Setting Aside of Arbitration Award : Time Limit on Submission of Draft Final Award for Technical Review and Effects on Tribunal's Mandate and Jurisdiction

SETIAKON BUILDERS SDN BHD V BELLWORTH DEVELOPMENT SDN BHD [WA-24C(ARB)-35-08/2023 & WA-24C(ARB)-41-09/2024]

24TH January 2025

ISSUES

Under the Arbitration Act 2005 ("**AA 2005**"), an award made by the Arbitral Tribunal pursuant to an arbitration agreement shall be final and binding. In this regard, the Court will not intervene in matters governed by AA 2005 except as provided in AA 2005. This follows that an arbitral award cannot be challenged except on the limited ground provided under Section 37 of AA 2005.

In this context, questions arise on whether an arbitral award could be set aside by the Court under Section 37(1)(a)(vii) of AA 2005 if the draft Final Award for technical review was beyond the prescribed time limit under the agreed institution rules, in this case, Rule 12(2) of the Asian International Arbitration Centre ("**AIAC**") Rules. Would such late submission *"deprive"* the Arbitrator of his mandate and jurisdiction to make a valid award?

These questions were answered in the recent High Court decision of **Setiakon Builders Sdn Bhd v Bellworth Development Sdn Bhd [WA-24C(ARB)-35-08/2023 & WA-24C(ARB)-41-09/2024].**

BRIEF FACTS

The brief facts of the case are as follows:-

(a) By way of a Letter of Award dated 17.12.2012 ("**LOA**"), Bellworth Development Sdn Bhd ("**Bellworth**") engaged Setiakon Builders Sdn Bhd ("**Setiakon**") as its main contractor for the execution and completion of a project in Kuala Lumpur.

(b) On 02.06.2014 i.e. after the Works has commenced, the parties executed the Agreement and Conditions of PAM Contract 2006 (With Quantities) containing the terms and conditions of Setiakon's appointment, including the Addendum to the Articles of Agreement and

Schedule of Conditions of PAM Contract 2006 (With Quantities) (collectively referred to as "**Contract**").

(c) Disputes arose between parties in relation to, amongst others, extensions of time and therefore, Setiakon referred the disputes to arbitration for final determination in accordance with Clause 34.5 of the Contract.

(d) On 19.01.2023, the last oral clarification before the Tribunal took place.

(e) Following the oral clarification, the Tribunal issued a letter dated 28.02.2023 to the parties' solicitors and copied to the AIAC, declaring the proceedings to be closed as of 19.01.2023 pursuant to Rule 12(1) of the AIAC Rules and henceforth, the parties shall not submit any further evidence or make any submissions.

(f) By a letter dated 19.04.2023, the Arbitrator wrote to the Director of the AIAC enclosing the Draft Final Award for technical review. The Arbitrator referred to the letter dated 28.02.2023 and stated that the time limit for the Tribunal to submit the Draft Final Award to the AIAC under Rule 12(1) of the AIAC Rules was 19.04.2023.

(g) In the award, the Tribunal found in favour of Setiakon and determined that Bellworth shall pay Setiakon the amount of RM11,452,910.00 together with interest and costs.

(h) Dissatisfied with the award made by the Arbitrator, Bellworth made an application to set aside the arbitral award pursuant to Sections 37(1)(a)(iii), 37(1)(a)(iv),37(1)(a)(vi), 37(1)(b)(ii), 37(2)(b)(ii) and 33(3) of AA 2005.

(i) At the same time, Setiakon applied to enforce the arbitral award pursuant to Section 38 of AA 2005.

PROCEEDINGS BEFORE THE HIGH COURT

One of the key issues brought by Bellworth in its setting aside application was whether the award should be set aside under subparagraph **37(1)(a)(vi) of AA 2005**, as the submission of the Draft Final Award for technical review was not in accordance with **Rule 12(2) of the AIAC Rules** thereby depriving the Arbitrator of his mandate and he has no jurisdiction to make a valid award.

For context, the ground for setting aside under subparagraph **37(1)(a)(vi) of AA 2005** are as follow:-

> *"the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in*

> *conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act"*

On the other hand, **Rule 12(2) of the AIAC Rules** provides that the Tribunal shall submit the Draft Final Award to the Director, within 3 month from the date when the proceedings were declared closed, for a technical review:-

> "*The arbitral tribunal shall, before signing the award, submit its draft of the final award (the "Draft Final Award"), to the Director within three months for a technical review. The time limit shall start to run from the date when the arbitral tribunal declares the proceedings closed pursuant to Rule 12(1)."*

However, **Rule 12(3) of the AIAC Rules** also provides that the time limit to submit the Draft Final Award may be extended by the Tribunal with the consent of the parties and upon consultation with the Director of the AIAC:-

> "*The arbitral tribunal shall, before signing the award, submit its draft of the final award (the "Draft Final Award"), to the Director within three months for a technical review. The time limit shall start to run from the date when the arbitral tribunal declares the proceedings closed pursuant to Rule 12(1)."*

Bellworth contended that the Draft Final Award was submitted one day after the prescribed time limit, which was contrary to **Rule 12(2) of AIAC Rules** which requires the submission to be made within three months from the date of the closure of the proceedings. Bellworth further contended that the breach is not merely procedural but goes to the jurisdiction of the Tribunal.

On the other hand, Setiakon contended that the issue raised by Bellworth only involved the *"computation of the timeline"* rather than non-compliance or breach of the procedural timeline as provided under AIAC Rules.

DECISIONS OF THE HIGH COURT

In computing the time limit for the submission of the Draft Final Award, the Learned High Court Judge held that the time limit shall start to run from 19.01.2023 i.e. the date that the Arbitrator declared the proceedings to be closed:-

> "*[51] Here, the Arbitrator declared the proceedings closed as of 19.1.2023 (see his letter to the parties and copied to AIAC dated 28.2.2023).* ***Therefore, the time limit of three months shall start to run from 19.1.2023****. In computing the period of three months from 19.1.2023, the Arbitrator was required to submit the Draft Final Award to the Director of AIAC on 18.1.2023 (the case of Migotti v Colvill (supra) applied).*

> *[52] The Court is unable to agree with Setiakon's submission that the three months period shall run from 28.2.2023, the date of the Arbitrator's letter, and that Article 2.6 of the UNCITRAL Arbitration Rules or ss 2, 3 and 105 of Act 388 apply in the instant case. The AIAC Rules have not been published in the Gazette and are thus, not "subsidiary legislation" within the meaning of Act 388 (see sub-s 86(1) Act 388)."*

The case of *Migotti v Colvill [1879] 44 CPD 233 (CA),* as cited by the counsel for Bellworth, highlighted the method of computation of time as follows:-

> "*[46] In computing time, the learned counsel relied on the English case of Migotti v Colvill [1879] 44 CPD 233 (CA) where it was held that:*
>
> > *"… the term a calendar month's imprisonment is to be calculated from the day of imprisonment to* ***the day numerically corresponding to that day in the following month less one****."*

Nevertheless, the Learned High Court was persuaded by Setiakon's arguments and distinguished the Court of Appeal case of *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal* [2021] 4 MLJ 622 [Click HERE for our update on this case].

In Ken Grouting's case, the Court of Appeal affirmed the High Court's decision to set aside the arbitration award due to the Tribunal's failure to deliver the arbitration award within the timeframe stipulated under the Pertubuhan Arkitek Malaysia ("**PAM**") Rules. The delivery of award, outside the stipulated timeframe, rendered the delivery to be *"without mandate or authority" and is therefore in excess of the arbitrator's jurisdiction".*

On this issue, the High Court held that the timeline in the current case that was not complied with, was the timeline to submit the draft Final Award to the Director for AIAC for technical review and not for delivery of the final award to parties. As such, the non-compliance does not affect the Tribunal's mandate and jurisdiction.

> "*[54] Nevertheless, I am persuaded by Setiakon's Argument Nos. 3 and 4, among others, that –*
>
> *(a) there are fundamental differences between the facts in the instant case and in Ken Grouting (supra) where Rules 12(1) and 12(2) of the AIAC Rules govern the submission of the Arbitrator's Draft Final Award to the Director of AIAC for technical review and not the delivery of the Final Award to the parties.* ***The timeline for delivery of the Draft Final Award as opposed to a Final Award under Article 21.3 of the PAM Arbitration Rules does not go to the Arbitrator's mandate and jurisdiction****…"*

The High Court further held that, even if Bellworth establishes the grounds for setting aside under subparagraph 37(1)(a)(vi) 2005, the High Court is inclined to exercise its jurisdiction to not set aside the arbitration award for reasons submitted by Setiakon:-

> *(b) even if Bellworth has established a case under subparagraph 37(1)(a)(vi) AA 2005,* ***the Court is inclined to exercise its discretion in not setting aside the Award for the reasons as submitted by Setiakon. Moreover, the delay in this case is merely one day****.*

For completion, the reasons submitted by Setiakon are as follow:-

> *"(i) the complaint here centered on the alleged non- compliance with the time limit imposed by Rule 12(2) AIAC Rules and it is a question of interpretation;*
>
> *(ii) the Arbitrator believed that he had submitted his Draft Final Award within time. Whether or not the deadline ought to have set in a day earlier would not have any effect on the outcome of the Final Award;*
>
> *(iii) the Director of AIAC and Bellworth did not raise any objection to the alleged non-compliance when the Arbitrator submitted his Draft Final Award to the Director AIAC;*
>
> *(iv) grave injustice would be caused to Setiakon if the Award is to be set aside in these circumstances, which was due to no fault on the part of Setiakon; and*
>
> *(v) costs of rehearing of the arbitration would be high. Based on the costs submission by the parties, the combined arbitration costs expended was approximately RM2 million. The arbitration had also taken almost four years to complete and it would probably take around the same time, if not more, if the case is to be re-heard."*

KEY TAKEAWAY

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

(a) The computation of time limit for the submission of Draft Final Award by the Tribunal to the Director of AIAC shall start to run from the date that the proceedings is closed, as per the Tribunal's declaration and not the date of the declaration itself;

(b) There is a difference between timeline for submission of draft award to the agreed institution for technical review and submission of Final Award to the parties. The breach of timeline for submission of draft award to the institution for technical review "*does not go to the Arbitrator's mandate and jurisdiction"*; and

(c) Even if a party can establish the grounds to set aside an award under subparagraph 37(1)(a)(vi) AA 2005, the Court may exercise its discretion to decline setting aside the award.

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

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