LHAG INSIGHTS

INTERNATIONAL ARBITRATION

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COURT OF APPEAL IDENTIFIES FIVE SOURCES FOR DETERMINING ARBITRAL JURISDICTION, REAFFIRMS NARROW APPROACH UNDER S.37 OF THE ARBITRATION ACT 2005, AND CLARIFIES TIMELINE FOR SUBMISSION OF DRAFT AWARD UNDER THE 2018 AIAC RULES

by Lim Chee Yong & Stephanie Lim Shu Juin

Recently, the Court of Appeal ("**COA**") in Bellworth Developments Sdn. Bhd. ("**Bellworth**") v Setiakon Builders Sdn. Bhd. ("**Setiakon**") (Civil Appeals No. W-02(C)(A)-1212-07/2024 and W-02(C)(A)-1214-07/2024) referred to five sources in determining a Tribunal's jurisdiction. The COA also reaffirmed the well-established position that an aggrieved party is not permitted to re-litigate the merits of the Award under the guise of a setting aside application under s. 37 of the Arbitration Act 2005 ("**AA**").

Additionally, the COA clarified that, under the 2018 Asian International Arbitration Centre ("**AIAC**") Arbitration Rules ("**2018 AIAC Rules**"), the timeline for submission of the

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draft award for technical review commences on the date when the Tribunal declares the closure of proceedings, not the date when proceedings are closed. The COA further clarified that procedural timelines under the 2018 AIAC Rules for submission of the draft award are merely directory, not mandatory. Accordingly, non-compliance with the procedural timelines for submission of the draft award does not nullify or invalidate the award, nor does it strip the Tribunal of its jurisdiction.

Factual Background

Bellworth, the developer of a project comprising several serviced apartment blocks with podium facilities ("**Project**"), appointed Setiakon to carry out and complete the superstructure works for the Project ("**Works**").[1] During the course of the Works, Setiakon submitted several extension of time ("**EOT**") applications, which were only partially granted. Thereafter, the Architect issued a Certificate of Non-Completion ("**CNC**"), and Bellworth imposed liquidated and ascertained damages ("**LAD**") against Setiakon.[2]

Disputes arose between the parties in relation to, among others, the EOT certification, the validity of the CNC, and the LAD imposed. Setiakon contended, among others, that the CNC was invalidly issued on the basis that there were EOT applications pending the Architect's determination at the time of its issuance. Setiakon referred the disputes to arbitration before a sole arbitrator ("**Arbitrator**").[3] The arbitration was governed by the 2018 AIAC Rules.

The Arbitrator, vide letter dated 28.2.2023, declared the arbitral proceedings to be closed as of 19.1.2023.[4] On 19.4.2023, the Arbitrator submitted the draft award to the AIAC for technical review pursuant to Rule 12(2) of the 2018 AIAC Rules. The final award was subsequently delivered ("**Award**"). Among others, the Arbitrator declared the CNC to be invalid and unlawful, and awarded Setiakon the sum of RM11,452,910.00 for unpaid work done, together with interest and costs.[5]

Setiakon applied to the High Court ("**HC**") to enforce the Award, whilst Bellworth applied to the HC to set aside the Award. The learned HC Judge dismissed the setting aside application and allowed the enforcement application.[6] Dissatisfied with the HC's decision, Bellworth filed two appeals to the COA, both of which were dismissed on the following grounds.

Ground 1: Rule 12(2) Of Part I Of The 2018 AIAC Rules Is Directory, Not Mandatory

Bellworth alleged that the Arbitrator failed to comply with Rule 12(2) of the 2018 AIAC Rules, as the draft award was submitted one day beyond the prescribed timeline. Bellworth contended that this non-compliance stripped the Arbitrator of his jurisdiction.

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[1] Court of Appeal grounds of judgment at [6] and [7].
[2] Court of Appeal grounds of judgment at [11] to [14].
[3] Court of Appeal grounds of judgment at [18].
[4] Court of Appeal grounds of judgment at [38].
[5] Court of Appeal grounds of judgment at [19].
[6] Court of Appeal grounds of judgment at [20] to [23].

For context, Rule 12(2) of Part I of the 2018 AIAC Rules provides –

> *"The arbitral tribunal shall, before signing the award, submit its draft of the final award (the "**Draft Final Award**"), to the Director within three months for a technical review. The time limit shall start to run from the date when the arbitral tribunal declares the proceedings closed pursuant to Rule 12(1)."*[7] [our emphasis]

The COA held that, based on a literal interpretation of Rule 12(2) of Part I of the 2018 AIAC Rules, the time for submission of the draft award for the AIAC's technical review starts to run on the "*date when the arbitral tribunal declares*" (i.e., 28.2.2023), and not the "*date declared by the arbitral tribunal*" (i. e., 19.1.2023). As such, the draft award submitted on 19.4.2023 was well within the 3-month timeline.[8]

Alternatively, even assuming there was non-compliance with Rule 12(2) of the 2018 AIAC Rules, the COA held that the word "*shall*" therein "o*ught properly to be construed as directory rather than mandatory*". The COA reasoned that the provision is "*administrative and procedural in nature*", particularly when read together with Article 32 of Part II of the 2018 AIAC Rules, which expressly provides for waiver in the event of non-compliance.[9] Furthermore, the COA observed that the 2018 AIAC Rules do not stipulate any sanctions for non-compliance or prescribe that an award delivered outside the prescribed period is null and void or unenforceable.[10] Accordingly, the procedural timelines are "*not intended to operate with rigid mandatory effect so as to invalidate the arbitral process in the absence of timely objection*".[11]

On this note, the COA emphasised that procedural irregularities which do not occasion substantial injustice or prejudice ought not to defeat the substantive determination of disputes, particularly in arbitration where party autonomy and finality are fundamental considerations.[12]

Ground 2: Architect's 19.6.2015 Letter Not A "New Difference" As It Was Within The Scope Of Issues Submitted To Arbitration"

Bellworth further alleged that the Arbitrator had decided on a "new difference" that was not raised by the parties in the arbitration proceedings. Specifically, Bellworth contended that Setiakon's case in the arbitration revolved solely around the Architect's failure to fairly and properly assess Setiakon's EOT entitlement, and not the legal consequences of the Architect's letter dated 19.6.2015, which the Arbitrator relied upon in finding the CNC invalid.

In assessing Bellworth's complaint, the COA referred to the Singapore Court of Appeal's ("**SG COA**") findings in ***CJA v CIZ***,[13] which set out a two-stage inquiry for determining whether an award should be set aside for

[7] Under the 2021, 2023 and 2026 iteration of the AIAC Rules, the corresponding provision for submission of the draft award for technical review stipulates that the time starts "*from the **date of the closure of proceedings***" (our emphasis). Parties in arbitrations governed by the AIAC Rules should take note of this distinction.
[8] Court of Appeal grounds of judgment at [41].
[9] Court of Appeal grounds of judgment at [42].
[10] Court of Appeal grounds of judgment at [45].
[11] Court of Appeal grounds of judgment at [46].
[12] Court of Appeal grounds of judgment at [48].
[13] ***CJA v CIZ*** [2022] 2 SLR 557 at [37] – [38], [75] – [76].

excess of jurisdiction: (a) first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the award involved such matters, or a new difference falling outside the submitted scope. In identifying what matters fell within the scope of submission, the COA referred to the SG COA case of ***CDM & Another v CDP***[14] which identified five sources: the parties' pleadings, agreed list of issues, opening statements, evidence adduced, and closing submissions. This approach mirrors the COA's earlier position in ***Hartela Contractors Ltd. v Hartecon JV Sdn Bhd & Anor***.[15]

Having reviewed the pleadings, oral and documentary evidence adduced, and the closing submissions in the arbitration, the COA found that there was no "new difference", and that Bellworth was not deprived of the opportunity to address the issue. Rather, the COA found that Bellworth had failed at the material time to recognise and/or utilise the opportunity to fully advance its legal arguments. Accordingly, Bellworth "*cannot now with the benefit of hindsight overcome its predicament in the guise that the Arbitrator embarked on a new difference*".[16]

Ground 3: Setting Aside Under AA Limited To Supervisory Oversight, Excludes Appeal On The Merits

Bellworth also contended that the Arbitrator's reasoning in finding the CNC invalid was untenable on the grounds that it is illogical, inconsistent and/or defective.

The COA found this to be an impermissible attempt by Bellworth to mount an appeal on the merits of the Award under the guise of a setting aside application.[17] In dismissing Bellworth's contention, the COA reaffirmed the minimal curial intervention approach as reflected in the Federal Court cases of ***Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd***,[18] ***Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd & Another Appeal***,[19] and ***Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor***.[20]

Conclusion

The COA's decision underscores **three practical points** of significance for parties to arbitration. First, a tribunal's jurisdiction is circumscribed by five sources: the parties' pleadings, agreed list of issues, opening statements, evidence adduced, and closing submissions. Parties must therefore ensure that all issues are comprehensively pleaded and all arguments fully exhausted during the arbitration itself, or risk being precluded from raising them thereafter. Second, procedural timelines under the 2018 AIAC Rules for submission of the draft award are directory, not mandatory; non-compliance does not strip the Tribunal of its jurisdiction or invalidate the Award, particularly where no timely objection is raised and no prejudice is occasioned. Third, consistent with the principle of minimal curial intervention enshrined in the AA, setting aside applications remain a

[14] ***CDM & Another v CDP*** [2021] 2 SLR 235 at [16], [18].
[15] ***Hartela Contractors Ltd. v Hartecon JV Sdn Bhd & Anor*** [1999] 2 CLJ 788 at [42].
[16] Court of Appeal grounds of judgment at [61] – [62].
[17] Court of Appeal grounds of judgment at [67].
[18] ***Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*** [2020] 6 MLRA 61 at [54].
[19] ***Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal*** [2020] 6 MLRA 124 at [10].
[20] ***Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*** [2019] 2 MLJ 413.

narrow and exceptional remedy. They are not, and must never be treated as, a vehicle to re-open or re-litigate the merits of an award.

Our consultant, Dato' Nitin Nadkarni was instructed as lead counsel at the Court of Appeal and successfully defended the Award obtained by Setiakon Builders Sdn. Bhd., with the assistance of Partner, Lim Chee Yong and Associate, Stephanie Lim Shu Juin.

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