CHAPTER
28

ARBITRATORS: APPOINTMENT AND REMOVAL*

Arbitrator: An Overview

An arbitrator is a person to whose attention the matter in dispute is submitted by the parties, a judge of the parties' own choosing. They are professional and business people who are appointed to assist in the informal resolution of disputes because of their knowledge, experience and reputation in upholding fairness and impartiality. His function is judicial, an impartial judge to dispense equal justice to the disputing parties. He will decide on the law and facts involved in the matter submitted to him with a view to determine and finally resolve the controversy. In *Re Carus and Wilson-Greene*,[1] Lord Esher stated:

> If it appears from the terms of the agreement by which a matter is submitted to any person, that what he is to do, is to be in the nature of a judicial enquiry, and that the object is that he should hear the parties and decide the matter upon evidence to be led before him, there the person is an arbitrator.

According to Russell:

> An arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; he is not a mere investigator but a person before whom material is placed by

* This chapter is contributed by Ashgar Ali Ali Mohamed.

1 (1886) 56 LJQB 530.

the parties, being either or both of evidence and submissions; he gives a decision in accordance with some recognised system of law and the rules of natural justice. He is private is so far as;

(a) he is chosen and paid by the disputants;

(b) he does not sit in public;

(c) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy;

(d) so far as the law allows, he is set up to the exclusion of the state courts;

(e) his authority and power are only whatsoever he is given by the disputant's agreement; (f) the effectiveness of his powers is derived wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of contract or public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with.[2]

Arbitrators have some expertise in the field of the dispute and they come from different educational and professional backgrounds including law, accounting, insurance, finance, health care, engineering, architecture and construction. In fact, many arbitrators are retired or former judges and lawyers and the arbitration agreement may specify the qualifications of potential arbitrators. In Malaysia, a person aspiring to be an arbitrator will have to fulfil the stringent requirements set by the Asian International Arbitration Centre (AIAC) which include having tertiary education, sufficient experience in arbitration and any membership or accreditation from any professional membership organisation for Alternative Dispute Resolution. When empanelled with the AIAC, he/she will be bound by the AIAC's Code of Conduct for Arbitrators.[3]

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2 DSJ Sutton *Russell on Arbitration* (24th Edn).

3 See 'Become a Panellist' at https://www.aiac.world.

Appointment Of Arbitrator

An arbitrator is appointed in accordance with the wishes of the parties and they are free to determine the number of arbitrators.[4] Where the parties fail to determine the number of arbitrators, s. 12(2) of the Arbitration Act 2005 ('the Act') states that in the case of an international arbitration, the arbitral tribunal shall consist of three arbitrators and in the case of a domestic arbitration, a single arbitrator. Where the arbitration consists of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator.[5] Unless otherwise agreed by the parties, no person shall be precluded by reason of nationality from acting as an arbitrator.[6]

Further, the parties are free to agree on the procedure for appointing the arbitrator or the presiding arbitrator.[7] If the parties have stipulated in the arbitration agreement as to the manner in which the appointment of an arbitrator or arbitrators shall be made, the procedure contemplated by the parties shall be followed and the arbitrator or arbitrators is/are appointed in accordance with the procedure agreed upon. As stated earlier, since the arbitration agreement is contractual in nature, neither side can travel outside the terms of the contract.

If the party fails to appoint an arbitrator within 30 days of receipt of a request in writing to do so from the other party or the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, either party may apply to the Director of the AIAC for such appointment.[8] Section 13(5) also provides that where in an arbitration with a single arbitrator, the parties fail to agree on the procedure for appointing the arbitrator or the presiding arbitrator, either party may apply to the Director of the AIAC for the appointment of an arbitrator.

4 Arbitration Act 2005, s. 12(1).

5 *Ibid* s. 13(3).

6 *Ibid* s. 13(1).

7 *Ibid* s. 13(2).

8 *Ibid* s. 13(4).

Further, s. 13(6) provides:

> Where, the parties have agreed on the procedure for appointment of the arbitrator—
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> (a) a party fails to act as required under such procedure;
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> (b) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or
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> (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the Director of the Asian International Arbitration Centre (Malaysia) to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.[9]

And s. 13(7) states that where the Director of the AIAC is unable to act or fails to act under the above-mentioned procedure within 30 days from the request, any party may apply to the High Court for such appointment.

In appointing an arbitrator, the Director of the AIAC or the High Court, as the case may be, shall have due regard to:

> (a) any qualifications required of the arbitrator by the agreement of the parties;
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> (b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and
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> (c) in the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties.[10]

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9 In *Sundra Rajoo Nadarajah v. Menteri Hal Ehwal Luar Negara, Malaysia & Ors* [2019] 1 LNS 443, it was stated *inter alia*, that the applicant, the former Director of AIAC, was entitled to protection for acts and omissions in his official capacity and that the power to waive the immunities can only be done by the Secretary General of the Asian-African Legal Consultative Committee.

10 Arbitration Act 2005, s. 13(8).

In *Sebiro Holdings Sdn Bhd v. Bhag Singh & Anor*,[11] it was stated that s. 13(8) of the Act does not stipulate that before the appointment of an arbitrator, the consent of the parties is required nor does it stipulate that before the arbitrator is appointed, the Director of the KLRCA (now AIAC) is required to seek consent of the parties. The decision of the Director of the AIAC or the High Court shall be final and no appeal shall lie against their decision.[12]

Revoking Authority Of Arbitrator: Application By Disputants

The arbitrator has wide discretion on the conduct of the proceedings and the courts will not ordinarily disturb the arbitrator's procedural conduct.[13] What is important is that an arbitrator must be independent and impartial which are the essential components of a fair trial. He is expected to carry out his role and responsibilities with integrity and efficiency. In *Sundra Rajoo v. Mohamed Abd Majed & Anor*,[14] Hamid Sultan Abu Backer J (as His Lordship then was) emphasised that:

(i) the requirement of impartiality is a principle of natural justice;

(ii) it is a fundamental principle that an arbitrator must remain independent and impartial;

(iii) where an arbitral tribunal contains party-nominated arbitrators, the presumption remains that, even if nominated by one of the parties, the arbitrator will be independent and impartial;

11 [2015] 4 CLJ 209, CA.

12 Arbitration Act 2005, s. 13(9).

13 Arbitration Act 2005, s. 21(1) provides:

> '... the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.'

See *Majlis Perbandaran Shah Alam v. Menara Biru Sdn Bhd & Anor* [2009] 6 CLJ 694.

14 [2011] 6 CLJ 923, HC.

(iv) a party-nominated arbitrator is usually appointed in international arbitrations by reason of culture or background, to be broadly sympathetic with the case to be put forward, but who will be strictly impartial when it comes to assessing the facts and evaluating the arguments on fact and law;

(v) a party may nominate an arbitrator who is generally predisposed towards it personally, or as regards to its position in the dispute, provided that the person concerned is at the same time capable of impartial and judicial application to the evidence and arguments submitted by both parties.[15]

The appointment of an arbitrator may be terminated by the arbitrator's own resignation. Alternatively, a party to the arbitration proceeding may seek to revoke the arbitrator's authority by an application to court. It is trite law that the court may revoke the authority of an arbitrator on grounds of misconduct or lack of impartiality. In *Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor*,[16] Nik Hashim J (as he then was) when dealing with the Arbitration Act 1952 held:

[1] Parties to an arbitration are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator. The arbitrator must not only be free from bias but there must not even be an appearance of bias.

[2] An arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect. He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment.

15 *Ibid* at [10].

16 [1999] 1 CLJ 632.

[3] The power of the High Court to give relief for leave to revoke the authority of the arbitrator where an arbitrator is not impartial is provided under s. 25 of the Act. The meaning of the word "impartial" in s. 25(1) of the Act is not restricted to the relationship of the arbitrator to any other parties to the agreement or connection of the arbitrator to the subject referred.

[3a] If an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred.

[4] An arbitrator can be or perceived to be impartial arising out of his conduct or arising out of his racial prejudice.

[5] As to whether an arbitrator is deemed to be biased or not, the 'reasonable suspicion' test and the 'real likelihood' test are both accepted as being the law at present. The trend, however, is towards the application of the 'reasonable suspicion' test as in essence the 'reasonable suspicion' test seems to be somewhat broader than the 'real likelihood' test. ...

The court can order the removal of an arbitrator when it can be established that either or both parties have lost all confidence in the impartiality and integrity of the arbitrator, for example, the arbitrator misconducted himself[17] or that the award had been improperly

17 The term 'misconduct' in arbitration does not connote the moral turpitude of the arbitrator but the failure of the arbitrator to adhere to the principle of natural justice such as appearance of bias or partiality. In *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172, Raja Azlan Shah J (as his Highness then was) said:

> '... In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an Arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. ...'

In *Sundra Rajoo Nadarajah v. Chong Lee Siong* [2009] 10 CLJ 708, the plaintiff who was appointed as an arbitrator under the PAM Arbitration Rules, was removed by a court order as he had misconducted in the proceedings. See also *Ng Chee Yew Sdn Bhd & 2 Ors v. IJM Corporation Bhd & Anor* [2009] 1 LNS 1225, HC; *Bintang Merdu Sdn Bhd v. Tan Kau Tiah @ Tan Ching Hai & Anor & Other Cases* [2009] 1 LNS 621, HC.

procured.[18] This includes the arbitrator's failure to perform the essential duties which were cast on him and failure to observe the rules of natural justice such as the appearance of bias or partiality.[19] It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience.[20] In *Sabah Medical Centre Sdn Bhd v. Syarikat Neptune Enterprise Sdn Bhd & Anor*,[21] the arbitrator's adverse comments and conclusions that SMC's claim was 'inequitable', questioning the bona fides of the claim were all made in circumstances where evidence on the issue of liquidated and ascertained damages had yet to be adduced and submissions made. A real possibility had arisen that the arbitrator had already made up his mind against SMC and that he would not have been able to approach the issues with an open mind.

It is noteworthy that s. 14(1) of the Act requires a potential arbitrator to:

> ... disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.

Further, s. 14(2) provides that an arbitrator shall, without delay, from the time of appointment and throughout the arbitral proceedings, disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence to the parties unless the parties have already been informed of such circumstances by the arbitrator. 'Justifiable doubts' of the arbitrator's impartiality or independence and the arbitrator not possessing the qualifications agreed to by the parties are the basis for an application to remove the arbitrator.[22] Section 14(3) provides:

18 See *Dato' Samsudin Abu Hassan v. Robert Kokshoorn* [2003] 3 CLJ 1, CA.

19 See *Sabah Medical Centre Sdn Bhd v. Syarikat Neptune Enterprise Sdn Bhd & Anor* [2012] 10 CLJ 767, HC.

20 See *Intelek Timur Sdn Bhd v. Future Heritage* [2004] 1 CLJ 743, FC.

21 [2012] 10 CLJ 767, HC.

22 See *SJEE Engineering Sdn Bhd v. Al-Ambia Sdn Bhd & Another Case* [2018] 1 LNS 922, HC.

An arbitrator may be challenged only if—

(a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or

(b) that arbitrator does not possess qualifications agreed to by the parties.

The phrase 'justifiable doubts' was highligted in *SJEE Engineering Sdn Bhd v. Al-Ambia Sdn Bhd & Another Case*,[23] where Darryl Goon Siew Chye JC stated:

> [66] All that is required to be established are "justifiable doubts". To put it the other way around, there need only be doubts as to the arbitrator's impartiality or independence. However, such doubts must be "justifiable" having regard to the circumstances. It need not be proven that the arbitrator is impartial or not independent. Whether the arbitrator is "probably" or "possibly" impartial or not independent are also not the test prescribed under s. 14 of the AA. To my mind, it would also follow that fanciful suppositions and mere suspicion would be insufficient. All these is because of the very words used by the legislation — "justifiable doubts".

In *SJEE Engineering*'s case, it was stated that being unhappy with any direction given or any decision made in the course of arbitration per se is not grounds to doubt the impartiality or independence of an arbitrator. Again, in *Indera Construction Sdn Bhd v. PNS Development Sdn Bhd*,[24] it was stated *inter alia*, that an inference of bias could not be made merely because the interim rulings leaned largely in favour of the defendant. Likewise, in *Ng Chee Yew Sdn Bhd & 2 Ors v. IJM Corporation Bhd & Anor*,[25] it was stated *inter alia*, that the arbitrator could not be blamed for taking necessary steps to expeditiously conduct the proceedings.

23 *Ibid.*

24 [2014] 7 CLJ 911, HC.

25 [2009] 1 LNS 1225, HC.

At this juncture, it is worthwhile to note that the rule of natural justice which is an important component in the administration of justice revolves on the principles of impartiality and fairness.[26] It ensures, *inter alia*, that the decision-making body is impartial and independent, and that it adopts procedures fair to all parties. Primarily, this is to prevent the decision from being tainted with allegation of miscarriage of justice on procedural grounds. The right to be heard and the rule against bias are among the important principles of the rules of natural justice. The above two rules which are separate concepts and governed by separate considerations are derived from two maxims namely, *audi alteram partem* (no order should be made without hearing the other side) and *nemo judex in causa sua* (a man should not be a judge in his own cause).

The rule on hearing both disputants requires that an individual shall not be penalised by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer the allegations and the opportunity to present his side of the matter. The disputants must have the opportunity to present its version of the facts and to make submissions and the allegations against them.[27] Meanwhile, the rule against bias revolves on the *maxim nemo debet esse judex in propria causa*, which means 'one who is interested in the subject matter of a dispute should exclude himself from acting as justice therein.'

Further, an essential part of the justice system is the phrase, 'justice should not only be done but manifestly and undoubtedly be seen to be done'.[28] A 'fair minded observer', acting 'reasonably'[29] should be able to say that justice was done without there being any element of bias on the

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26 *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14, PC.

27 Arbitration Act 2005, s. 20 of the Act provides:

> 'The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.'

28 *R v. Sussex Justices; Ex p McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

29 *Ambard v. A-G for Trinidad and Tobago* [1936] AC 322 at 335, [1936] 1 All ER 704 at 709, PC per Lord Atkin.

part of the adjudicator. The House of Lords in *Franklin v. Minister of Town and County Planning*,[30] stated, *inter alia*, that the use of the word 'bias' should be confined to its proper sphere:

> Its proper significance ... is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute'.

Litigants must have the confidence and trust in the impartiality of the adjudicating officer.[31] To put the principles against bias in perspective, no one can be a judge in his own cause, that is to say in a case in which he is directly or indirectly interested. If a member of an arbitral tribunal is 'subject to bias', whether personal or official, in favour of or against any party to a dispute, or is in such a position that bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal.[32] In other words, if an arbitrator has any pecuniary or proprietary interest in the outcome of the proceedings, however small in the subject matter of inquiry, or any other interest in the subject matter of the trial as to create a reasonable suspicion of bias, he must disqualify himself from hearing the matter. The fact that the adjudicator is an interested party or has any pecuniary or proprietary interest in the subject matter of the dispute affords the strongest proof that he cannot be indifferent, and in such situations, justice may not be seen to be done.

30 [1948] AC 87, [1947] 2 All ER 289, HL.

31 See *Dato' Dr Joseph Eravelly v. Dato' Hilmi Mohd Nor & Ors* [2011] 3 CLJ 294, HC.

32 Arbitration Act 2005, s. 2: 'Arbitral tribunal' means an emergency arbitrator, a sole arbitrator or a panel of arbitrators.'

Where an application is made, for example, to recuse the trial judge from hearing and deciding a case, the applicant must satisfy the court that 'there is a real danger of bias'[33] on the part of the judge if he or she were to proceed to hear the case. However, each case has to be decided on its own set of facts and circumstances and there cannot be a blanket disqualification.[34] In *Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor*,[35] a case cited by VT Singham J in *Dato' Dr Joseph Eravelly v. Dato' Hilmi Mohd Nor & Ors*,[36] the English Court of Appeal stated *inter alia*, that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. In particular, the court observed:

> ... a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particular if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.

33 In *R v. Gough* [1993] AC 646 at 670, [1993] All ER 724 at 737, HL, Lord Goff of Chieveley noted, *inter alia*, that the expression 'real danger' is preferred to 'real likelihood' to ensure that the court is thinking in terms of possibility rather than probability of bias.

34 See *Dato' Tan Heng Chew v. Tan Kim Hor* [2006] 1 CLJ 577, FC; *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, FC; *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701, FC; *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2002] 4 CLJ 268, CA.

35 [2000] QB 451 at 480, [2000] 1 All ER 65 at 76.

36 [2011] 3 CLJ 294 at [7].

> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

The above mentioned principles of natural justice have been vigorously and firmly enforced by the courts of law, arbitration and other quasi-judicial tribunals.[37] It also includes those bodies which have to act judicially in deciding the rights of others such as domestic inquiries and administrative proceedings.[38] Violation of the above principles of natural justice is a justifiable ground to seek for judicial review against the decision or award. Section 37(1)(b)(ii) of the Act provides that an award may be set aside by the High Court if the court finds that the award is in conflict with the public policy of Malaysia. And s. 37(2)(b) states that an award is in conflict with the public policy of Malaysia where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

Revoking Authority Of Abitrator: Application By Co-Arbitrator

In an arbitral tribunal comprising of more than one arbitrator, the question arises whether an arbitrator has *locus standi* to seek the removal of a co-arbitrator. The High Court had, in *Sundra Rajoo v. Mohamed Abd Majed & Anor*,[39] addressed this issue. In this case, the

37 *Frome United Breweries Co Ltd v. Keepers of the Peace and Justices for County Borough of Bath* [1926] AC 586, HL.

38 *Gullapali Nageswara Rao v. State of Andhra Pradesh* AIR 1959 1376 at 1379, SC per Justice Subra Rao.

39 [2011] 6 CLJ 923, HC.

application to revoke the authority of the arbitrator was not made by the parties to the arbitration proceedings namely, Haryana Oils & Soya Ltd and Sangrur Agro Ltd, but by the applicant, Sundra Rajoo, a co-arbitrator. The applicant had sought an order of the court requesting that the first respondent to declare and/or disclose all his past and present appointments by Virgoz Oils & Fats Pte Ltd and its group of companies to the following arbitration proceedings conducted under the auspices of the second respondent:

(1) arbitration case no. A330 between Virgoz and Haryana Oils & Soya Ltd; and

(2) arbitration case no. A331 between Virgoz and Sangrur Agro Ltd.

Alternatively, the applicant requested for an order that the second respondent declare and/or disclose the first respondent's past and present appointments in the above mentioned arbitration cases. The applicant also sought an order to remove and disqualify the first respondent as the arbitrator of the arbitration cases nos. A330 and A331.

The facts of the above case as laid down by the learned trial judge, Hamid Sultan Abu Backer J (as he then was), are as follows:

> The applicant and the 1st respondent are co-arbitrators with one by the name of Lim Guan Leong who was appointed in arbitration cases A330 and 331 where the claimant is Virgoz and the respondents are Haryana Oils & Soya Ltd and Sangrur Agro Ltd respectively. Both Haryana and Sangrur have refused to participate in the arbitration proceedings. Apart from cases A330 and 331 the 1st respondent and the applicant had been appointed in three other PORAM [Persatuan Penapis Minyak Sawit Malaysia] Arbitrations where Virgoz and/or the Virgoz group were the respondents (three arbitrations). It must be noted that the 1st respondent in all the above proceedings were appointed by Virgoz and/or their group.
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> The claimant in the three arbitrations had objected to the 1st respondent on the grounds that the 1st respondent had been nominated by Virgoz and/or the Virgoz group in over twenty PORAM Arbitrations and his participation would be perceived as bias. On the basis of the objection the 1st respondent had voluntarily resigned as the co-arbitrator in the three arbitration proceedings.

> The applicant having come to know the facts and being aware of the fact that Haryana and Sangrur have chosen not to submit to the arbitration proceedings in A330 and A331, has taken upon himself the task to preserve the sacrosanct status of arbitration tribunal to make this application upon: (i) the 1st respondent's refusal of disclosure of all his present and past appointments by the Virgoz group to the parties to cases A330 and A331; (ii) the 2nd respondent's refusal to do the same notwithstanding the 2nd respondent had advised that such disclosure by the 1st respondent will be in order.
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> The reason the 2nd respondent advances for not making any disclosures from the records is that PORAM Rules and the Arbitration Act 2005 (AA 2005) do not make provision for bodies such as PORAM to make disclosures as to the previous appointment received by arbitrators.
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> The 1st t respondent has raised a number of side issues to oppose the applications. However, the learned counsel for the 1st respondent says that "the real issue should be whether the 1st respondent owes a duty to disclose to another co-arbitrator who already made up his mind that the 1st respondent is partial and biased and the failure to answer to a 'hostile and fishing' request amounts to 'partiality and biasness'".[40]

The applicant's application was allowed with costs. The first respondent was ordered to disclose his past and present appointments to the arbitral tribunal within seven days failing which he would be removed and disqualified as an arbitrator in Arbitration Cases nos. A330 and A331. In arriving at the above conclusion, the learned trial Judge had given reasons for his decision which can be broadly categorised into the following sub-headings.

(a) **Impartiality and Independence of Arbitrator.** His Lordship agreed with the submission of the applicant that the most important element in the requirement of impartiality and independence is disclosure. Reference was made to the United States Supreme Court case of *Commonwealth Coatings Corp v. Continental Casualty Co*.[41] In the above case, Justice Byron White stated:

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40 *Ibid* at [3]-[7].

41 393 US 145 (1968).

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions, which he has had or is negotiating with either of the parties.

According to the learned Judge in *Sundra Rajoo's* case:

> ... the requirement of impartiality is a principle of natural justice, and in consequence the court has an inherent jurisdiction to check its breach or purported breach *at limine*[42] when the complaint comes from any interested party involved and it may include co-arbitrator or witnesses etc; and is not one limited to the litigants to the arbitration proceedings *per se*.[43]

(b) **Breach of Natural Justice May Render the Arbitral Award Void.** It was stated that the argument by the learned counsel for the first respondent that the applicant had no *locus standi* to seek the disclosure was not supported by case laws or jurisprudence. It was further stated that the court was sufficiently empowered to entertain such an application and hear it on merit as breach of natural justice in appropriate cases, may render an arbitral award void.

(c) **Fiduciary Duty Applicable to Arbitrators.** The learned Judge noted that the courts in India had gone to the extent of saying that the doctrine of *uberrima fides* or utmost good faith is applicable to arbitrators.[44] In particular, the learned Judge stated:[45]

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42 The Latin term '*at limine*' means 'at the outset, on the threshold'.

43 [2011] 6 CLJ 923 at [10].

44 *Satyendra Kumar v. Hind Constructions Ltd* AIR 1952 Bom 227.

45 [2011] 6 CLJ 923 at [10].

I am inclined to say that the jurisprudence relating to fiduciary may be applicable to arbitrators; as ultimately in consideration of a fee they are entrusted to deliver an award. *The Lexis Nexis Hong Kong Legal Dictionary* defines fiduciary relationship as follows:

> The critical feature of a fiduciary relationship is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. A fiduciary relationship is a relationship which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is accordingly vulnerable to abuse by the fiduciary of his or her position. The extent of a fiduciary relationship may be restricted by a contract: *Kelly v. Cooper & Anor* [1993] AC 205, (PC). The relationship between solicitor and client is fiduciary giving rise to specific legal and professional obligations on the part of the solicitor: *McMaster v. Byrne* [1952] 1 All ER 1362, (PC); Brown v. IRC [1965] AC 244, (HL).

Support for similar propositions can be found in a number of cases. To name a few are as follows: (a) *Boardman v. Phipps* [1966] 3 All ER 721; (b) *Mohd Latiff bin Shah Mohd & Ors v. Tengku Abdullah ibni Sultan Abu Bakar & Ors and other actions* [1995] 2 MLJ 1; (c) *Kartika Ratna Thahir v. PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257. In essence the category of persons who may be liable as fiduciary has always been an open subject which falls within the jurisdiction of the courts to decide on the facts. In *Reading v. R* [1949] 2 KB 232 at 236, CA, Asquith LJ made the following observations:

> ... there is a well-established class of cases in which he can so recover, whether or not he has suffered any detriment in fact. These are cases in which the servant or agent has realised a secret profit, commission or bribe in the course of his employment; and the amount recoverable is a sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a 'fiduciary relation' existed between himself and the defendant and that the defendant acted in breach of this relation, but the term 'fiduciary relation' in this connection

> is used in a very loose, or, at all events, a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property tangible or intangible (as, for instance, confidential information) and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorised by him and not otherwise…(b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available ... .

(d) **Duty of Disclosure Not Merely Restricted to Disputing Parties.** The first respondent vehemently argued that the duty of disclosure is only to the parties involved in the dispute. Reference was made to s. 8 of the Act where it provides to the effect that the jurisdiction for the court to interfere is restricted.[46] In relation to the above argument, the learned Judge stated:[47]

> The reading of the said section clearly does not prohibit the intervention of court *per se*. It provides for a minimum intervention as strictly provided by the Act and governed by the Act. When the Act is silent on any issues outside the scope of the Act or is not governed by the Act then the common law powers of the court cannot be said to be ousted. The AA 2005 does not remove the inherent jurisdiction of the court. In my view inherent jurisdiction of the court cannot be a ground to intervene with any matter which has been provided for in the Act. I have dealt with this area of jurisprudence in the case of *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83. I do not wish to repeat the same. In the instant case no provision has been made for co-arbitrators to seek such reliefs as prayed notwithstanding there is provision for the litigant to do so.

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46 Arbitration Act 2005, s. 8 provides:

> 'No court shall intervene in matters governed by this Act, except where so provided in this Act.'

47 [2011] 6 CLJ 923 at [10].

(e) **Whether Applicant a Party to Arbitration Proceedings.** The first respondent asserted that the applicant was not a party to arbitration proceedings and in consequence, s. 14 of the Act does not apply to the applicant. The word 'party' in s. 14(4) of the Act is defined in s. 2 of the same Act namely:

> ... a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration.

On the other hand, the applicant contended that he should be regarded as a party to the arbitration within the meaning of s. 2 above. The applicant asserted that a contract exists between the parties and the arbitrators i.e. a bilateral contract. Such contract creates rights and obligations for both the arbitrators and the parties. Where arbitration is administered by an arbitral institution, the contractual relationship becomes triangular. In relation to the above, the learned judge agreed with the applicant's arguments and made reference to the following cases:

(i) In *Compagnie Europeene de Cereals SA v. Tradax Export SA*,[48] Hobhouse J stated:

> It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract.

(ii) In *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd*,[49] Sir Nicholas Browne-Wilkinson VC stated:

> The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: *Compagnie Europeene de Cereals SA v. Tradax Export SA* [1986] 2 Lloyd's Rep 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial

48 [1986] 2 Lloyd's Rep 301.

49 [1992] QB 863, [1991] 1 Lloyd's Rep 524.

> functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status. Amongst those disabilities is an inability to deal unilaterally with one only of the parties to the arbitration, let alone to bargain with one party alone for a personal benefit.

Having cited the above authorities, the learned Judge stated:[50]

> It is trite that the arbitrator assumes the status of a quasi-judicial adjudicator with all its inherent duties and obligations. On the facts of the instant case I am satisfied that the 1st respondent ought to have disclosed his past and present appointments to preserve the dignity of his office and avoid the award at the end of the day to be set-aside pursuant to s. 37(2)(b) of AA 2005 which reads as follows:

(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.

The applicant has a legitimate ground to seek the assistance of the court at common law to arrest the mischief in limine as he is a co-arbitrator and after having received a remuneration for work he may become personally liable in contract and/or negligence and/or breach of his fiduciary duty for having participated in an award which has a real likelihood of being set-aside pursuant to s. 37(2)(b) of AA 2005.

His lordship added:[51]

> It is disappointing to note that in this time and era where transparency, accountability and good governance has become a trite jurisprudence in arbitration proceedings to check impartiality and/or any form of vagaries, the 1st respondent's conduct of non-disclosure and resistance on the facts of the case notwithstanding the 2nd respondent has requested to do so, may place the 1st respondent, a person unfit to decorate the arbitral seat and/or hold any form of quasi-judicial work and/or sit as an arbitrator.

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50 [2011] 6 CLJ 923 at [10].

51 *Ibid.*

As from *Sundra Rajoo's* case, the applicant, a co-arbitrator, had legitimate grounds to seek the assistance of the court to compel the first applicant to disclose his past and present appointments to preserve the dignity of his office. This is primarily to avoid the award at the end of the day from being set-aside on grounds of violation of the principles of natural justice. It was further stated that the applicant may become personally liable in contract and/or negligence and/or breach of his fiduciary duty for having participated in an award which has a real likelihood of bias. The above formed a justifiable basis for the award to be set aside pursuant to s. 37(2)(b) of the Act.[52] Further, to the above, an interesting observation by the learned Judge in *Sundra Rajoo*'s case is that since an arbitrator is in a fiduciary position who, in the exercise of a power or discretion, makes a decision or award that will affect the interests of that other party in a legal or practical sense, therefore, the doctrine of *uberrima fides* (utmost good faith) — a legal doctrine which governs insurance contracts — is equally enforceable to arbitrators.

Revoking Arbitrator's Authority: Required Challenge Procedure

The required challenge procedure is contained in s. 15(1) of the Act:

> Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

Section 15(2) further provides that:

> Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall make a decision on the challenge.

52 Arbitration Act 2005, s. 37(2)(b) provides that an award is in conflict with the public policy of Malaysia where breach of the rules of natural justice occurred, during the arbitral proceedings; or in connection with the making of the award.

Where a challenge is not successful, s. 15(3) provides that the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge. While such an application is pending, s. 15(4) provides that the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. The decision of the High Court under sub-s. (3) shall be final and s. 15(5) provides that:

> No appeal shall lie against the decision of the High Court under subsection (3).

From the above, whether there is justifiable basis to remove an arbitrator, there must first be a challenge to the arbitrator's fitness to act besides complying with the specific timelines namely, within 15 days after becoming aware of the constitution of the Arbitral Tribunal or of any reasons referred to in sub-s. 14(3). More importantly, a written statement of the reasons for the challenge must first be provided so as to enable the arbitral tribunal to make a decision on the challenge.[53] The intervention of the court can only start when the challenge before the arbitral tribunal was not successful.[54]

In *Tan Sri Dato' Professor Dr Lim Kok Wing v. Thurai Das Thuraisingham & Anor*,[55] the applicant made an application to the High Court to remove the first respondent as the arbitrator on the basis that there was no agreement for arbitration between the applicant and the architect in the second proceeding. Instead of sending a written statement to the Arbitral Tribunal of the reasons for the challenge and attending the proposed preliminary meeting arranged by the arbitrator, the applicant had raised the complaint with KLRCA and Pertubuhan Arkitek Malaysia. As the applicant had not taken the correct approach to challenge the appointment or fitness of the first respondent to act as arbitrator there was no basis for this application.

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53 Arbitration Act 2005, s. 18(1) of the Act provides:

> 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.'

54 In *Salconmas Sdn Bhd v. Kementerian Dalam Negeri & Anor* [2018] 1 LNS 846, it was stated *inter alia*, that ss. 14 and 15 of the Arbitration Act 2005 are mandatory laws to be followed in order to remove an arbitrator.

55 [2011] 1 LNS 717, HC.

Besides the above, s. 16(1) of the Act provides that where an arbitrator becomes unable to perform the functions of that office, or for other reasons fails to act without undue delay, the arbitrator's mandate terminates on withdrawal from office or if the parties agree on the termination. Where any party disagrees on the termination of the mandate of the arbitrator, sub-s. (2) provides that any party may apply to the High Court to decide on such termination. The decision of the High Court shall be final and no appeal shall lie against that decision.

Appointment Of Substitute Arbitrator

Section 17(1) provides that a substitute arbitrator shall be appointed in the following circumstances:

(a) the mandate of an arbitrator terminates under section 15 or 16;

(b) an arbitrator withdraws from office for any other reason;

(c) the mandate of the arbitrator is revoked by agreement of the parties; or

(d) in any other case of termination of mandate.

Where a single or the presiding arbitrator is replaced, s. 17(2) provides that any hearings previously held shall be repeated before the substitute arbitrator. Where an arbitrator other than a single or the presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal. It is noteworthy, that the replacement of a member of an arbitral tribunal does not change the character of the arbitral tribunal. It is still the same arbitral tribunal but with a different composition of members.[56] Unless otherwise agreed by the parties, any order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely on the ground there has been a change in the composition of the arbitral tribunal.[57]

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56 *The Government Of India v. Vedanta Limited & Anor* [2018] 1 LNS 617, HC.

57 Arbitration Act 2005, s. 17(3).

Conclusion

One of the fundamental aspects of the arbitral process is its independence and the impartiality of the arbitrator. An arbitrator acts in a similar manner to a judge in the ordinary courts of law. He will deliver a legally binding decision known as an award that is based on the evidence put before him by the parties or their representatives. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly been seen to be done. An arbitrator must ensure that there is not the slightest appearance of bias on his part. Further, no person shall serve as an arbitrator in any proceeding in which he or she has any financial or personal interest in the outcome. In *Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor*, Nik Hashim J held:

> If an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred.[58]

An arbitrator can be or perceived to be not impartial arising out of his conduct or arising out of his racial prejudice, among others.

Therefore, prior to accepting any appointment, an arbitrator must disclose any circumstances likely to create an appearance of bias or which might disqualify him or her as an impartial arbitrator, so that he or she is not later challenged for engaging in unprofessional or unethical conduct or other misconduct in the role of an arbitrator. A party to the arbitration proceeding may apply to the court to revoke the authority of the arbitrator at any time prior to the making of the award in the event of any non-disclosure and/or disqualification for actual or apparent conflict of interest. It is trite law that the court may revoke the authority of an arbitrator on grounds of misconduct or lack of independence or impartiality.[59] Even an arbitrator has *locus standi* to seek the removal and disqualification of a co-arbitrator as held in *Sundra Rajoo v. Mohamed Abd Majed & Anor*.[60]

58 [1999] 1 CLJ 632 at 641.

59 Sundra Rajoo 'Revocation of Authority and Removal of Arbitrator' INSAF (2003) XXXII No 2 p. 1.

60 [2011] 6 CLJ 923, HC.