IGAB NEWS

Newsletter of the Chartered Institute of Arbitrators, Malaysia

IN THIS ISSUE

Message from the Chairman

Happy Malaysia Day!

Welcome to the second issue of the IGAB Newsletter of 2020. We are now in trudging into the fourth quarter, still grappling with the new norm. The full effects of the pandemic and its consequent global lockdown has yet to be seen. Industries have continued to benefit in some form or another, in varying degrees, from government initiatives and credit moratorium. These can only be temporary.

As the market braces itself for disputes unprecedented in its reach and effect, focus will be drawn to the capacity and effectiveness of ADR. Mediation, expert determination and neutral evaluation are options not employed often enough. Employed early on, these options may defray and avoid a potentially debilitating dispute resolution process.

The Malaysian branch is committed to the continuous development of ADR. We will be rolling out its courses on a virtual platform for the rest of 2020, and indeed the foreseeable future. You will see in this issue a schedule of these courses. Aside from accredited courses, we will also conduct training and webinars on current topics, including mediation. I would encourage you to register for these.

Message from the Chairman

Continued

The Malaysian branch is also stepping up on its collaborations with various professional institutes to promote ADR amongst professional members. There is much to be learned across the industries, all for the betterment of ADR!

I wish you happy reading!

Warm wishes,

Foo Joon Liang
Chairman
Chartered Institute of Arbitrators, Malaysia Branch

Directors of IGAB (Year 2020-2021)

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MEDIATION MATTERS IN A TIME OF CHANGE

by Shanti Abraham

INTRODUCTION

Economic uncertainty continues as we move into the second half of a perplexing 2020. All of us are grappling with the notion of a new normal. No one has been untouched. Meanwhile, the drum beat of emerging disputes are starting to surface. The shock of the Covid-19 crisis first inspired parties to negotiate in an attempt to quell their anticipated problems.

But as crunch time looms, the time for casual talk may be over.

The prospect of litigation almost seems foolish, and maybe even irresponsible, in a landscape mired with deeply cash-strapped parties and even uncertain continued employment for decision makers within the parties. The conversation seems to turn to the need for facilitating better conversations and coaching parties through their conflict rather than cudgelling their counterparties into submission.

Mediation has been skirting on the edges of problem-solving for more than 2 decades. Cloaked with an uncertain value proposition, mediation has been a welcomed concept in theory but not the first touchstone for most advisors given that there is no apparent reward for swift solutions, at least in this part of the world.

But now, as a consequence of the devastating ripple effects of the Covid-19 crisis taking root, the wisdom switch has flicked on for many.

The prospect of a swift, sensible cost-effective solution via Mediation has been pushed front and centre. The recurring questions remain – how and why does it work? This article endeavours to answer some of these basic questions and also tackle some of the thorny questions posed by those considering Mediation.

MEDIATION MATTERS IN A TIME OF CHANGE

Continue from page 3

A brief overview of the basics.

How does Mediation work:
Mediation, unlike Arbitration and Adjudication, is a facilitated discussion between disputants to identify the issues in dispute and to then explore solutions to resolve them.

Why does Mediation work:
The final decision belongs entirely to the parties and when a solution is reached, the parties would have come to accept (through the process of mediation) why the solution they are agreeing to is to be preferred over keeping the problem alive. This is why Mediation is a voluntary process and the main key to why it works.

One notable feature is that the rate of compliance of final mediated agreements is anecdotally high. This is despite nothing being imposed. This phenomenon happens for a few reasons, which is explained below.

The Mediation process is a flexible one and the Mediator is privileged to speak with parties privately as well as jointly. The entire process is protected by confidentiality and there is an additional layer of confidentiality for parties in private session(s) where they can be assured that what is shared in the private session remains confidential unless the party authorises the Mediator to disclose or communicate the same. There are of course, some limitations to confidentiality and these would include matters relating to any illegal activity e.g. admission to criminal conduct.

The Mediator uses various techniques to understand the facts which have brought the parties into dispute; to explore why earlier attempts to resolve were not successful (invariably parties would have tried to resolve the problems on their own) and to understand the issues that continue to affect the parties in dispute. The engagement between the Mediator and parties serves to build rapport and Mediators are trained to actively listen to what the real issues in dispute are.

MEDIATION MATTERS IN A TIME OF CHANGE

Continue from page 4

The next step would be to help the parties put the issues into context and to recognize their own key interests. This is where the real work of a Mediator is done. A Mediator has to remain the most positive and optimistic person in the mediation space with more patience and stamina than anyone else to plough through the invariable impasses that will be presented by the parties.

Mediators are most crucially, neutral option explorers. Mediators take the parties on the journey of how they got to the room, what the problem really is and where the parties want to head to.

One of the key challenges in the mediation landscape is the perception that Mediation is a soft and easy process. It is not. A good Mediator makes it look soft. But it is never easy.

Mediation requires the marshalling of every ounce of one's temperament, ability to deal with impasses, stamina, alertness, creativity and conflict management skills every single time one is invited to "hold the room". There is no break or letting up as all eyes and ears are on the Mediator for guidance and impasse-overcoming strategies.

The basics of Mediation are not complicated. The next questions relating to Mediation are more complex.

Why hasn't Mediation been used more?

Even though formal mediation has been a known process for the last 2 decades, it really has only surfaced as a utilized form of dispute resolution in the last decade.

One of the key reasons for this is that the usual gatekeepers of disputes (lawyers) previously were not given a respected place at the mediation table – especially by mediators who ostensibly mediate for free.

MEDIATION MATTERS IN A TIME OF CHANGE

Continue from page 5

Why some mediations succeed and some don't.

Parties must make the first choice to walk into the Mediation Chamber with their problem. It is entirely up to the parties if they choose to walk out of the Mediation Chamber with a solution. More precisely, a solution they can live with.

All parties have an idea of what they want and why they want it. A Mediator's role is to discover the "Why" and to respectfully explore alternatives.

Mediations which do not result in resolution may be a result of many reasons. In some cases, there is insufficient data for the parties to decide or the parties require more time to consider the issues. Alternatively, the parties may find themselves hemmed in by personal fears or rigid mandates or policies (which may make no sense from a time and cost expense perspective but are built on notions of "matter of principle"). In such situations, the parties are hopeful that the other side will bend or back off. If this does not happen, then an adversarial process needs to be used to break the impasse by calling out a winner and declaring a loser.

How is it that parties will voluntarily agree to something when negotiations have failed?

In a negotiation, parties argue passionately from their own self-interest (and fears). Facts, Law and Merits are used as weapons to demonstrate who is more right than the other. But no one is actually listening to the other side. Parties may be listening to prepare a rebuttal but not really listening to the root of the problem. A Mediator is trained to change the dynamics of unproductive posturing. Mediation helps parties consider options without pressure of penalty. This flexibility often leads parties into workable solutions.

MEDIATION MATTERS IN A TIME OF CHANGE

Continue from page 6

Why is there a generally high compliance rate with final mediated settlement agreements?

In an adversarial process, both parties are inflicted with an outcome which invariably ends with one declared the winner and the other, the loser. In these post Covid-19 times, the important question ought to be – and then what? Will there be compliance? Would the winning party simply be left with a paper judgement? Enforcement is always the consolation option but often parties have not done a cost-time analysis on the enforcement process involved.

In Mediation, the parties understand the larger context in which their problem lies. Solutions must be workable for both parties otherwise, it will not (cannot) be agreed upon. A skilled Mediator knows to test the durability of the proposed agreement and a back-up plan for continued mediation is often built-in to anticipate bumps on the road to compliance.

One organisation that uses Mediation effectively is the Securities Industries Dispute Resolution Centre ("SIDREC"). SIDREC can be proud that there has 100% compliance with the mediated settlement agreements the members and claimants have reached. The parties in each settled matter may have once upon a time failed at direct negotiation. However, during Mediation- with the guidance of a trained Mediator, they reached the point where they understood the value of a swift resolution to the problem they had and have chosen to agree to a course of action they can live with.

And what happens if the party reneges on the final mediated settlement agreement?

The true question is why it happened. With no known history of any of the parties reneging on the final mediated settlement agreements I have assisted with, my response is framed in theory.

MEDIATION MATTERS IN A TIME OF CHANGE

Continue from page 7

The answer may be found back in the Mediation itself (party felt bullied into submission or mediator strong-armed an unworkable solution onto the party) or may lie in original poor intentions of the parties (eg delay tactics, no intention to really resolve). Having said this, I would see this as a peril of free/volunteer mediation as parties would not have invested anything in the mediation process and therefore have no skin in the game. In that sense, one would be getting what one paid for.

In any event, it is prudent that all final mediated settlement agreements build in a future mediation clause should parties face any issues with compliance.

CONCLUSION

This is a watershed year for Mediation where we will hopefully see robust changes in our Malaysian Mediation Act 2012 and the relevant regulations, thereby strengthening this mode of problem solving. Mediation continues to be available as a pre-action option as we are one of the few countries in the world which has a Mediation Act.

Making Mediation the First Touchstone.
With the scourge of Covid-19 tipping lives upside down, parties will have to consider and prepare themselves for a possible tsunami of disputes. If so, pre-action Mediation would be an excellent place to start.

Are you a Nextliner?
Frontliners helped us survive the pandemic. Now Post Covid-19, lawyers and other advisors are going to be the Nextliners to help the community to pick up the pieces of economic carnage left behind. Perhaps, it is time for lawyers and advisors to top up their skills to include Mediation Advocacy and to be a first mover in influencing wise problem-solving in a crisis. Alternatively, for those who are keen to step up to train as Mediators, CIARB will be rolling out programmes in due course.

Shanti Abraham FCIArb is a director of IGAB. She is on the CIARB Approved Training Faculty for Mediation. She is also an IMI and SIMI Certified Mediator with a public profile at https://www.simi.org.sg/profile/mediator/Shanti--Abraham

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

AN INTERVIEW WITH TAN SRI DATUK SERI PANGLIMA DAVID WONG DAK WAH. THE 5TH CHIEF JUDGE OF SABAH AND SARAWAK (RETIRED ON 20.02.2020)

BY CRYSTAL WONG WAI CHIN*

The COVID-19 pandemic continues to demand rapid adaptation by the judiciary, arbitral institutions and legal practitioners in utilising technology for local court and other dispute resolution proceedings. The unprecedented Movement Control Order and other similar travel & immigration restrictions, aimed at combating the pandemic, present the reality that it will be difficult to conduct existing and future physical hearings.

In this interview, we explore recent technological advancement in local courts, evaluate the shortfalls of current technologies and way forward.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

01|

In February 2020, we witnessed the use of Artificial Intelligence (AI) for data sentencing in Sabah courts. Whilst welcomed as a progressive move by the Malaysian judiciary to use technology as a form of aid in meting out punishment, concern has been registered by some that the application is in breach of 2 articles of the Federal Constitution.

A:

There will always be challenges whenever new things (especially the use of technology to assist the Courts) are introduced and hence the concern that the use of AI may have breached certain provisions of the Federal Constitution is anticipated. The aforesaid concern is definitely a concern of the judiciary as it is the only statutory body which is tasked with dispensing justice. And in doing so, it must ensure that the rule of law or the due process of law is never compromised.

In using AI for data sentencing, the standard operating procedure for the magistrates and Sessions Court judges, in brief, is that the final decision as to what is the appropriate sentence to be handed out to the accused lies in the sole discretion of the relevant magistrates and Sessions Court judges. The recommendation of sentence by the AI machine is nothing but a guideline and such recommendation is made known to the accused before he or she is asked whether the guilty plea is maintained or not. Thereafter, submissions are requested from respective counsel by the court as to the appropriateness of the recommended sentence and only after taking into consideration of respective submissions, the sentencing magistrate and the judges delivers his or her decision. If anything, the right of the accused has been enhanced in that the likely sentence is made known to him before he decides whether his initial guilty plea should be retracted or maintained. Anyway, to my knowledge there is in fact an appeal pending before the High Court in Kota Kinabalu premised on the aforesaid concern and we await for that result with much anticipation.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

Continue from page 10

02|

We have seen considerable investment in technology in the local courts. Most courts have monitors, or a large screen and projector, allowing counsel, witness and judges to view evidence that has been produced in digital form. Key text or other parts may be emphasised or enlarged. Courts also permit the use of presentational software, especially in oral opening submission. This can transform what might otherwise be dry technical and difficult to understand reports into a comprehensible submission. Could you please share with us some of the advancements that you found particularly useful?

A:

You are absolutely correct about the benefits of the use of technology in making it easier for lawyers to present their cases more effectively in a pictorial or video form which of course naturally helps the judges in comprehending the disputes before them. However, this is only happening in the local courts. The Court of Appeal and the Federal Courts since November 2019 have been conducting hearings paperless in Sabah and Sarawak. What that entails is simply that documents referred to from the records of appeal by counsel are accessed via the virtual files through the monitors on the bench. Submissions are accessed generally through the iPads of each individual judge. There is no doubt that such manner of hearings (e-appellate hearings) will one day be implemented throughout the country. With such a paradigm shift, advocates must learn to adapt especially in preparing their submissions and the manner in which their submissions are presented to the judges. The first step which advocates must take is to learn and present their submissions using their iPads or tablets so that the judge and the advocate are on the same page so to speak. The manner or structure of the submissions must also change. Generally, in appellate hearings limited documents are referred to by advocates. Hence in terms of presentation of one's submission, those documents or exhibits should form part of the submissions (or hyperlink those exhibits to the submissions) so that there is no need for the judges to refer to the monitors which does not allow any markings to be made as opposed to the ability to make comments on documents stored on the iPads or tablets.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

Continue from page 11

03|

It is commonly agreed that successful advocacy requires keen sensitivity to the words and body language of witnesses and judges, and in some cases opposing counsel. For instance, lawyers can usually tell when a judge is getting impatient, but with videoconferencing or virtual hearing these subtle nuances will be lost in translation.

A:

As technology improves and also as lawyers gain more experience in virtual cases, I am confident that they will be able to detect subtle signs from witnesses, judges and arbitrators more acutely. There is certainly a strong case for advocacy training to incorporate virtual hearing and videoconferencing. I have mentioned two areas in my answer to the previous question where trainings are required.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

Continue from page 12

04|

In view of the challenging environment, recently in the UK, an entire trial for a Court of Protection case was conducted over Skype, to enable it to proceed without risking the health of any of the participants.[1] In Australia, the Supreme Court of New South Wales has directed that all hearings will be conducted using video or teleconference facilities.[2] In Singapore, as part of the safe distancing measure to safeguard the continuity of court operations and services, from March 30, all hearings in chambers will be conducted by video conference using Zoom or by way of written submissions for counsel.[3] In Malaysia, the Chief Registrar of the Federal Court issued a brief circular detailing the rules and procedures to activate online hearing via videoconference.[4]

A:

Videoconferencing and virtual hearing should first be considered for all short, interlocutory, or non-witness, applications. E-appellate hearings, for one, should be progressively extended. I must add that these technological deployments should also be piloted to allow the formulation of practice directions. Until the courts are fully equipped with video conferencing facilities to allow virtual hearings, one must make use of applications such as Zoom or Webex. Lawyers must acquire knowledge of such technology especially in the present challenging environment. Further, arbitration may be a practical alternative to the challenges and delays that will likely be faced in court litigation, either during the pandemic or later as the backlog in cases causes its own delays.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

Continue from page 13

05|

The technology conundrum: embracing technological advancements such as online court and virtual hearing for arbitration and preserving access to justice and rule of law. Many have expressed cautions worrying that video conference and virtual hearing will result in procedural impropriety or deprive a party of an equal and proper opportunity to be heard. These are indeed the main grounds to appeal against a court decision or set aside an arbitral award.

A:

We must all work together to develop the protocols needed to address challenges ahead to ensure access to justice and observe the rule of natural justice. The proper measures are also essential to "safe-distance" any appeal on procedural irregularities for both court decisions and arbitral awards. Several institutes and arbitral institutions have issued guidelines seeking to provide parties to existing and future disputes a guide for conducting proceedings in any circumstance where parties to the dispute are unable to meet physically:

- The Chartered Institute of Arbitrators offers a Guidance Note on Remote Dispute Resolution Proceedings.
- The Korean Commercial Arbitration Board (KCAB) issued the Seoul Protocol on Video Conferencing in International Arbitration.
- The International Chamber of Commerce issued ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

Continue from page 14

06|

Having been involved in the transformation for over a decade, do you have any parting advice to the legal profession?

A:

When we started this process in 2007 under the tutelage of the former Chief Justice, Tan Sri Richard Malanjum, the aim was to turn the manual system of the courts into a fully digital system which will make access to justice more meaningful. We met with many challenges, first of which was the reluctance to embrace the transformation. I encountered quite a number of lawyers who blatantly refused to accept such changes. But we persisted by doing road shows at all the major towns in East Malaysia to sell our vision by explaining how embracing such transformation, the legal profession will become more efficient and more importantly, if we don't embrace it we will be left behind. Fortunately we succeeded and the very same lawyers who had refused to accept the change had told me recently that they are grateful that the Judiciary in Sabah and Sarawak had persisted with the change and they cannot now practice without such technology.

Our motto then in 2007 was "the future is here" and it should remain so as it is to remind ourselves that we must be proactive always. The use of AI by the legal profession is as sure as the sun sets tonight and rises tomorrow morning. AI machines will make the legal profession more efficient. The mundane task for due diligence by lawyers can, with the use of AI machines reduce the time involved tremendously and more importantly give more accurate analysis as there will be absence of human errors and frailty. Predictive technology (a software which forecasts litigation outcomes) is already in the market and the legal profession, especially the younger lawyers, must now come to the fore, learn and embrace the change which is happening now. Casetext's CARA AI claims that if you upload your brief to its platform, the result will quickly and easily provide litigators with the answers to their research questions.

THE FUTURE OF COURTS AND ARBITRATION HEARINGS

Continue from page 15

Similarly, the Judiciary has taken the "baby step" in using AI in data sentencing with the primary aim to achieve consistency in sentencing, a scenario which society desires. There is no doubt in my mind that this is a prelude to more to come. Prior to my retirement, I had started work on a design for an AI application to give tentative guidelines on damages to be awarded in accident cases. The indicative damages to be awarded will form the foundation for parties to commence negotiation to settle the disputes. There is no doubt in my view that more cases of such nature will be settled without the necessity of a trial.

My final words are simply this. A lawyer with technological knowledge would in the future be more employable than another lawyer without such knowledge. My best wishes to you and thank you for giving me this opportunity to share my views on this area of legal practice.

***Director of Chartered Institute of Arbitrators, Malaysia Branch. Partner of International Arbitration Practice, Lee Hishammuddin Allen & Gledhill (wwc@lh-ag.com). A previous version of the interview script was published on the Current Law Journal, [2020] 1 LNS(A) xxxii 1.**

Endnotes:

[1] https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article.
[2] http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx.
[3] https://www.supremecourt.gov.sg/docs/default-source/module-document/registrarcircular/rc-3-2020---information-on-measures-and-other-matters-relating-to-covid-19-for-court-users-and-visitors-to-the-supreme-court.pdf.
[4] https://www.malaysianbar.org.my/document/members/circulars/2020---2024/2020&rid=39062.
[5] http://www.kcabinternational.or.kr/.
[5] https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf.

YMG Webinar "Developing your career in arbitration – How to become an accredited arbitrator and get appointed as an arbitrator"

By Lim Tse Wei

On 5 June 2020, the Malaysian chapter of the Chartered Institute of Arbitrators Young Members Group held a webinar "Developing your career in arbitration – How to become an accredited arbitrator and get appointed as an arbitrator". Continuing its efforts to reach out to arbitrator aspirants, this webinar addressed how individuals should and can kickstart their careers as young arbitrators. The conversation also sought to bridge an oft-perceived gap in industry conversations on career development by inviting input from a diverse panel comprising Malaysian arbitrators of a wide range of seniorities, arbitration institutions, and international practitioners.

The panel featured Lam Wai Loon (Partner, Harold & Lam Partnership), Ooi Huey Miin (Partner, Raja, Darryl & Loh), Michelle Sunita Kumar (Deputy Head of Legal, AIAC), and Sharon Chong (Partner, Skrine). Lim Tse Wei (Herbert Smith Freehills) moderated the discussions.

The discussions started with an overview of the process of becoming an accredited arbitrator as well with audience members being informed of the multitude of routes and certifications available for individuals to become accredited arbitrators. A point of interest was the differing importance that each panel member placed on the need for arbitrators to be accredited. An interesting debate ensued seeking to define the common qualities of successful arbitrators and the extent to which arbitrator certifications provide adequate assurance that these qualities are met. This generated an interesting proposal that arbitration institutions should consider placing less importance on arbitrator certifications in their appointment criteria to manage these criticisms.

Webinar "Developing your career in arbitration – How to become an accredited arbitrator and get appointed as an arbitrator"

Continue from page 17

A further point of interest were the impressive statistics of the AIAC on the appointment of young arbitrators, ie. under 40 years of age. The figures reflected the Malaysian institution's commitment to developing the talent pool of young arbitrators within the Southeast Asia region. The session ended with a canvassing of the personal journeys of the panellists in their arbitrator career and their top tips in accelerating one's career as an arbitrator.

The session proved to be widely successful with it attracting a wide-ranging audience across Asia and Europe, which demonstrates the topical nature of such discussions and need to continue this conversation in the near future.

MEET OUR YMG COMMITTEE

Loshini Ramarmuty

Raja Kumar

Tatvaruban Subramaniam

James Ding

Serene Hiew

Janice Tay

Lim Tse Wei

Shaun Tan

Case Update:
MASTER MULIA SDN BHD v SIGUR RUS SDN BHD [CIVIL APPEAL NOS. 02(F)-33-05/2018(W)

FEDERAL COURT
MOHD ZAWAWI SALLEH, VERNON ONG LAM KIAT, ABDUL RAHMAN SEBLI, ZALEHA YUSOF FCJ, BADARIAH SAHAMID JCA

27 August 2020

The appellant, Master Mulia, and the respondent, Sigur Rus are parties to a Charter party Agreement (CPA). The appellant hired out its vessel to the respondent for undersea pipelines installation works in the high seas. A pipeline installation arm called Stinger Hitch was installed on the vessel for the purpose of conducting the works. Under the CPA, the original period of hire was from 23.10.2012 to 21.11.2012. The period of hire was extended twice until the final date on 26.01.2013; after which the respondent will be liable to pay a certain daily sum until the redelivery of the vessel. As the Stinger Hitch was damaged on 09.01.2013, the respondent suspended works and carried temporary repairs to the damaged Stinger Hitch to enable it to complete the remaining works. The charter party was paid until 14.02.2013 and the vessel was redelivered to the appellant on 05.03.2013, a period of 37 days after the due delivery date. The appellant claimed that the respondent was obliged to pay daily charter hire for the charter period from 15.02.2013 to 22.05.2013, being the date after the vessel had been dry-docked for reinstatement works, in the sum of USD 3,968,279.00. The appellant also claimed costs of repairs and/or reinstatement of the vessel, usage of consumables, medicine, tools, communications and equipment of the vessel during the charter period and extension of the validity of the Bank Guarantee for the extended period of charter.

The disputes between the parties were firstly referred to arbitration, where an Award was decided in the favour of the appellant. The respondent then applied o the High Court to set aside the Award. The respondent relied on two grounds namely: (i) that the Award was issued in breach of the rules of natural justice in contrary to ss 37(1)(b)(ii) and 37(2)(b); and (ii) that the Award went beyond the scope of submission to arbitration under ss 37(1)(a)(iv) of the AA 2005. Notwithstanding the finding that the Award was in breach of natural justice, the High Court affirmed the Award on the ground that the respondent had failed to show that it suffered actual or real prejudice arising from the breach of the rules of natural justice.

Case Update:
MASTER MULIA SDN BHD v SIGUR RUS SDN BHD

The respondent again, appealed to the Court of Appeal, where the appeal was decided in favour of the respondent and the Award was set aside for breaching the rules of natural justice. The Court found that the arbitrator had failed to indicate two pieces of critical and material evidence to the parties, until the Award was rendered, by which time it was too late. The material evidence here related to the cause of damage to the Stinger Hitch, whereby the appellant had chosen to frame the cause as one grounded in negligence. This submission invited response submissions from the respondent, where the respondent denied the claims and required the appellant to prove its claims that the respondent's negligent act in operating and/or handling the Stinger Hitch had caused the structural alteration and modification to the vessel. The Court of Appeal held that the evidence in question related to the very heart of the dispute between the parties and, without the evidence, the arbitrator could not have been in the position to make the orders for monetary compensation in the form of payment for the extended period of charter hire and the costs of repair and reinstatement that were mentioned at the outset of the judgment. Therefore, the Award was liable to be set aside under ss 37(1)(a) of the AA 2005.

The appellant sought leave to appeal to the Federal Court and the Federal Court allowed leave to appeal to the Federal Court on following questions of law:

1. Whether the High Court in exercising its jurisdiction under s 37 of the AA 2005 is bound to set aside an arbitration award if any of the grounds of challenge under ss 37(1) or (2) is established?

2. Whether the High Court in exercising its jurisdiction under s 37 of the AA 2005 is obliged to set aside the whole Award if the plaintiff has succeeded only one out of the three principal issues before the Arbitrator?

3. Where an application is made jointly under s 37 and s 42 of the AA 2005 to set aside an Award and only part of the Award is found to be bad in law, whether the Court would be entitled under ss 42(2) to set aside the Award in part or to vary it accordingly?

4. Where a breach of natural justice is justified to set aside an arbitration award under ss 37(1)(b)(ii) and ss 37(2)(b), is it sufficient for the plaintiff to prove the alleged breach of natural justice without also establishing that the alleged breach would have made a difference to the outcome of the case?

Case Update:
MASTER MULIA SDN BHD v SIGUR RUS SDN BHD

Held, dismissing the appeal with costs, thereby affirming the decision of the Court of Appeal.

The guiding principles on the exercise of residual discretion to set aside an arbitral Award on the ground of breach of natural justice is as follows:

- The court must consider (a) which rule of natural justice was breached; (b) how it was breached; and (c) the connection between the breach and the making of the award;
- The court must consider the seriousness of the breach and whether the breach was material to the outcome of the arbitral proceeding;
- Discretion will be refused if the breach was immaterial or was not likely to affect the outcome;
- The court may refuse to set aside the award even if there is a serious breach if the breach would not have any real impact on the result and the arbitral tribunal would not have reached a different outcome;
- The award may be set aside where the breach is significant and might have affected the outcome;
- In some instances, the significance of the beach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
- The materiality of the breach and the possible effect on the outcome are relevant factors to be considered by the Court, but they are not the determinant factors;
- Whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an Award for breach of the rules of natural justice.

The Singapore position is not applicable in Malaysia as ss 37(1)(b)(ii) and 37(2)(b)(ii) do not require prejudice to be established. Instead s 37 mirrors the setting aside provision on the NZ Act. The question of whether an award ought to be set aside for breach of natural justice does not turn on prejudice. It turns instead, on amongst other things, the significance of the breach and the extent to which it might or may have affected the outcome of the arbitration. It is not necessary to show that the breach did in fact affect the outcome. Materiality of the breach and the possible effect on the outcome are treated as relevant factors going to the exercise of the discretion. Prejudice, if it can be shown, would be material. However, no single factor is decisive or necessary for an award to be set aside. Hence, the threshold under s 37 is very low compared to that under s 42 of the AA 2005.

Case Update:
MASTER MULIA SDN BHD v SIGUR RUS SDN BHD

There is no basis on which it can be said that the onus is on the applicant to show that the consequences of the breach are sufficiently material to warrant setting aside an award. The ordinary burden on an applicant cannot be elevated to a legal requirement to show that the outcome would be different had the breach not occurred.

Although the Court's discretion to set aside an award under s 37(1) is unfettered, it must be exercised with regard to the policies and objectives underpinning the AA 2005. The Federal Court held that the High Court in exercising its jurisdiction under s 37 is not bound to set aside an arbitration award merely because any of the grounds of challenge under ss 37(1) or (2) is made out by a party. The Court also held that the High Court is not obliged under s 37 to set aside the whole Award if only one of the three issues is made out. Hence, Questions 1 and 2 are answered in the negative.

In this case, it was held that the Court of Appeal was correct in setting aside the entire award on the basis that the breach had material and causative effect on the outcome of the arbitration. This was due to the fact that the Court of Appeal found that the two pieces of evidence were relevant and material to the issue of causation of the damage to the Stinger Hitch, and the evidence in question were considered by the arbitrator without informing the parties until the Award was rendered. As such, the case which had been submitted for arbitration had been redefined by the arbitrator without giving the parties the opportunity to present their responses.

The Federal Court declined to deal with Question 3 as it was premised on the assumption that only one part of the Award is bad in law.

Question 4 has been answered in the foregoing paragraphs on the guiding principles on the exercise of discretion. The Court held that a mere finding of a breach of the rules of natural justice is in itself insufficient. It must be shown that the breach was significant or serious such as to have an impact on the outcome of the arbitration. Prejudice is a relevant consideration, not a requirement.

**IGAB would like to express its appreciation to Ms. Nur Atiqah binti Ahmad Ariff from Messrs Harold & Lam Partnership for the above case summary.

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