

DISPUTE RESOLUTION

SETTING ASIDE AN ARBITRATION AWARD IN MALAYSIA - MUST PREJUDICE BE ESTABLISHED?

Is 'Prejudice' a factor to be considered in setting aside an arbitration award for breach of the rules of natural justice pursuant to Section 37 of the Arbitration Act 2005?

In August 2020, the Federal Court of Malaysia had the opportunity of interpreting and determining the scope and legal effect of Section 37 of the Arbitration Act 2005 ("AA 2005") in the case known as *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 19 CLJ 213* ("Master Mulia Case").

THE ISSUES The questions that were posed and answered by the Federal Court were *inter alia* as follows:-

- (i) **Question 1** - *Whether the High Court exercising jurisdiction under section 37¹ of the AA 2005 is bound to set aside an arbitration award as a matter of course, if any of the grounds of challenge under sections 37(1) or (2) is made out by a plaintiff other than a complaint falling under section 37(3); and*
- (ii) **Question 2** - *Where the complaint by the plaintiff under section 37 of the AA 2005 is only in respect of one of the three principal issues before the arbitrator or where the plaintiff's case is made out only in respect of one out of three issues, whether the High Court is obliged as a matter of law under section 37 to set aside the whole Award.*

BRIEF BACKGROUND FACTS The Appellant hired out its vessel to the Respondent pursuant to a Charter Party Agreement for undersea pipelines installation works in the high seas. Subsequently, a dispute arose and the Appellant initiated arbitral proceedings against the Respondent. The arbitrator decided in favour of the Appellant whereby the Respondent applied to the

High Court to set aside the arbitration award ("Award") pursuant to Section 37 and Section 42 of the AA 2005 where one of the grounds relied upon by the Respondent was 'breach of the rules of natural justice' when the Award was issued.

At first instance, the High Court had made a clear finding that there were 2 breaches of the rules of natural justice as against Section 37 of the AA 2005. However, the High Court declined to set aside the Award premised on the ground that there had not been any **actual or real prejudice** arising from the said breach. The High Court placed its reliance on Singapore's position as propounded in the *Song Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*² case.

Aggrieved by the said decision, the matter was appealed to the Court of Appeal. The Court of Appeal in allowing the appeal, made the following findings:-

- (i) Where a breach of the rules of natural justice has been established, it is the whole Award that will be set aside as section 37 do not appear to allow for operation of the principle of severance; and
- (ii) If the 2 pieces of evidence which were never put to the parties until the Award was rendered was not considered by the arbitrator, it would have resulted in a different conclusion to the arbitration.

FINDINGS OF THE FEDERAL COURT

In dismissing the appeal, the Federal Court scrutinized the meaning and the scope of Section 37 of the AA 2005 and held that the question of whether an award ought to be set aside for breach of the rules of natural justice is **not** dependent nor does it turn on 'prejudice' arising from the said breach. Prejudice, though a relevant consideration, is not a requirement.

Rather the Court should instead consider the **significance of the breach** and the **extent to which it might or may have affected the outcome of the arbitration**. It is not necessary to show that the breach did in fact affect the outcome.

¹ Application for setting aside

² [2007] SGCA 28

It was further held by the Federal Court that whilst ‘prejudice’ remains a requirement that must be established in other jurisdictions such as Singapore, the Malaysian Courts must be **mindful against importing principles advocated by foreign jurisdictions** in light of the clear wordings of the AA 2005.

The Federal Court then proceeded to answer Question 1 and Question 2 in the negative.

CONCLUSION The Federal Court in the Master Mulia case has clearly demarcated the lines of the approach that is to be taken and what needs to be established in an application to set aside an arbitration award under section 37 AA 2005 and has departed from Singapore’s position where establishing ‘prejudice’ is a requirement under the provisions of the Singapore Arbitration Act 2001.

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16 October 2020