. As observed by Raja Azlan Shah J. in *Cheng Keng Hong v. Government of the Federation of Malaya*,⁴ ‘the court is not concerned with his finding of fact, the court is concerned only to see that there was evidence to support his finding’.

The purpose of the hearing in arbitration is to adduce evidence as to the matters in dispute. Evidence is defined in Osborn's Concise Law Dictionary as ‘...all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. The law of evidence is highly complex. However, it is provided in section 2 of the Evidence Act 1950 that it does not apply to arbitration, *‘This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.’* But this does not mean an arbitrator can abandon the principles of evidence completely. What is allowed is that the rules of evidence need not be applied rigidly in arbitration.⁵

Evidence in a broad sense refers to something that furnishes proof of a matter. In the legal context, it is something legally submitted in court or other decision-making body to ascertain the truth of a matter. Evidence may take various forms, such as oral testimony, videotape, documents, and other forms.⁶

³ 2nd Halsbury's Laws of England (4th Ed.) at para. 610; *Desa Teck Guan Koko Sdn Bhd v. Sykt. Hap Foh Hing* (1994) 2 MLJ 246.

⁴ (1966) 2 MLJ 33.

⁵ Evidence Act 1950. s 2.

⁶ Sundra Rajoo (2003). *The Process of Arbitration in Resolving Sport Dispute*. 4 MLJ 148.

Evidence is required to establish or prove those averments of fact. The strict rules of evidence applied in a court of law are not usually used in arbitration. This does not mean that the arbitrators should accept everything presented to them. The evidence should relate to the case. For example, no party should be allowed to introduce evidence of any settlement offer that it made or received. The parties should be given an opportunity to object or comment on anything that is presented to the panel. The key consideration is fairness. In conducting arbitration, strict adherence to the rules of evidence is not only unnecessary, but may have an adverse impact on the effective and speedy resolution of the arbitration, particularly where the rules are used to obstruct and/or obfuscate the facts.⁷

Admissible evidence is that evidence which may be received by the judge or jury in a case in order to decide the merits of a controversy. Rules of evidence, which vary by jurisdiction, determine the admissibility of evidence. It is the judge's duty to apply the rules of evidence in the case at hand to determine its admissibility. The court in *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd*⁸ explained, “*a departure from the rules of the Evidence Act 1950 does not per se amount to misconduct, unless the rule of evidence violated is one which is based on natural justice and an infringement of it is, therefore, repugnant to one’s sense of justice and fairness*”.

Misconduct occurs if the arbitrator fails to decide all the matters which were referred to him.⁹ Thus, *Russel on the Law of Arbitration* has stated that “*It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. It may, however, be misconduct if there are gross errors in failing to hear or improperly receiving evidence*”

⁷ William C. Turner, Esq. (2010), *Articles: A Brief Overview Of The Use Of Evidence In Arbitration*, Nevada Lawyer.

⁸ [1998] 6 MLJ 545

⁹ *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99

Therefore, the primary requirement of evidence in order that it may be admitted is that it must be relevant to the points at issue and the arbitrator has to determine the admissibility and weight of the evidence since the power to determine the admissibility, relevance, materiality and weight of any evidence in arbitration lies with the arbitrator. However, it is subjected to non-violation of the principle of natural justice.¹⁰

1.2 Statement of Issues

The arbitration award is the final product of a great deal of work both by the arbitrator and by the parties and their legal teams. The arbitrator is under a duty to proceed with due diligence and reasonable dispatch in making his award.¹¹

In common circumstance, the court has a general discretion to remit or set aside an award on the basis that something has gone wrong.¹² 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. For that reason, it is necessary for the parties to await the outcome of the award before registering a challenge.¹³ The arbitrator is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or deed of settlement he is required to give such reasons. The

¹⁰ Sundra Rajoo (2003). *Law, Practice and Procedure of Arbitration*. Malayan Law Journal Sdn Bhd. pp. 353.

¹¹ Sundra Rajoo (2002). *Arbitration Awards*. Malayan Law Journal Sdn Bhd.

¹² *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.

¹³ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, [1981] 1 All ER 289, HL.

reasonableness of the reasons given by the arbitrator cannot, however, be challenged.¹⁴

When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on the evidences.¹⁵

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.¹⁶ Grace Xavier (2001) also pointed out that arbitral award is not final and binding and thus can still be challenged by any of the parties, until it is registered and accepted as a judgement by leave of the High Court.¹⁷ The courts have the right to intervene where the arbitrator has failed to analyse and appraise the relevant and admissible evidence.¹⁸

In *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd*¹⁹, the High Court held that, “a failure to analyse and appraise the evidence [will] vitiate the award [if] ‘the evidence is material, relevant and had gone to affect the award’”.

Furthermore, the court may also set aside the award which the arbitrator clearly did not appreciate the admissible evidence according to the case of *Tetuan*

¹⁴ *Bijendra Nath Srivastava v. Mayank Srivastava* AIR (1994) SC 2572

¹⁵ *Puri Construction Pte. Ltd. v. Union of India* [1989] AIR SC 777

¹⁶ Douglas A. Stephenson (1987). *Arbitration for Contractors*, 2nd Edition. London: International Thompson Organisation, pp. 6.

¹⁷ Grace Xavier (2001). *Law and Practice of Arbitration in Malaysia*. Malaysia: Sweet & Maxwell Asia a division of Thomson Asia Pte. Ltd., pp. 180.

¹⁸ *Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd*. [2003] 1 MLJ 49

¹⁹ [2000] 6 MLJ 433

*Bakar & Partners v Malaysia National Insurance Bhd & Ors*²⁰, and also arbitrator had completely ignored the pertinent evidence and arrived at the wrong finding as per in the case of *The Government Of Sarawak v Sami Mousawi-Utama Sdn Bhd*²¹. All these circumstances will lead to arbitrator misconduct and it was frequently used by the courts for setting aside arbitral awards. The court may set aside the award for the arbitrator's misconduct or, if the award is improperly procured, it may remit any matters referred to the arbitrator back to him for reconsideration. Pursuant to s 24 of the Arbitration Act 1952, an arbitral award may be set aside if the arbitrator has misconducted himself or the proceedings or where the arbitration or award has been improperly procured.²²

Furthermore, in Arbitration Act 2005 it does not interpret the word of "misconduct" in any section. According to section 14(3) an arbitrator's award can be challenged if he gives rise to justifiable doubts for the impartiality or independence. A party seeking to challenge an award may apply to set it aside under section 37 of the Arbitration Act 2005, where the grounds include the award being in conflict with the public policy of Malaysia, fraud or breach of rules of natural justice.

Therefore, the issues derived from the statement above are what are the exact circumstances in which an arbitrator could be said has misconducted himself in receiving admissible evidence in the arbitration proceedings? Then, this study will look deeper into this circumstances due to arbitrator did not aware in receiving admissible evidence during proceeding. Sometimes, when he admits the evidence, it might be an admissible and inadmissible; the disagreements arose when the evidence is admissible to him but actually inadmissible to the court. Thus, by deciding on evidence which was not admissible, the award can be challenged and one of the challenges is misconduct.

²⁰ [2010] 4 MLJ 493

²¹ [2000] 6 MLJ 433

²² Arbitration Act 1952. s 24(1).

1.3 Objective of Study

To identify the circumstances that will lead to arbitrator's misconduct in receiving evidence that can be challenged in arbitral award.

1.4 Scope of Study

The approach adopted in this research is case law based. Only cases related to arbitrator's misconduct in receiving admissible evidence will be discussed in the study. The selection of cases was not restricted to construction law cases only. Most of the cases found are derived from the interpretation of court on Arbitration Act 1952. Also, the study will discuss on the provision that are provided under the Arbitration Act 2005 as well as Arbitration Act 1952, the Evidence Act 1950, and experts' opinion.

In order to meet the goals and objectives, the primary data collection was based on the Malaysia Law Journal (MLJ) court cases. It was carried out using the university's library online e-database via the Lexis-Nexis website and Society of Construction Law website.

1.5 Significant of Study

The importance of this study is to give an overview about the arbitrator misconduct in receiving evidence in arbitration proceeding. Besides, it may help the parties in disputes to have a more complete understanding on the exact circumstances in which an arbitrator could be said has misconducted himself or the proceedings.

Furthermore, it can be the guideline for the arbitrator to conduct the proceedings in a proper manner in order to avoid from challenging his award.

1.6 Research Methodology

In order to achieve the research objective, a systematic research process had been drawn up and adhered to. The research process consists of four major stages, namely, identifying the research issue, data collection, data analysis and writing. Each stage is shown in detail below. (Refer to Figure 1).

1.6.1 Identifying the Research Issue

The initial stage is to identify the area of study and research issue. Initial literature review was done in order to obtain the overview of the particular research topic. It involved reading on various sources of published materials for example, articles, journals, seminar papers, related cases, previous research and other related research materials. Then, the next step is to formulate a suitable objective and designing a scope of study.

1.6.2 Data Collection

The second stage is to develop research design and data collection. The main purpose of research design is to determine the important data to be collected and the method to collect it. The data will be collected through documentary study on the Court cases form MLJ, Building Law Report and other law journals form Lexis Nexis. The data can be also collected through published resources, like books, journals, articles, varies standard form of contract and related statutory are the most

helpful sources in collecting primary and secondary data. Data collection stage is an important stage where it leads the researcher towards achieving the main objectives.

1.6.3 Data Analysis

During this stage, the case laws collected and all the relevant information will be specifically arranged and analyse and also interpreted based on the literature view. The researcher will carefully review the relevant case laws collected and also with special attention on the facts of the case, issues and judgments presented by each case law.

1.6.4 Writing

This stage is the final stage of the study. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis. Essentially, the whole process of the study is reviewed to identify whether the research objective has been achieved

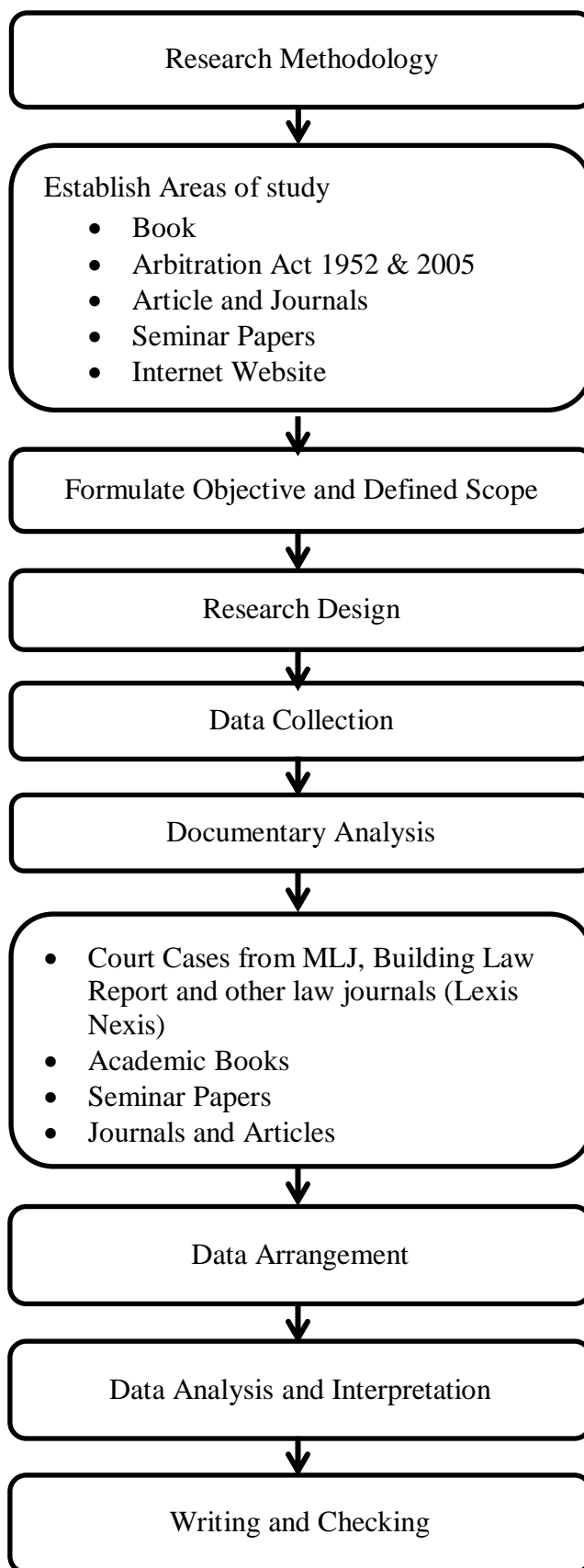


Figure 1: Research Methodology Flowchart

1.7 Chapter Organization

1.7.1 Chapter 1: Introduction

This chapter is basically an introduction on the topics, problem statement, objectives and scope of research, significance of research, research methodology and organization of chapter.

1.7.2 Chapter 2 : Types of Evidence and Admissibility of Evidence

This chapter discusses the theoretical framework on the definition and purpose of an evidence, type of evidence, admissibility of evidence, admissibility factors, the rules of evidence, proof of evidence and etc. The study of this chapter is based on the books, Arbitration Acts, articles and journals, seminars papers and internet information.

1.7.3 Chapter 3 : Challenging Award By Arbitrator's Misconduct

Basically is the literature review on the theoretically study of the misconduct by arbitrator in arbitration proceeding. This chapter also will discuss the circumstances and grounds that will lead to an arbitrator's award being remitted or set aside by the court (based on books, journals, articles, seminar paper and internet websites).

1.7.4 Chapter 4 : Arbitrator's Misconduct In Receiving Admissible Evidence That Can Be Challenged In Arbitral Award

This chapter will discuss on the court cases reviewed and analysed on the ground and circumstances that will lead to arbitrator misconduct in receiving an admissible evidence in arbitration proceeding. The court cases analysis will only focus on the selected court cases which deal with the arbitrator misconduct during the arbitration proceeding.

1.7.5 Chapter 5 : Conclusion and Recommendation

This chapter is consisted of the discussion on findings and interpretation of the data collected, conclusion and recommendation. The findings and analysis, conclusion and recommendation are utilized in order to answer the objectives of the research.

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