



Law of Arbitration

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The
BITTERSWEET
MEETING of
PERCEPTION
and REALITY...

YAY! I'M
SAVED!!



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“Hell, I was hoping we could avoid binding arbitration.”

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“Would you consider binding arbitration?”

Content

- Cost
- Fees
- Taxation
- Interest
- Remission
- Setting aside

COSTS

- ❖ **Costs of legal advice and representation, the arbitrator fees, the costs of evidence, costs of accommodation and administrative support during the arbitration proceedings and other expenses incurred in connection with the reference.**
- ❖ **It does not refer to the substantive amount claimed in a reference to arbitration.**

Types of Costs

- 1. The arbitrator's fees and expenses
- 2. The fees and expenses of any arbitral institution involved
- 3. The parties' own costs including legal costs and fees of counsel of rep
- 4. Any costs incidental to the arbitration. Eg fees of experts, translators, photocopying, hiring of premises.

TERMS USED IN ARBITRATION ACT 2005

Costs and expenses of arbitration

- **Costs** – eg. Arbitrator fees,
- **Expenses** – eg. travelling, photocopying, hiring of premises

COSTS OF THE REFERENCE AND COSTS OF THE AWARD

Costs of the reference

**Those which the
parties reasonably
incur in prosecuting
the claims made or
in defending
against them**

Item 3

Costs of the Award

**Arbitrators fees and
proper expenses
incurred in the
arbitration process
Item 1, 2 and 4.**

SECTION 44

Parties to a reference are in general at liberty to agree who shall pay the costs (reflected in S. 44 (1))

S. 44 (1) (a) arbitral tribunal has discretion to

i) Direct to and by whom and in what manner those costs or any part thereof shall be paid

ii) Tax or settle the amount of such costs and expenses

iii) Award such costs and expenses to be paid

DISCRETION OF ARBITRAL TRIBUNAL

- ✓ Arbitral tribunal has discretion to order costs + interest (award interest and determined the rate of interest)
- ✓ It has to be exercised judiciously
- ✓ The arbitral tribunal must state reasons for awarding the costs

Arbitrator is Empowered to make an award of costs

- *Re Stephen, Smith and Co and Liverpool and London and Globe Insurance Co* [1892] 36 Sol Jo 464
 - The effect of the clause is to make arbitrators and umpires judges in their own cause and to allow them to settle finally the amount of costs to be paid to them.
- Must not take into account: prejudice of race, religion or sympathy with the unsuccessful party.
- The exercise of this power must be in the form of an award.
- The arbitrator must specify
 - the party entitled to costs
 - Who shall pay
 - The amount
 - Method of determining that amount
 - Manner in which the cost shall be paid

Cost???

- The complexity of the cause or matter and the difficulty or novelty of the questions involved
- The skill, specialised knowledge and responsibility required of, and the time and labour expended
- The number and importance of the documents (however brief) prepared or perused
- The place and circumstances in which the business involved is transacted
- The urgency and importance of the cause or matter to the client
- Where money or property is involved, its amount or value

Costs Prima Facie to follow the event

- ✓ **costs of an action are usually awarded to the successful litigant.**
- ✓ **The party who requires to submit to arbitration in order to achieve that to which he is entitled should recover his costs incurred in so doing from the other party. The loser pays.**
- ✓ **Smeaton, Hanscomb & Co Ltd v Sassoon Setty, Sons & Co (No. 2)**
 - ✓ **Prima facie, a successful party is entitled to costs. Not entitled at law but merely prima facie entitled.**

Exception

(i) Costs thrown away

eg: failing to comply with a discretion, failing to appear, cause delay in proceedings.

ii) Adjournments or cancellations

a) Failure of a successful party to accept an offer made earlier by the other party

b) extravagance, such as using too many counsels or expert witnesses and the like

c) Causing a large amount of time (or costs) involved

✓ **the arbitrator may normally retain his award until such fees or remuneration is paid to him.**

✓ **however, by virtue of S.44 (4), the HC may order the arbitral tribunal to deliver the award on such conditions as the HC thinks fit**

Award without specifying the costs

- S 44 (b): Apply to the HC for the costs to be taxed if the arbitrator fails to specify the amount of costs within 30 days of having been requested to do so.

Award without costs

- *Williams v Wilson* [1853] LR 9 Ex 90
- If the arbitrator has not included costs in his award, it is assumed that each party to bear his own costs
- S 44 (c): Each party shall be responsible for its own legal and other expenses .

INTEREST ON THE AWARD

✓ the court will not interfere with the tribunals exercise of its discretion to award costs merely because the court would itself exercised that discretion differently

✓ by virtue of S. 33(6), interest is payable from the date on which the award is made

S.33 (6) – unless otherwise provided by the arbitration agreement, the arbitral tribunal may –

- a) Award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation**
- b) Determine the rate of interest**

- ✓ **the rate of the interest would be the same as that of judgment debt**
- ✓ **The interest would accrue unless the award otherwise states**
- ✓ **The arbitral tribunal may award interest from the date of the award.**
- ✓ **This power is inherent in an arbitrator by virtue of his implied powers which he may exercise unless there is a valid objection against it**

APPLICATION TO SET ASIDE OF AN AWARD

S. 37 (1) (a) the party who apply to set aside the award must provide proof that:

i) A party to the arbitration agreement was under incapacity

ii) arbitration agreement is not valid under the law which the parties have subjected it

iii) the party making the application was not given proper notice of appointment of an arbitrator / arbitral proceedings/ unable to present that party's case

iv) The award deals with a dispute not contemplated /not falling within the terms of the submission to arbitration

v) Award contains decisions on matters beyond the scope of submission to arbitration

vi) Composition of the arbitral tribunal /arbitral procedure was not in accordance with the arbitration agreement

b) the HC finds that

i) Subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

ii) The award is in conflict with the public policy of Malaysia

What is meant by in conflict with the public policy of Malaysia?

(S. 37(2))

a) The making of the award was induced or affected by fraud or corruption

Fraud?

- **Court consider fraud as something which is in conflict with the public policy of Malaysia**
- **It is part of misconduct of arbitrator**

Case: *Haigh v Haigh* [1861] 31 LJ Ch 420

“Arbitrators like other judges are bound, when they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice, and the court when called upon to review their proceedings, is bound to see those rules have been observed”

- a) A breach of natural justice occurred**
 - i) During the arbitral proceedings**
 - ii) In connection with the making of the award**

Other situations in which an award is set aside

i) No choice except to set aside

✓ The award would have to be set aside where the only conclusion to which the court can arrive is to set aside the award

Eg: when the contract is illegal

ii) Where arbitrator is biased

✓ The court would also set aside an award where the arbitrator has misconducted himself by favouring one party over the other / fails to reconsider the award impartially

iii) Award being excessive

✓ an award which is manifestly excessive may be set aside

iv) Mistake or error apparent on the face of the award

**Case: Pegang Prospecting Co.Ind
(1967) MLJ 231**

The arbitrator in this case refused to accept certain question of law. It was held that the award should be set aside as the arbitrator may have decided certain questions of law

EFFECT OF SETTING ASIDE AN AWARD

- ✓ it becomes devoid of any legal effect (as if it had never existed before)
- ✓ the purpose of setting aside the award is to prevent the original arbitrators from hearing the case again
- ✓ Once the award is set aside, the arbitrator becomes *functus officio* (having discharged his duty)

REFERENCE ON QUESTION OF LAW

- ✓ **An award could also be set aside if a party refer to the HC any question of law which arise from an award (S. 42)**
- ✓ **S. 42(4) The HC may on the determination of a reference –**
 - a) **Confirm the award**
 - b) **Vary the award**
 - c) **Remit the award**
 - d) **Set aside the award (in whole or in part)**

REMISSION

- ✓ **send back for reconsideration**
- ✓ **Simply means that the court is asking the arbitrator to make a fresh award on some or all of the issues under arbitration**
- ✓ **The power to remit an award is limited only to matters which relate to question of law arising out of an award**

DISTINCTION BETWEEN REMISSION AND SETTING ASIDE

REMISSION	SETTING ASIDE
<p>The door for arbitration is not completely closed. Arbitrator could rectify the mistakes he might have committed earlier</p>	<p>The whole award becomes null and void</p>