

Setting Aside of Arbitration Award : Estoppel by Conduct and the Risks of Silence

ONE AMERIN RESIDENCE SDN BHD V RAGAWANG CORPORATION SDN BHD [B-02(C)(A)-2128-12/2023]

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ISSUES

Where multiple arbitrations are commenced under the same contract, disputes may arise not only on the merits but also on jurisdiction, including whether certain claims are arbitrable or have already been decided. Can a party who had earlier argued that a claim was premature later take the opposite position, asserting that the same claim had already been decided?

Arbitral proceedings may be terminated under section 34 of the Arbitration Act 2005 (“**AA 2005**”) if the tribunal finds that *“the continuation of the proceedings has for any other reason become unnecessary or impossible”*. But if such a decision is later found to be wrong, can it amount to a breach of natural justice and risk the award being set aside?

Finally, in the course of ongoing disputes, parties sometimes take positions through letters or notices, such as asserting a set off. If the receiving party remains silent or does not expressly dissent, can that inaction be treated as an admission that gives rise to estoppel?

These questions were examined by the Court of Appeal in the recent case of **One Amerin Residence Sdn Bhd v Ragawang Corporation Sdn Bhd** [B-02(C)(A)-2128-12/2023].

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The dispute arose from a construction contract for the One Amerin project between the employer, One Amerin Residence Sdn Bhd (“**Appellant**” or “**OASB**”) and its contractor, Ragawang Corporation Sdn Bhd (“**Respondent**” or “**Ragawang**”).

- (b) On 14.09.2018, the Appellant commenced arbitration claiming for Liquidated Ascertained Damages (“**LAD**”) against the Respondent (“**1st Arbitration**”). The Respondent submitted a Defence and Counterclaim (“**subject Counterclaim**”), which initially included a claim for under-certification by the Architect and the remaining unpaid sums under Architect’s Progress Certificates 32 & 33 (“**subject APCs**”), together with claims for loss and expense (“**L&E**”), retention sum, and late payment interest.
- (c) The Final Account was only issued on 16.01.2019 (“**Final Account**”), and the Respondent only disputed the same on 11.04.2019, both events taking place after the commencement of the 1st Arbitration.
- (d) In view of the premature state of disputation, the Appellant mounted a jurisdictional challenge on 18.10.2019, arguing that the majority of the Respondent’s counterclaim was not yet arbitrable (“**1st Jurisdictional Challenge**”).
- (e) The tribunal in the 1st Arbitration agreed, confining the arbitration to the LAD claim and the counterclaim for L&E only (“**1st Arbitration Interim Award**”), and eventually found in the Appellant’s favour, allowing the LAD claim of RM9,180,000.00 and dismissing the counterclaim for L&E (“**1st Final Award**”).
- (f) Following the 1st Arbitration, the Appellant issued a set off notice pursuant to the construction contract and directly set off the LAD amount from its liability to settle the balance due under the subject APCs and the Retention Sum. The total set-off was RM7,072,020.34, leaving a balance LAD sum of RM2,107,979.66 (“**Set Off Letter**”).
- (g) In doing so, the Appellant effectively admitted liability for the subject APCs and Retention Sum. The Respondent did not reply or object to the Set-Off Letter and even adopted the set off position in its pleadings in the 2nd Arbitration. This omission later became central to the estoppel finding.
- (h) For completeness, the Respondent attempted to set aside the 1st Final Award and resisted enforcement, but was unsuccessful at the High Court and the Court of Appeal. Leave to appeal to the Federal Court was also refused.
- (i) Meanwhile, on 29.07.2019, the Respondent commenced the 2nd Arbitration to claim for the unpaid balance under the subject APCs and the allegedly under-certified works in the Final Account that were left undetermined in the 1st Arbitration.
- (j) Upon issuance of the Certificate of Making Good Defects (“**CMGD**”), the Respondent initiated the 3rd Arbitration on 17.03.2020 to claim for the release of the Retention Sum (despite the set off), along with alleged related taxes and interests. The 2nd and 3rd Arbitrations were heard by the same arbitrator (“**2nd Arbitrator**”).

- (k) The Appellant raised jurisdictional challenges against both the 2nd and 3rd Arbitrations and sought their termination under sections 34(1) and 34(2)(c) of the Arbitration Act 2005 (“**AA 2005**”), contending, amongst others, that:
 - (i) Following the 1st Arbitration, the set off exercise, and exhaustion of appeals, all disputes had come to a final conclusion. There were no longer any arbitrable matters competent to be referred to arbitration.
 - (ii) The Appellant further relied on the doctrine of res judicata and the finality of the Architect’s Final Account.
- (l) Following the Appellant’s jurisdictional objections, the 2nd Arbitrator summarily terminated both arbitrations on 07.09.2022, primarily on the ground of res judicata, holding that “*all of Ragawang’s claims and disputations had already been finally determined via the 1st Final Award*” (“**2nd Final Award**”).
- (m) Dissatisfied with the summary termination of the 2nd and 3rd Arbitrations, the Respondent applied to set aside the 2nd Final Award.

DECISION OF THE HIGH COURT

The High Court set aside the 2nd Final Award and found that the summary termination was improper, amongst others, on the following grounds:-

- “...b. *The 2nd Arbitrator was in error in the manner of his decision-making process when he found that res judicata applies on the grounds that Ragawang’s disputation against the Final Account, and claims for retention sum as well as under the subject APCs had already been earlier determined within the 1st Arbitration (despite the clear instance that all other matters aside from OASB’s LAD and Ragawang’s L&E were ousted from the 1st Arbitrator’s jurisdiction and determination in the 1st Arbitration); and*
- c. *The 2nd Arbitrator’s erroneous application of res judicata and wrongful termination of the 2nd and 3rd Arbitrations had effectively breached the rule of natural justice (as Ragawang’s right to (have its disputation against the Final Account and the subject APCs) be heard had been unlawfully deprived).”*

Dissatisfied with the High Court’s decision, the Appellant appealed to the Court of Appeal against the setting aside of the 2nd Final Award for the 2nd and 3rd Arbitrations (“**Appeals**”).

ISSUES BEFORE THE COURT OF APPEAL

In deciding whether the High Court was correct to set aside the 2nd Final Award, the Court of Appeal considered the following key issues:-

- (a) Whether a wrongful summary termination under section 34 of AA 2005 amounts to a breach of natural justice.
- (b) Whether the principles of res judicata applied, or whether the parties were instead bound by their respective conducts, forming what the Court described as a “*complex web of estoppel by conduct*”.

WRONGFUL SUMMARY TERMINATION AMOUNTS TO BREACH OF NATURAL JUSTICE

At the outset and having reviewed the applicable legal framework, the Court of Appeal reaffirmed the position that a setting aside application may only examine the decision-making process of the arbitrator, and not the merits of the decision itself.

“[46] Succinctly, a setting aside Application against an arbitral award can only enquire into the decision-making process of the arbitrator and not the decision in and of itself. And even such enquiry is statutorily limited to the limited grounds enumerated under section 37 of the Arbitration Act 2005. The repeal of section 42 was clearly intended to close the window on any challenges against the merit of any arbitral award.”

The Court further noted that the Appellant’s jurisdictional challenge in the 2nd and 3rd Arbitrations was grounded in Section 34(1) and Section 34(2)(c) of the AA 2005, seeking to summarily terminate the arbitration proceedings on the basis that that further continuation had become unnecessary or impossible:-

*“[48] OASB’s 2nd jurisdictional challenge was mounted in reliance of **Section 34(1) and Section 34(2)(c) of the Arbitration Act 2005:***

34. Termination of Proceedings

- 1) The **arbitral proceedings shall be terminated** by a final award or by an order of the arbitral tribunal in accordance with subsection (2).*
- 2) The arbitral tribunal shall order the termination of the arbitral proceedings where—*



- a) *the claimant withdraws the claim, unless the respondent objects to the withdrawal and the arbitral tribunal recognises the respondent's legitimate interest in obtaining a final settlement of the dispute;*
- b) *the parties agree on the termination of the proceedings; or*
- c) ***the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.***

[49] *It is pertinent to be aware that the foundation of OASB's 2nd jurisdictional challenge (under section 34(2)(c) of the Arbitration Act 2005) **seeks to cease the CONTINUATION of the arbitral proceedings.** Res ipsa of a 'jurisdictional challenge' (coupled with the ceasing the continuation of an arbitral proceedings), it is evidently clear that the discontinuation or a ceasing of an arbitration (vide termination) would mean that the arbitration would be stymied and halted even before the arbitration can proceed to be heard and be determined proper. **It is a summary termination before or latest being, in the 'midst' of the arbitral process due to the 2nd Arbitrator's belief that the dispute was 'no longer arbitrable' owing to the belief that all of the parties' disputations had been fully determined via the 1st Arbitration (which was certainly far from the actual truth of the matter). The direct effect and consequence of which was that the Respondent-Ragawang barred from its rights to be heard and to ventilate its case and complaints before an arbitral panel.**"*

[Emphasis added]

In this context, the Court of Appeal observed that a summary termination, if ultimately found to be wrongful, could result in the affected party being unjustifiably denied the opportunity to present its case before a tribunal. Accordingly, the Court agreed with the Respondent that a wrongful summary termination of arbitral proceedings would amount to a breach of the rules of natural justice, and would also contravene the public policy of Malaysia.

"[50] *Thus, in the hypothetical instance that the 2nd Arbitrator was correct in his decision to terminate the 2nd and 3rd Arbitrations, the Respondent would not have a right to be heard in limine as the dispute was not even arbitrable from the outset. **On the contrary, in the opposite instance that the 2nd Arbitrator's termination of the 2 Arbitrations was wrong, then the Respondent effectively would have been unlawfully deprived its right to be heard before an arbitral panel...***



[53] ...we are in agreement with the Respondent that a wrongful summary termination of the 2nd and 3rd Arbitrations would certainly deprive the Respondent off of the most rudimentary right in law (being the very right to be heard). It goes without saying that allowing or condoning a wrongful finding that a dispute is not arbitrable in limine (during or even before the substantial hearing of an arbitral proceeding) would be immensely injurious to the interest of the public. It would be in the public's best interest that the Court reinstate and uphold an Applicant's right to arbitrate its dispute as and when an arbitrator's summary termination of an arbitration was found to be erroneous."

[Emphasis added]

RES JUDICATA AND THE COMPLEX WEB OF ESTOPPEL BY CONDUCT

Having decided that a wrongful summary termination can constitute to a breach of natural justice, the Court of Appeal turned to the facts of the case.

The Court noted that the appeal did not turn squarely on the doctrine of res judicata, but rather on the parties' respective conduct following the 1st Arbitration. This conduct effectively limited the scope of the 2nd and 3rd Arbitrations:-

"[55] As we have iterated in the previous heading of this judgment, the 2nd Arbitrator had ceased or terminated the 2nd and 3rd Arbitrations primarily on the basis that Ragawang's claims had already been determined as early as the 1st Arbitration. On the contrary, we find that this issue does not simply lie on the principle of estoppel per rem judicatam (or res judicata) but instead a complex web of estoppel by conduct. It was less estoppel in the sense of Court determination, but more so estoppel in view of the conducts and admissions of parties."

[Emphasis added]

The Court held that the Appellant was estopped from arguing that the Respondent's claims had already been decided in the 1st Arbitration. This was because the Appellant had earlier taken the opposite stance during its 1st Jurisdictional Challenge, asserting that many of those claims were not yet arbitrable:-



[58] For the record, we find that the Appellant instead ought to be barred by estoppel (by its own conduct and admission) from insisting that the 1st Final Award had finally determined all of Ragawang's remainder claims against OASB. As aptly appreciated by the Learned JC, the Appellant cannot go against its own admission and insistence (within its 1st Jurisdictional Challenge) that 1st Arbitrator only had jurisdiction (at that time) to determine OASB's claim for LAD and Ragawang's claim for L&E. Thus, at the time of the conclusion of the 1st Arbitration (and upon the award of the 1st Final Award) Ragawang's claims and disputation against the subject APCs, the Architect's Final Account, claims for late payment interests had not been addressed let alone been determined vide the 1st Arbitration."

However, the Respondent was also estopped from pursuing the balance due under Interim Progress Certificates No.32 and 33 and the Retention Sum. This was because it had neither protested nor responded to the Appellant's unilateral set off, and had in fact adopted the set-off in its pleadings in the 2nd Arbitration. Crucially, the Court of Appeal held that, within the realm of commercial disputes, it is a rule of law that when one party puts forward a position, the counterparty must respond in protest or at least record its dissent, if it disagrees. Failing which, such inaction may, depending on the circumstances, amount to an admission.

*[60] Unfortunately, on the same principle and authorities, **estoppel should also equally set in against Ragawang when Ragawang had acquiesced to the full settlement (via OASB's unilateral set off exercise) of all remainder sum under the subject APCs and the release of the retention sum. Within the realm of commercial disputes, it is a rule of law that if one party had taken a certain stance in a letter to the counterparty, the counterparty must necessarily respond in protest, or at least reply to the letter recording the counterparty's dissent. A failure to do so may (although not necessarily automatically) be deemed to be an admission.*** Depending on the circumstances of a given case, if the letter so issued was in nature critical against the recipient, then it ought to be equally critical against the recipient to respond and record its stance or narrative in opposition to the contents of that letter...

[61] Especially in the Appeal before us, OASB in its Set Off Letter had made clear pronouncement as to the extent and remainder balance unpaid under the subject APCs (interim Progress Certificates 32 & 33) as well as the retention sum and its intention to set off the total amount due from its entitlement for LAD as awarded in the 1st Final Award. It ought to be incumbent upon the Respondent-Ragawang to voice out their dissatisfaction against the supposed inadequacy or shortfall in OASB's



calculation of the settlement vide a set off. But instead Ragawang had not only failed to record and respond against the set off exercise, Ragawang had even adopted the set off exercise within its Statement of Claim in the 2nd Arbitration.”

[Emphasis added]

DECISION OF THE COURT OF APPEAL

In the upshot, the Court of Appeal dismissed the Appeals and affirmed the High Court’s decision to set aside the 2nd Final Award. However, the Court of Appeal varied the High Court’s decision by holding that the Respondent was estopped from pursuing further claims under Interim Progress Certificates No.32 and 33 and the Retention Sum. This is because those sums had been subject to a unilateral set off by the Appellant via the Set Off Letter, without any protest from the Respondent.

[62] *Thus, despite the fact that the 1st Final Award have not barred the Respondent’s claims by res judicata, the Respondent’s apparent lack of response (as an admission) would necessarily bar the Respondent’s claim under the subject APCs, and retention sum by the operation of estoppel by conduct. Coupled with the fact that the set off exercise had later found further legitimacy by Court Order (up to the Federal Court), it is even more compelling for us to find that it no longer lies before the Respondent to stake any other or further claims in reliance of the subject APCs or for the retention sum...*

[64] *Thus, **WITHOUT DISTURBING THE LEARNED JC’S ULTIMATE DECISION TO SET ASIDE THE 2ND FINAL AWARD**, we find that estoppel does apply to bar any further claim under the interim Progress Certificates 32 & 33 (subject APCs) and any claim for the release of the retention sum. Thus, Ragawang’s other claims (inclusive of the alleged under-certified claims within the Architect’s Final Account, alleged late payment interest accrued for the delay in paying the alleged under-certified amount under the Architect’s Final Account, or alleged refund of sponsorship payment) as itemised in paragraphs 19.4, 19.5, and 19.6 of Ragawang’s Statement of Claim (“remainder claims”) **HAVE NEVER BEEN DETERMINED** before any arbitration (and thus can still be claimed via arbitration by Ragawang against OASB)...*

KEY TAKEAWAYS

Following this decision, the following points should be noted:-

- (a) **Summary terminations, if wrongful, risk being set aside.** A summary termination of arbitral proceedings under section 34 AA 2005, if later found to be wrongful, amounts to a breach of natural justice, exposing the award to be set aside by the courts.
- (b) **Past jurisdictional objections may trigger estoppel.** Where parties are entangled in a series of arbitrations, a party who previously argued that a claim was not yet arbitrable in an earlier reference may be estopped from later asserting that it had already been decided.
- (c) **Silence in commercial disputes may amount to admission.** In commercial disputes, a party who receives a critical letter (e.g. asserting a set off) must respond in protest, or at least reply to record dissent, if it disagrees. Failure to do so may amount to an admission, which may estop the party from asserting its position or claims.

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

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