



Law of Arbitration

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Content

- Award
- Extension of time for making an award
- Enforcement of Award

Award

- AA 1952 and UNCITRAL Model Law do not ascribe any meaning to the term 'award'.
- S-1: A decision of the arbitral tribunal on the substance of dispute and includes any final, interim or partial award and any award on cost or interest but does not include interlocutory orders.

What is an award?

- *Jeuro Development Sdn Bhd v Teo Teck Huat M Sdn Bhd* [1998] 6 MLJ 545
- An award is the decision determination rendered by arbitrators or commissioners or other private or extra-judicial deciders upon a controversy submitted to them.
- It also includes the writing or document embodying such decision.
- Any decision by a person who is not an arbitrator or a body which is not an arbitral tribunal is not an arbitral award.

Types of Award

- Normally: Monetary award or performance award
- Interim Award
- Consent Award
- Draft Award
- Provisional Award
- Final Award

Interim Award

- Interim means a temporary or provisional arrangement adopted in the meanwhile....
- Any award that is not final award.
- Re Arbitration between Mohamed Ibrahim and Koshi Mohamed [1963] MLJ 32
 - Arbitrator's order is an award although it was an interim nature because it amounted to a decision of some of the questions referred.

Consent Award and Draft Award

- Consent award: Any settlement reached between the parties during the arbitration proceedings
 - Arbitrator to record the consent award
- A draft award: Not binding on the parties until confirmed by the arbitrators.
 - Draft awards are not awards as such.
 - Correction and clarification.

Provisional Award

- Where the parties agree that the arbitrator may order that a sum be paid to the claimant by the respondent pending the final determination of the issues.

Final Award

- To describe the effect of an award: Binding
- To describe the scope of the award: Complete
- Once the final award is made the arbitrator is functus officio and the arbitration proceedings are terminated.
- The arbitrator's authority ceases to operate and the reference terminates

Final Award

- *MCIS Insurance Bhd v Associated Cover Sdn Bhd*
[2001] 2 MLJ 561
 - Where there are controversies to liability and quantum and an interim award is made on the issue of liability and quantum and an interim award is made on the issue of liability that interim award is final.
 - The arbitrator becomes functus officio and cannot revisit the issue of liability when he deals with the other issue of quantum.

Interlocutory Orders?

- Eg. Pertaining to the admissibility of evidence, security for costs or for the claim, preservation of the property, discovery of documents.
- Not awards but orders or directions.

Requirement

- In writing?: S 33 (1)- Shall be in writing; AND
- Signing? S 33 (2)- must.
 - If more than one arbitrator, majority members's signature
- Date and Place?: S 33 (4): Shall state both.
- The reason? S 33 (3): Shall state the reason unless the parties have agreed that no reason to be given
- Publication? S 33 (5): To deliver a copy of the award signed

Signing

- Not necessary: *European Grain and Shipping Ltd v Johnston* [1983] QB 520
 - Kerr J: unnecessary and undesirable unless prescribed by rules which govern the arbitration.
- It is a must: S 33 AA 2005

Format of the Award

- Heading
- Recitals
- Determination of Issues
- Reasons and Findings
- The award
- Signature

Features of a Valid Award

- Unconditional, unambiguous and non-contradictory.
- 1. All issues raised must be resolved
- 2. Issues outside the submission must not be dealt with
- 3. the final award must be final and unconditional
- 4. the obligations of the parties must be certain and capable of performance
- 5. the award must contain reason
- 6. the award must be the result of the involvement and deliberations of the arbitrators
- 7. must be capable of enforcements by the courts.

Set Aside the Award

- Awards are not legal judgments and should not be faulted merely because the arbitrator has not expressed his conclusion in correct legal language.
- *Official Assignee v Chartered Industries of Singapore* [1978] 2 MLJ 99
 - The arbitrator failed to decide on all matters question submitted to him.
 - The award is defective and void.
 - The award must be set aside.

EXTENSION OF TIME FOR MAKING AN AWARD

- **Where the time to make an award is limited by virtue of the conditions in the agreement itself, court has always the power to extend the time**

WHETHER EXTENSION OF TIME FOR MAKING AN AWARD CAN BE MADE?

Yes. By virtue of S.46, HC can extend the time if the time for making an award is limited by arbitration agreement

HOW???

S. 46(2)

An application may be made by giving notice

Such notice could be made by;

(a) the arbitral tribunal; or

(b) any party to the proceedings

General rule – HC will not make such order

Exception: S. 46(3)

HC will make such order if:

(a) All available tribunal processes for obtaining an extension of time have been exhausted; and

b) The HC is satisfied that substantial injustice would otherwise be done

Substantial injustice??

- ✓ **not define in the act**
- ✓ **what is considered as substantial?**
- ✓ **Substantial injustice and undue hardship are different**
- ✓ **Undue hardship : excessive hardship**
- ✓ **Substantial injustice : major injustice**

POWER OF HC IN RELATION TO EXTENSION OF TIME IN MAKING AN AWARD

S. 46(4)

The HC may exercise its power under subsec (1) notwithstanding that the time previously fixed by or under the arbitration agreement or by a previous order has expired

FINALITY OF AN AWARD

S. 36(1) - an award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties

General rule – An award shall not be varied, amended, corrected, reviewed, added to, or revoked by the arbitral tribunal (S. 36(2))

Exception : S. 35

S.35 – an award can be :

i) Corrected (S.35(1)(a))

- Error in computation, clerical, typographical error, other error of similar nature (eg: Daniel being referred to as David)**

ii) Interpretation of a specific point (S.35(1)(b))

- Some points are not clear enough, therefore requires further clarification**

iii) Additional award (S.35(4))

- Certain claims being presented during the arbitral proceeding but was omitted in the award. Therefore requires the arbitral tribunal to make an additional award to address the claims.

PROCEDURE

Correction, interpretation, additional award shall be made within 30 days of receipt of the award

■ Correction

- a) Gives notice to the other party (S.35 (1) (a) / initiative of the arbitral tribunal to correct any error (within thirty days of the date of the award – S. 35 (3))**
- b) Correction shall be made within 30 days of the receipt of the request**

ii) Interpretation

- **Upon notice + agreement with the other party (S.35 (1) (b))**
- **Interpretation shall be made within 30 days of the receipt of the request**

iii) Additional award

- a) Application within 30 days of the receipt of the award + notice to the other party**
- b) Additional award will be made within 60 days from the receipt of the request**

RECOGNITION AND ENFORCEMENT

- ✓ **S.38 (1) – on application to the HC an award shall be recognised as binding and be enforced by entry as judgment in terms of the award or by action**
- ✓ **an award is binding on the parties**

REQUIREMENTS FOR APPLICATION

S. 38(2) – applicant shall produce

- a) Original award/ duly certified copy of the award; and**
- b) Original arbitration agreement / duly certified copy of the agreement**

HOW TO ENFORCE AN AWARD?

- ✓ **by virtue of S.36(1) since the award is binding on the parties, it is inherently enforceable by the successful party**
- ✓ **an award can be enforced by virtue of the following:**
 - a) Inherent enforceability**
 - b) Active enforceability**
 - c) Summary enforceability**

a) Inherent enforceability

- ✓ **An award is regarded as inherently enforceable as it represents an agreement btw the parties, and as such it should be enforced without any excuse**
- “ **If an award has been made, that award is binding on the parties. In effect, the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award...**”
- ✓ **if a party to arbitration becomes bankrupt before the execution of an award, it will not affect the validity of the award and it may be enforced.**

b) Active enforceability

- ✓ **an award can be enforced as of right against the unsuccessful party**
- ✓ **certain elements which need to be proved in an action for the enforcement of an award:**
 - i) That a submission has been made or that a dispute arose pursuant to a clause in the contract**

ii) That arbitrators were appointed in accordance with arbitration agreement

iii) The award has been concluded

iv) The party has not complied with the award

c) Summary Enforceability

Summary enforcement of an award (S. 38)

✓ the award assumes the form of court judgment which is regarded as an effective tool

DEFENCES AGAINST ENFORCEMENT OF AN AWARD

- ✓ in an action enforcement of award, a defendant cannot plead as a defence misconduct or irregularity on the part of arbitrator
- ✓ he could only claim that there is an irregularity in bringing the award into existence

- ✓ **The following defences are available in action on the enforcement of an award**
- i) The action is time-barred – barred by virtue of Limitation Act**
- ii) Arbitrator has exceeded his jurisdiction – he must only decide dispute submitted to him (arbitrator may have exceeded in some matters. Hence, only those matters will be considered invalid)**

iii) Subject matter of an award is non-existent

iv) The subordinate contract upon which the award was made is connected to the primary contract which has been terminated, or has come to an end

v) The award has been satisfied.

WHEN AWARD CANNOT BE ENFORCED

- ✓ **S.38 (1) – on application to the HC an award shall be recognised as binding and be enforced by entry as judgment in terms of the award or by action**
- ✓ **there are certain situations whereby an award may be refused.**
- ✓ **it may be refused only at request of the party against whom it is invoked (S. 39(1))**

✓ 2 types of parties could refuse to recognise an award, namely a) the party against whom it is invoked b) the HC

a) the party against whom it is invoked

✓ the party must provide proof to the HC that (S. 39(a)) –

i) A party to the arbitration agreement was under any incapacity

Eg: Mentally Disordered Person

Maybe bound by a submission to arbitration unless incapable of contracting to the knowledge of the other party

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

Eg: failure or impossibility to act S.16(1)

iv) The award deals with a dispute not contemplated /not falling within the terms of the submission to arbitration eg: Arbitrator decided issues which were not submitted to him

(s.37 (1) (a) (iv))

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

***DAEWOO CORP V BAUER (M) SDN BHD[1998]
7 MLJ 25***

The mere reference to a contract containing an arbitration clause is inadequate to incorporate that clause into another contract. There must be specific reference to the arbitration clause itself. Distinct and specific words are required to incorporate an arbitration clause. Moreover, a dispute in relation to contracts without an arbitration clause cannot be referred to arbitration even if those contracts are related to a contract with an arbitration clause.

- vi) Composition of the arbitral tribunal /arbitral procedure was not in accordance with the arbitration agreement (S.14(3)(b))**
- vii) Award has not yet become binding on the parties /has been set aside**

b) the HC (S. 39(1)(b))

- 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**