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Konsortium Lord-Saberkat Sdn Bhd v. RP Chems. M Sdn Bhd

HIGH COURT (KUALA LUMPUR)

11 APRIL 2018

ORIGINATING SUMMONS NOS 24NCC(ARB)-39–12 OF 2016 AND 24NCC(ARB)-8–02 OF 2017

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Malayan Unreported Judgments

Reporter
2018 MLJU 602

Konsortium Lord-Saberkat Sdn Bhd v RP Chemicals (M) Sdn Bhd

Core Terms

arbitrator, trailer, final award, prime mover, question of law, invoice, tribunal, loss of profits, natural justice, arbitration proceedings, fact finding, legitimate expectation, registration, depreciate, retransfer, deed, decoupling, re-transferring, register, goodwill, whether, expiry, bias, arbitration award, question of fact, contractor, transport, mitigate, outstand, adduce

Counsel: *Ben Chan (Noor Asnie bt Md Salleh and Chih Yu Yen with him) (Megat Najmuddin Leong & Co) for the plaintiff.*

Preetha Pillai (Tan Hui Wen with him) (Skrine) for the defendant.

Opinion by: Khadijah Idris JC:

Opinion

GROUNDS OF JUDGMENT

Introduction

[1] The Plaintiff filed Originating Summon WA-24NCC(ARB)-39- 12/2016 (OS 39) in this court seeking, inter-alia, for the final award made and published on 3 November 2016 (Final Award) by the arbitrator Mr. Ragunath Kesavan (Arbitrator) to be varied and/or set aside pursuant to sections 37 and 42 of the Arbitration Act 2005 (AA 2005).

[2] Subsequently the Plaintiff filed another Originating Summons WA- 24NCC(ARB)-8-02/2017 (OS 8) in another court for the Final Award to be set aside pursuant solely to section 37 of the AA 2005. By an order dated 15 March 2017 the court ordered for OS 8 to be heard together with OS 39.

[3] After considering the affidavits and hearing submission from both parties I dismissed the Plaintiff's OS 39 and OS 8. In this grounds of judgment I will first discuss the Plaintiff's OS 39 followed by the Plaintiff's OS 8.

Parties

[4] The Plaintiff, Konsortium Lord-Sarbekat Sdn Bhd is a private limited company incorporated in Malaysia having its registered address at 38, 2nd Floor, Jalan Dato Bandar Tunggal, Seremban Negeri Sembilan.

[5] The Defendant, RP Chemicals (Malaysia) Sdn Bhd formerly known as RP Chemicals Sdn Bhd is a private limited company incorporated in Malaysia. Its registered address is Lot 116 Gebeng Industrial Estate Jalan Gebeng 1/11, Pusat Perkhidmatan Gebeng, Kuantan Pahang.

Factual Background

[6] The Plaintiff and the Defendant entered into a Purchase Agreement for Transport Services (TSA) and Trust Deed (Trust Deed) both dated 21 June 2005.

[7] By the TSA the Plaintiff was engaged by the Defendant to provide inland transportation services for the Defendant's bulk Purified Terephthalic Acid (PTA) in the specialised trailers belonging to the Defendant which would be attached to the Plaintiff's prime movers.

[8] It is a requirement under the law and the relevant regulatory frameworks set by the Road Transport Department and the Land Public Transport Commission (SPAD) that the Defendant's trailers had to be registered in the name of the Plaintiff who is the registered owner of the prime movers and licence permit holder to perform the transportation services. The Trust Deed was therefore entered simultaneously with the TSA to enable the Plaintiff to hold the Defendant's trailers on trust for the Defendant.

[9] Pursuant to the TSA and Trust Deed, the Defendant delivered over to the Plaintiff twenty-one (21) trailers together with twenty-one (21) registration cards which were registered in the name of various owners. Pursuant to the Trust Deed the Plaintiff proceeded to execute the registrable transfer of the vehicles through the registration Form JPJK3 ("*Borang Penyata Pertukaran Milikan Kenderaan Motor Secara Sukarela oleh Pemunya Berdaftar*") and delivered the same to the Defendant. This is not disputed.

[10] It was undisputed that registrable *Borang Penyata Pertukaran Milikan Kenderaan Motor Secara Sukarela oleh Pemunya Berdaftar* (JPJK3 Forms) for the retransfer of the registration of the trailers back to the Defendant duly executed in escrow by the Plaintiff were delivered by the Plaintiff to the Defendant at the commencement of the TSA and Trust Deed.

[11] After the extension and expiry of the TSA on 31 December 2011, the Plaintiff returned 6 of the 22 trailers to the Defendant's possession for service and repairs. The Plaintiff, however, retained possession of the remaining trailers and did not transfer the registration in respect of all trailers as at that material time, the Plaintiff contended that the Defendant were not able to provide the relevant JPJK3 forms which had been forwarded to the Defendant earlier pursuant to the Trust Deed. It is undisputed that the Defendant had misplaced the specific JPJK3 forms and therefore the Plaintiff imposed conditions for the Defendant to lodge a police report, provide a statutory declaration and also for a letter of indemnity.

[12] The Defendant refused to comply with the conditions imposed by the Plaintiff as it was the Defendant's position that the conditions were unnecessary and unreasonable and not required under the law. The Defendant argued that certain provisions of the Trust Deed survive termination and upon the expiry of the TSA, the Plaintiff had a fiduciary duty to re-transfer and register the trailers to the Defendant.

[13] The Defendant had on multiple occasions asked the Plaintiff to return the remaining 15 trailers and re-transfer registration back to the Defendant. The Plaintiff refused to do so until March 2014, which was after the Defendant's commencement of proceedings at the Seremban High Court in October 2013.

[14] As at 24 October 2013, the Plaintiff continued to remain the registered proprietor of all the 22 trailers. On 25 October 2013, the Plaintiff's solicitors sent the Defendant's solicitors fresh JPJ K3 forms for 21 of the 22 trailers with Part A of the form duly pre-signed by the Plaintiff for the purpose of retransferring the registered proprietorship back to the Defendant together with a letter dated 25 October 2013.

[15] On 17 March 2014, the Plaintiff informed the Defendant that they would permit the Defendant to collect the outstanding 15 trailers from them and the collection of the remaining 15 were completed before the end of March 2014.

[16] As such dispute arose between the parties in relation to the delay of the retransfer of the registration of fifteen (15) trailers to the Defendant.

[17] The dispute was then referred to arbitration under clause 9 which provides as follows -

9. DISPUTE RESOLUTION

This clause applies to any and all disputes arising out of or in

connection with this Agreement, including any question regarding its

existence, validity or termination. Both parties agree that a good

faith effort shall be made to resolve any such dispute. If such good

faith efforts fail and no resolution of the dispute has been agreed by

the parties within (30) days from the date one party notified the other

in writing that a dispute exists and referring to this clause 9, the

parties may mutually agree within 10 days thereafter to settle the

dispute through mediation. If parties do not agree to

mediation within

the said 10 days or the dispute is not resolved through mediation

within ninety (90) days of agreement to mediate being reached, the

dispute shall be finally resolved by arbitration in accordance with the

Rules for Arbitration of the Kuala Lumpur Regional Centre of

Arbitration applying the UNCITRAL Arbitration Rules.

[18] Pursuant to Rule 4(8) of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) Arbitration Rules, the Arbitrator was appointed by the director of the Kuala Lumpur Regional Centre for Arbitration as the sole arbitrator.

[19]

The Plaintiff's claims as stated in its statement of claim filed in the arbitration proceedings are as follows:

(a) RM3,008,681.03 being the outstanding charges for services rendered and

unpaid in respect of the invoices issued in respect of the following

invoices -

Go to table1

(b) USD60,000.00 being the balance agreed goodwill payment;

(c) RM6,958,873.90 for the maintenance of the trailers during Period (3)

when the trailers were in the possession of the Plaintiff;

(d) Loss of profit of not less than RM2,570,256.00; and

(e) Damages for depreciation in value of the prime movers to be assessed.

[20] The Defendant's defence, inter alia, is that the Plaintiff is not entitle to their claim as the delay in the de-registration and re-transferring was caused by the Plaintiff. The Defendant's counterclaim against the Plaintiff is for the following -

(a) RM5,250.00 being the costs incurred by the Defendant in collecting the
relevant 15 trailers;

(b) RM1,050.00 being charges paid by the Defendant to JPJ for the new
registration certificates for the relevant trailers;

(c) Refund of goodwill payment paid in October 2011 of USD60,000-00; and

(d) USD356,073.54 being the total cost incurred by the Defendant on account
of all the FIBC bags that the Defendant needed to use for the period 1
February 2012 to 28 August 2014 when the trailers were in the
possession of the Plaintiff.

[21] The hearing of the arbitration proceedings was carried out from 16 November 2015 to 20 November 2015, 14 December 2015 and completed on 17 February 2016. In the Final Award, the Arbitrator made the following award –

(a) the Plaintiff's claim in respect of the Invoice KLSSB/SP/002 (for RM300,
000.00) is allowed in part for RM212,500.00;

(b) all other claims by the Plaintiff are dismissed;

(c) the Defendant's counterclaim is dismissed; and

(d) interest at the rate of 5% shall be payable by the Defendant to the
Plaintiff in respect of any amount due including the costs of
arbitration and legal costs.

[22] As stated above the Plaintiff filed two originating summons, OS 39 and OS 8. It is the Plaintiff's position that OS 8 was filed out of an abundance in caution to set aside the Final Award under s. 37 of the AA 2005. It is noted that in OS 39 whilst the intitulement cited s. 42 and s. 37 of the AA 2009, the main prayers sought in the OS are –

(a) for the Final Award to varied and/or set aside under s. 42 of the AA;

(b) for the Final Award be remitted in whole or in part, together with this
court determination on the question of law to the

arbitral tribunal; and

(c) the Final Award be set aside in whole or in part.

[23] Whereas the prayers sought in OS 8 are as follows –

(a) that the final award (Final Award) made and published on 3 November
2016 by the arbitrator Mr. Ragunath Kesavan (Arbitrator) be set aside
under section 37 of the Arbitration Act 2005 and/or the inherent
powers of this Honourable Court;

(b) an order that:

(i) the Defendant shall pay to the Plaintiff a total sum of RM3,008,
681.03 being the outstanding charges for services rendered and
unpaid in respect of invoices issued;

(ii) the Defendant shall pay to the Plaintiff USD60,000.00 being the
balance agreed goodwill payment;

(iii) the Defendant shall pay to the Plaintiff RM6,958,873.90 for the
maintenance of the trailers during the period when the trailers
were in the possession of the Plaintiff;

(iv) the Defendant shall pay to the Plaintiff Loss of profit of not
less than RM2,570,256.00; and

(v) damages for depreciation in value of Prime Movers to be assessed
by arbitration.

Preliminary Objection

[24] Initially the Defendant raised a preliminary objection in respect of OS 39. It was the Defendant's position that OS 39 should be struck off on the ground that the Plaintiff is precluded from filing the said OS by its own agreement. The Defendant relied on Rule 1(ii) of the Kuala Lumpur Regional Center for Arbitration 2013 read with s. 3(2) of the AA 2005 and submit the Plaintiff is precluded from filing the OS under s. 42 of the AA 2005. However on the hearing date the preliminary objection was withdrawn by the Defendant. With regards to the merits of the Plaintiff's OS 39, I am of the view the questions raised by the Plaintiff are not questions of law and dismissed OS 39.

[25] In respect of OS 8, the Defendant had also raised a preliminary objection. The Defendant submits OS 8 which is premised on s. 37 of the AA 2005 is fatally flawed as it seeks reliefs that is not available under s. 37 of the AA 2005. As stated in paragraph 23 above, the Plaintiff had sought for this court to order the Defendant to pay to the Defendant all the claims and grant the relief the Plaintiff sought in the arbitration proceedings.

[26] In this respect, I am in agreement with learned counsel for the Defendant that s. 37 of the AA 2005 only provides this court with the discretionary power to set aside the Final Award in the event the statutory requirements are met. The said s. 37 does not empower this court, in the event the Final Award is set aside, to grant judgment in favour of the Plaintiff for the monetary claims it had sought in OS 8 which is the same prayers it sought in the arbitration proceedings. If the Final Award is set aside the matter would have to be re-arbitrated. In other words this court has no power to substitute the decision of the Arbitrator with a decision of this court. In this respect I am in agreement with the Defendant that the Plaintiff's OS 8 is fatally flawed and ought to be dismissed. Nevertheless, I had also considered the merits of the Plaintiff's OS 8 and dismissed it.

Merits of OS 39

[27] In so far as the application under s. 42 of the AA 2005 is concerned, the issue is whether the questions posed by the Plaintiff are question of law and that such question substantially affect the Plaintiff's right.

The law

[28] S. 42 of the AA 2005 reads as follows –

(1) *Any party may refer to the High Court any question of law arising out*
of an award.

(1A) The High Court shall dismiss a reference made under subsection

(1) unless the question of law substantially affects the rights of one
or more of the parties.

(2) *A reference shall be filed within forty-two days of the publication*

and receipt of the award, and shall identify the question of law to be

determined and state the grounds on which the reference is sought.

(3) *The High Court may order the arbitral tribunal to state the reasons*

for its award where the award –

(a) *does not contain the arbitral tribunal's reasons; or*

(b) *does not set out the arbitral tribunal's reasons in sufficient*

detail.

(4) *The High Court may, on the determination of a reference—*

(a) *confirm the award;*

(b) *vary the award;*

(c) *remit the award in whole or in part, together with the High*

Court's determination on the question of law to the arbitral

tribunal for reconsideration; or

(d) *set aside the award, in whole or in part*

(5) *Where the award is varied by the High Court, the variation shall have*

effect as part of the arbitral tribunal's award.

(6) *Where the award is remitted in whole or in part for reconsideration,*

the arbitral tribunal shall make a fresh award in respect of the

matters remitted within ninety days of the date of the order for

remission or such other period as the High Court may direct.

(7) *Where the High Court makes an order under subsection (3), it may make*

such further order as it thinks fit with respect to any additional

costs of the arbitration resulting from that order.

(8) *On a reference under subsection (1) the High Court may -*

(a) *order the applicant to provide security for costs; or*

(b) *order that any money payable under the award shall be brought*

into the High Court or otherwise secured pending the

determination of the reference.

[29] Some of the governing principles applicable under s. 42 of the AA 2005 was set out in the case of *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126 (CA) -

[57] On the present case authorities, a number of propositions can

be stated as guidelines. We enumerate these below, without intending

them to be exhaustive, since clearly the law has to be developed

further:

(a) *the question of law must be identified with sufficient*

precision (*Taman Bandar Baru Masai Sdn Bhd v Dinding*

Corporation Sdn Bhd [2009] MLJU 0793; ;

[2010] 5 CLJ 83;

Maimunah Deraman v Majlis Perbandaran Kemaman);

(b) *the grounds in support must also be stated on the same basis;*

(c) *the question of law must arise from the award, not the*

arbitration proceeding generally (Majlis Amanah Rakyat v Kausar

Corporation, Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd;

(d) *the party referring the question of law must satisfy the court*

that a determination of the question of law will substantially

affect his rights;

(e) *the question of law must be a legitimate question of law, and*

not a question of fact 'dressed up' as a question of law

(*Georges SA v Trammo Gas Ltd (The Belarus)* [1993] 1 Lloyd
's Rep 215);

(f) *the court must dismiss the reference if a determination of the*

question of law will not have a substantial effect on the rights

of parties (Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd;

(g) *this jurisdiction under* s 42 *is not to be lightly*

exercised, and should be exercised only in clear and exceptional

cases (*Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn*

Bhd [2013] 5 MLJ 98; ; [2013] 8 CLJ 655);

(h) *nevertheless, the court should intervene if the award is*

manifestly unlawful and unconscionable;

(i) *the arbitral tribunal remains the sole determiners of questions*

of fact and evidence (*Gold and Resource Development (NZ) Ltd*

v Doug Hood Limited [2000] 3 NZLR 318*); and*

(j) *while the findings of facts and the application of legal*

principles by the arbitral tribunal may be wrong (in instances of

findings of mixed fact and law), the court should not intervene

unless the decision is perverse.

[30] In *Awangku Dewa Pgn Momin & Ors v Superintendent of Lands And Surveys, Limbang Division* [2015] 3 CLJ 1 (CA) the Court of Appeal said –

[28] A High Court in dealing with a s. 42 *reference must*

summarily dismiss the application, without even attempting to answer

the 'question of law' posed to the court, if the question is, in the

first place, not properly and intelligibly framed; or where it is clear

to the court that there is a disguised attempt by the applicant to

appeal against the decision of the arbitral tribunal. In other words, a

court of law must always be vigilant against any attempt by a party to

abuse the s. 42 *procedure as provided for by the Act and to*

utilise the provision as a backdoor avenue for appealing against the

decision of an arbitral tribunal.

The Court of Appeal in Chain Cycle Sdn Bhd v Kerajaan Malaysia

[2016] 1 MLJ 681 *(CA) said this about the purpose of the said* s.

42 *and caution the court against being dragged into being an*

appellate court –

[64] The legislative intent behind allowing reference to be

brought on questions of law (s 42 of the AA) *to the court*

appear to be to cut a middle path between those divergent

positions, namely, to allow the courts a limited role to

re-examine issues or questions of law arising out of an award. It

is pertinent in this regard to note our statute use the term '

reference' and not 'appeal' (as found in the English Arbitration

Act 1996). It is also equally pertinent to highlight that

provision of similar purport in England, New Zealand and

Singapore (domestic arbitration) require the 'leave of court'

to be first obtained as a preliminary step before proceeding with

such 'appeal' or 'reference' on a question of law itself. Such '

subject to leave of court' provisions are clearly designed to '

sieve out' what are in essence appeals on facts or otherwise

frivolous or irrelevant questions of law.

…

[66] The pressure was definitely on the courts therefore to

be ever vigilant and to resist attempts to engage the courts in a

review of the arbitral award on its merits, akin to an 'appeal',

often camouflaged masterly as 'questions of law'. There was no

room for any dispute that the curial function of the court

under s 42 of the AA *was only intended by the Legislature to*

be extended to questions of law per se, that too, which would

affect substantially the rights of one or the other party.

[Emphasis added]

[31] With regards to what tantamount to question of law, the court in *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd* [2015] 11 MLJ 841 said –

[55] … a question of law refers to 'a point of law in controversy'

which requires the opinion or determination of this court. Such

question will include one where there is an incorrect interpretation of

the applicable law. It, however, will not include any question as to

whether the award or any part of the award was supported by any

evidence or any sufficient or substantial evidence; or whether the

arbitral tribunal drew the correct factual inferences from the relevant

primary facts.

[56] Most important, the identified question of law must be a real

and legitimate question of law and not a question of fact 'dressed up'

as a question of law. There have been frequent enough reminders that

the court should restrain from interfering and substituting for the

arbitrator's findings, its own views and findings. This reminder comes

from the recognition of party autonomy and choices in their dispute

resolution mechanisms regardless how obviously wrong findings of facts

may be (except of course where the findings are truly irrational or

bizarre) or even the scale of the financial consequences of the mistake

of fact might be. The court should always be vigilant to guard against

challenges of findings of facts dressed up as questions of law.

[32] As stipulated in s. 42 (1A) of the AA 2005, not only the question referred to must be a question of law but it must be demonstrated that the question of law substantially affects the rights of the parties. In *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd* [2015] 10 MLJ 689 (HC) the court applied the interpretation adopted by two Singapore Court of Appeal decisions where 'substantially affect the rights' was interpreted to mean that it refers to 'a point of practical importance – not an academic point – nor a minor point' (*Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609) and that whether a claim was substantial or not can sometimes be considered in absolute terms and such consideration involves largely a matter of discretion (*Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR 494). The court in *MMC Engineering Group Bhd* case further said that there must be evidence presented or at the very least a claim or an assertion in the cause papers including the affidavits filed in support to the effect that the applicant's rights have been affected substantially by the arbitration award; and an explanation as to how those rights are affected substantially.

Findings of the court

[33] Question 1 - relate to the Plaintiff's claim for the outstanding charges of RM3.008,681.03 for services rendered and unpaid. This question is said to have arose from paragraphs 33 to 42 and 59 of the Final Award. The question is as follows –

'Whether upon true construction of the contract between the parties and

the law on limitation in respect of an action founded on a contract,

the Plaintiff could be deprived of a claim for RM2,701,476-03 (or any

part thereof) incurred for services rendered to the Defendant merely

because the duration to make such claim in the contract was allegedly

not complied with though made within the time permitted by law?'

[34] In considering the Plaintiff's claim for the outstanding transportation charges, it is apparent from paragraphs 33 to 42 of the Final Award that the Arbitrator had set out the facts surrounding the issuance of the invoices LORDBPH 63 – 01 to 69 – 01 issued by the Plaintiff in respect of services rendered in 2010 before the expiry of the TSA. The said invoices are amounts which the Plaintiff claimed as short falls in the actual amount received by the Plaintiff. The Arbitrator had considered the testimony of a witness RW-1 whose testimony the Arbitrator found was not challenged. The Arbitrator had made a finding of fact that the Plaintiff had already invoiced the Defendant in respect of the Plaintiff services for the last period of invoicing and that the last invoice was paid in full.

[35] Besides acting on oral evidence of a witness in making a finding of fact that the invoice had already been paid in full, the Arbitrator had also considered the relevant provision in the TSA, namely, clause 13 and 30 in the event there is dispute as to the invoice of payment. Clause 13 and 30 of the TSA reads as follows –

Clause 13 Billing Records

Contractor [Plaintiff] shall maintain, at no additional charge to

Company [Defendant], in accordance with generally accepted accounting

principles complete and accurate records related to amounts billed to

and payments made by Company. Contractor shall provide Company

supporting documentation concerning any disputed

invoice or payment

within thirty (30) days after Company notifies Contractor of a dispute.

Payments made under this Agreement shall be subject to final adjustment

as determined by Company review, if a dispute arises it will be settled

under Clause 9. Contractor shall retain such records for a period of

seven (7) years from the expiration of this Agreement or such length of

time as may be required by any law, ordinance or regulation, whichever

is longer.

Clause 30 Invoices

30.1 Contractor will submit invoices monthly to the following

address:

BP CHEMICALS (MALAYSIA) SDN BHD

Lot 116, Gebeng, Industrial Estate

P.O. Box 11, Balok

16080 Kuantan, Pahang, Malaysia Attention: Accounting

Contractor shall submit invoices to Company each month no later than

the 15th of the following month for which the Services are being

billed. Company shall pay the Contractor at the rate and in accordance

with the pricing structure and payment mechanism in Exhibit "B". Where

any item or items on an invoice are disputed, the Company may withhold

payment for the item or items so disputed until such time as the

disputed is resolved.

Services shall be delivered free from all claims, liens and charges

whatsoever. Before making payment, Company reserves the right to

require proof that all parties furnishing labour and materials for the

Services have been paid. Undisputed invoices shall be payable thirty

(30) days from receipt of the invoice. Currency to be used for payment

under this Agreement will be Ringgit Malaysia.

[36] Based on the evidence, the Arbitrator found the Plaintiff had not complied with the contractual provision and therefore the Plaintiff is estopped from pursuing with the claims as the Plaintiff had not complied with the provisions relating to invoicing and billings.

[37] Likewise, in respect of invoice no. KLSSB/SP001 which was issued after the expiry of the TSA, the Arbitrator found no evidence to show that the Plaintiff has complied with clause 13 and 30. This claim was dismissed by the Arbitrator.

[38] With regard to Invoice No. KLSSB/SP002 for a sum of RM300,000.00 the Arbitrator found there is evidence (via email dated 12 March 2012) to show that there was a sum of RM212,500.00 remaining unpaid and that the Defendant did not challenge the amount outstanding. The Arbitrator allowed the claim for such sum and ruled that clauses 13 and 30 of the TSA is not applicable as there was no dispute as to the said amount.

[39] Having considered the relevant paragraphs of the Final Award and Question 1 posed by the Plaintiff, I am of the view the question posed is not purely a question of law as discussed in the case of *Magna Prima Construction*. By the said Question 1, the Plaintiff is disputing the finding of facts made by the Arbitrator that the Plaintiff did not comply with clauses 13 and 30 of the TSA. Thus Question 1 is an attempt on the part of the Plaintiff to question the correctness of the finding of fact (ie non-compliance of clause 13 and 30 of the TSA by the Plaintiff) which is dressed up as a question of law.

[40] It is trite that in arbitration proceedings, the arbitral

tribunal is the sole determiners of questions of facts and evidence (*Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126 (CA)). The Arbitrator had examined and evaluated the evidence adduced before him and made his findings. Based on the evidence the Arbitrator rejected the Plaintiff's claim in respect of invoices LORDBPH 63 – 01, LORDBPH 65 – 01, LORDBPH 66 – 01, LORDBPH 69 – 01 and KLSSB/SP/001 as the Plaintiff did not raise the issue of part-payment in accordance with the terms of the TSA that was mutually agreed between the Plaintiff and the Defendant. Be that as it may the Plaintiff's claim in respect of invoices KLSSB/SP/001 was allowed partly in the sum of RM212,500.00 even though the Plaintiff failed to comply with clause 13 and 30 on the ground that the Defendant did not object the fact that such sum is outstanding and due to the Plaintiff. These are the proven facts which forms the basis of the Arbitrator to reject and partly allowed the Plaintiff's claim.

[41] As to the purported question of law raised by the Plaintiff that clause 30 of the TSA has curtailed the rights of the Plaintiff under s. 6(1)(a) of the Limitation Act 1953 to pursue its claim against the Defendant, it is pointed out by learned counsel for the Defendant that this issue was never pleaded by the Plaintiff and it was not raised in the submission in the arbitration proceedings. It was also pointed out by the Defendant that the allegation that clause 30 of the TSA is void because it contravenes s. 29 of the Contracts Act was never pleaded and raised in submissions at the arbitration proceedings.

[42] In its submission, the Plaintiff did not deny that the above issues on clause 30 and its validity in context of s. 6(1)(a) of the Limitation Act 1953 and s. 29 of the Contracts Act 1950 was never pleaded and raised at the arbitration proceedings. The Plaintiff submits in an application under s. 42 of the AA 2005, an applicant would not be able to pre- determine the question of law before an award is being published.

[43] With respect, the Plaintiff's contention is not justifiable nor tenable. It is settled law that an applicant under s. 42 of the AA 2005 must demonstrate that the question of law arise from the award of the arbitrator and not any other extraneous material (*Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 3 CLJ 403 (CA)). Based on paragraphs 33 to 42 of the Final Award, it is obvious that there is no mention or reference made by the Arbitrator with regards to the said issues. This is rightly so since that issue was never raised in the Plaintiff pleadings nor raised in its submission. An arbitrator cannot decide on matters and issues which are not submitted or argued before him. As such it is manifestly wrong on the part of the Plaintiff to challenge the award of the Arbitrator on issues which were not pleaded and accordingly issues which the Arbitrator has not applied his mind to. Since the said issues are issues which were not adjudicated in the arbitration proceedings and consequently no findings were made in the Final Award, it is my considered opinion that there is no basis for the Plaintiff to pose such questions as the said issues are not issues which arise out of the Final Award (*Majlis Amanah Rakyat v Kausar Corporation* [2009] 1 LNS 1766; *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2014] 1 AMR 253).

[44] Question 2 - relate to the Plaintiff's claim for the balance of goodwill payment in the amount of USD60,000.00. This question is said to have arose from paragraphs 50, 51 and 59 of the Final Award. The question is as follows –

'Whether, upon true construction of the contract between the parties
and having considered the finding of the Arbitrator and/or conduct of
the parties that the delay in returning and retransferring of the
Defendant's trailers was caused by the Defendant, the Plaintiff was
entitled to the agreed balance sum of USD60,000-00 in respect of the
goodwill payment?'

[45] Again, the above question is not purely a question of law. While construction of contract may be a question of law, the above question in actual fact revolves on the finding of fact made by the Arbitrator in respect of the construction of the contract between the parties based on the conduct of the parties in respect of the return of the trailers to the Defendant.

[46] The Plaintiff contends that the finding of fact by the Arbitrator that the conditions imposed by the Plaintiff (that the Defendant to lodge a police report on the said loss, provide a statutory declaration and a letter of indemnity) on the Defendant were not too onerous or impossible for the Defendant to fulfil simply means it was the Defendant who had caused the delay in the de-registration and re-transferring of the remaining trailers from the Plaintiff to the Defendant. And it is the Plaintiff's contention that since the Arbitrator had concluded the collection of the remaining 15 trailers were completed before the end of March 2014 therefore the Arbitrator

should have allowed the Plaintiff's claim for the balance of the performance bonus of USD60,000.00.

[47] It is apparent that the Plaintiff is asking this court to re-look at the finding of facts made by the Arbitrator and substitute the decision of the Arbitrator in favour of the Plaintiff.

[48] Based on the relevant paragraphs of the Final Award, the Arbitrator had considered the fact that the parties had agreed for a goodwill payment of USD120,000.00 in two payments be paid to the Plaintiff. At the same time the Arbitrator had also determined that the said payment is subject to the Plaintiff fully discharging their obligations under the TSA and Trust Deed. It is the finding of the Arbitrator that the Plaintiff had failed to carry out their obligations to physically return and retransfer the ownership of the trailers as the Plaintiff ought to have done in accordance with the TSA and Trust Deed. Based on paragraph 50 of the Final Award, the Plaintiff ought to have return and retransfer the trailers before January 2012 but the Plaintiff failed to do so and such failure has prompted the Defendant to refuse making the payment of the balance USD60,000.00 which was due in January 2012.

[49] Since it is the finding of the Arbitrator that the Plaintiff in fact failed to retransfer and physically return the trailers which is a specific obligation of the Plaintiff under the TSA, the Arbitrator had therefore ruled that the Plaintiff is not entitled to the balance payment of USD60,000.00. Based on the above, it would appear that it is the finding of the Arbitrator that the collection of the remaining 15 trailers were completed before end of March is of no significance in so far as it relate to the Plaintiff's specific obligation to return and retransfer the trailers under the TSA and Trust Deed.

[50] Considering the factual circumstances and the evidence, I am of the view the decision of the Arbitrator dismissing the Plaintiff's claim cannot be possibly said to be perverse as to warrant this court to interfere with the said decision (*Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2014] 1 AMR 253).

[51] Question 3 – relate to the Plaintiff's claim for the sum of RM6,958,873.90 being the maintenance of the trailers when the trailers were in the possession of the Plaintiff. This questions are said to have arose from paragraphs 24 to 32 and 59 of the Final Award. The questions are as follows –

'Whether, upon true construction of the contract between the parties
and having considered the finding of the Arbitrator and/or conduct of
the parties that the delay in the de-registration and re-transferring
of the Defendant's Trailers was caused by the Defendant, the Plaintiff
was entitled to the maintenance costs amounting to RM6,958,873-90 (or
any part thereof) incurred by the Plaintiff to maintain the Defendant's
Trailers in road-worthy condition during the period when these Trailers
were in the possession of the Plaintiff during Period (3) [12 January
2012 – March 2014]?'

'Whether in law, the Defendant is estopped from denying the claim for
the maintenance costs having considered the entire circumstances of the
case including the undisputed fact that the Plaintiff had regularly
sent invoices to the Defendant without any protest from the Defendant
and that the Plaintiff kept incurring costs to maintain the Defendant's
trailers?'

'Whether on the true construction of the contract between the parties
and having considered the entire circumstances of the case, there
established a legitimate expectation for the continuation of the
contractual relationship between the parties which entitled the
Plaintiff to claim the maintenance costs of RM6,958,873-90 (or any part
thereof)?'

[52] By the above questions the Plaintiff submits that –

(a) the Arbitrator had failed to construe or interpret the parties'
obligation under clause 7 and 36 of the Trust Deed and the TSA
respectively when dismissing the Plaintiff's claim for the maintenance
costs of RM6,958,873.90;

(b) the Defendant cannot be allowed to enforce its strict legal rights
after having by conduct having encouraged and

represented to the
Plaintiff that it is entitled to the maintenance costs. The conduct
referred to by the Plaintiff is that the Defendant did not protest to
all the invoices for the maintenance costs which were regularly
forwarded by the Plaintiff to the Defendant;

(c) the same conduct on the part of the Defendant had led the Plaintiff to
continue to maintain the Trailers. As such there was a legitimate
expectation for the continuation of the TSA.

[53] I am of the view the above questions does not pose real and legitimate question of law as the Plaintiff is relying on the finding of facts made by the Arbitrator to dispute the correctness of the Arbitrator's decision.

[54] Whether there is legitimate expectation or otherwise is essentially a question of fact. The Plaintiff cited the case *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 where it was held that a person who invokes the doctrine of legitimate expectation need to –

… place sufficient material before a court from which an inference

may fairly be drawn that he was influenced by his opponent's actings.

Further, it is not necessary that the conduct relied upon was the sole

factor which influenced the representee. It is sufficient that 'his

conduct was so influenced by the encouragement or representation … that

it would be unconscionable for the representor thereafter to enforce

his strict legal rights'

[55] My perusal of paragraphs 24 to 32 and 59 of the Final Award shows the Arbitrator had identified the issue of legitimate expectation which the Plaintiff relies in order to support its claim for maintenance in the sum of RM6,958,873.90. It can be clearly seen from the relevant paragraphs that the Arbitrator had set out and scrutinized the evidence adduced in the arbitration proceedings which includes the conduct of the parties prior to the expiry of the TSA and thereafter.

[56] It is the finding of the Arbitrator that the Plaintiff failed to discharge the burden to prove there was a legitimate expectation for the continuation of the TSA and that there was an agreement in place between both parties, at least by conduct, for the continuation of the TSA. The Arbitrator found no evidence to indicate the Defendant's conduct in any way gave rise to any firm of legitimate expectation for the continuation of the TSA. The Arbitrator accepted the testimony of RW1 and the evidence adduced that the TSA is a fixed term contract which ended on 31 December 2011. Furthermore the Arbitrator found there was a tender exercise conducted by the Defendant where the Plaintiff had participated but failed to secure the contract.

[57] It is my considered opinion that the Arbitrator had applied the correct position of the law to the evidence adduced by the parties in determining whether there is legitimate expectation for the continuation of the TSA. Predominantly, the Arbitrator found no sufficient and material evidence adduced for an inference to be drawn that the conduct of the Defendant has influenced or encouraged the Plaintiff that the TSA will be continued. Based on the evidence available it is not possible to conclude that the finding and decision of the Arbitrator is manifestly unlawful and unconscionable.

[58] Perusing paragraphs 57 to 59 of the Final Award, it is pertinent to note that the Arbitrator's finding that the conditions imposed is not onerous or impossible for the Defendant to comply was made when the Arbitrator was adjudicating the Defendant's counter-claim for the losses the Defendant incurred due to the inability to use their trailers. The position of the law as rightly emphasised by the Arbitrator is that the Defendant is obliged to take all necessary and reasonable steps to mitigate its losses. The Arbitrator decided, based on the evidence, that the Defendant ought to have provided the Plaintiff with the documents requested by the Plaintiff for the purpose of mitigating the Defendant's losses.

[59] Perusing the Final Award, there was no finding made by the Arbitrator that it was the Defendant who caused the delay in the de- registration and re-transferring of the Defendant's trailers. Such 'finding' is the Plaintiff's own conclusion.

[60] Question 4 – relate to the Plaintiff's claim for loss of profit of not less than RM2,570,256.00. The question is said to arise from paragraphs 43 to 49 and 59 of the Final Award. The question which comes in three parts are as follows –

'Whether in law in deciding a question of law on the

change of terms of
commercial vehicle permit / licence, an arbitrator was wrong in
accepting the opinion evidence of a lay witness without considering the
relevant statutory provisions regulating the same?'

'Whether in law the Plaintiff who had been deprived of the use of its
prime movers caused by the default and delay of the Defendant in
effecting a retransfer of ownership of the Defendant's trailers is
entitled to claim for loss of profit for the duration of the delay
amounting to RM2,570,256-00 (or any part thereof)?'

'Whether in law mitigation of damages could apply against the Plaintiff'
s claim for loss of profit when the decoupling of the Plaintiff's prime
movers could not be perfected due to the delay in the de- registration
and re-transferring of the Defendant's Trailers was caused by the
Defendant?'

[61] In paragraphs 43 to 49 of the Final Award, the Arbitrator had analysed the evidence made available by the Plaintiff as it is trite law that the burden is on the Plaintiff to prove the loss of profit it is claiming against the Defendant. In other words it is incumbent upon the Plaintiff to prove that it has been deprived of the use of its prime movers because the trailers has yet to be re-transferred and re-registered in the name of the Defendant.

[62] The Arbitrator's finding is that the Plaintiff failed to produce evidence of specific details of the lost business opportunities or evidence that the Plaintiff had to turn down fresh orders due to the inavailability of prime movers. At paragraph 49 of the Final Award the Arbitrator said as follows –

49. Further in a claim for loss of profits, the burden is on the

Claimant [Plaintiff] to produce evidence of specific details of the

lost business opportunities or evidence that the Claimant had to turn

down fresh orders because of the inavailability of prime movers. No

such evidence was produced before this Tribunal. In these circumstances

this claim for loss of profits is dismissed.

[63] Based on the evidence of the witnesses the Arbitrator found, even though the decoupling process between the prime movers and the trailers were pending, the Plaintiff as the registered owner of both the prime movers and trailers could and ought to have taken steps to replace the Defendant's trailers with the Plaintiff's trailers and apply to the authority for approval to change the terms of the permit/license to reflect usage of the new trailers. The Arbitrator said at paragraph 47 of the Final Award –

47. The finding of this Tribunal is that the Claimant even if they

had a legitimate claim for loss of profits against the Respondent, they

would be under a duty to mitigate their losses. The Claimant ought to

have proceeded to give notice to the Respondent of their intention to

decouple and proceed with fresh registration for their commercial

license/permit for each of their fresh coupling of the prime mover and

trailer. There would have been no problem for the Claimant to proceed

as they are on record as the registered owners of both the prime movers

and trailers.

[64] The Arbitrator has applied the correct position of the law in so far as the Plaintiff's burden to prove its losses and its obligations to mitigate the losses. Whether the plaintiff has prove the loss of profit that it claims to be RM2,570,256.00 and the steps taken to mitigate such losses is indeed a question of fact. The Plaintiff claims the Arbitrator's reliance on the opinion of RW-4 and his failure to consider the relevant statutory provision regulating the licence granted by SPAD tantamount to the Arbitrator making his decision without an independent mind.

[65] With respect, the Plaintiff's argument is

misconceived. Just because the Arbitrator had relied on the testimony of a witness whose evidence is not in favour of the Plaintiff does not mean that the Arbitrator had adjudicated the matter without an independent mind and bias towards the Defendant. The Arbitrator may not have considered the relevant statutory provision but based on the evidence before the Arbitrator as set out in paragraph 43 to 49 of the Final Award I am of the view the decision of the Arbitrator dismissing the Plaintiff's claim for loss of profit is not truly irrational and bizarre.

[66] Question 5 - relate to the Plaintiff's claim for depreciation in the value of the Plaintiff's prime movers to be assessed. The question which is said to arise from paragraphs 52 and 59 of the Final Award is as follows –

'Whether in law the Plaintiff who had been deprived of the use of its
prime movers caused by the default and delay of the Defendant in
effecting a retransfer of ownership of the Defendant's trailers is
entitled to claim for depreciation in the value of the Plaintiff's
prime movers to be assessed'

[67] The above question is not a question of law as envisaged in the case of *Magna Prima Construction*. In actual fact it is a question which requires this court to re-evaluate the finding of fact made by the Arbitrator that there is no evidence adduced by the Plaintiff to prove the prime movers has depreciated in value due to the trailers not re-transfer to the Defendant. As stated above the Arbitrator is the sole determiner of fact and evidence. Based on paragraph 52 of the Final Award which is to be read with the relevant paragraphs relating to the Arbitrator's evaluation in respect of loss of profit, the claim was dismissed due to the failure by the Plaintiff to show evidence that the prime movers has depreciated in value. It is not open to the Plaintiff to challenge, under the pretext of question of law, the decision made by the Arbitrator on grounds of inadequacy or insufficiency of evidence (*Magna Prima Construction* case).

[68] To summarise, the above questions posed by the Plaintiff are not purely question of law. The above questions are question of facts. The Plaintiff has also failed to show how their rights are substantially affected by the above purported questions of law. In arbitration proceedings, the arbitrator is the sole determiners of questions of fact and evidence. Perusing the Final Award as a whole, it is apparent that the Arbitrator has analysed the evidence put forward by the parties. The Arbitrator has applied the legal principles to the facts and made his finding of facts based on the evidence. Under s. 42 of the AA 2005 it is not for this court to question whether the findings were supported by substantial or sufficient evidence (*Magna Prima Construction* case).

Merits of OS 8

[69] In so far as OS 8 is concerned the issue is whether the Final Award is in conflict with the public policy of Malaysia due to breach of the rules of natural justice.

The law

[70] The Plaintiff's OS 8 is premised on s. 37 of the AA 2005 which reads as follows –

37 Application for setting aside

(1) *An award may be set aside by the High Court only if-*

(a) *the party making the application provides proof that-*

(i) *a party to the arbitration agreement was under any*
incapacity;

(ii) *the arbitration agreement is not valid under the*
law to which the parties have subjected it, or,
failing any indication thereon, under the laws of
Malaysia;

(iii) *the party making the application was not given*
proper notice of the appointment of an arbitrator or
of the arbitral proceedings or was otherwise unable

to present that party's case;

(iv) *the award deals with a dispute not contemplated by*

or not falling within the terms of the submission to

arbitration;

(v) *subject to subsection (3), the award contains*

decisions on matters beyond the scope of the

submission to arbitration; or

(vi) *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; or

(b) *the High Court finds that-*

(i) *the subject-matter of the dispute is not capable of*

settlement by arbitration under the laws of Malaysia;

or

(ii) *the award is in conflict with the public policy of*

Malaysia.

(2) *Without limiting the generality of subparagraph (1)(b)(ii), an*

award is in conflict with the public policy of Malaysia where-

(a) *the making of the award was induced or affected by fraud*

or corruption; or

(b) *a breach of the rules of natural justice occurred-*

(i) *during the arbitral proceedings; or*

(ii) *in connection with the making of the award.*

(3) *Where the decision on matters submitted to arbitration can be*

separated from those not so submitted, only that part of the

award which contains decisions on matters not submitted to

arbitration may be set aside.

(4) *An application for setting aside may not be made after the*

expiry of ninety days from the date on which the party making the

application had received the award or, if a request has been made

under section 35, *from the date on which that request had*

been disposed of by the arbitral tribunal.

(5) *Subsection (4) does not apply to an application for setting*

aside on the ground that the award was induced or affected by

fraud or corruption.

(6) *On an application under subsection (1) the High Court may,*

where appropriate and so requested by a party, adjourn the

proceedings for such period of time as it may determine in order

to allow the arbitral tribunal an opportunity to resume the

arbitral proceedings or to take such other action as in the

arbitral tribunal's opinion will eliminate the grounds for

setting aside.

(7) *Where an application is made to set aside an award, the High*

Court may order that any money made payable by the award shall be

brought into the High Court or otherwise secured pending the

determination of the application.

[71] With regards to the law, I am reminded of the following authorities –

(a) the High Court in *Infineon Technologies (M) Sdn Bhd v Orisoft*

Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and

another application [2011] 7 MLJ 539 held as follows -

[71] … The concept of public policy as a ground to set aside

an arbitral award remains a thorny area where the position of the

law can vary widely, first, in relation to the question whether

the award is a domestic arbitration award and second, whether it

concerns an International Arbitration Award. In the case of the

latter, the available comparative jurisprudence would appear to

suggest a relatively narrow view being taken of the concept of

public policy. A somewhat wider approach would apply in relation

to a Domestic Arbitration Award, such as the case here.

Nevertheless, there is always a danger that the court, when

applying the concept of public policy in relation to breach of

the rules of natural justice, might willy-nilly encroach upon the

merits of the award and thus offend the basic principle that a

setting aside proceeding must never be in the nature of an

appeal. See the latest Court of Appeal decision in Cairns

Energy India Pty Ltd v Government of India [2009] 1 LNS

1128 *and the very strong holding on this basic principle as can*

be found, for instance, in the following passage:

Generally, to reopen or re-examine the merits of the case

and in effect determine, and replace, the findings of the

majority arbitrators… would fly against all established

principles. (per Suriyadi Halim JCA at p 437)

[Emphasis added.]

(b) The High Court in *Sime Darby Property Berhad v Garden Bay Sdn Bhd*
[2017] MLJU 145 (HC) referred to the Singaporean Court of Appeal

decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte*

Ltd [2007] 3 where it was held that a party challenging an
arbitration award as having contravened the rules of

natural justice
has to establish the following:

(i) Which rule of natural justice was breached;

(ii) How it was breached;

(iii) In what way the breach was connected to the making of the award;
and

(iv) How the breach prejudices its rights.

[72] The Defendant had also referred to *Law, Practice and Procedure of Arbitration* (Second Edition, 2016) by Datuk Professor Sundra Rajoo where examples of arbitral misconduct occasioning breaches of natural justice, includes:-

(1) An arbitral tribunal being said to have an interest in the outcome of
the dispute;

(2) A party being unable to present its case or respond to evidence and
arguments in proceedings;

(3) Deciding the case based on extrinsic evidence not presented by the
parties and without giving them the opportunity to comment;

(4) Basing decisions upon direct unilateral contact with witnesses;

(5) An arbitral tribunal unjustifiably refusing to admit material evidence;

(6) A refusal by the arbitral tribunal to grant a proper hearing as to the
question of costs and reversing the burden of proof in deciding the
quantum of costs;

(7) Taking of a bribe;

(8) Excessive charges for its services.

[73] The Plaintiff contends that the Arbitrator had breach the rules of natural justice in the following manner –

(a) the Arbitrator failed to consider issues which were put before him by
the parties;

(b) the Arbitrator took into account irrelevant considerations and failed
to take into account relevant consideration;

(c) the Arbitrator has misdirected himself in law;

(d) the Arbitrator acted in a manner which was biased against the Plaintiff;

(e) the Arbitrator failed to consider any statutory rules or common law on
matters before him;

(f) the Arbitrator arrived at a decision against the Plaintiff which is
manifestly unreasonable that no reasonable body of person could have
reached it.

[74] The instances where the Plaintiff claim there is breach of the rules of natural justice on the part of the Arbitrator are as stated and discussed below.

Breach in connection with the making of the Final Award

[75] The Plaintiff contends the breach arise from paragraphs 24 to 32 and 59 of the Final Award in that the Arbitrator failed to consider the following conducts of the Defendant in determining the issue on legitimate expectation –

(a) the loss of the JPJK3 Forms by the Defendant;

(b) the refusal of the Defendant to furnish the relevant documents as
requested by the Plaintiff to complete the de-registration and
re-transferring of the remaining trailers;

(c) the previous conduct of the Defendant where the Defendant had extended
the TSA after the expiration of 4 ½ months from the initial duration;

(d) the Defendant allowed the Plaintiff to retain the remaining trailers in
the name and physical possession of the Plaintiff during the period
from 12 January 2012 until March 2014.

[76] Paragraphs 24 to 32 and 59 of the Final Award relate to the Arbitrator's decision on the Plaintiff's claim that there was a legitimate expectation for the extension of the TSA. This issue on legitimate expectation in turn goes to the validity of the Plaintiff's claim for maintenance of the Defendant's trailers based on invoices dated 13 February 2012 to 2 April 2014. In the said paragraphs the Arbitrator has analysed the evidence before it and made the following finding –

(a) the TSA had been terminated by effluxion of time;

(b) no evidence to indicate that the Defendant's conduct in any way give
rise to any form of legitimate expectation for the continuation of the
contract;

(c) the Defendant has provided evidence and documents to show that the TSA
which is a fixed term had expired on 31 December 2011;

(d) there was a tender exercise conducted by the Defendant where the
Plaintiff had participated but failed to secure the contract;

(e) the loss of the JPJK3 Forms by the Defendant and the failure of the
Defendant to comply with the conditions imposed by the Plaintiff for
replacement JPJK3 Forms is not sufficient to amount to a legitimate
expectation for the continuation of the TSA;

(f) the conducts of the parties prior and post expiry of the TSA (as stated
in paragraphs 26 to 30 of the Final Award and simplified in this
paragraph 76) supports the Defendant's contentions that there was no
legitimate expectation that could be relied upon by the Plaintiff;

(g) there is no clear unequivocal agreement either orally or in writing for
the extension if the TSA; and

(h) the Defendant had made it abundantly clear to the Plaintiff that they
did not intend to extend the TSA contract with the Plaintiff.

[77] As stated in paragraph 56 above, the Arbitrator had taken into account the material and relevant evidence in determining the issue of legitimate expectation pleaded by the Plaintiff. Of significance is the fact that the Plaintiff themselves had actually participated in a tender exercise conducted by the Defendant but failed to secure the contract. The parties are given equal opportunity to tender their evidence be it oral or documentary for the Arbitrator's consideration. It was on the evidence tendered that made his findings and decision which under the circumstance is not manifestly unlawful or unconscionable as to warrant this court interference.

[78] The Plaintiff also contend based on paragraphs 33 to 42 and 59 of the Final Award the Arbitrator had breached the rules of natural justice when the Arbitrator failed to hold that clause 30 of the TSA was void for contravening s. 29 of the Contracts Act 1950 because the said clause clearly limits the time within which the Plaintiff could enforce its rights under s. 6(1)(a) of the Limitation Act 1953. As discussed in paragraphs 41 to 43 above, the issue on the validity of clause 30 of the TSA in the context of s. 29 of the Contracts Act 1950 and s. 6(1)(a) of the Limitation Act was never raised in the Plaintiff's pleadings and submissions during the arbitration proceedings. Therefore the failure by the Arbitrator to consider such issue is not a breach on the part of the Arbitrator as he is duty bound to decide within the scope of the arbitration issues submitted to him by the parties.

[79] The Plaintiff further contend based on paragraphs 43 to 49 and 59 of the Final Award, the Arbitrator had committed an error of law and misdirected himself on the law on the face of the award when he accepted the opinion evidence of a lay witness, RW4, and not the statutory provisions regulating the de-registration and retransfer of the trailers.

[80] As the Arbitrator had rightly stated in the relevant paragraphs of the Final Award, it is incumbent on the Plaintiff to prove its loss of profits and its obligation to mitigate the losses. Such is the correct legal principle which essentially requires proof of facts. Based on paragraphs 43 to 49 of the Final Award, the Arbitrator not only took into consideration the evidence of the witness RW4 (Mohd Noor Ihsan bin Draman, Head of Policy and Project Unit, Licensing Department of the Land Public Transport Commission (SPAD)) but he had also took into account the other evidence or the lack of it put forward by the Plaintiff to prove its claim. As such

the Arbitrator has analysed the whole of the evidence and the submissions by the parties, which the Arbitrator is duty bound to do. The Arbitrator may not have considered the relevant statutory provision but the decision made is not irrational, considering the evidence made available by the parties and the legal principles applicable. As such it is not for this court to re-examine or re-evaluate the evidence as this would inevitably tantamount to an appeal against the decision made by the Arbitrator.

[81] The Plaintiff submits based on paragraphs 50, 51 and 59 of the Final Award, the Arbitrator had breached the rule of natural justice when he erroneously dismissed the Plaintiff's claim for the balance agreed goodwill payment of USD60,000.00. This is because such decision is inconsistent with the Arbitrator's finding of fact that the delay in the decoupling of the prime movers and the trailers was caused by the Defendant. The Arbitrator also failed to consider the undisputed fact that the remaining trailers had been returned to the Defendant in March 2014.

[82] As stated above, there is nothing in the Final Award which pronounced it was the Defendant who caused the delay in the decoupling of the prime movers and the trailers. As such Plaintiff's contention that there is inconsistency in the Arbitrator's decision when the Arbitrator dismissed the Plaintiff's claim for the balance of the goodwill payment is misplaced. In fact based on paragraph 51 of the Final Award it was the finding of the Arbitrator that the Plaintiff failed to carry out their obligations under the TSA to physically return and retransfer the ownership of the trailer to the Defendant after the expiry of the TSA. As stated in paragraph 49 above the fact that the trailers were returned to the Defendant in March 2014 long after the expiry of the TSA in 2011 is not relevant in relation to the agreed goodwill payment which is subject to the Plaintiff's fulfilling of certain specific obligation. As such it is my considered opinion that the Arbitrator did not erred in fact when he dismissed the Plaintiff's claim under the circumstances.

[83] According to the Plaintiff, the Arbitrator had also breached the rules of natural justice when he dismissed the Plaintiff's claim for depreciation in the value of the Plaintiff's prime movers to be assessed. This is because the Arbitrator failed to analyse and appraise the effect of his finding that the delay in the decoupling of the prime movers and the trailers was caused by the Defendant. The Arbitrator did not give further valid reasons when dismissing the said claim but simply relying on his findings in respect of the Plaintiff's claim for loss of profit.

[84] As I have stated above it was the Plaintiff who made its own conclusion that the Defendant was the cause of the delay in the decoupling exercise as no such finding was made by the Arbitrator in the Final Award. The reason for the dismissal of the Plaintiff's claim for depreciation in the value of the prime movers as stated in paragraph 52 of the Final Award is as follows –

In respect of the loss of commercial usage of the prime movers and

depreciation in value of the prime movers, the Claimant in their

submission relied on the same argument as in the computation of the

loss of profits. As the claim for the loss of profits was dismissed,

the Tribunal is also dismissing this claim on the same grounds.

[85] For its claim for loss of commercial usage of the prime movers and the depreciation in value of the prime movers the Plaintiff relied on the same argument as in the computation of the loss of profits. Since the Plaintiff's claim for loss of profits was dismissed due to the Plaintiff's failure to prove with details of the specific business opportunities which the Plaintiff lost or fresh orders which the Plaintiff had to turn down due to inavailability of their prime movers, the Arbitrator dismissed the claim for loss of commercial usage of the prime movers and the depreciation in value of the prime movers. The reasoning by the Arbitrator is simply this – since no proof that the Plaintiff were deprived of the use of the prime movers therefore there is no issue of loss of commercial usage and the depreciation in value due to the usage of the prime movers. I am of the view the Plaintiff's contentions that failure of the Arbitrator to provide further valid reasons is a breach of the rules of natural justice is misplaced as the Arbitrator had made known its reasoning in the Final Award albeit not to the satisfaction of the Plaintiff.

Whether the Arbitrator has acted in a manner which was biased against the Plaintiff

[86]

The instance where the Arbitrator is alleged to have

acted in a manner which was biased against the Plaintiff was when the Arbitrator suggested and/or proposed to the Defendant to call additional witness to rebut the Plaintiff's contentions on the issue of coupling of the Plaintiff's prime movers to the Defendant's trailers. The relevant passage from the proceedings which the Plaintiff alleged biasness on the part of the Arbitrator is as follows –

Go to table2

[87] The Plaintiff contends by making such suggestion to the Defendant, the Plaintiff had created an impression of unfairness or of partiality and biasness which is a departure from the standard of even- handed justice which the law requires from him as an Arbitrator. It was therefore alleged justice was not done in this case, nor it could be seen to be done.

[88]

In this respect the Defendant submits that the question was posed to the Defendant's counsel because the Plaintiff's counsel had earlier informed the Arbitrator that the Plaintiff intends to put forward Arbitrator two witnesses on the contested issue of coupling of the Plaintiff's prime movers to the Defendant's trailers. In this respect it is important to appreciate the circumstances under which the Arbitrator posed the said question. For that purpose the relevant parts of the Notes Proceedings is reproduced below –

Go to table3

[89] Based on what transpired as evident from the above Notes of Proceedings, I am of the view the question or suggestion made by the Arbitrator did not in any way created an impression of unfairness or partiality as the Plaintiff made it to be. I am of the view the conduct of the Arbitrator enquiring from the Defendant whether a rebuttal witness would be call is perfectly acceptable as the Plaintiff had, towards the end of the proceedings, informed the Arbitrator that the Plaintiff had filed additional documents which shows that the Plaintiff's prime mover and the Defendant's trailer are tied to each other.

[90] As correctly stated by the Arbitrator, the issue which he is required to determined is whether the prime movers cannot be decoupled (as argued by the Plaintiff) and if so, this would deprive the Plaintiff of the use of their prime movers for the period the prime movers were tied with the trailers and in the possession of the Plaintiff. If there is evidence that the prime movers cannot be decoupled then the Defendant could be liable for the damage suffered by the Plaintiff. If, on the other hand there is evidence to show that the prime movers can be decoupled then the Plaintiff's claim against the Defendant would fail.

[91] Under the circumstances and also for purpose of assisting him in deciding the said issue, the Arbitrator has asked the Defendant to consider whether the Defendant wants to provide evidence to rebut the Plaintiff's evidence. By doing that the Arbitrator is according an opportunity to the Defendant, faced with new documents/evidence from the Plaintiff, to rebut the Plaintiff's evidence. The Arbitrator is duty bound to ensure parties are given equal opportunity to deal (adduce evidence and submit) with the said issue on decoupling of the prime movers.

[92] I do not see why and how, by asking the Defendant to consider rebuttal evidence, the Arbitrator had acted in a bias manner towards the Plaintiff. The Plaintiff failed to demonstrate how they are prejudice by the conduct of the Arbitrator raising the issue of rebuttal evidence. The Plaintiff also failed to demonstrate how the conduct of the Arbitrator is a departure from the standard of even-handed justice which the law requires from him as an Arbitrator. General allegations or complaints of biasness or impartiality without proof is insufficient to make a case of breach of the rules of natural justice.

[93] The Plaintiff cited the case of *Catalina v Norma* [1936] 61 K.B. 360 to support their contentions. In this respect I am in agreement with the Defendant that the facts in that case can be distinguished from the instant case. In *Catalina v Norma*, the arbitrator expressed derogatory remarks about the witness based on nationality. In a motion to remove the arbitrator due to misconduct, the court found that the arbitrator did express such an "actual bias" and granted the motion. In the instant case, the Arbitrator did not express such words of a similar nature about any of the witnesses in the arbitral proceedings and it does not involve a challenge to the arbitrator's appointment or an application to remove the arbitrator from conducting the arbitral proceedings due to the arbitrator's impartiality or independence.

[94] Based on the above I am of the considered view the instances above does not show breach of the rules of natural justice on the part of the Arbitrator. Taking into account the conduct of the arbitration proceedings and the evidence led by the parties, the instances cited by

the Plaintiff has failed to show that the Arbitrator has acted in a manner which is prejudicial to the interest of the Plaintiff or that there is arbitral misconduct on the part of the Arbitrator which tantamount to breach of the rules of natural justice.

Conclusion

[95] Premised on the above reasons, I am of the view the Plaintiff has failed to overcome the high threshold under s. 42 of the AA 2005. The Plaintiff also failed to discharge its burden of proving breach of the rules of natural justice in the context of s. 37 of the same, as expounded by the authorities cited above. I accordingly dismissed the Plaintiff's OS 39 and OS 8.

Load Date: November 15, 2018

Table1 (*Return to related document text*)

NO.	DATE	INVOICE	BALANCE (RM)
1.	8 April 2010	LORDBPH 63-01	3392.00
2.	10 June 2010	LORDBPH 65-01	1000.00
3.	10 July 2010	LORDBPH 66-01	1120.00
4.	7 October 2010	LORDBPH 69-01	1693.00
5.	11 January 2012	KLSSB/SP/0001	2,701,476.03
6.	11 January 2012	KLSSB/SP/0002	300,000.00
		TOTAL	3,008,681.03

Table1 (*Return to related document text*)

Table2 (*Return to related document text*)

ARB (Arbitrator) Ok. Do you want to call a rebuttal witness? To be fair to you, because this is Claimant's.

VRD (Defendant's counsel) The thing is I have actually gone through some of these documents with my clients and they have, they are not sure how these documents are going to be used or relied upon and what it actually shows.

ARB But you know where he's coming from, yes?

VRD Yes. So until I see the witness statement and the nature of evidence that will be elicited to try and make it, to try and use this to support their contentions, I am not sure how I'm going to rebut it

Table2 (*Return to related document text*)

Table3 (*Return to related document text*)

KKP: (Plaintiff's counsel) … We had filed since the last adjournment, an additional document called Claimant's Additional Bundle of Documents, the yellow bundle consisting of documents from SPAD and PUSPAKOM and JPJ. These documents will go to show that the prime mover and the Respondent's trailers are indeed tied to each other, that the witnesses from SPAD and PUSPAKOM who was supposed to give evidence today on these documents–

ARB How many witnesses?

KKP One from SPAD one from PUSPAKOM

ARB No witness statement?

KKP … we have proposed some questions to them, we were supposed to see them this morning to get the answers…and email it to respective parties but we were caught by these holidays that was declared over the week end… they will be formal witnesses just to explain these documents

ARB : …Do you want to call a rebuttal witness? To be fair to you, because this is Claimant's.

VRD The thing is I have actually gone through some of the documents with my clients and they have, they are not sure how these documents are going to be used or relied uponand what it actually shows

… …

VRD … so until I see the witness statement and the nature of evidence that will be elicited to try and make it, to try and use this to support their contentions, I am not sure how I am going to rebut it.

ARB: … The issue will be, the way I look at it, if you cannot decouple, that means the prime movers were out of commission, they had, they couldn't use the prime movers forwhatever period of time, then would your client be liable for the damages for that period of time which until it as, … but if it could be decoupled, then the whole chunk of their claim cannot be entertained because they have taken the reasonable step to decouple. That's the issue, right?

VRD : Yes. I may need a rebuttal witness. I really can't say now.

ARB : No problem. I mean, of course I leave it to you because this is a witness

which is being raised at the
(inaudible).

VRD: Not only because it's a witness that is being raised towards the end of the trial but also because it is an industry of specific area which I cannot comment upon and my clients at this point even with the input from those in the know-how of the industry can't comment upon
…[…]

ARB … to be fair to both sides, you can take one month to get things sorted, I mean to be fair really I don't want to, one party be ambushed or whatever. I think Kiru [Plaintiff's counsel] have got no problem with that …

ARB: My issue is that if I have another witness from your side to explain, then it gives, it makes it easier for me to decide on the interpretation.

VRD: Yes, I understand, Mr. Arbitrator. I think indeed if there is a witness who is going to say what my learned friend suggests,
I would definitely want to get a witness also, also for my own clarities sake to the actual interpretation.

ARB: Ok. Then the issue will be how long? Would you have any documents to provide us? …

KKP: Perhaps if you think that you've got a document to countenance this and if we can have those documents, then that will be put to SPAD and PUSPAKOM.

ARB: Yes, your witnesses, yes.

KKP: So maybe we … can tentatively fix a date after 16thJanuary but in the meantime, we can have a case management where we can see where we are moving forward.

ARB: Yes.

VRD: Yes.[…]

Table3 (*Return to related document text*)

End of Document