

LEGAL PROFESSION

Arbitration in Sabah – Foreign lawyer – Exclusive right – Lawyer not ‘advocate’ as defined in Advocates Ordinance 1953 (Sabah Cap. 2) – Whether lawyer prohibited from representing parties in arbitration proceedings in Sabah – Meaning of ‘practising in Sabah’ – Advocates Ordinance 1953 (Sabah Cap. 2), section 2(1)(a) and (b) and section 8(1)

Samsuri Baharuddin & Ors v Mohamed Azahari Matiasin & Another Appeal

[2017] 3 CLJ 287, Federal Court

Facts One Samsuri Baharuddin and 813 others (“the claimants”) entered into a joint venture agreement with Borneo Samudera Sdn Bhd (BSSB). A dispute arose between the parties, which resulted in arbitration. The seat of the arbitration was in Sabah. During the course of the arbitration, the claimants argued that the counsel appointed by BSSB was required to obtain *ad hoc* admission to the Sabah Bar if he wished to appear at the arbitration hearing in Kota Kinabalu, Sabah. An application was made by the respondent (Mohamed Azahari bin Matiasin) for a declaration that (i) a foreign lawyer who is not an ‘advocate’ within the meaning of the Advocates Ordinance 1953 (Sabah Cap. 2) (“the Ordinance”) is not prohibited from representing parties to arbitration proceedings in Sabah; and (ii) the Ordinance has no application to arbitration proceedings in Sabah. The High Court held in favour of the appellants. The respondent appealed to the Court of Appeal, which was subsequently allowed. Hence, this appeal.

Issue The issue is whether section 8(1)¹ read together with section 2(1)(a) and (b)² of the Ordinance prohibits a foreign lawyer, who is not an advocate within the meaning of the Ordinance, from representing parties in arbitration proceedings in Sabah.

Held In allowing the appeal, the Federal Court held that since section 2(1)(a) and (b) of the Ordinance merely defines the phrase “to practise in Sabah”, it does not create any substantive right and must therefore be read with section 8(1) of the Ordinance. The first limb of section 8(1), which also has the phrase “to practise in Sabah”, means to perform any of the functions that may be performed by the barristers and solicitors regardless of whether those functions are exclusive or non-exclusive. Thus, it was held that a foreign lawyer, who is not an advocate within the meaning of the Ordinance, is prohibited by the same from representing parties to arbitration proceedings in Sabah.

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¹ Right to practise in Sabah

² “to practise in Sabah” means to perform in Sabah

- (a) Any of the functions which in England may be performed by a member of the Bar as such; or
- (b) Any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such