

# Enforcement of Arbitral Award Following Court-Ordered Arbitration

## PEMBINAAN JAYA ZIRA SDN BHD v SUNGAI LUI CONSTRUCTION & DEVELOPMENT SDN BHD & ANOTHER APPEAL (CIVIL APPEAL NOS.: W-02(C)(A)-538-04/2025 & W-02(C)(A)-547-04/2025)

25th February 2025

### ISSUES

In construction disputes, parties typically refer their disputes to arbitration based on the arbitration clause in their construction contracts. However, is there any distinction between arbitration commenced by agreement of the parties and court-referred arbitration?

That said, when a matter is referred to arbitration by the Court under Section 24A of the Courts of Judicature Act 1964, would the arbitral award that ensues fall under purview of the Arbitration Act 2005 or Courts of Judicature Act 1964?

Further, would a total subcontract arrangement constitute an “*Ali Baba*” arrangement, rendering the contract illegal and unenforceable?

These questions were answered by the Court of Appeal in the recent case of **Pembinaan Jaya Zira Sdn Bhd v Sungai Lui Construction & Development Sdn Bhd & Another Appeal (W-02(C)(A)-538-04/2025 & W-02(C)(A)-547-04/2025)**.

### BRIEF FACTS

The brief facts of the case are as follows:-

- (a) Jabatan Kerja Raya awarded a project to Pembinaan Jaya Zira JV Iscorp Sdn Bhd, a joint venture company, as the main contractor (“**Project**”). The Appellant was granted a power of attorney to carry out the Project.
- (b) Pursuant to a Letter of Award dated 18 July 2019 (“**Letter of Award**”), the Respondent was appointed by the Appellant as the total subcontractor for the Project.

- (c) In November 2020, the Respondent initiated a suit against the Appellant in the Kuala Lumpur High Court for non-payment of fees and alleged wrongful termination of the contract by the Appellant.
- (d) The Court (with consent of the parties) ordered for the dispute to be referred to arbitration pursuant to Section 24A of the Courts of Judicature Act A964 (“**CJA**”) on 26 February 2021.
- (e) The arbitration concluded in favour of the Respondent and pursuant to a final award dated 31 May 2024 (“**Final Award**”), the Respondent was awarded a sum of RM13,647,485.47.
- (f) In June 2024, the Respondent sought to enforce the Final Award in the High Court and the Appellant sought to set it aside. The Respondent’s enforcement application is based on Section 38 of the Arbitration Act 2005 (“**AA 2005**”) and the Appellant’s setting aside application is based on Section 37 of AA 2005.
- (g) On 18 July 2024, the Respondent, through its solicitors had requested for further directions from the High Court which led to the Court’s directions to proceed under section 38 of AA 2005 for the enforcement application.
- (h) In March 2025, the High Court Judge allowed the enforcement application and dismissed the setting aside application. Dissatisfied, the Appellant appealed against both decisions

### ISSUES BEFORE THE COURT OF APPEAL

The main issues before the Court of Appeal are as follow:

- (1) Is there a difference between arbitration initiated with parties’ consent under the Arbitration Act and arbitration initiated by Court?
- (2) Can an award obtained pursuant to Court referred Arbitration be enforced under the Arbitration Act?
- (3) Whether the Subcontract from the Appellant to the Respondent is contrary to public policy?

## ISSUE 1: THE DIFFERENCE BETWEEN ARBITRATION UNDER ARBITRATION ACT 2005 AND COURTS OF JUDICATURE ACT 1964

In addressing this issue, the Court referred, amongst others, to the Australian case of *Buckley & Anor v Bennell Design & Construction Pty Ltd & Anor* (1978) 19 ALR257 (“**Buckley**”). In that case, it was highlighted that a court-ordered arbitration derive its authority from the court itself, and not mutual consent of the parties. Therefore, the “*powers and consequences*” that ensue would be materially different between a court-ordered arbitration and arbitration through parties’ agreement.

The Court of Appeal agreed with the position taken in *Buckley* and held as follows:-

*“[30] In our view, we are in agreement with Buckley, in that section 24A of the Courts of Judicature Act deals with a court-ordered reference to arbitration, which must be distinguished from a submission to arbitration under the Arbitration Act.”*

The Court of Appeal further elaborate that the primary difference between enforcement of an award under Section 38 of the AA 2005 and Section 24A of the CJA is on the source of authority for the arbitrator as well as the court’s supervisory role:-

*“[32] The distinction between enforcing an award under section 38 of the Arbitration Act as opposed to section 24A of the Courts of Judicature Act lies primarily in the source of the arbitrator’s authority and the nature of the Court’s supervisory role.”*

## ISSUE 2: CAN AN AWARD OBTAINED PURSUANT TO COURT-ORDERED ARBITRATION BE ENFORCED UNDER THE ARBITRATION ACT?

Further, the Court explained that where parties voluntarily submit their dispute to arbitration under an arbitration agreement, the arbitrator’s authority comes from contractual agreement between parties. Such arbitrations are governed exclusively by the AA 2005, and the Court may only intervene on narrow grounds in sections 37 and 39:-

*“[33] Since an award under section 38 of the Arbitration Act arises from a voluntary and private submission to arbitration, the arbitrator derives his jurisdiction from a contractual agreement between the parties. In such cases, the Arbitration Act governs the entire process, and the Court’s intervention is limited to narrow grounds listed in sections 37, and 39 of the Arbitration Act...”*

However, where the arbitration arose from a Court-ordered reference, the arbitrator derives authority from the Court’s order. In this situation, the arbitrator functions as an officer or delegate of the Court, and the resulting award forms part of the Court’s own process:-



*“[35] By contrast, an award made pursuant to a court-ordered reference to arbitration, as in Buckley, derives its authority from the order of reference made by the court. The arbitrator in such circumstances acts as a delegate of the court, and the award, once adopted, assumes the character of a judgment of the court itself. Accordingly, the supervisory power to set aside or vary such an award arises not under section 37 of the Arbitration Act, but under section 24A, in particular subsection (3), of the Courts of Judicature Act or the Court’s inherent jurisdiction...”*

As a result, the Court is not confined to the narrow grounds under the AA 2005 and retains broader discretion:-

*“[36] Under this framework, therefore, the Court retains broader discretion to correct errors of law on the face of the award, procedural irregularities, or misconduct by the arbitrator, and may vary, remit, or set aside the award as it would any other judgment made in proceedings under its control.”*

Accordingly, the Court of Appeal held that an award procured due to referral to arbitration by the Court should be enforced under the CJA and not AA 2005:-

*“[51] We, therefore, took the position that an arbitral award made pursuant to section 24A of the Courts of Judicature Act should be enforced under that very provision, which accords such an award the same status as a decree, judgment, or order of the Court. As a section 24A arbitral award does not stem from a written arbitration agreement within the meaning of the Arbitration Act, it cannot be enforced under section 38, which expressly requires the production of both (i) the arbitral award and (ii) the written arbitration agreement between the parties, neither of which exists in this instance.”*

### **ISSUE 3: WHETHER THE SUBCONTRACT FROM APPELLANT TO RESPONDENT IS CONTRARY TO PUBLIC POLICY**

One of the Appellant’s contentions was that the arrangement between the Appellant and the Respondent contravened the National Economic Policy as it constituted an “Ali Baba” arrangement, where the Respondent to execute all works, including those prescribed under the main contract (between Jabatan Kerja Raya and the Appellant).

After reviewing the evidence before the Court, the Court of Appeal agreed that the total subcontracting in these circumstances amounted to an “Ali Baba” arrangement:-



*“[55] A review of the evidence revealed that the Appellant is a Bumiputera company, and that the Letter of Award to the Respondent effectively created a total subcontract. In substance, this amounted to an Ali Baba arrangement, as the entire scope of works under the main contract was subcontracted to the Respondent. This was clearly supported by the fact that the Appellant was registered as a G7 (Bumiputera) company, as reflected in the Butiran Kontrak attached to the Letter of Award.”*

The Court also referred to the case of *Agasta Co Ltd & another v Autopulence Sdn Bhd* (Civil Appeal No.: B-03(IM)-3-01/2024) in explaining an “Ali Baba” arrangement:-

*“[60] In *Agasta Co Ltd & another v Autopulence Sdn Bhd* (Civil Appeal No.: B-03(IM)-3-01/2024), it was stated:*

*[51] In our view, the object of the contractual arrangement that had been entered into by each respondent with Rintis was clearly intended to circumvent the requirements imposed under the Dasar Baharu AP Terbuka. The avowed objectives of the MITI policy was set out in paragraph 1.1, and included the aim of fortifying the economic agenda of Bumiputeras. The scheme put in place by Rintis and the respondents exemplifies what is colloquially referred to as an Ali Baba arrangement, with the Bumiputera company acting merely as a front, and reduced to a rent-seeking role. It is difficult to see how this arrangement does not abuse and undermine the affirmative action policies of the government.*

*[52] We are thus of the view that the contracts entered into by each of the respondents with Rintis are void ab initio as being contrary to public policy under section 24(e) of the Contracts Act 1950. For this reason, title to the subject MPVs never passed to the respondents, notwithstanding that they may have paid for them.”*

*[Emphasis added]”*

Therefore, the Court of Appeal held that since the arrangement contravened public policy, it is void under Section 24 of the Contracts Act 1950. Further, the Court also held that when an agreement is tainted by illegality, the Court cannot enforce the agreement even when parties have not specifically pleaded on illegality:

*“[62] It is well established that when facts before the Court indicate that an agreement may be tainted by illegality, the Court is duty-bound to take notice of it ex proprio motu. Even if illegality had not been specifically pleaded, no court may, with knowledge, lend its aid to enforce an unlawful agreement: *Keng Soon Finance Bhd v M. K. Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897.”*

Accordingly, the Court of Appeal allowed the appeals.

### KEY TAKEAWAY

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

- (a) **Different statutory regimes carry different legal consequences.** Arbitration under the Arbitration Act 2005 is consensual and derives its authority from the parties' agreement, whereas court-ordered arbitration under the Courts of Judicature Act 1964 derives its authority from the court. This difference affects the court's supervisory jurisdiction, as well as the extent and scope of judicial review.
- (b) **Awards from court-ordered arbitration should be enforced under the CJA, not the AA 2005.** The enforcement route depends on the source of the arbitrator's mandate, such that an award arising from court-ordered arbitration should be enforced pursuant to Section 24A of the CJA rather than Section 38 of the AA 2005.
- (c) **Contracts tainted by illegality will not be enforced by the court.** A total subcontract arrangement inconsistent with the objective of the National Economic Policy (i.e. an "*Ali Baba*" arrangement) would be contrary to public policy and may be declared to be void under Section 24 of the Contracts Act 1950.

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

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