

**CONSOLIDATION OF ARBITRATION PROCEEDINGS**

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## DEDICATION

*Kupanjatkan rasa syukur yang tidak terhingga ... Hanya kepada Allah SWT, yang memudahkan proses pelaksanaan kajian ini.*

*Insan yang sangat ku sayangi, pinjaman dari tuhan yang tiada ganti iaitu,*

*Bapaku, En Ahmad Annuar Bin Mohd Dom*

*Bondaku, Pn Mastura Binti Sidik*

*Adik beradikku Mohd Azwan, dan Aina Nabiha*

*Kepada Penyelia Projek yang tidak putus-putus mencurahkan ilmu,*

*Dr Farrah Azwanee Binti Aminuddin*

*Isteri yang sentiasa menyokong perjuangan dan memahami erti pengorbanan, serta anak-anak yang sentiasa menjadi pendorong dan pembakar semangat buat baba.*

*Nurul Izzah Binti Mohd Nah*

*Muhammad Iman Anaqi Bin Muhammad Ashraf*

*Muhammad Iman Aryan Bin Muhammad Ashraf*

*Serta Ayah dan Ibu mertuaku, Mohd Nah Bin Ujang dan Norsham Binti Nordin*

*Teman seperjuanganku 'Batch 2020/2021' Insan-insan dibelakang tabir yang terlibat membantu secara langsung dan tidak langsung,*

*Ucapan ribuan terima kasih yang tidak terhingga diatas segala bantuan, pengorbanan, kata-kata motivasi serta ilmu yang dicurahkan. Ucapan yang dizahirkan tidak cukup untuk membalas segala kebaikan, kasih sayang dan pergorbanan yang tidak terhingga buatku. Hanya Allah SWT yang dapat membalas segala kebaikan kalian*

## **ACKNOWLEDGEMENT**

First and foremost, I would like to praise Allah the Almighty, the Most Gracious, and the Most Merciful for His blessing given to me during my study and in completing this thesis. May Allah's blessing goes to His final Prophet Muhammad (peace be up on him), his family and his companions

I would like to express my gratitude and sincere thanks to Dr Farrah Azwanee Binti Aminuddin who read my numerous revisions and helped make some sense of the confusion. I have benefited greatly from your wealth of knowledge and meticulous editing. I am extremely grateful that you took me on as a student and continued to have faith in me over the years.

I also would like to express my heartfelt gratitude and sincere appreciation to my beloved wife, Nurul Izzah Binti Mohamad Nah, my mother, Mastura Binti Sidek, my father, Ahmad Annuar Bin Mohd Dom, my Family, and my Friends. You have always stood behind me, and this was no exception.

I would also like to extend my gratitude to everyone who has been directly or indirectly involved in assisting me in the completion of my research. Every bit of assistance in every kind of form was important, and I want to convey my gratitude here.

Finally, I have a great expectation that my study will be beneficial and useful for anyone who is interested in reading this final project.

## ABSTRACT

Malaysia has an arbitration system that's commonly used for commercial disputes, and this type of dispute resolution is often utilized for domestic and international matters involving in many industries include the construction industry. There were 125 arbitration cases registered in 2019, and the number of cases started to increase in 2011. Due to the complexity of the industry, there are many parties that are involved in a contract. For example, there are multiple contractors, sub-contractors, and employers who are involved in the construction industry. These parties often have to resolve their disputes through arbitration but not all of them are placed under one consolidation arbitration proceeding. Due to that, there are several issues that are seen as a barrier factor in a consolidation process, especially for cases that occur in Malaysia. Therefore, the purpose of this study is to look at the issues that occur involving consolidation in arbitration proceeding cases which have been brought to the Malaysian Court. Basically, this research process consisted of four major stages, which involved initial study, data collection, data analysis, and completion. The methodology used in this research is document analysis where the cases selected from Lexis Nexis which related to consolidation in arbitration. Based on ten (10) cases involving various industry sectors that have been identified, there are four (4) main issues that are known, which are about instructions issued by the court or arbitrator to carry out consolidation, duplication in consolidation, consolidation without the consent of the parties involved and withdrawal from unification which has contributed to problems in implementing unification in Malaysia. Based on these four (4) factors, the researcher tries to see the reason why the court rejects or accepts an application for consolidation. After analysing the cases, it can be concluded that before the application to conduct consolidation is carried out it is important for each party to identify the main issues in each case to enable consolidation to be carried out and the dispute to be resolved properly. Apart from identifying the main issues in the case, other factors that need to be considered are the parties involved in the consolidation. This is important because it is to avoid any conflict or overlapping cross-actions which can make it difficult for the arbitrator to resolve and this situation can also make the main issue more complex.

## ABSTRAK

Malaysia mempunyai sistem timbang tara yang biasa digunakan untuk pertikaian komersial, dan penyelesaian pertikaian jenis ini sering digunakan untuk urusan domestik dan antarabangsa yang melibatkan pelbagai industri termasuk industri pembinaan. Terdapat 125 kes timbang tara didaftarkan pada 2019, dan bilangan kes mula meningkat pada 2011. Disebabkan kerumitan industri, terdapat banyak pihak yang terlibat dalam kontrak. Sebagai contoh, terdapat beberapa kontraktor, sub-kontraktor dan majikan yang terlibat dalam industri pembinaan. Pihak-pihak ini selalunya perlu menyelesaikan pertikaian mereka melalui timbang tara tetapi tidak semuanya diletakkan di bawah satu prosiding timbang tara penyatuan. Disebabkan itu, terdapat beberapa isu yang dilihat sebagai faktor penghalang dalam proses penyatuan khususnya bagi kes-kes yang berlaku di Malaysia. Oleh itu, tujuan kajian ini adalah untuk melihat isu-isu yang berlaku melibatkan penyatuan dalam kes prosiding timbang tara yang telah dibawa ke Mahkamah Malaysia. Pada asasnya, proses penyelidikan ini terdiri daripada empat peringkat utama, yang melibatkan kajian awal, pengumpulan data, analisis data, dan penyiapan. Metodologi yang digunakan dalam penyelidikan ini adalah analisis dokumen di mana kes-kes dipilih daripada Lexis Nexis yang berkaitan dengan penyatuan dalam timbang tara. Berdasarkan sepuluh (10) kes yang melibatkan pelbagai sektor industry telah dikenal pasti, terdapat empat (4) isu utama yang dikenal iaitu mengenai arahan yang dikeluarkan oleh court atau arbitrator untuk melakukan penyatuan, pertindihan di dalam penyatuan, penyatuan tanpa persetujuan dari pihak yang terlibat dan penarikan diri dari penyatuan yang telah menyumbang kepada masalah dalam melaksanakan penyatuan di Malaysia. Berdasarkan empat (4) faktor ini, pengkaji cuba melihat sebab mengapa mahkamah menolak atau menerima permohonan penyatuan. Setelah menganalisis kes-kes tersebut, dapatlah dirumuskan bahawa sebelum permohonan untuk menjalankan penyatuan dijalankan adalah penting bagi setiap pihak untuk mengenal pasti isu-isu utama dalam setiap kes bagi membolehkan penyatuan dijalankan dan pertikaian diselesaikan dengan baik. Selain mengenal pasti isu utama dalam kes tersebut, faktor lain yang perlu dipertimbangkan ialah pihak

yang terlibat dalam penyatuan. Ini penting kerana ia bagi mengelakkan sebarang konflik atau tindakan silang bertindih yang boleh menyukarkan penimbang tara untuk menyelesaikannya dan situasi ini juga boleh menjadikan isu utama lebih kompleks.

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- Arbitration Act 1952
- Arbitration Act 2005
- Rule Of Court 2012
- Asian International Arbitration Centre (AIAC), 2020)
- Kuala Lumpur Regional Centre for Arbitration (KLRCA)
- International Court of Arbitration (ICC) 2021
- Arbitration And ADR Worldwide (LCIA) 2020
- Singapore International Arbitration Centre (SIAC) 2016

## **LIST OF ABBREVIATIONS**

<b>AIAC</b>	<b>-</b>	<b>Asian International Arbitration Centre</b>
<b>KLRC</b>	<b>-</b>	<b>Kuala Lumpur Regional Centre for Arbitration</b>
<b>ICC</b>	<b>-</b>	<b>International Court of Arbitration</b>
<b>LCIA</b>	<b>-</b>	<b>Arbitration And ADR Worldwide</b>
<b>SIAC</b>	<b>-</b>	<b>Singapore International Arbitration Centre</b>

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background Studies

Disputes can often involve more than one contract. This is referred to as consolidation proceedings, and it is frequently cited as a concern by users of arbitration. Due to the nature of the construction industry, disputes often involve multiple parties. In most cases, the owner enters separate contracts with different parties, such as engineers and architects. These contracts are typically used to subcontract the work of the other parties. The complexity of the construction industry and the number of parties involved in disputes can result in lengthy and costly disputes. If the tribunals determine that the architect is not liable, then the owner will not be able to recover damages. On the other hand, if the other tribunal decides that the contractor is not liable, then the owner will be left with no remedy.

A consolidation process is a procedural device used in arbitration that enables parties to resolve their disputes in one single procedure, which can reduce costs and time. It is also seen as a key step in preventing disputes from escalating. However, it can be challenged due to the nature of arbitration. A consolidation proceeding occurs when multiple disputes involving the same or conflicting parties are brought to court. They usually involve multiple legal sources and are resolved through one or a combination of these factors. This type of dispute usually occurs on projects where multiple agreements have been awarded to different parties. When the parties can't agree on an arbitration route, the proceedings can be initiated. Due to the nature of the construction industry, which is prone to multi-party transactions, multiple proceedings are frequently initiated in this area. It is not unusual for multiple parties to start dispute resolution proceedings related to the same or similar issues during construction projects.



Commonly, consolidation proceedings can be initiated due to a disagreement between a project owner and several contractors and sub-contractors. Although the issues and legal procedures related to the dispute may be the same, they can prevent the parties from participating in the same forum. This chapter explains various challenges faced by both the parties and the arbitration panel while dealing with consolidation proceedings. This research also will discuss on the various issues that arise when dealing with consolidation proceeding

## 1.2 Problem Statement

The ability to consolidate multiple references to arbitration is a functional tool that can be applied by both parties in arbitration proceeding. It can help reduce the time and cost associated with handling multiple references. The issue of inconsistent awards is a concern for arbitration proceeding. This issue has been highlighted in several court decisions. In one case, a court in Hong Kong held that two awards were issued on the same set of facts, which could potentially threaten the credibility of the arbitration process (*WvAW [2021] HKCFI 1701*, 2021). In another case, the court set aside a second award, which was manifestly invalid, due to the inconsistencies and contradictions in the first award (*Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch WA-24NCC(ARB)-13-03/2018*, 2020). This case serves as a warning to both parties and arbitration facilities.

On top of that, used of consolidation tools as a means of improving case management is also a concern for arbitration proceeding (Global Turkey, 2020b). It could conflict with the principles of the process and the parties' consent. Despite the advantages of using consolidation tools, it can still be very challenging and time-consuming to carry out due diligence before proceeding. This research aims to provide a comprehensive overview of the various considerations involved in the consolidation of proceedings.

Moreover, a consolidation can be defined as process where two or more separate arbitrations are joined into a single arbitration. This type of arbitration can only be achieved if all the parties agree to it. Unfortunately, due to the rules of the arbitral institutions, it is impossible to achieve this kind of consolidation(Global Turkey, 2020a). In addition, joinder is a process where a third party is added to an existing arbitration, which eliminates the need for parallel arbitration. This type of arbitration is also different from consolidation as it does not involve the parties agreeing to the same terms. Some commentators and parties object to the consolidation of arbitral proceedings. They cited various reasons for this, including lack of consent, non-participation, and the improper allocation of costs and fees.

According to Article 34(iv) of the UNCITRAL Model Law, it is stated that a party may challenge an arbitral award if the composition of the award is contradicting with the agreement of the parties. This means, this procedure can only be executed if both parties agreed. Under the same act, it does not address the issue of enforcing them in accordance with the parties' intentions. Malaysia arbitration law highlight that the courts can consolidate arbitrations in certain circumstances as per stated under Section 37 of Arbitration Act 2005. These include where there is a common question of law or fact that arises in the arbitrations, or where the relief claimed arises out of a series of transactions. Usually, parties do not explicitly agree to the consolidation of their arbitrations. However, they can commonly agree to it upon certain conditions, such as when dealing with complex multi-party projects(Global Turkey, 2020a). One of the main reasons why parties may not agree to the consolidation is due to their shared interest in the dispute. For instance, they may not want to participate in lengthy multi-disciplinary proceedings, and they may not want to spend their time and money dealing with the various administrative and logistical issues that come with doing so. In most cases, the parties' consent to the consolidation will have to be considered in the arbitration agreement's institutional rules. These rules usually require that the agreements contain an identical or compatible arbitration agreement.

One of the most challenging aspects of consolidating is managing the discontinuation of the arbitrations, especially when the appointed or nominated arbitrators are already involved. Certain institutional rules allow the institution to rescind or appoint the appointed or nominated arbitrators as part of the process. Most rules may not allow consolidation, especially when a tribunal has already been established. Therefore, it is important to establish a clear process and procedures when it comes to establishing a new arbitration. One of the most challenging aspects of establishing a new arbitration is ensuring that it has a fair and equal treatment for all parties. This is especially the case when the Consolidating Arbitration has more than two parties (United Nations Conference on Trade and Development., 2011)

Due to the increasing number of multi-party and multi-contract disputes, the rules of the arbitral institutions have been modified to accommodate the consolidation process. This type of arbitration can help resolve these disputes more effectively and cost-effectively. Over the years, there has been a steady increase in the number of rules that enable the consolidation process. The latest versions of these rules, such as the LCIA Rules 2020, ICC Rules 2021, and ICDR Rules 2021, have broadened the scope of these rules.

### **1.3 Research Objective**

Based on the issues raised in the problem statement, the following are the relevant research questions:

- I. To identify disputes relating to the consolidation of arbitration
- II. To identify court rulings to the disputes relating to the consolidation of arbitration

### **1.4 Research Scope**

This research is focused on court cases related to consolidation in arbitration proceedings, which will focus on the main issues related to issues involving

consolidation. In addition, the case selection factor is focused on the Malaysian Court to allow the researcher to understand the criteria or considerations used in determining whether a consolidation that was formed can be continued or vice versa. It is also made to reference cases from other countries, which have the same Model Law with Malaysian Court.

## **1.5 Organizational Proposal Chapter**

The following is a summary of the chapters in this study:

### **1.5.1 Chapter 1: Introduction**

This chapter introduces the study that was conducted that begin with background and progressing through the problem statement, aim and objectives of the research, significance of the study, research methodology, expected findings, the scope and limitation of the study, importance of the study and the chapter organisation. It then goes on to discuss the various issues that were identified during the study. These include the methods used by the court in dealing with cases involving non-signatories. The two research questions were generated due to nature of this study. These will be linked to the creation of the scope and objectives of the study. The guidelines that were established for the researchers are also used to facilitate their studies.

### **1.5.2 Chapter 2: (Literature Review – Arbitration Dispute Resolution)**

The goal of this chapter is to collect all the necessary information about the topic of research. After that, it will be divided into various sub-topics to develop more effective and relevant research. One of the first topics that will be covered in this section is the definition of arbitration. This will help in understanding the various aspects of an arbitration dispute. First an overview of arbitration dispute resolution method that will include definition of arbitration, arbitration agreement, arbitration proceeding and matter that relate to the arbitration such as arbitrator, arbitration hearing, evidence in arbitration, award, and cost of the arbitration. In this section, the

author also discusses on limitation of application and enforcement in the context of arbitration, which this matter will become the basis and guidance to analyse the case law in Chapter 5

### **1.5.3 Chapter 3: (Literature Review – Consolidation in Arbitration)**

Following that, Chapter 3 will review the various steps involved in the process of consolidation. It will also provide a definition of consolidation and the procedures for arbitration related to it this include definition of consolidation according to legal principles, characteristics of consolidation, issues faced in consolidation arbitration, procedures for consolidation and rules of arbitration institutions. This chapter aims to provide an in-depth analysis of the various factors that need to be taken into consideration before a consolidation can be carried out. By referring to chapter 2, this chapter also used by researchers as a guide to analyse the case law stated in Chapter 5.

### **1.5.4 Chapter 3: Research Methodology**

Chapter 4 describes the research methodology used in this study and how it will aid in answering the research question. This research has been prepared so that it can be carried out in a systematic manner via various stages. Each step has specific objectives that must be fulfilled to ensure the process is successful. In this research, the author will implement the Doctrinal legal research by analysing case law, organising, arranging, and systematising legal concepts, and studying legal institutions using legal justification or logical inference to identify the grounds that contribute to court decision that relate to the consolidation issue. For the aim and objective of this research, it was separated into five stages, each of which was completed in turn. First stage will discuss on identification of research that consist of problem statement, objectives of study and scope of research. Second stage will contain of literature review that divided into two section which are primary data and secondary data. Third stage will consist of data collection which the author will collect cases from Malaysia Court that relate on the consolidation issue in arbitration context. Fourth stage will analyse the case law by extracting the grounds that court

consider when dealing with consolidation issue and what is the consideration by the court for their judgement and to provide important findings and outcome of research. Fifth and final stage will be covered on conclusion, limitation of research and to provide recommendation.

### **1.5.5 Chapter 5: Research Analysis and Results**

This chapter aims to provide a comprehensive analysis of the various issues that arose during the Malaysia Court's consolidation proceedings. Through the legal case analysis, the court was able to identify four (4) major issues that were considered to be significant issues during the proceeding. Only one (1) of the ten (10) cases was allowed to continue the proceedings while the other nine (9) were rejected.

### **1.5.6 Chapter 6: Discussion and Findings**

The findings and results of the study are discussed in Chapter 6. The findings and results will be presented and discussed in further detail. The research will describe consolidation in contractual context, particularly those favouring arbitration agreement. Additionally, it contributes to a better understanding of the cases to show the grounds that the court consider when dealing with the consolidation issue in arbitration proceedings.

### **1.5.7 Chapter 7: Conclusion and Recommendation**

The dissertation ends with Chapter 7, the summary of the research findings and conclusion will be established in this chapter from this study in order to achieve the objective of the research. At the same time, the author will include the limitation of this research and the problem encountered during carrying out this research including recommendation for future research.

### **1.5.8 Chapter Summary**

Both parties to an consolidation of arbitration procedure may use the practical instrument of the ability to combine several referrals to arbitration proceeding. This study seeks to give a thorough understanding of the numerous factors that go into the consolidation of proceedings. The discussion then moves on to cover the many problems that the study's findings revealed. This chapter seeks to offer a thorough examination of the numerous problems that developed throughout the consolidation procedures before the Malaysian Court. The goal of this chapter is to offer a thorough overview of the numerous elements that must be considered before a consolidation can be performed. The purpose of this chapter is to offer a thorough examination of the many concerns that emerged throughout the Malaysia Court's consolidation processes.

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