

# Arbitral Awards

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Enforcement & Setting Aside



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FCI Arb, FMI Arb

# Issues

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Recognition & Enforcement

Grounds for Setting Aside / Non-Enforcement

Outside Jurisdiction

Defective Award

Conflict with Public Policy

Natural Justice



# Recognition & Enforcement

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## Section 38 AA 2005

- Seat is Malaysia or Foreign State
- Foreign State – signatories to New York Convention (reciprocity approach)
- Apart from procedural requirements, it is straightforward
- Reactive approach to setting aside – grounds to refuse recognition & enforcement under section 39



# Setting Aside

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- Section 37 AA 2005 & what seems to be limited grounds
- Effect of deletion of section 42 under AA (Amendment)(No.2) 2018
- Concerns with deletion of section 42:-
  - No power to remit
  - No consideration of technical misconduct
  - No consideration of Errors of Law on the Face of the Award
  - No judicial supervision
  - Awards on Summary Determination – section 19 AIAC Rules
- Risk of Courts being tempted to have a more liberal & expansive approach to setting aside / non-enforcement under section 37 & 39





# Grounds for Setting Aside / Non-Enforcement





# *Outside* Jurisdiction

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## Time limits for Award prescribed by Arbitration Agreement or applicable rules

### PAM Arbitration Rules

- Art 21.3 : deliver Award no later than 3 months from receipt of closing statements
- Art 21.4 : Arbitrator can extend by way of notification to parties

### ICC Rules

- Part 31 : Within 6 months of the TOR unless the ICC Court extends

### AIAC Rules 2021

- Rule 34 : 90 days from the date of declared closure of proceedings (Rule 32.1), draft Award for technical review
- Rule 34.2 : Time may be extended by Director after consulting Parties

### Cases

- Ken Grouting v RKT Nusantara – excess of Arbitrator's jurisdiction
- Sunway Creative STones v Syarikat Pembinaan Yeoh Tiong Lay – generally undue delay is not a ground of conflict with public policy



# *Outside* Jurisdiction

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## Deciding matters not pleaded or referred

- What needs to be Referred / Plead?
- Head of claim or counterclaims & Issue in dispute
- Specific defences & set-offs
- Discretion to allow amendment vs Matters not referred in Request

## Taman Bandar Baru Masai v Dindings Corporation

- Emphasised jurisdiction based on Arbitration Agreement & conflated this with jurisdiction on submission to arbitration

## Kerajaan Malaysia v Pewira Bintang Holdings

- New issues not submitted to Arbitration or pleaded
- Excess of jurisdiction





# Defective Award - *Not an Award*

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## 1. Section 33 AA 2005

- In writing
- Signed by Majority but reason for omitted signature stated
- Reasoned (unless agreed otherwise)
- Dated
- Seat of arbitration (deemed made at seat)
- Signed copies to Parties

## 2. Rule 33 AIAC Rules 2021

- Electronic signature allowed





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Induced or affected by fraud or corruption

Breach of Natural Justice during arbitral proceedings

Breach of Natural Justice with making of Award

Non-Exhaustive listing of what can be in conflict with Public Policy

- Public Policy for S.37 & S.39: Narrower and more restrictive than the usual broad concept
- Fundamental principle of substantive or procedural law or justice is affected
- Some element of illegality
- Shock the conscience
- Injury to public good
- Offensive to ordinary reasonable and fully informed public
- Injury to integrity of Court process or powers
  - –Only in deserving case
  - –Violation of basic notions of morality and justice
  - –Patent injustice, manifestly unlawful or unconscionable, substantial injustice, serious irregularity
- Jan De Nul v Vincent Tan case

# Conflict with Public Policy of Malaysia



# Natural Justice

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## Section 20

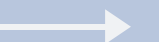
Treating parties with equality  
(equal time and equal opportunity)

## Section 20

Fair and reasonable opportunity  
(not full opportunity)

## Breach

- Must be serious (materiality)
- Must be material to outcome (causative)
- need not have wholly prejudiced the party asserting breach
- Master Mulia v Sigur Rose case



# Natural Justice

## *Making Award*

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### Failure to deal with and address Key Issues completely

- Failure to consider by failing to address a material pleaded or submitted issue
- Failure must be clear and virtually inescapable
- AKN & Anor v ALC & Others case (Singapore)
- Front Row Investment Holding v Daimler South East Asia (Singapore)

### Using Own Knowledge of Facts or Law without opportunity for Parties to address the same – S.21(3)(b) AA 2005

#### Master Mulia v Sigor Ros case

- emphasized the duty to give the party an opportunity to address the arbitrator on matters within own knowledge

#### Pancaran Prima v Iswarabena case

- distinguished between whether the use of own knowledge was reasonably foreseeable or a complete surprise
- If used for areas of decision where there is a discretion, it is acceptable
- emphasized on materiality to the decision by the use of own knowledge

# Not a Breach of Natural Justice



## Allianz General Insurance Company v Virginia Surety Company Labuan Branch

- Award need not refer to all submissions or arguments
- Award can reformulate the way arguments and concepts have been presented
- Award refers to findings on some argument infers rejection of other conflicting arguments that were not specifically referred to

## TMM Division Maritima v Pacific Richfield Marine (Singapore)

- Issues are deemed considered and disposed of implicitly by the language used in the Award

## AKN & Anor v ALC & Anor (Singapore)

- Misunderstanding of Facts or Mistaken as to Law or Not dealing with an argument raised because the award states it is irrelevant or unnecessary (whether wrongly or rightly)

## SEF Construction v Skoy Connected (Singapore), JY Creative v MEACS Construction

- Need not allow Parties right to respond to all submissions.



# Breach of Natural Justice & Public Policy

## *Subjective Determination*

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### Widening the Prospect of Breach of Natural Justice?

- Ignoring the doctrine of Stare Decisis : Misapplication of Law
- UDA Land v Puncak Sepakat

### JY Creative v MEACS Construction

"I am mindful that I have in UDA Land...set aside the arbitration award on misapplication of the law. It is however an exceptional case where the arbitrator transgressed by blatantly refusing to conform and apply statutory law that has been definitely interpreted by the Federal Court; thus a very rare instance of an award made in denial of natural justice which conflicted with Malaysian public policy."



# Thank you



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