

JUDICIAL INTERPRETATIONS ON ARBITRATOR'S MISCONDUCT

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JUDICIAL INTERPRETATIONS ON ARBITRATOR'S MISCONDUCT

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**A master's project report submitted in fulfillment of the
requirements for the award of the degree of
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To my beloved family members

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ABSTRACT

Arbitration is a method of private, binding and enforceable dispute resolution. A neutral third party called arbitrator renders an award after hearing testimony and argument from each party. Therefore, the qualification of the arbitrator is important to render a valid award. Under the Arbitration Act 1952, there are circumstances that can cause award to be set aside. The Arbitration Act 1952 had clearly expressed that arbitral award may be set aside when the arbitrator has misconducted himself or the proceedings. However, the Act does not provide any definition on the meaning of arbitrator's misconduct. Hence, this research intends to identify the judicial interpretations of arbitrator's misconduct in arbitration proceedings. This research was carried out mainly through documentary analysis of relevant case reported in law journals. The analysis showed that there were five main judicial interpretations on arbitrator's misconduct which included breach of the rules of natural justice, failure to consider all matters referred to by the parties, ignored the condition in the contract, bias, and contravention of the rules of evidence. There are many interpretations on arbitrator's misconduct in arbitration proceedings. Most of the cases interpreted arbitrator's misconduct more to his wrongful behaviour, action and the way he conduct the proceedings. Therefore, there is absolutely no easy answer. The arbitrator would be wise to remember that they must always conduct the proceeding in a proper manner.

ABSTRAK

Timbangtara merupakan kaedah penyelesaian pertikaian secara peribadi, mengikat dan berkuatkuasa. Seorang pihak ketiga iaitu penimbangtara akan membuat award selepas membuat pendengaran bukti dan alasan antara kedua-dua pihak. Oleh sebab itu, kelayakan penimbangtara adalah penting untuk membuat award yang sah. Menurut undang-undang timbangtara, terdapat keadaan-keadaan yang boleh menyebabkan award diketepikan. Undang-undang Timbangtara menyatakan secara jelasnya tentang award boleh diketepikan apabila penimbangtara melakukan kesalahan diri sendiri atau dalam proses timbangtara. Namun Undang –undang Timbangtara tiada memberi definisi tentang salah laku seorang penimbangtara. Oleh itu, kajian ini bertujuan untuk mengenalpasti tafsiran kehakiman terhadap salah laku penimbangtara. Kajian ini dijalankan melalui analisis dokumen, iaitu laporan dan jurnal undang-undang. Kajian ini menunjukkan bahawa terdapat lima tafsiran kehakiman yang utama terhadap salah laku seorang penimbangtara iaitu pelanggaran rukun keadilan asasi, kegagalan untuk mempertimbangkan semua hal, mengabaikan keadaan dalam kontrak, berat sebelah, dan bertentangan dengan rukun bukti. Sebahagian besar kes menyatakan bahawa salah laku penimbangtara boleh ditafsirkan sebagai salah di sisi perilaku dan tindakan penimbangtara dalam proses timbangtara. Terdapat banyak tafsiran terhadap salah laku penimbangtara dalam proses timbangtara. Oleh sebab itu, tiada satu tafsiran yang muktamad terhadap salah laku seorang penimbangtara. Maka, seorang penimbangtara harus mengadakan timbangtara dengan cara yang betul.

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Modern Engineering (Bristol) Ltd v. C Miskin & Son Ltd [1981] 1 Llyod's Rep 45

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Tan Tong Meng Co (Pte) Ltd v. Artic Builders & Co (Pte) Ltd [1986] 2 MLJ 241

The Government of India v. Cairn Energy India Pty Ltd & Ors [2003] 1 MLJ 348

Thompson Meggitt & Co. V. Moody [1920] 21 SR NSW 125

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
BLLR	Butterworths Labour <i>Law Reports</i>
BLR	Building Law Reports
EGLR	Estates Gazette <i>Law Reports</i>
FLR	Family Law Reports
KB	King Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
MY & CR	Mylne and Craig's Chancery Reports
ONGC	Oil and Natural Gas Corporation Ltd
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
PWD	Public Work Department
QB	Queen's Bench Division
SASR	South Australian State Reports
SEDC	Sarawak Economic Development Corp
SLR	Singapore Law Report
UNCITRAL	United Nation Commission on International Trade Law
VR	Victorian Reports
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background Studies

Unlike other types of industries, the nature of projects in the construction industry is extremely diverse. It is a multi-party process where numerous specialist parties are involved due to the diversity of skills required and thus maintaining teamwork atmosphere and controlling potential conflicts is important.¹ In Malaysia, if the disputes which are not settled or resolved by negotiation, agreement can be dealt under the arbitration clause provisions of the *Arbitration Act 1952 (Revised in 1972)*, *Act 93, Law of Malaysia*, and currently replaced and revamp by the *Arbitration Act 2005 (Act 646)*.² For construction disputes, there are available provisions in the standard form of contract for those disputes to be referred to arbitration.³

¹ Wood, G.D. (2001) Conflict Avoidance and Management, Postgraduate Course in Construction Law and Arbitration, Leeds Metropolitan University.

² Norhafizah Binti Yusop. (2007). Arbitration: Challenging The Arbitral Award (Certiorari). Universiti Teknologi Malaysia: Master Dissertation

³ Clause 34.5 of PAM Contract 2006, clause 65 of P.W.D. Form 203 (revision 2007)

In *Collins v. Collins*,⁴ Romilly MR said, “Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference or dispute between the parties ...”⁵ This is a broad definition which is not very useful. It is better to list the attributes which collectively identify arbitration, like what Lord Wheatley did in *Arenson v. Arenson*.⁶ He listed the following attributes which point towards arbitration:

*“(a) There is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person [i.e. the arbitrator] to resolve in such manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.”*⁷

Arbitration is a method of private, binding and enforceable dispute resolution. It is not new but it was once considered part of a growing league of alternative dispute resolution procedures, competing with conciliation, mediation and expert determination as an alternative to more costly and often lengthy litigation.⁸ Generally arbitration became a more accepted approach to manage disputes compared to litigation, with parties having control over the venue, the appointment of arbitrator, and to a certain extent, the process.⁹ Past facts have shown that arbitration is the second highest rankings for dispute resolution after litigation in the context of Malaysia construction disputes.¹⁰

⁴ 28 LJ Ch 184.

⁵ *Ibid.* at pp.186-187.

⁶ [1977] AC 405.

⁷ *Ibid.* at p. 428.

⁸ Gordon Bell. (2006) Construction Arbitration – Past and Present. Retrieved 27th April 2010 from <http://www.pinsentmasons.com/media/1316796178.htm>

⁹ Fatin Marsyita. (2002). Arbitration in Malaysia. Universiti Teknologi Mara: Unpublished Bach Dissertation.

¹⁰ Mahran Mohamed Zain. (2006). The Awareness of Mediation among the Key Players in Construction Industry in Malaysia. Universiti Islam Antarabangsa Malaysia: Unpublished Bach. Dissertation

Contrary to popular belief and knowledge, arbitration is not the only means of resolving disputes arising from construction contracts.¹¹ Compared to other means of dispute resolution, arbitration as a means of resolving disputes does however have well-defined and generally well-understood mechanisms. Under arbitration, a neutral third-party renders a decision after hearing proofs and arguments from each party. While both the agreement to arbitrate and the presentation of these arguments are voluntary, the arbitrator's decision is binding, in the sense that courts will enforce it against a reluctant party.¹²

Once an arbitration award is made, it is considered final and cannot usually be appealed.¹³ There are some exceptions to this rule. It is because of the Arbitration Act 1952 which had expressly stated that an arbitral award may be set aside if the arbitrator has misconducted himself or the proceedings or where the award has been improperly procured.¹⁴ For example, an award made by the arbitrator in breach of the agreed procedure may be set aside on the basis that the parties have not agreed to be bound by an award made by the procedure in fact adopted.¹⁵ This means that the arbitration award has no effect. For these reasons, the court's role, discretion and action are then become a requirement.

An arbitrator can also be removed if the arbitrator is not impartial, or may not be impartial.¹⁶ The *UNCITRAL* Rules similarly include a procedure for challenging arbitrators.¹⁷ Other than these, an arbitrator can also be removed, or has his authority revoked, if he has misconducted himself, or has misconducted the proceedings.¹⁸ What constitutes "misconduct"? This is an issue we now turn to.

¹¹ Oon Chee Kheng. (2003). Resolution of Construction Industry Disputes – An Overview being a paper based on a lecture presented to The Institution of Engineers, Malaysia (Negri Sembilan Branch)

¹² Goltsman, M. et. al (2008). Mediation, Arbitration and Negotiation. *Journal of Economic Theory*. Retrieved 28th April 2010 from www.sciencedirect.com

¹³ Dee, S. (2010). What is an Arbitration Award. Retrieved 24th April 2010 from www.wisegeek.com.

¹⁴ Section 24, Arbitration Act 1952

¹⁵ *KS Abdul Kader v MK Mohamed Ismail* [1954] MLJ 231.

¹⁶ Section 25(1) Arbitration Act 1952 and section 14(3) of Arbitration Act 2005.

¹⁷ Article 10-12 of the *UNCITRAL* Rules.

¹⁸ Section 24 of arbitration Act 1952.

1.2 Problem Statement

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.¹⁹ As stated, the courts have the supervisory powers of revoking the very submission to arbitration and causing a case to be stated under s 22 of the Act 1952 and s 14 of the Act 2005.

The court may also 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. Matters that may constitute misconduct justifying the setting aside of an award are those capable of causing a substantial miscarriage of justice. The High Court has the power to remove an arbitrator, or has his authority revoked, if the arbitrator has misconducted himself or has misconducted the proceedings.²⁰ Further, with respect to an award which has been published by the arbitrator, the award may be set aside if the arbitrator has been found to have committed misconduct or has misconducted the proceedings.²¹

However, the word "misconduct" is not defined in the Arbitration Act. The use of the word is unfortunate for misconduct does not necessarily imply a lack of moral value.²² Moreover, in Arbitration Act 2005 does not interpret the word of "misconduct" in any section. According to s 14(3) an arbitrator's award can be challenged if he gives rise to justifiable doubts for the impartiality or independence. Section 37 of the Arbitration act 2005 replaces the procedures for remitting and

¹⁹ Sundra Rajoo. (2002). Arbitration Awards. Kuala Lumpur: Malayan Law Journal Sdn Bhd.

²⁰ Section 24(1) Arbitration Act 1952.

²¹ Section 24(2) Arbitration Act 1952.

²² Raja Azlan Shah J in *Sharikat Pemborong Pertanian dan Perumahan v. FELDA* [1971] 2 MLJ 210 at p. 211

setting aside awards under section 23 and 24 of the 1952 Act. An award may only be set aside on limited grounds, modeled on those set out in s 37 such as party incapacity, lack of due process, non-arbitrability of the subject matter of the dispute and public policy grounds.²³ Therefore, the term of arbitrator's misconduct has been totally eliminated from the Act but there are available judicial interpretations of arbitrator's misconduct by the judges through the court cases.

Misconduct has a broad meaning and refers not only to moral misconduct but also misinterpretation of the law.²⁴ In the enacted English Arbitration Act 1996, the word "misconduct" is not used; instead the phrase "serious irregularity" is used. Successful challenges to an award on the ground of serious irregularity are rare.²⁵ The applicant must show both an irregularity affecting the tribunal, the proceedings or the award and that the irregularity has caused, or will cause, substantial injustice.²⁶

Hence, the issues derived from the statement above are what are the judicial interpretations on the word 'misconduct' of arbitrator in construction industry? What are the exact circumstances in which an arbitrator could be said has misconducted himself or the proceedings? Thus, the above-mentioned question forms the basis for this research which intends to identify the closest answers of it.

1.3 Research Objective

Following the issues stated above, this research attempts to:-

1. To determine judicial interpretations on the term of arbitrator's misconduct in arbitration proceedings.

²³ Arbitration Act 2005.

²⁴ Bhag Singh. (2007). The Appeal. Articles of Law, *The Star*.

²⁵ Ashurst. (2003). Retrieved on May 1, 2010 from www.ashursts.com

²⁶ *Ibid*

1.4 Scope of Research

The following are the scopes for this study: -

1. Only cases related to arbitrator's misconduct will be discussed in the study.
2. Examine court cases related to the issue, particularly Malaysian cases. For this study, the selection of cases was not restricted to construction law cases only. Most of the cases found is derived from the interpretation of court on Arbitration Act 1952. Reference is also made to cases in other countries such as United Kingdom, Singapore, Australia, and Hong Kong.
3. The provisions provided under the Arbitration Act 1952.

1.5 Significance of the Research

The importance of this study is to give an insight of judicial interpretations on the word 'misconduct' of arbitrator in construction industry. It may helps 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 archive the research objectives, a systematic process of conducting this study had been organized. Choosing a correct methodology is important because it will smoothen the process of the research. Basically, the research process consists of 4 major stages, which involve initial study, data collection, data analysis, and completion.

1.6.1 Initial Study

Firstly, initial literature review was done to obtain an overview of the concept of the topic in this stage. At the same time, discussions with supervisors, lecturers, as well as friends, were held so that more ideas and knowledge relating to the topic could be collected. The research issue, objective and scope of the study were then determined. The research methodology was also being determined. The research topic as well as its outline was then formulated to guide the progress of the whole research.

1.6.2 Data Collection

Collection of relevant data and information can be started in this stage. There are two types of data which has been collected: primary data and secondary data. Data were collected mainly through documentary analysis. All collected data and information were recorded systematically. Data collected to analyse mainly from Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. It is collected through the Lexis-Nexis legal database. All the cases relating to the research topic were taken out from the database. Important cases were collected and used for the analysis at the later stage.

In addition, secondary data were also collected from books, articles reports, seminar papers, newspaper as well as from the internet. All the relevant books were obtained from the library of Universiti Teknologi Malaysia. Moreover, seminar papers, articles, reports and newspapers were the sources to strengthen the theories found in books. All sources are important to complete the literature review chapter.

1.6.3 Data Analysis and Interpretation

In this stage, all the collected data, information, ideas, opinions and comments were arranged, analysed and also interpreted. This process is to process and convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process of writing of the paper.

1.6.4 Completion

The last stage of the research process mainly involved the writing up and checking of the writing. In this stage, the author had reviewed on the whole process of the study with the intention to identify whether the research objectives have been achieved. Further research was suggested after presenting the research findings, recommendations and limitations of the study. Conclusion and recommendations were made based on the findings during the stage of analysis.

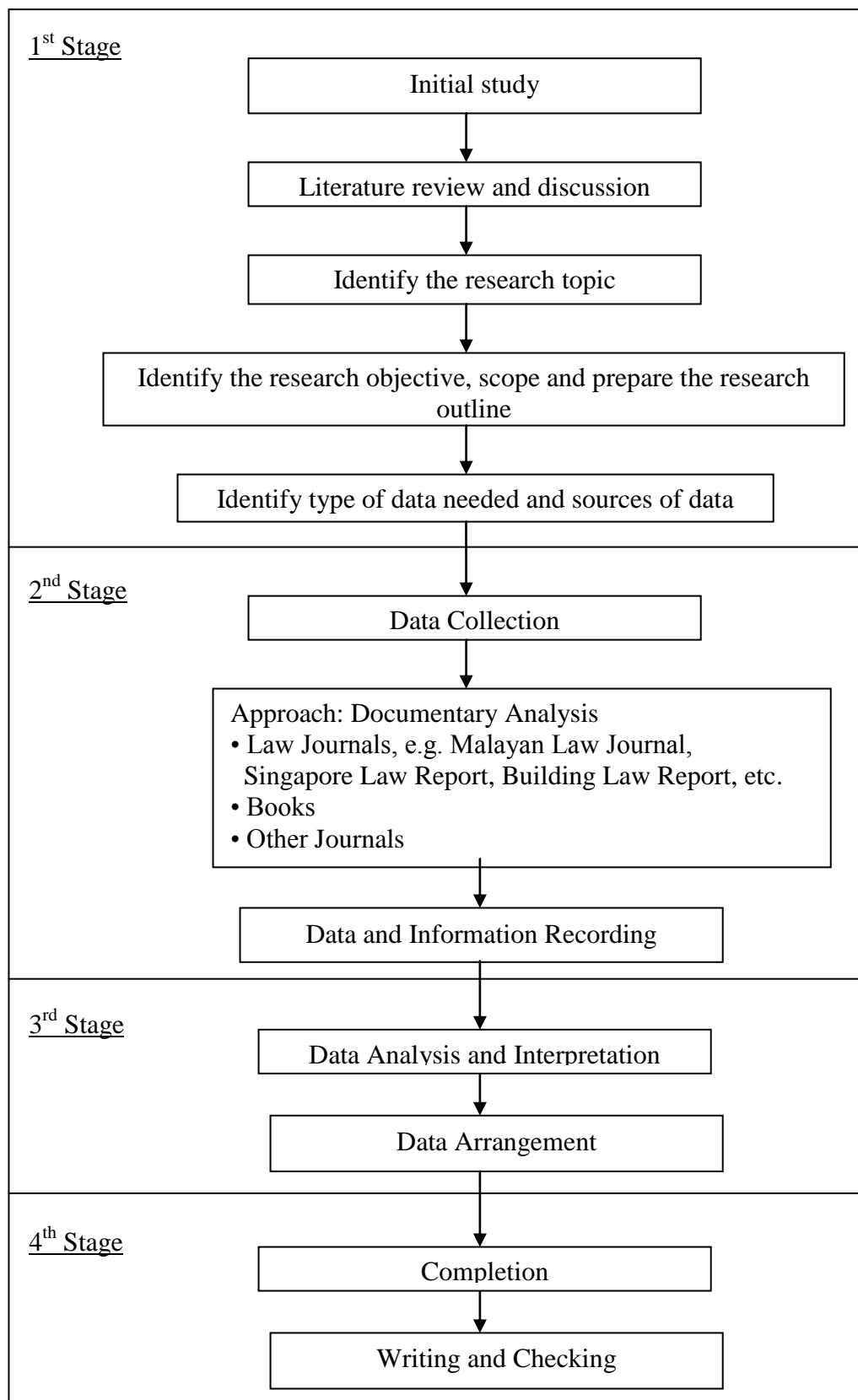


Figure 1.1 : Research Process and Methods of Approach

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