

Does Delay in Issuing an Arbitral Award Result in Loss of Arbitrator's Jurisdictional Mandate?

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Introduction

In *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal* [2020] MLJU 1901, the Malaysian Court of Appeal ("**Court of Appeal**") dealt with the issue of an arbitrator's failure to deliver the arbitral award within the specified timeline, and whether this resulted in a loss of the arbitrator's jurisdictional mandate.

Facts

Ken Grouting ("**Appellant**") and RKT Nusantara ("**Respondent**") were parties to a building contract that adopted the PAM Arbitration Rules 2003 Edition ("**PAM Rules**"). Disputes arose between the Appellant and the Respondent which resulted in the commencement of arbitral proceedings. An arbitrator was appointed by the President of *Pertubuhan Akitek Malaysia* ("**PAM**") as the sole arbitrator pursuant to Clause 34.2 of the Conditions of Contract in accordance with the PAM Rules.

Article 21.3 of the PAM Rules stipulates 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". As such, the deadline for the arbitrator to deliver his award was 26 April 2016.

There exists an in-built extension mechanism to cater for the eventuality where the three-month timeline may not be sufficient for the preparation of an award. Article 21.3 of the PAM Rules expressly provides that if the arbitrator considers that more time is required, "such time frame for delivery of the award may be extended by notification to the parties".

The arbitrator delivered his award on 10 March 2017 ("**Original Award**"). The Original Award was delivered without any attempt by the arbitrator to extend the timeline for delivery of the award.

Neither party raised any objection to the fact that the deadline for delivery of the arbitral award had passed. However, on 27 March 2017, the Respondent's solicitors wrote to the Appellant's solicitors giving notice that they were objecting to the delivery of the Original Award beyond the timeline stipulated in the PAM Rules, but notwithstanding this and without prejudice to their right to raise this objection, they were going to seek for the arbitrator to make corrections to the Original Award pursuant to Article 23 of the PAM Rules and/or Section 35(1)(a) of the Arbitration Act 2005. On 29 March 2017, the Respondent's solicitors wrote to the arbitrator requesting him to make these corrections to the Original Award.

In response, the Appellant's solicitors issued a reply to the arbitrator on 6 April 2017 stating that the arbitrator in this matter was already *functus officio* and ought not be allowed to make the requested corrections because in reality, such corrections were in relation to the substance of the Original Award rather than corrections allowed by Article 23 of the PAM Rules and/or Section 35(1)(a) of the Arbitration Act 2005.

Notwithstanding these objections, the arbitrator proceeded to issue the Amended Award on 7 April 2017 and thereafter declared himself as *functus officio* ("**Amended Award**").

The Respondent filed an application to set aside the Original Award, whilst the Appellant filed an action to set aside the Amended Award and to reinstate the Original Award.

High Court

The High Court Judge held that the failure to (a) deliver the Original Award within the time frame and (b) extend the deadline as provided before delivering the Original Award meant that the Original Award was delivered without mandate or authority, and was therefore delivered in excess of the arbitrator's jurisdiction. This led to the Original Award being set aside pursuant to Section 37(1)(a)(vi) on the basis that the arbitral procedure was not in accordance with the agreement of the parties.

Court of Appeal

On appeal, the essence of the Appellant's solicitors' submission was that Article 21.3 of the PAM Rules was a procedural rather than a jurisdictional rule because of the arbitrator's ability to extend time by giving notice to the parties.

The Court of Appeal disagreed. It held that the timeline in Rule 21.3 of the PAM Rules was a mandate to the arbitrator that he was to deliver the award within a particular period. The Court considered that it was "not an option for an arbitrator who conducts an arbitration under a time-sensitive arbitral regime to ignore, or be oblivious to, or be nonchalant to his duty and responsibility to deliver the award on time".

The second layer of argument raised by the Appellant was that the Respondent, by not raising any objection before the Original Award was delivered, had by that reason waived their right to mount any challenge to set aside the Original Award. However, the Court of Appeal took a more liberal approach against this argument. Whilst there could generally be a waiver of the matters or content of what is deliberated or what transpired in the arbitral proceedings, there could be no waiver on the part of the parties to the arbitration with respect to

the cessation of the arbitrator's mandate and jurisdiction to deliver the award on time or within an extended period. Hence, the Respondent's silence prior to the Original Award being issued was irrelevant.

To that end, the Respondent's solicitors also highlighted that Article 21.3 of the PAM Rules used the word "shall", and it was therefore "obligatory" for the arbitrator to comply with the deadline. It was argued that Article 21.3 of the PAM Rules was mandatory and must therefore be strictly adhered to.

The Court of Appeal agreed with the argument raised by the Respondent's solicitors and in that regard referred 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 which held that once a time limit or deadline lapses, the arbitrator "no longer has the requisite jurisdiction to make a valid award".

Having decided as above, the Court of Appeal also went on to highlight a recent High Court decision – *Sunway Creative Stones Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd (YTL) and Anor* [2020] MLJU 658 ("**Sunway**") – which was similar and also involved a decision in respect of Article 23.1 of the PAM Rules. The High Court in the *Sunway* case took the view that YTL's election to be a mere observer and not make any application to raise the jurisdictional objection in a timeous manner was to its detriment. It also expressed the view that the parties to an arbitration should raise potential jurisdictional issues promptly or risk waiving their rights to subsequently raise an objection successfully. As YTL failed to raise any objection after the three-month timeline for the delivery of the award had passed, it was too late in the day for YTL to raise this argument during the setting-aside application.

However, the Court of Appeal was not inclined to agree with the approach taken by the High Court in the abovementioned *Sunway* case. Remaining silent was not an option for the objecting party, but, be that as it may, a failure to raise an objection timeously did not extend the jurisdiction of the arbitrator automatically.

Whilst the Court of Appeal recognised that the arbitrator's mandate and jurisdiction may be resurrected if time was extended pursuant to Section 46 of the Arbitration Act 2005, nevertheless, to trigger such an extension, the arbitrator or the parties would have to make an application to that effect. A court could not of its own volition extend time.

Take Away

This decision highlights the importance for arbitrators to deliver their awards within the timeframe specified. Parties to an arbitration do not bear the responsibility to monitor the timeline, nor are they under any duty to remind or prompt the arbitrator to keep within the timeline. In the event that a party receives an arbitral award outside the timeframe, the party may make an application under Section 46 of the Act for an extension of time for the making of the award, or by way of an application to set aside the award pursuant to section 37(1)(a)(vi).

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