

SETTING ASIDE AN AWARD: ARBITRATOR'S MISCONDUCT

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SETTING ASIDE AN AWARD: ARBITRATOR'S MISCONDUCT

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## DEDICATION

To my beloved wife, Joyce,  
daughters, Florence and Jessica  
and son Brian.

Thank You!

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## **ABSTRACT**

Arbitration award is final and binding on the parties and is enforceable against the losing party. However, the High Court may set aside an award on grounds such as corruption or misconduct of the arbitrator. However, the Arbitration Acts 1952 and 2005 gives jurisdiction to the High Court to set aside arbitrators award. section 24 of the 1952 Act uses the word “misconduct” but section 37 of the 2005 Act sets out eight grounds for setting aside the award. An issue that arises is relating to the meaning of “misconduct” or the circumstances that may be inferred as “misconduct” on the part of arbitrators. The objective of this research is to determine the differences between the scope of “misconduct” under section 24 of the 1952 Act as interpreted by the judges and the scope of section 37 of the 2005 Act relating to grounds for setting aside of arbitrators’ award. The approach adopted in this research is based on case law reported in the Malayan Law Journal/ Malayan Law Unreported Journal, Singapore law/cases reported in Malayan Law Journal and English law/cases as reported in England/United Kingdom Law Journal. This is a descriptive research using case law analysis. The analysis involved detail examination of cases the judicial interpretations of the term “misconduct” found in thirty two cases. The research finds that there are twenty two circumstances of misconduct under section 24 of the Arbitration Act 1952. Whereas section 37 of the 2005 Act contains only three circumstances of misconduct.

## ABSTRAK

Keputusan timbang tara adalah muktamad, terikat serta sah untuk pelaksanaannya atas pihak yang mengalah. Walaubagaimanapun, ia boleh diketepikan oleh Mahkamah Tinggi jika terdapat unsur “misconduct” pada juru timbang tara. Isu yang bangkit adalah berkenaan dengan maksud “misconduct” atau situasi yang mungkin dianggap sebagai “misconduct” oleh juru timbang tara. Objektif pengajian ini untuk menentukan perbezaan antara skop “misconduct” dibawah seksyen 24 Akta Timbang tara 1952 sebagaimana yang ditaksir oleh hakim dengan skop dibawah seksyen 37 Akta Timbang tara 2005 mengeani situasi untuk mengetepikan keputusan juru timbang tara. Pendekatan pengajian ini berdasarkan analisis kes-kes undang berkaitan dan ia meliputi kes-kes di Malaysia dan Singapura seperti yang dilaporkan oleh ‘Malayan Law Journal/ Malayan Law Unreported Journal’ dan kes-kes di England seperti yang dilaporkan di bulletin England. Ini adalah ‘descriptive research’ berdasarkan analisis kes-kes undang. Sumber utama adalah kes-kes mahkamah seperti yang dilaporkan di Malayan Law Journal, Malayan Law Unreported Journal dan England Law Journal melalui akses Lexis Nexis yang terdapat di ‘online database’ universiti. Pengajian ini menganalisis kes-kes undang dan memeriksa dengan lanjut taksiran mahkamah berkenaan istilah “misconduct” oleh juru timbang tara dan situasi berhubung pengetepian keputusan timbang tara berdasarkan “misconduct”. Pemeriksaan tiga puluh dua kes telah mengenal pasti maksud “misconduct” dibawah seksyen 24 Akta Timbang tara 1952 dan dua puluh dua situasi mengakibatkan “misconduct” telah dikenal pasti. Ia sangat penting dan berfaedah untuk membolehkan semua pihak yang akan melibatkan diri dalam industri pembinaan.

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**LIST OF ABBREVIATIONS**

AC	Appeal Cases, House of Lords
AIR SC	All India Reporter Pvt. Ltd - Supreme Court
All ER	All England Law Reports
ALL ER (D)	All England Law Reports
AMR	All Malaysia Reports
Ch	Law Reports: Chancery Division from 1991-
CIDB	Construction Industry Development Board (Malaysia)
CLJ	Current Law Journal (Malaysia)
EG	Estate Gazette
ER	Equity Reports
IEM	The Institute of Engineers, Malaysia
LILR/LIL Rep	Lloyd's List Reports
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
Macq	Macqueen's Cases on Appeal
MLJ	Malayan Law Journal
MLUJ	Malayan Law Unreported Journal
PAM	Pertubuhan Arkitek Malaysia
PWD	Public works Department (Malaysia)
QB	Law Reports: Queen's Bench Division
WLR	Weekly Law Report



## CHAPTER 1

### INTRODUCTION

#### 1.1 Background Studies

The basic principle of arbitration is that parties to a contract from which a dispute arises elect to appoint a tribunal of their own choice to determine the dispute<sup>1</sup>. It is especially relevant where in construction, technicalities are involved. Arbitration is a voluntary procedure, available as an alternative to litigation<sup>2</sup>. It is not enforceable as a means of settling disputes except where the parties have entered into an arbitration agreement<sup>3</sup>. In comparison to other alternative modes of private dispute resolution, arbitration is one of the renowned and preferred modes of dispute resolution techniques in the Malaysian construction industry<sup>4</sup>. The said method is made available in all standard form of building contracts<sup>5</sup>.

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<sup>1</sup>. Lecture Notes on MBG1253 ARBITRATION, PESISIR Semester 2 Session 2010/2011 by Assoc. Prof. Dr. Maizon Hashim, Department Of Quantity Surveying, Faculty of Built Environment, Universiti Teknologi Malaysia.

<sup>2</sup>. *Supra*, footnote 1.

<sup>3</sup>. *Supra*, footnote 1.

<sup>4</sup>. Oon Chee Kheng, BE (Civil) (UNSW), LLB (Hons), MBA, CLP, MIEM, PEng (M) Advocate and Solicitor, "Arbitration in Construction Disputes-A Procedural and Legal Overview." The Institution of Engineers, Malaysia (Negri Sembilan Branch), 24 May 2003.

<sup>5</sup>. PAM 2006 Clause 34.0, PWD 2010 Clause 66, CIDB 2000 clause 47.3, IEM 1989 Clause 55.

After the arbitrator has closed the proceedings at the reference he must prepare his award which embodies his decision. The word “award” is defined in the Arbitration Act 2005 as “*a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders*”.

Augustine Paul J in the High Court case of *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd*<sup>6</sup> adopted the definition of “award” in *Black’s Law Dictionary* (1990, 6<sup>th</sup> ed., West Publication Co.) as:

“The decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision<sup>7</sup>”.

Thus, an award is a decision/judgment made by an arbitrator on a controversy or a dispute submitted to him<sup>5</sup>. It informs the parties of his decision, and the reasons for it<sup>8</sup>.

Section 36<sup>9</sup> provides that an *award* made by the arbitral tribunal is *final and binding* on the parties and is enforceable against the losing party. It terminates the arbitration and extinguishes the original cause of action.

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<sup>6</sup>. [1998] 6 MLJ 545.

<sup>7</sup>. Supra, footnote 6, at pg.551.

<sup>8</sup>. Supra, footnote 6.

<sup>9</sup>. Section 36, The Arbitration Act 2005.

The Court of Appeal in *Hartela Contractors Ltd v Hartecon Jv Sdn Bhd & Anor*<sup>10</sup> held that the general rule at common law is that, in the absence of contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous. However, the Court of Appeal judge, Gopal Sri Ram cited the case of *Union of India v Rallia Ram*<sup>11</sup> where Shah J stated that the Court may also set aside an award on the ground of “*corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception.*”<sup>12</sup>

In Malaysia, section 24(2) of The Arbitration Act 1952 provides that “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.”

Misconduct is contained in The Arbitration Act 1952. However, it is not defined in The Arbitration Act 1952. Thus, what amounts to misconduct is entirely a matter for the judges to interpret and therefore reliance shall be placed on decided cases. There were many cases relating to applications to setting aside award on the basis of arbitrator’s misconduct. Some were successful and some were not.

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<sup>10</sup> . [1999] 2 MLJ 481.

<sup>11</sup> . 1963 AIR SC 1685

<sup>12</sup> . Supra, footnote 11, at p. 1691.

Now, the Arbitration Act 2005 provides for setting aside of award under section 37. The provision expresses eight grounds without referring to misconduct.

## 1.2 ISSUE

Since the Arbitration Act 1952 does not define “misconduct”, an issue that arises is relating to the meaning of “misconduct” or the circumstances that may be inferred as “misconduct” on the part of arbitrators. The term “misconduct” is found in Section 24 of the 1952 Act and not found in section 37 of the 2005 Act. Instead of using “misconduct”, the 2005 Act details out eight acts as listed in para 2.2.2 below that may justify the setting aside of an arbitration award.

Under section 37 of The Arbitration Act 2005, application to the High Court for setting aside of award is limited to the eight grounds as follows:

- (1)(a) (i) a party to arbitration is under any incapacity;
- (ii) the arbitration agreement is not valid under the law;
- (iii) proper notice was not given on the appointment of an arbitrator or of the arbitral proceedings or unable to present that party’s case;
- (iv) award not falling within the terms of the submission to arbitrator;

- (v) award contains decisions beyond the scope of the dispute;
- (vi) composition of the arbitral tribunal or the arbitral procedure not in accordance with the agreement of the parties;
- (1)(b) (i) subject matter of the dispute is not capable of settlement by arbitration under the law;
- (ii) the award is in conflict with the public policy of Malaysia.

What amounts to “misconduct” under Section 24 of the 1952 Act is subject to interpretation by the judges. From the relevant cases, it appears, under the 1952 Act that the action that amounts to “misconduct” are many.

In *Koperasi Pos Nasional v Hafsa Bte Mohd Tahir*<sup>13</sup>, the high court in setting aside the award with costs held that “the arbitrator had departed from the pleadings and made an award on an issue that was not before him. By doing so, the arbitrator *acted beyond his jurisdiction* and the award ought to be set aside ; *R Rama Chandran v The Industrial Court of Malaysia & Anor*<sup>14</sup> and *Transfield Projects (M) Sdn Bhd & Anor v Malaysian Airline System Bhd and another application*<sup>15</sup> followed”. Further, “the arbitrator’s failure to recognize the principle of law that when no notice period is given, a reasonable notice period should be adopted as an implied term was an *error of law* and therefore, ***misconduct***.”

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<sup>13</sup>. [2002] 6 MLJ 691

<sup>14</sup>. [1997] 1 MLJ 145, [1997] 1 CLJ 147.

<sup>15</sup>. [2001] 2 MLJ 403.

In *Syarikat Pemborong Pertanian & Perumahan v. FELDA*<sup>16</sup>, Raja Azlan Shah J. (as His Highness was then) held that the arbitrator in his finding of determination was guilty of **misconduct** because he *failed to analyze and appraise material and relevant evidence* which affected the award (see p 731G). In the same judgement, his lordship describes **misconduct** as understood in arbitration law in the following terms:

*"In the law of arbitration **misconduct** is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an Arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment, the Plaintiff's complaint is sustainable only if the failure to do so had occasioned a miscarriage of justice that is apparent on the face of the award..."*<sup>17</sup>

The learned Judge further said that "It is not misconduct to make an erroneous findings of law or fact"<sup>18</sup>.

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<sup>16</sup>. [1971] 2 MLJ 210.

<sup>17</sup>. *Supra* footnote 16, at p.211.

<sup>18</sup>. *Supra* footnote 16.

In *Appalanaidu A/L Nookaiah v Intercontinental Commodities Trading Sdn Bhd*<sup>19</sup>, the sole Arbitrator and the Appeal Tribunal heard the parties separately. Neither party had the opportunity to observe the proceedings. There were no witnesses. Surely the applicant's fear that there was elements of danger of biasness on the part of the sole Arbitrator and the Appeal Tribunal could not be dismissed as a mere suspicion. Raus Sharif J is of the view that there is a basis for the applicant to fear *biasness* towards the respondent on the part of the sole Arbitrator and the Appeal Tribunal. Based on the above reasons, the learned judge ruled that the sole Arbitrator and the Appeal Tribunal has **misconducted** himself, and themselves respectively within the meaning of section 24(2) of the Act.

The learned judge cited the case of *B. Surinder Singh Kanda v The Government of the Federation of Malaya*<sup>20</sup>, where Lord Denning said:-

*“.... that a judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representation did work to his prejudice. Sufficient that they might do so, the risk of it is enough..”*

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<sup>19</sup>. [2004] MLJU 119.

<sup>20</sup>. [1962] 28 MLJ 173.

### **1.3 OBJECTIVE OF THE RESEARCH**

The objective of this research is to determine the differences between the scope of “misconduct” under section 24 of The Arbitration Act 1952 as interpreted by the judges and the scope of section 37 of The Arbitration Act 2005 relating to grounds for setting aside of arbitrators’ award.

### **1.4 SCOPE OF THE RESEARCH**

The approach adopted in this research is case law related and it covers:

1. Malaysian law/cases reported in Malayan Law Journal/ Malayan Law Unreported Journal.
2. Singapore law/cases reported in Malayan Law Journal.
3. English law/cases as reported in England/United Kingdom Law Journal.



## **1.5 RESEARCH METHODOLOGY**

This is a descriptive research using case law analysis. Main source will be law cases found in Malayan Law Journal, Malayan Law Unreported Journal and the England Law Journal through the access of Lexis Nexis available in the university's online database.

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