



# Setting Aside of Arbitration Award : Timeline for Delivery of Award – Procedural or Jurisdictional?

**RKT NUSANTARA SDN. BHD. v KEN GROUTING SDN. BHD. & ANOTHER APPEAL**  
**[W-02(C)(A)-1560-07/2018]**  
**[W-02(C)(A)-1562-07/2018]**

## **ISSUES**

Where the agreed arbitration rules provide for a specific timeline for delivery of the arbitration award, will such provision be construed as a procedural provision or will the failure to adhere to such timeline affects the jurisdiction of the arbitrator?

What if such arbitration rules also allow the arbitrator to *“unilaterally extend time upon notification to the parties”*? Will the inclusion of a unilateral extension of time procedure lean towards construing such provisions as mere procedures?

Even if the timeline for delivery of arbitration award provision is construed to have effect on the jurisdiction of the arbitrator, will the right to object be waived if parties failed to *“raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered”*?

These questions were answered in the recent Court of Appeal case of **RKT Nusantara Sdn. Bhd. v Ken Grouting Sdn. Bhd. & Another Appeal** [W-02(C)(A)-1560-07/2018] and [W-02(C)(A)-1562-07/2018].

## **BRIEF FACTS**

The brief facts of the case are as follows:-

- (a) By a Letter of Acceptance dated 11.07.2007, the Respondent, RKT Nusantara Sdn Bhd (“**RKT**”) appointed the Appellant, Ken Grouting Sdn. Bhd. (“**KEN**”) as the contractor for the *“construction and completion of substructure works for a 10 storey commercial building along Jalan Raja Abdullah, Kuala Lumpur”* (“**Works**”).
- (b) The building contract was based on the Pertubuhan Akitik Malaysia (“**PAM**”) Standard Form 1998 (Private Edition without Quantities) [**Building Contract**], which includes the Articles and Agreement and Conditions of Building Contract (Private Edition Without Quantities) (1998) issued by PAM (“**Conditions of Contract**”).
- (c) The arbitration agreement, as contained in the Conditions of Contract, adopted the PAM Arbitration Rules [2003 Edition] (“**PAM Rules**”).
- (d) Dispute arose between parties relating to, amongst others, deductions of liquidated & ascertained damages (“**LAD**”) by RKT following allegations of delay on the part of KEN. KEN challenged the deductions of LAD and commenced arbitration via its Notice of Arbitration dated 26.08.2009.
- (e) On 21.12.2009, the President of PAM appointed the arbitrator as the sole arbitrator pursuant to Clause 34.2 of the Conditions of Contract and in accordance with the PAM Rules. *“Pursuant to Clause 34.3 of the Conditions of Contract, the Arbitrator shall, upon appointment conduct the arbitration in accordance with the provisions of the Act and the PAM Rules”*.



- (f) Article 21.3 of the PAM Rules provides that the *“Arbitrator shall deliver his award as soon as practical but not later than 3 months from his receipt of the last closing statement from the parties”*.
- (g) Article 21.3 also had *“an in-built extension mechanism to cater for the eventuality where the 3 month time-line may not be sufficient for the preparation of an award”* and should the arbitrator require more time for preparation of the award, *“such time frame for delivery of the award may be extended by notification to the parties”*.
- (h) In this case, *“the last closing statement from the parties was RKT’s submission in reply dated 29 January 2016. As such, pursuant to Article 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award was 26 April 2016”*.
- (i) The arbitrator did not issue any notice to extend time for delivery of the arbitration award and thus the deadline for delivery of award on 26.04.2016 was not extended.
- (j) However, the arbitrator only delivered the award on 10.03.2017 (**“Original Award”**) where *“RKT was ordered to pay KEN the sum of RM710,614.25 and interest in the sum of RM198,099.58 failing which interest of 5% will be added to the sum of RM908,713.83. The arbitrator also declared himself to be “functus officio.”*
- (k) Following the above, RKT requested for certain corrections to be made to the Original Award pursuant to Article 23 of the PAM Rules / section 35(1)(a) of the Arbitration Act 2005 (**“AA 2005”**) but reserved its rights to object to the delivery of the Original Award beyond the timeline under the PAM Rules. Ken objected to RKT’s request for corrections.
- (l) Notwithstanding KEN’s objections, the arbitrator issued an Amended Award on 07.04.2017 directing *“RKT to pay the reduced sum of RM586,721.25 with interest in the sum of RM198,099.58 failing which interest rate of 5% per annum shall be added to the amount of RM586,721.25”* (**“Amended Award”**). The arbitrator *“again declared himself functus officio.”*

## **HIGH COURT**

Both parties were unhappy with the outcome and consequently, filed the following applications at the High Court:-

- (i) RKT filed *“Originating Summons No. WA-24C (ARB)-13-04/2017 (**“OS13”**) to set aside the Original Award (and the Amended Award). RKT’s application was based on, inter alia, s. 37(1)(a)(vi) of the Act”*.
- (ii) KEN filed *“Originating Summons No. WA-24C (ARB)-18-05/2017 (**“OS18”**) to set aside the Amended Award and to reinstate the Original Award. KEN’s application was based on ss. 36(2), 37(1)(a)(iv-v), 37(2)(b)(ii) and/or s.42 of the Act”*.

On 09.07.2018, the High Court allowed OS 13 and set aside the Original Award / Amended Award *“pursuant to s. 37 (1) (a) (vi) of the Act on the basis that **“the arbitral procedure was not in accordance with the agreement of the parties”**.”* Consequently, OS 18 was dismissed.

In relation thereto, the High Court found that *“by failing to deliver the Original Award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline as provided for before delivering the Original Award on 10 March 2017, **the Original Award was delivered “without mandate or authority” and was therefore in excess of jurisdiction**”*

(Emphasis added).



## **COURT OF APPEAL**

Dissatisfied, KEN appealed to the Court of Appeal the High Court's decisions in allowing OS 13 ("Appeal 1560") and dismissing OS 18 ("Appeal 1562"). RKT has a cross-appeal in Appeal 1560.

The Court of Appeal noted that the questions of importance in these Appeals are:-

*"[119] The primary question of importance here is whether the timeline for delivery of an arbitration award which is stipulated in the rules of arbitration is a procedural provision or whether it is jurisdictional. And if the timeline is determined to be jurisdictional, then the next question is whether there could be any waiver.*

*[120] Lastly, whether the arbitrator ceases to have the mandate and exceeds his jurisdiction by delivering the Original Award in breach of the timeline which is stipulated in the rules of arbitration."*

## **PROCEDURAL OR JURISDICTIONAL**

The crux of KEN's submissions on this issue "was that Article 21.3 is procedural and not jurisdictional because of the arbitrator's ability to extend time by giving notice to the parties." It is worth reiterating that the arbitrator can unilaterally exercise the built-in extension of time mechanism for delivery of the award without the need for parties' agreement.

By drawing analogy to "judicial review proceedings where the "jurisdiction" of the court is predicated on a fixed timeline, which is subject to being extended in a fit and proper case", the Court of Appeal found that time period prescribed in the arbitration rules "affects the arbitrator's mandate and therefore, his jurisdiction":-

*"[126] Consequently, applying the logic of that principle to the instant case, we do not agree that the mere presence of an in-built contractual mechanism per Article 21.3 of the PAM Rules, which enables the arbitrator to unilaterally extend time derogates from the arbitrator's duty to deliver the award within the time period as prescribed in Article 21.3 and **which necessarily and fundamentally affects the arbitrator's mandate and therefore, his jurisdiction...***

*[128] In our view, the timeline in Article 21.3 is a mandate to the arbitrator that he is to deliver the award by a certain date and if requires more time, then he has to extend time by notifying the parties. **The arbitrator's mandate is not a matter of mere procedure. Rather, the arbitrator's jurisdiction springs from his mandate. Once the mandate ceases, then the jurisdiction also ceased.***

[Emphasis added]

Consequently, the Court of Appeal rejected KEN's submissions' that the timeline provisions are merely procedural.

*"[134] We therefore reject the suggestion that Article 21.3 is merely procedural. On the contrary, we find that it is inherently and fundamentally, jurisdictional."*

## **MANDATE AND JURISDICTION**

On this issue, the Court of Appeal, by reference to the Singaporean High Court case of **Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd and others** [2010] SGHC 20; [2010] SLR 625 ("Ting's case"), held that once the time limit or deadline lapses, the arbitrator "no longer has the requisite jurisdiction to make a valid award":-



*“[135] The principle that may be culled from Ting’s case which we find relevant and applicable to the present case, is that where the rules of arbitration stipulate that an award is to be delivered by a certain date, then if the time limit or deadline is reached, the authority or mandate of the arbitrator is at an end. **Simply put, the authority or mandate of the arbitrator dissipates, and he no longer has the requisite jurisdiction to make a valid award.**”*

[Emphasis added]

The Court of Appeal recognised that the arbitrator’s mandate and jurisdiction may be resurrected if time is extended pursuant to **section 46 of the AA 2005**. However, to trigger such extension, the arbitrator or the parties will have to make an application to that effect and the Court cannot on its own volition extend time pursuant to section 46 of the AA 2005:-

*“[146] For completeness, we may also mention that s.46 of the Act gives the Court power to extend time. KEN contends that the Judge ought to have extended time.*

*[147] It is relevant to note that there was not even an application before the Judge for her to consider and to exercise her powers. Of course, this is on the assumption that there are merits for such an application. Thus, if an application under s. 46 of the Act had been made and the court had granted an extension of time then the arbitrator’s mandate and jurisdiction would have been resurrected, but not otherwise.*

*...The court may not extend time on its own volition under s.46 of the Act. The parties or the arbitrator have to make an application for purposes of s.46 of the Act. Ting’s case provides useful guidance as to the considerations which are relevant to an application for extension of time.”*

## **WAIVER**

It is KEN’s case that “RKT had “waived” their right to mount any challenge” on the late delivery of the Original Award in view of “RKT’s conduct in not raising any objection before the Original Award was delivered on 10 March 2017”.

In relation thereto, KEN contended that “RKT is deemed to have waived its right to object” under **Article 20.1 of the PAM Rules** and/or **section 7 of the AA 2005**. For completion, Article 20.1 of the PAM Rules and section 7 of the AA 2005 provide as follows:-

### **“Article 20 – Waiver of Rules**

*20.1 A party who knows that any provisions of, or requirement under these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance shall be deemed to have waived his right to object”.*

### **“ 7 Waiver of right to object**

*A party who knows-*

*(a) of any provision of this Act from which the parties may derogate; or*

*(b) that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.”*



In relation to RKT not having raised any objection after the deadline for delivery of award until the Original Award was eventually delivered, the Court of Appeal held that the parties are not under any obligations to monitor the timeline nor are they under any duty to remind or prompt the arbitrator to keep to the timeline:-

*“[141] We will now deal with KEN’s suggestion that RKT should have raised objection before the delivery of the Original Award. The first point we make is that parties to an arbitration are not under duty to monitor the timelines or to remind or prompt the arbitrator about the timeline...”*

*[142] Hence, in a time-sensitive arbitration, the proverbial guillotine falls once the deadline has passed and time has not been extended...”*

On the issue of waiver, the Court of Appeal held that objections following the cessation of the arbitrator’s mandate and jurisdiction, arising from failure to deliver the arbitration award within the agreed timeline, cannot be waived:-

*“[143] On the issue of waiver, we take the view that whilst generally there can be a waiver of the matters or content of what is deliberated or what transpires in the arbitration proceedings, there can be no waiver on the part of the parties to the arbitration with respect to the cessation of the arbitrator’s mandate and jurisdiction in relation to the obligation to deliver the award on time or within an extended period. Hence, RKT’s silence or inaction prior to the Original Award being issued is irrelevant.”*

## **COURT OF APPEAL’S DECISION**

In the upshot, the Court of Appeal held that the Original Award was delivered without mandate or authority and therefore was in excess of the arbitrator’s jurisdiction:-

*“[160] In the result, we agree with the Judge that by failing to deliver the Original Award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline as provided for, before delivering the Original Award on 10 March 2017 (about 13 months later), the Original Award was delivered “without mandate or authority” and is therefore in excess of the arbitrator’s jurisdiction. The Original Award (and by extension the Amended Award) was properly and validly set aside pursuant to s. 37(1) (a)(vi) of the Act.”*

Consequently, the Court of Appeal dismissed both Appeal 1560 and 1562. Following dismissal of Appeal 1560, the cross-appeal thereunder was also dismissed.

## **MOVING FORWARD**

Following the decision, it is important to note that:-

- (a) The arbitrator ceases to have authority or mandate as arbitrator, should the arbitrator fails to adhere to the agreed timeline for delivery of the arbitration award (or any extension thereto). Consequently, the arbitrator will no longer have the requisite jurisdiction to make a valid award.
- (b) An award made under such circumstances are liable to be set aside pursuant to section 37(1)(a)(vi) of the AA 2005 on the basis that *“the arbitral procedure was not in accordance with the agreement of the parties”*.



- (c) Parties to the arbitration are not under any obligations to monitor the timeline nor are they under any duty to remind or prompt the arbitrator to keep to the timeline.
- (d) Insofar as an application to set aside pursuant to section 37(1)(a)(vi) of the AA 2005 is concerned, there is no issue of waiver even if objection to the late delivery of award was only made after such award was delivered, but not at the earliest opportunity.
- (e) The Court may not on its own volition extend time for delivery of the arbitration award under section 46 of the AA 2005 if there is no application from the arbitrator or the parties.

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