Setting Aside of Arbitration Award : Duty to Provide a Reasoned Award and to Consider Parties' Submissions

KEBABANGAN PETROLEUM OPERATING COMPANY SDN BHD V MALAYSIA MARINE AND HEAVY ENGINEERING SDN BHD [W-02(C)(A)-1836-09/2022]

30th May 2025

ISSUES

Article 34(3) of the UNCITRAL Arbitration Rules, which is part of the Asian International Arbitration Centre ("**AIAC**") Rules, requires the Tribunal to "*state the reasons upon which the award is based*". Is the failure to provide a reasoned award a breach of natural justice or a failure to comply with the agreed procedures? Could an application to set aside an award be sustained on the ground of a failure to provide reasons, assuming the parties had agreed to adopt the UNCITRAL or AIAC Rules?

If on a reading of the award, it appears that the Tribunal had disregarded parties' submissions or without considering the merits of parties' submissions, would that tantamount to a breach of natural justice?

Whilst natural justice does not require the Tribunal to respond to all of parties' submissions, would the failure to address significant issues, which could have impacted the outcome of the award, constitute a breach of natural justice?

These questions were answered in the recent Court of Appeal case of **Kebabangan Petroleum Operating Company Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd [W-02(C)(A)-1836-09/2022]**.

BRIEF FACTS

The brief facts of the case are as follows:-

(a) In 2011, the Appellant ("**Kebabangan**") appointed Sime Darby Engineering Sdn Bhd as the contractor for the Fabrication of KBB Topsides ("**Contract**") and the Contract was then novated to the Respondent ("**MMHE**").

(b) Under the Contract, MMHE "*was required to supply 2" & below and 3" & above manual ball valves. The valves were to be procured from Mikuni (M) Sdn Bhd with OMB Valves S.p.A, of Italy as the manufacturer*".

(c) It is not disputed that the works under the Contract were completed in June 2014.

(d) Dispute arose sometime in 2016 when Kebabangan discovered that the manual valves were not OMB valves but were of unknown origin.

(e) In March 2019, the dispute was referred to arbitration where Kebabangan's case against MMHE were:-

(i) MMHE were obliged to procure OMB valves from Mikuni;

(ii) The manual valves supplied by MMHE were not OMB valves and are, in fact, of unknown origin; and

(iii) As a result of the foregoing, Kebabangan suffered loss and damage.

(f) Ultimately, the Arbitral Tribunal determined that the valves under the Contract had to be OMB valves and that MMHE, in breach of the Contract, delivered valves that were not OMB valves.

(g) In the Final Award dated 23.07.2021 ("**Final Award**"), the Tribunal awarded Kebabangan, amongst others, the following:-

(i) RM17,241,178.02 as damages for expenses incurred by Kebabangan for assessment, procurement and replacement of valves in the period 2016 to 2019 ("**Claim 1**"); and

(ii) RM9,820,770.00 as damages suffered by Kebabangan in having to procure 1365 valves and install 1454 valves in the future ("**Claim 2**").

(h) Kebabangan applied to enforce the Final Award and in response, MMHE applied to set aside the Final Award.

PROCEEDINGS BEFORE THE HIGH COURT

The High Court dismissed Kebabangan's enforcement application and allowed MMHE's application to set aside the Final Award. In so doing, the High Court found that:-

"(a) The Final Award was in breach of natural justice under s 37 of the Arbitration Act 2005 ("AA") on three counts in that the Tribunal failed to consider or make a finding on MMHE's arguments on:

(i) Quantification of Claim 1;

(ii) The issue of waiver, acquiescence and estoppel; and

(iii) Whether Kebabangan mitigated its losses.

(b) The Tribunal failed to make a finding and a reasoned award as envisaged by s 33(3) of the AA and Art 34(3) AIAC Rules 2018."

The Court of Appeal noted that the setting aside was predicated the Tribunal disregarding the opinion of the parties' experts as well as the submissions made on Claim 1. The High Court also found that there was a breach of natural justice when the Tribunal did not address the issue of mitigation, which was material to the outcome of the arbitration:-

"[13] According to the learned Judge, the Tribunal was in breach in connection with the making of the Final Award as the Tribunal (in concluding the Final Award) had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the sub-claim under Claim 1. The breach, the learned Judge found, was a serious one. The learned Judge was of the view that had the Tribunal considered and made known its findings on each of the sub-claims, it may well be that the Tribunal would not have awarded the full amount as claimed by Kebabangan.

[14] The High Court further held that the Tribunal was in breach of the rules of natural justice by not addressing the issue of mitigation, which was material to the outcome of the Arbitration."

Dissatisfied with the High Court's decision, Kebabangan appealed to the Court of Appeal.

PROCEEDINGS BEFORE THE COURT OF APPEAL

Kebabangan's appeal are grounded on the following:-

"(a) ***The Final Award was set aside because the claim for RM17m was allowed, although experts opined it should be RM14m****. The learned Judge erroneously held that* ***the Tribunal failed to consider or make a finding in the Final Award on MMHE's arguments*** *on the* ***quantification***

of Claim 1*… According to the learned counsel****, the duty to give reasons is not part of natural justice****. In any event, the learned counsel contended that the Tribunal had appropriately awarded Kebabangan the sum claimed as per its Statement of Claim and nothing more****.***

(b) The High Court had erred in finding that the Tribunal failed to consider MMHE's arguments on waiver, acquiescence and estoppel. According to the learned counsel for the ***appellant, the Tribunal had already considered… The learned counsel contended that even if there was an absence of findings by the Tribunal on the question posed by MMHE on waiver, acquiescence and estoppel****, natural justice does not require MMHE to be given responses to all submissions****.*

(c) The High Court had also erred in holding that the Tribunal failed to consider or otherwise make a finding in the Final Award on MMHE's argument on whether Kebabangan mitigated its loss. The learned counsel submitted that the Tribunal had indeed considered and made findings on mitigation in the Final Award.

(d) …the High Court had ***erroneously held that the arbitral procedure was not in accordance with s 34(3) of the AA and Art 34(3) of the UNCITRAL Arbitration Rules adopted by the AIAC Rules 2018*** *in failing to make a reasoned award for Claim 1… the learned counsel reiterated the propositions that* ***the duty to give reasons is not part of natural justice and failure to provide reasons is merely an error in law****."*

[Emphasis added]

- Failing To Appreciate Parties' Submissions [Claim 1]

On the issue of the Tribunal failing to consider / discuss the parties' arguments on Claim 1, the Court of Appeal found that the Tribunal did not attempt to appreciate the parties' submissions nor provide explanation in awarding Kebabangan an amount higher than the value assessed by Kebabangan's own expert.

"[16] As to the first ground, we take note that ***the Tribunal did not make any attempt to appreciate any of the arguments with respect to the sum of RM27,241,178.02 being the component of sub-claims. What was more glaring was there was no explanation from the Tribunal as to how did it arrive at the claimed amount of RM27,241,178.02 when Kebabangan's Expert Witness had assessed and valued Kebabangan's claim at RM14,162,655.***

> *[17] While we agree that **the Tribunal is not bound to accept the position advanced by either expert**, as pointed out by the learned Judge, **it would only be fair to expect the Tribunal to discuss each sub-claim under Claim 1**…"*

[Emphasis added]

In this regard, the Court of Appeal held that a breach of natural justice would occur if, "*in the course of reaching its decision, the Tribunal disregarded the submissions and arguments made by the parties on the issues without considering the merits thereof.*":-

> *"[18] In the circumstances of the case, we respectfully agree with the learned Judge that **the Tribunal was in breach of the rules of natural justice in connection in concluding of the Award since it had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the sub- claim in Claim 1**… As stated by the Singapore Court of Appeal in **Pacific Recreation Pte Ltd v SY Technology Inc** [2008] 2 SLR(R) 491 CA, **a breach of natural justice occurs if, in the course of reaching its decision, the Tribunal disregarded the submissions and arguments made by the parties on the issues without considering the merits thereof**. As correctly pointed out by the learned Judge, had the Tribunal considered and made known its findings on each of the sub-claims, it may well be that the Tribunal would not have awarded the full amount as claimed by Kebabangan."*

[Emphasis added]

- Failure To Address Questions Posed By Parties [Waiver, Acquiescence and Estoppel]

The Court of Appeal held that, whilst natural justice does not require the Tribunal to respond to all submissions, the failure to address significant issues which could have impact on the outcome would constitute a breach of natural justice:-

> *"[21] As to the Tribunal's **failure to consider MMHE's arguments on waiver, acquiescence and estoppel**, the learned counsel for Kebabangan contended that since the Tribunal found that the valves were discovered to be not being from OMB was only in April 2016, Kebabangan would not have waived, acquiesced or should be estopped from something it was not aware of.*
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> *[22] There were three questions posed by MMHE at the Tribunal….*

[23] ***Unfortunately, the Tribunal failed to deal with these Three Issues raised by MMHE****. We therefore respectfully agree with the learned Judge that* ***such a failure constitutes a serious breach of natural justice in connection with the making of the Award and is material to the outcome of the arbitral proceedings****…*

[24] *While* ***we recognise that natural justice does not require MMHE to be given responses to all submissions made before the Tribunal, the failure of the Tribunal to specifically address the Three Issues raised by MMHE is of significance that could have impacted the outcome of the arbitral proceedings****."*

[Emphasis added]

- Failure to Address Pleaded Issues / Submissions [Mitigation]

On this issue, the Court of Appeal took cognisance of the fact that the issue of mitigation was specifically pleaded in the Statement of Defence, but the Tribunal did not address the same. The Court of Appeal agreed with the High Court that such failure tantamount to a breach of natural justice as the quantum could have been reduced if the Tribunal addressed the issue of mitigation.

"[25] *As to whether Kebabangan had mitigated its loss,* ***we take cognisance that the issue was clearly pleaded and submitted by the parties****…*

[26] ***Unfortunately, despite the specific pleadings on the issue of mitigation made by the parties, it was not addressed by the Tribunal****. We respectfully agree with the learned Judge that* ***such a failure amounts to a breach of the rules of natural justice****. Our reason is this.* ***Had the Tribunal addressed MMHE's contention on mitigation, it could have resulted in a reduction of the quantum of the Award****."*

[Emphasis added]

- Arbitral Procedure Not In Accordance With Agreement [Reasoned Award]

The Court of Appeal noted that the relevant agreed arbitral procedure, which the High Court found that the Tribunal failed to comply with, is **Article 34(3) of the UNCITRAL Arbitration Rules** and Section 33 of the Arbitration Act 2005 ("**AA 2005**"), which required the Tribunal to "*state the reasons upon which the award is based upon*":-

"[27] Finally, Kebabangan took issue against the finding of the learned Judge that the arbitral procedure was not in accordance with the agreement of the parties. ***The agreed arbitral procedure is as follows****:*

(a) ***Art 34(3) of the UNCITRAL Arbitration Rules as part of the AIAC Arbitration Rules 2018****. The Art provides that* ***the arbitral tribunal shall state the reasons upon which the award is based upon*** *unless the parties have agreed that no reasons are to be given.*

(b) Likewise, ***s 33(3) of the AA provides that an award shall state the reasons upon which it is based*** *unless (a) the parties have agreed that no reasons are to be given or (b) the award is an award on agreed terms under s 32."*

[Emphasis added]

The Appellant argued that the duty to give reason is not part of natural justice and the failure to provide reason or adequate reasons / explanations is at the very most, an error of law – which is incapable of sustaining a challenge against the entirety of an award.

However, on the facts of the case, the Court of Appeal found that the Tribunal's failure is more than mere failing to provide adequate reasons and explanations. The award does not inform parties of the basis of quantification of Claim 1, which is especially relevant considering that the Tribunal awarded a higher amount to Kebabangan than what was assessed by Kebabangan's own expert.

"[29] ***In our view, the failure of the Tribunal is more than mere failing to provide adequate reasons and explanations. It is beyond that****. As alluded to earlier, the Final Award, even taken at its highest,* ***does not inform the parties of the basis in which the Tribunal arrived at its decision with respect to the quantification of Claim 1****. At the risk of being repetitive, the* ***Award does not explain how did the Tribunal reach the sum of RM17,241,178.02, being the component sub-claims and whether Kebabangan has proven its loss for the purpose of assessment and quantification of the same amount****. This is even more so considering* ***Kebabangan's expert itself stood on record in assessing Kebabangan's claim at a much lower amount in the sum of RM14,162,655****."*

[Emphasis added]

Whilst the Court of Appeal recognises that the Tribunal is not bound to accept expert evidence, but if an expert opinion is accepted or rejected, the Tribunal "*must give a cogent reason for doing so*".

Departing from the opinion of experts without assigning any reason would come within the ambit of **Art 34(3) of the UNCITRAL Arbitration Rules and Section 33(3) of the AA 2005**. Thus, a challenge on this ground can be sustained:-

> *"[30] Make no mistake. It is trite that a tribunal, just like a court, is not bound to accept expert evidence. However,* ***if an expert opinion is accepted or rejected, a tribunal must give a cogent reason for doing so... In the instant appeal, the arbitral Tribunal did not assign any reason, let alone a cogent one, in awarding a sum much higher than the assessment made by Kebabangan's own expert witness****.*
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> *[31] In our considered view,* ***such a departure, without assigning any reasons thereto, is more than a mere error of law. It goes beyond that. It comes within the ambit of Art 34(3) of the UNCITRAL Arbitration Rules and s 33(3) of the AA. A challenge on the award can, therefore, be sustained****."*

[Emphasis added]

KEY TAKEAWAY

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

(a) A breach of natural justice may occur if, in the course of reaching its decision, the Tribunal disregarded the submissions and arguments made by the parties on the issues without considering its merits.

(b) Whilst natural justice does not require the Tribunal to address all submissions, a failure to consider significant issues which could have impact on the outcome would constitute a breach of natural justice.

(c) A challenge on the Arbitral Award for failing to state reasons for the Award, pursuant to the agreed arbitral rules, may be sustained if the Tribunal fails to provide any reasons for accepting or rejecting expert opinion. Whilst the Tribunal is not bound to accept expert opinion, "***a tribunal must give a cogent reason***" if an expert opinion is accepted or rejected.

If you have any questions or comments on this article, please contact:-

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