

DISQUALIFICATION OF ARBITRATOR

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*“Almighty Allah, please give blessing to them...
my family, my parents,
~Idris B. Ismail
~Hasnah Bt Mohamad
~Izwan B. Idris
~Ikram B. Idris
my friends, my students and to all Muslims”*

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ABSTRACT

In Arbitration, an arbitrator has important role to conduct the Arbitration proceeding according to the Act. It is only natural for courts faced with enforcement of an award from a reputed institutional arbitration to be more accommodating, considering the institution's reputation is running a well administered and supervised arbitration. According to the Arbitration Act 2005, an arbitrator can be disqualifying due to some circumstances. This section is set out because of to give opportunity to the parties have fairness in the arbitration. Therefore, the objective of this study is to identify the legal problem in disqualifying the arbitrator. The methodologies of this study have been separated into few steps; identifying the research issue, literature review, data collection, research analysis, and conclusion and recommendation. This approach is to ensure that the collection of the information and the data analyzing can be precisely implemented. An investigation of the most frequent reasons for disqualifying an arbitrator by Court according to the Arbitration Act is done to create awareness among the arbitrator. So the parties have equal trust in arbitration proceeding. It is found out that the factor of disqualifying and arbitrator is impartiality, independence, duty to disclose, misconduct, qualification and bias. In addition, the court are using tests in order to identify an arbitrator is disqualifying. Conclude that, from the result of the analysis there are cases reported under the Malaysia law journal which the disqualifying an arbitrator according to arbitration proceeding. Under the Arbitration Act 2005, the disputes party can send the notice to the tribunal or Court if they feel that arbitrator not having fairness in the proceeding in fifteen days.

ABSTRAK

Dalam Timbang tara, penimbang tara memainkan peranan dalam mengendalikan aturcara timbang tara mengikut Akta Timbang Tara. Telah menjadi kebiasaan bagi pihak mahkamah melaksanakan keputusan yang sesuai berdasarkan reputasi dan pengurusan yang baik daripada institusi timbang tara. Berdasarkan Akta Timbang Tara 2005, seorang penimbang tara boleh di lucutkan di atas beberapa keadaan. Akta ini dikeluarkan adalah untuk memberi peluang kepada pihak yang tidak berpuas hati dengan keputusan timbang tara. Oleh itu, objective kajian ini adalah untuk mengenal pasti masalah perundangan dalam melucutkan penimbang tara.. Cara- cara pengajian untuk kajian ini dibahagikan kepada dua langkah iaitu, mengenal pasti isu-isu, tinjauan pustaka, mngumpul data, menganalisis kajian serta kesimpulan dan cadangan. Pendekatan in ialah untuk memastikan pengumpulan informasi dan analisis data boleh dilaksanakan dengan tepat. Satu siasatan tentang kekerapan alasan untuk perlucutan penimbang tara oleh mahkamah berdasarkan Akta Timbang Tara di lakukan untuk membentuk kesedaran dikalangan penimbang tara. Jadi, semua pihak mencapai kepercayaan yang sekata didalam prosedur timbang tara. Dijumpai factor yang menyebabkan perlucutan penimbang tara ialah keadilan, kemerdekaan, kewajipan untuk mendedahkan, salah laksana, kelayakan dan bias. Sebagai tambahan, kes mahkamah menggunakan beberapa ujian untuk mengenal pasti perlucutan penimbang tara. Kesimpulannya, daripada keputusan analisis, terdapat kes-kes yang dilaporkan dibawah Jurnal Undang-undang Malaysia yang mana perlucutan penimbang tara adalah berdasarkan prosedur timbang tara. Dibawah Akta Timbang Tara 2005, pihak yang bercanggah boleh menghantar notis kepada mahkamah jika mereka merasa ketidakadilan terhadap prosedur dalam lima belas hari.

CHAPTER 1

INTRODUCTION

1.1 Background of Study

This thesis is concerned with procedural fairness in Arbitration proceedings. The Arbitration known as a process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.¹ Nowadays, everybody require that some degree of procedural fairness be observed when the rights and liabilities expressed of citizens are determined. In Common Law jurisdictions, where the expression ‘procedural fairness’ is often used interchangeably with the more emotive label ‘natural justice’, the requirement is often expressed in the negative as a binding rule of precedent that a denial of natural justice shall entitle the affected party to challenge the decision maker or apply for judicial review of their determination.

¹ Sudra Rajoo, *The Process of Arbitration in Resolving Sport Disputes* (LexisNexis Asia,2003)

Modern principles of procedural fairness are derived from two maxims of law. The first is that “*audi alteram partem*”². The second is that every man has a right to an impartial (and independent) adjudicator, a corollary of which is that no man may be a judge in his own cause: *nemo debet esse judex in propria causa*³. Observation of the first maxim includes the recognition of the right to be heard, present evidence, make submissions, and confront one’s accusers. Abiding by the second will mean that only a person who has no significant interest in the cause and no preference with respect to the parties involved may sit in determination of it. It is with the operation of the second maxim in international commercial disputes that this thesis is principally concerned.

The important of Arbitration is a flexible process for the final determination of private rights in international contexts⁴; when parties submit to arbitration they agree to appoint a third party (or third parties, in the case of multi-member tribunals common high value disputes) to act quasi-judicially and finally decide their rights, duties and obligations in the dispute. The different between court is arbitral award are portable- there is no international enforcement instrument for court judgments comparable to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958). The New York Convention allows parties to transact across borders safe in the knowledge that, if a dispute arises, they will not have to press their substantive rights in the other party’s national courts in order to get a final result. The prospect of trial in foreign courts is alarming for a number of reasons: the substantive and procedural laws that apply may be different or poorly developed and the processes of the court may be inefficient or costly. There are also the risks of parallel proceedings in different countries and the operation of exotic conflict of laws rules determining jurisdiction.

² According to the Oxford Law is hearing the other side. It stated that the decisions cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer the other side’s case

³ This means that any decisions, however it may seem, is invalid if made by a person with any financial or other interest in the outcome or any known bias that might have affected his impartiality.

⁴ Sudra Rajoo, *Privacy and Confidentiality in Arbitration* (LexisNexis Asia,2003)

In addition in this thesis will discuss on public policy has procedural and substantive facets; the New York Convention public policy exception therefore covers situations where one party has been denied procedural fairness by the tribunal in that one or more its members were biased or had conflict of interest when they sat. For Lew, Mistelis and Kroll, the '*Magna Carta*' of International Commercial Arbitration (ICA) has two main rules:

1. Due process and fair hearing; and
2. The independence and impartiality of arbitrators⁵

In Mustill and Boyd, considering the consequences of obtaining a fair trial by an impartial tribunal in deciding the dispute according to the parties legal rights, have formulated the following requirements to be observed by an arbitrator while conducting arbitral proceedings⁶. At the Arbitration proceedings as example hearing, each party must have notice that the hearing is to take place and must have a reasonable opportunity to attend the hearing together with his advisors and witnesses. Besides that each party must have the opportunity to be present throughout the hearing and etc. This arbitration proceeding will be detail on chapter 2 in this thesis.

Arbitration process both parties involved are free to agree on appointing the arbitrator or the presiding arbitrator. According to Section 13(1)⁷, unless otherwise agreed by the parties, no person shall be precluded by reason of nationality from acting as an arbitrator. The Act not imposes limits on who may be appointed an arbitrator. The appointment of completely unsuitable persons is prevented by the challenge procedure

⁵ Lew, J.D.M, Mistelis, L.A, Kroll, S.M, *Comparative InternationalCommercial Arbitration*, (Kluwer 2003), p.95

⁶ Mustill and Boyd, *Commercial Arbitration*, 2nd Edn, 1989, at p 302.

⁷ Section 13(1) Arbitration Act 2005

provided in section 15.⁸ The freedom to choose their arbitrator not depending to the arbitrator's nationality where the involvement of foreign nationals as arbitrators is quite common in international commercial arbitration. In other word the appointment of the arbitrator represents the starting point for any arbitration after the request for arbitration is made. However in *Russell on Arbitration*⁹ highlight that the parties would want to appoint the most suitable candidates and not simply avoid those that are unsuitable.

The Director of the Kuala Lumpur Regional Centre set out the requirement for selecting an arbitrator if the parties fail to appoint an arbitrator;¹⁰

- a) Any qualifications required of the arbitrator by the agreement of the parties;
- b) Other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and
- c) In the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties.

Section 13(8) now gives directions to the Director of the Kuala Lumpur Regional Centre for arbitration and the High Court on how to approach the appointing process. Before exercising his discretion in making any appointment, the Director is required to have due regard to any qualifications required by the agreement of the parties and such other considerations which are likely to secure the appointment of an independent and impartial arbitrator. The object of this section is, notwithstanding his intervention, to

⁸ Arbitration Act 2005

⁹ Russell,(2003), *Arbiration*, paragraph 4-020,pp 101-102)

¹⁰ Section 13(8) Arbitration Act 2005

ensure that the Director respects the parties' agreement as to required qualifications of the arbitral tribunal. Thus Sundra Rajoo set out the criteria to the Director of the Kuala Lumpur Regional Centre:¹¹

- a) To act fairly between the parties, avoid conscious and, so far as possible, unconscious bias;
- b) Not only to be impartial but be seen to be impartial;
- c) To pay close attention to any evidence or arguments presented by the parties and be clearly seen to be doing so; and
- d) To keep the parties fully advised as to what he or she is doing and proposes to do.

The Arbitrator has no implied powers at common law, but only those which are conferred upon him by statutes or by the parties, and it affect his powers are dependent upon express or implied agreement of the parties. The word duties denote rules that an arbitrator ought to follow. An arbitrator has a duty to:¹²

- a) Act judicially;
- b) Act fairly and in accordance with natural justice, that is, to be unbiased and to give each party a fair opportunity to present his case, to know the opposing case and to meet the opposing case;
- c) Act within the terms of his or her appointment;

¹¹ Sundra Rajoo *FUNCTION, POWERS AND DUTIES OF THE ARBITRAL TRIBUNAL* (LexisNexis Asia 2003)

¹² Sundra Rajoo *FUNCTION, POWERS AND DUTIES OF THE ARBITRAL TRIBUNAL* (LexisNexis Asia 2003)

- d) Act efficiently; and
- e) Give certainty and finality to the process.

The arbitrator is the master of the proceedings, subject to any rules that apply and to any joint directions from the parties. In general terms, the arbitrator can conduct the proceedings in any way he or she likes, provided each party is given a proper and equal opportunity to present their case. He or she must abide by the principles of natural justice.

1.2 Issues/ Problem Statement

Arbitration Act 2005 sets out clearly how an arbitral tribunal can be challenged¹³, safeguarding justice and trust in the institution of arbitration. Under this Act, a party is given right to disqualify arbitration if the arbitrator fails to carry out in made the decision or not act fairly¹⁴ in the process of arbitration, through the Arbitral tribunal¹⁵ and High Court¹⁶. However in the arbitrator in *Ian Keith Brown v CBS (Contractors) Ltd*¹⁷ had heard matters alleged to have been made ‘without prejudice’ during the hearing. The court held that it was not in the interest of justice or the parties for the arbitrator to be removed. The matter was remitted to the arbitrator with the direction that he should hear submissions from the parties on this point.

¹³ Section 15 Arbitration Act 2005

¹⁴ Section 14(3) Arbitration Act 2005

¹⁵ Section 15(1) Arbitration Act 2005

¹⁶ Section 15(3) Arbitration Act 2005

¹⁷ [1987] 1 Lloyd’s Rep 279.

In Malaysian's unreported case of *Goldcourse Sdn Bhd v Azastera Sdn Bhd*, the judge held that they do not find any irregularity of action, which is not consonant with the general principles of equity and good conscience in to disqualify an arbitrator in the arbitration proceedings even though the applicant claim that arbitrator was act unfair toward the arbitration proceedings. The judge held that there has been no failure to perform the essential duties which are cast on an Arbitrator as such, for instance, a failure to observe the rules of natural justice, or the existence of appearance of bias or partiality. Each party is given a fair opportunity to present and argue its case, and the decision of the Arbitrator should be respected, the arbitral tribunal being the forum of choice of the parties.

In the past, the Court has refused an application to remove the arbitrator for misconduct¹⁸ of a technical nature¹⁹, admitting inadmissible evidence²⁰ and adhering persistently to an incorrect view²¹. The court in *Turner v Stevenage Borough Council*²² ruled that an arbitrator who had sought an interim payment from both parties was not guilty of wrongful conduct in accepting payment from one party and in seeking to negotiate payment from the other in genuine and open discussions. The applicant had alleged that there was a demand for the payment of fees at an unreasonable time.

Therefore, this thesis will focus on what are the factors that can disqualify an arbitrator in the proceeding based on the past cases law? How the judge determines the "factors" to disqualify and remove the authority an arbitrator?

¹⁸ One of the factor to disqualify an arbitrator and will discuss in detail at chapter 3

¹⁹ *Hagop Ardahalian v Unifert International SA, The Elissar* [1984] 2 Lloyd's Rep 84;

²⁰ *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545

²¹ *Asia Construction Company v Crown Pacific Ltd* (1988) 44 BLR 135.

²² [1997] ADRLJ 409.

1.3 Aim

The aim of study is to investigate the origin of disputes settlement by Court with the issue on disqualifying an arbitrator in the arbitration proceedings. As we know the functions of arbitration within the legal terms of reference to achieve consistency in the arbitral decision making process and maintain a fair balance between the arbitrating parties.

Through this study, the arbitrating parties may able to have better understanding on concept and their legal positions in disqualifying the arbitrator especially through the process of litigation proceeding.

1.4 Objectives

The above aim of research is supported with the objective to identify the legal problem in disqualifying the arbitrator.

1.5 Scope of Study

This research is based on case-law. The scope of this research will cover the following areas:

- a) The Arbitration Act 2005, Common Law, PAM Arbitration Rules 2010, UNCITRAL Model Law on International Commercial Arbitration and KLRCA
- b) Court cases referred in this research

1.6 Research Methodology

The methodologies of this study have been separated into few steps; identifying the research issue, literature review, data collection, research analysis, and conclusion and recommendation. This approach is to ensure that the collection of the information and the data analyzing can be precisely implemented.

1.6.1 Initial Study and Identifying the Research Issue

The overview of concept for the study was obtained through initial concentrated reading of books, journals, articles and newspaper cutting which can easily be attained from the libraries which is related to current situation of construction industry in Malaysia and the contract issues in the industry were referred. From the research issue, the objectives of the study are identified.

1.6.2 Literature Review

Various documentation and literature review regarding to Arbitration issues are identified to achieve the research objectives. Books, journals, research papers, reports, newspaper as well as sources from the internet are referred. References were obtained from The Arbitration Act 2005 (UNCITRAL Model Law as applied in Malaysia, Standard forms of contract commonly referred to and examined in this research are Pertubuhan Arkitek Malaysia (PAM) (2nd Edition, 2006), Public Works Department (P.W.D) Form 203A and Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition) and Court cases referred in this research include Malaysia, Singapore, and English cases.

1.6.3 Data Collection

Legal cases based on previous court cases, journals, papers, reports which are related to disqualifying the Arbitrator are collected from Malayan Law Journals via UTM library collection and electronic database. Primary data: electronic database, secondary data: books, act, articles, seminar papers and etc.

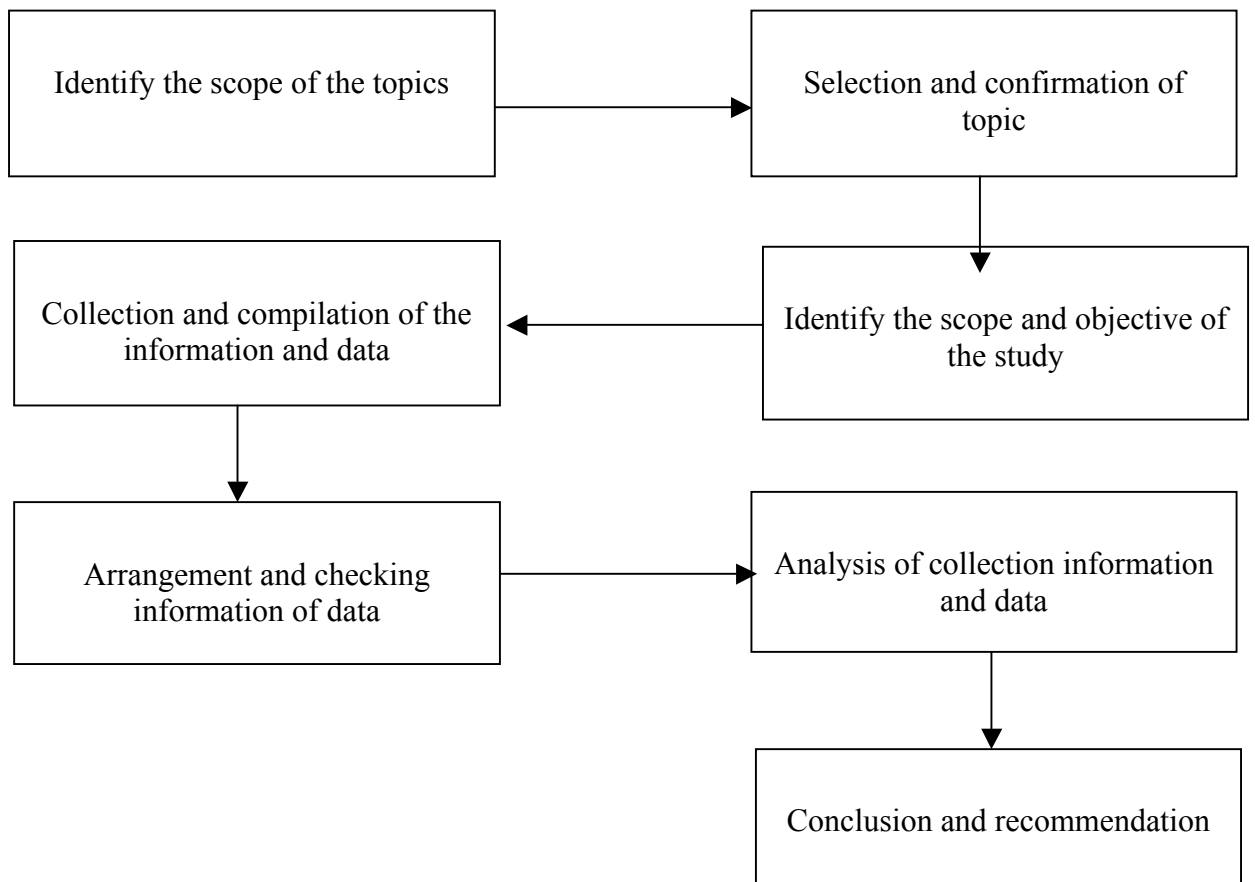
1.6.4 Research Analysis

Once the data are collected, case study is conducted on the related legal cases. All the fact of the cases are reviewed and clarified. The focus of the analysis is on disputes associated with the disqualifying the arbitrator, which is referred to the court and the consequences of disputes towards the parties involved in the contract. Further to this, discussion and comparison would be done.

1.6.5 Research Process

Basically, this research is done by stages to achieve aim and meet the objectives. The process is shown in figure 1.1.

Figure 1.1 Research Process



1.7 Outline of Chapter

CHAPTER 1 : INTRODUCTION

In this chapter, the introduction starts with the definition of the title, the aim of study, the scope of study, the objective of study and the research methodology on disqualifying the arbitrator in respect of arbitration process. Then, the chapter will end with the conclusion.

CHAPTER 2 : QUALIFICATION OF ARBITRATOR

In this chapter, there will be discussion on the qualification of arbitration; impartiality and independent that caused the bias. This discussion will include the theoretical and practice to give better understanding. In addition this chapter also will be discussion on the detail arbitration proceeding involved; before hearing, the hearing, and order for direction, oral hearing and award. Each explanation of the arbitration proceeding will support with cases. The chapter will end with the conclusion.

CHAPTER 3 : ANALYSIS OF CASES: DISQUALIFYING AN ARBITRATOR IN ARBITRATION PROCEEDING

In this chapter, there will be analyze of the cases on factor that can disqualifying the arbitrator in arbitration proceeding; duty to disclose, impartiality, independences, bias and misconduct. This chapter will include with cases to support all the point. The chapter will end with the conclusion.

CHAPTER 4 : CONCLUSIONS AND RECOMMENDATIONS

In this chapter, the content is about concluding with the conclusions, which answers all the objectives of the research. The recommendations for this research are also included in this chapter.

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