AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-39–09 OF 2018
NANTHA BALAN J
16 JULY 2019

Arbitration — Award — Setting aside — Application for — Whether plaintiff had 'abstract' right or 'accrued' right — Whether repeal of s 42 of Arbitration Act 2005 to apply prospectively or retrospectively — Whether there was breach of rules of natural justice by arbitrator in terminating plaintiff's counterclaim — Whether plaintiff wrongfully set off amount claimed by defendant — Whether there was merit in plaintiff's complaint under s 37 of Arbitration Act 2005 — Arbitration Act 2005 ss 37 & 42

This was an application by AMDAC (M) Sdn Bhd ('AMDAC') pursuant to ss 37 and 42 of the Arbitration Act 2005 ('the Act') to set aside the final arbitration award ('the award') of the learned arbitrator ('the arbitrator') dated 18 July 2018 and published on 20 August 2018. Sykt Prasarana Negara Bhd ('Prasarana') issued a letter of award ('the LOA') to BYD Auto Industry Company Ltd ('BYD') for a project. BYD and AMDAC ('the parties') formed a joint venture for profit in an enterprise as per the collaboration agreement ('the CA'). Under the CA, the parties would undertake the project and agreed to share the profit in the enterprise involving the base works sum where the BYD was to receive RM13,106,995 being 63.4% and the remaining RM7,564,430 being 36.6% thereof belonged to AMDAC. The parties executed a deed of assignment ('the first DOA') where BYD, as the assignor irrevocably assigned to AMDAC all the proceeds it was to receive from Prasarana under the LOA to enable AMDAC to apply to Malaysian Debt Venture Bhd ('MDV') for project financing. Pursuant thereto via another deed of assignment, AMDAC further assigned the receivables under the first DOA to MDV ('the second DOA') which resulted in all the payments which were due under the LOA to be paid directly to MDV and no longer to AMDAC as agreed. The project had been successfully completed and delivered to Prasarana. The dispute now pivoted on the share of profit. In the arbitration proceedings, BYD was the claimant and AMDAC was the respondent. BYD contended that via a letter dated 19 October 2015 ('the letter') AMDAC had unilaterally terminated the CA and wrongfully set off a sum of RM4.5m on the basis of an 'opportunity loss' it had suffered as a result of a failure on BYD's part to execute the after sales service agreement. AMDAC had also filed a counterclaim. However, AMDAC did not pay the requisite deposit towards the arbitration costs vis a vis the counterclaim. As such, in accordance with r 13(6) of the Kuala Lumpur Regional Center for Arbitration ('KLRCA') Arbitration

Rules, the arbitrator consulted the Director of the KLRCA and terminated the counterclaim. BYD's claim was allowed and AMDAC was ordered to pay a sum of RM4.5m. Hence, this application by AMDAC that was filed on 27 September 2018 which was after the coming into force of the Arbitration (Amendment) (No 2) Act 2018 ('2018 Amendment Act') which repealed s 42 of the Act.

Held, dismissing the application with costs of RM10,000:

(1) The right which AMDAC had vis a vis s 42 of the Act was a right which was vested in them at the time of institution of the original arbitration proceedings and not merely as a consequence of an adverse decision ie the award. Thus, AMDAC did not just have an 'abstract' right. On the contrary, they had the right to challenge any award that was to be given by the arbitrator and such a right existed from the commencement of the arbitration proceedings and not upon publication of the award (see paras 140–141).

(2) It was quite clear that the legislative intention was to do away with challenges to arbitral awards under s 42 of the Act and it would be horrendous to think that the amendment was done whilst allowing awards that were made under pending arbitrations to take the s 42 route. As such, although the 2018 Amendment Act did not state anything about the repeal having retrospective effect, looking at all the circumstances, there was room for implying an intention on the part of Parliament that the repeal of s 42 of the Act was indeed to have retrospective effect. The true and only possible intention of Parliament by repealing s 42 was for the repeal to apply retrospectively and to close the door to a s 42 challenge with effect from 8 May 2018 in respect of any award that was published on or after 8 May 2018. The award here fell in that category. In the result, AMDAC's complaints pursuant to s 42 of the Act were accordingly dismissed in limine (see paras 146–147 & 153).

(3) Since the parties had agreed that their dispute was to be referred to arbitration which was to be conducted in accordance with the KLRCA Rules of Arbitration, it did not lie in the mouth of AMDAC as the defaulting party to avoid the consequence of non-payment by invoking s 34 of the Act. The fact that the arbitrator consulted the Director of the KLRCA was not sinister as this was exactly what he was supposed to do pursuant to r 13(6) of the KLRCA Arbitration Rules and secondly, 'consult' did not connote or suggest that the Director of the KLRCA had asserted any authority over the arbitrator or that the latter was bound by any views that the Director may have on the matter. The arbitrator was fully entitled to exercise his discretion in one manner when it concerned AMDAC's non-payment of deposit vis a vis BYD's claim and dealing with their non-payment of deposit for their counterclaim in a totally

different manner. AMDAC must bore the consequences of their decision not to take the court litigation route and this necessarily meant that they would have to abide by the KLRCA Rules of Arbitration in every respect. There was just no legal or factual basis for AMDAC to assert that there was a breach of the rules of natural justice by reason of the arbitrator's decision to terminate the counterclaim (see paras 158, 161, 163 & 168).

(4) The arbitrator made a correct and valid finding of fact that BYD never agreed or acquiesced to any set off. The so-called set off was a unilateral act on AMDAC's part. It had no effect whatsoever as it was an 'unlawful' set off. It did not bind BYD. The letter was the proverbial 'smoking gun' document, which said plenty about the payment arrangement between the parties per the CA and the unsigned addendum. Thus, but for the unlawful and unilateral set off, the balance sum payable to BYD was RM4.5m. That was the clear and unmistakable contractual obligation (liability) of AMDAC as per the CA. As rightly opined by the arbitrator, these obligations remained with AMDAC and were not assigned under the first DOA and/or the second DOA (see paras 185, 188 & 191).

(5) There was no privity of contract between MDV and BYD. AMDAC's contention that they were not obliged to make payment as per the CA because no monies were routed directly by Prasarana to them was at best, disingenuous. The MDV refunds was to be construed as indirect payments by Prasarana and as such, it followed that AMDAC remained liable to make full payment to BYD for the amounts as stipulated in the CA. AMDAC's failure to pay the sum of RM4.5m to BYD constituted a breach of the CA and BYD's claim in the arbitration was unmistakably predicated on AMDAC's breach of the CA in failing to pay the sum of RM4.5m. In the result, there was no merit in AMDAC's complaint under s 37 of the Act (see paras 202–206).

[Bahasa Malaysia summary

Ini adalah permohonan oleh AMDAC (M) Sdn Bhd ('AMDAC') menurut ss 37 dan 42 Akta Timbang Tara 2005 ('Akta') untuk mengetepikan award timbang tara akhir ('award') penimbang tara yang bijaksana ('penimbang tara') bertarikh 18 Julai 2018 dan diterbitkan pada 20 Ogos 2018. Sykt Prasarana Negara Bhd ('Prasarana') mengeluarkan surat award ('LOA') kepada BYD Auto Industry Company Ltd ('BYD') untuk satu projek. BYD dan AMDAC ('pihak-pihak') membentuk usaha sama untuk mendapatkan keuntungan dalam perusahaan mengikut perjanjian usaha sama ('CA'). Di bawah CA, pihak-pihak akan melaksanakan projek itu dan bersetuju untuk berkongsi keuntungan dalam perusahaan yang melibatkan jumlah kerja asas di mana BYD menerima RM13,106,995 iaitu 63.4% dan selebihnya RM7,564,430 iaitu 36.6% milik AMDAC. Pihak-pihak melaksanakan surat ikatan penyerahhakan ('DOA pertama') di mana BYD, sebagai penyerah menyerahakkan dan tidak boleh menarik balik kepada AMDAC semua hasil

yang harus diterima dari Prasarana di bawah LOA untuk membolehkan AMDAC memohon kepada Malaysian Debt Venture Bhd ('MDV') untuk pembiayaan projek. Menurut satu lagi surat ikatan penyerahhakan, AMDAC selanjutnya menyerahkan penyerahakkan di bawah DOA pertama kepada MDV ('DOA kedua') yang mengakibatkan semua pembayaran yang perlu dibayar di bawah LOA harus dibayar terus kepada MDV dan tidak lagi kepada AMDAC seperti yang dipersetujui. Projek telah berjaya disiapkan dan dihantar ke Prasarana. Pertikaian sekarang berputar pada bahagian keuntungan. Dalam prosiding timbang tara, BYD adalah penuntut dan AMDAC adalah responden. BYD berpendapat bahawa melalui surat bertarikh 19 Oktober 2015 ('surat') AMDAC telah secara sepihak menamatkan CA dan secara salah menolak sejumlah RM4.5 juta berdasarkan 'kehilangan peluang' yang dialaminya akibat kegagalan di pihak BYD untuk melaksanakan perjanjian perkhidmatan selepas jualan. AMDAC juga telah mengemukakan tuntutan balas. Walau bagaimanapun, AMDAC tidak membayar deposit yang diperlukan untuk kos timbang tara berkenaan tuntutan balas. Dengan demikian, menurut perkara 13(6) Kaedah-Kaedah Pusat Timbang Tara Serantau Kuala Lumpur ('KLRCA'), penimbang tara berunding dengan Pengarah KLRCA dan membuang tuntutan balas. Tuntutan BYD dibenarkan dan AMDAC diperintahkan untuk membayar sejumlah RM4.5 juta. Oleh itu, permohonan ini oleh AMDAC yang difailkan pada 27 September 2018 iaitu selepas penguatkuasaan Akta Timbang Tara (Pindaan) 2018 ('Akta Pindaan 2018') yang memansuhkan s 42 Akta tersebut.

Diputuskan, menolak permohonan dengan kos RM10,000:

(1) Hak yang dimiliki AMDAC mengenai s 42 Akta adalah hak yang diberikan pada mereka pada saat proses prosiding timbang tara yang asal dan bukan hanya sebagai akibat keputusan bertentangan iaitu award. Oleh itu, AMDAC tidak hanya mempunyai hak 'abstrak'. Sebaliknya, mereka berhak untuk mencabar setiap award yang akan diberikan oleh penimbang tara dan hak tersebut ada sejak bermulanya proses timbang tara dan bukan setelah penerbitan award tersebut (lihat perenggan 140–141).

(2) Cukup jelas bahawa niat perundangan adalah untuk menghilangkan cabaran untuk mendapatkan kepada timbang tara di bawah s 42 Akta dan adalah dahsyat untuk memikirkan bahawa pindaan itu dilakukan sementara membenarkan award yang dibuat di bawah timbang tara yang belum selesai untuk mengambil jalan s 42. Oleh itu, walaupun Akta Pindaan 2018 tidak menyatakan apa-apa mengenai pemansuhan yang mempunyai kesan retrospektif, melihat semua keadaan, ada ruang untuk menyiratkan hasrat pihak Parlimen bahawa pemansuhan s 42 Akta itu semestinya mempunyai kesan retrospektif. Tujuan sebenar dan hanya munasabah Parlimen dengan membatalkan s 42 adalah untuk pemansuhan itu berlaku secara retrospektif dan menutup pintu s 42

sebagai cabaran berkuatkuasa pada 8 Mei 2018 berkenaan dengan sebarang award yang diterbitkan pada atau selepas 8 Mei 2018. Award di sini jatuh dalam kategori itu. Oleh itu, aduan AMDAC berdasarkan s 42 Akta ditolak in limine (lihat perenggan 146–147 & 153).

(3) Oleh kerana pihak-pihak telah bersetuju bahwa perselisihan mereka harus dirujuk ke timbang tara yang harus dilakukan menurut Kaedah-Kaedah Timbang Tara KLRCA, adalah tidak patut AMDAC sebagai pihak yang melanggar kotrak untuk menghindari akibat dari tidak membayar dengan membangkitkan s 34 Akta. Fakta bahawa penimbang tara berunding dengan Pengarah KLRCA tidak mencurigakan kerana inilah yang seharusnya dilakukannya menurut perkara 13(6) Kaedah-Kaedah Timbang Tara KLRCA dan kedua, 'berunding' tidak bermaksud atau menyarankan agar Pengarah KLRCA telah menegaskan apa-apa kuasa atas penimbang tara atau penimbang tara terikat dengan apa-apa pandangan yang mungkin dimiliki oleh Pengarah mengenai perkara itu. Penimbang tara sepenuhnya berhak menggunakan budi bicaranya dengan satu cara ketika berkenaan tiada pembayaran deposit oleh AMDAC mengenai tuntutan BYD dan berurusan dengan tiada pembayaran deposit mereka untuk tuntutan balas mereka dengan cara yang sama sekali berbeza. AMDAC mesti menanggung akibat dari keputusan mereka untuk tidak mengambil jalan litigasi mahkamah dan ini semestinya bermaksud bahawa mereka harus mematuhi Kaedah-Kaedah Timbang Tara KLRCA dalam segala hal. Tidak ada asas undang-undang atau fakta untuk AMDAC menegaskan bahawa terdapat pelanggaran peraturan keadilan semula jadi dengan alasan keputusan penimbang tara untuk membuang tuntutan balas (lihat perenggan 158, 161, 163 & 168).

(4) Penimbang tara membuat penemuan fakta yang betul dan sahih bahawa BYD tidak pernah bersetuju atau menerima dengan sebarang penolakan. Penolakan yang disebut itu adalah tindakan sepihak di pihak AMDAC. Itu tidak mempunyai kesan sama sekali kerana ia adalah penolakan 'tidak sah'. Ia tidak mengikat BYD. Surat tersebut adalah dokumen 'smoking gun', yang banyak mengatakan mengenai pengaturan pembayaran antara pihak-pihak di CA dan addendum yang tidak ditandatangani. Oleh itu, kecuali untuk penolakan yang tidak sah dan sepihak, jumlah baki yang perlu dibayar kepada BYD adalah RM4.5 juta. Itu adalah kewajiban kontrak (liabiliti) AMDAC yang jelas dan tidak dapat disangkal menurut CA. Sebagaimana pendapat yang tepat oleh penimbang tara, kewajipan ini tetap dengan AMDAC dan tidak diserahakkan di bawah DOA pertama dan/atau DOA kedua (lihat perenggan 185, 188 & 191).

(5) Tidak ada priviti kontrak antara MDV dan BYD. Pendapat AMDAC bahawa mereka tidak berkewajipan untuk membuat pembayaran menurut CA kerana tidak ada wang yang diarahkan secara langsung oleh

Prasarana kepada mereka adalah salah. Pengembalian dana MDV harus ditafsirkan sebagai pembayaran tidak langsung oleh Prasarana dan oleh itu, AMDAC tetap bertanggungjawab untuk membuat pembayaran penuh kepada BYD untuk jumlah yang ditetapkan dalam CA. Kegagalan AMDAC untuk membayar sejumlah RM4.5 juta kepada BYD merupakan pelanggaran CA dan tuntutan BYD dalam timbang tara adalah secara nyata mengenai pelanggaran AMDAC terhadap CA kerana gagal membayar jumlah RM4.5 juta. Hasilnya, tidak ada merit dalam aduan AMDAC berdasarkan s 37 Akta (lihat perenggan 202–206).]

Cases referred to

ABU v Comptroller of Income Tax [2015] 2 SLR 420; [2015] SGCA 4, CA (refd)

African & East Malaya Ltd v White Palmer & Co Ltd (1930) 36 Ll L Rep 113, KBD (refd)

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625; [2013] 4 AMR 789; [2013] 7 CLJ 18, FC (refd)

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656; [2010] 7 CLJ 785; [2010] 3 AMR 721, CA (refd)

Attorney-General for Manitoba v Kelly [1922] 1 AC 268, PC (refd)

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545; [1999] 4 CLJ 665; [1999] 4 AMR 4557, CA (refd)

Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal [2018] 4 MLJ 640, CA (refd)

Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor [2017] 3 MLJ 394, CA (refd)

Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor [2008] 3 MLJ 564; [2008] 2 AMR 741; [2008] 3 CLJ 741, CA (refd)

Bond M & E (KL) Sdn Bhd v Southern Cable Sdn Bhd & Ors [2011] MLJU 541; [2012] 6 CLJ 134, HC (refd)

Colonial Sugar Refining Company Limited v Irving [1905] AC 369, PC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345; [1994] 4 CLJ 285; [1994] 3 AMR 2103, FC (refd)

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2011] 1 All ER 485; [2010] UKSC 46; UKSC 2009/0165; [2010] WLR (D) 279; [2011] Bus LR 158; 133 Con LR 1; [2011] 1 All ER 485; [2011] 1 AC 763; [2010] 2 Lloyd's Rep 691; [2010] 3 WLR 1472; [2011] 1 All ER (Comm) 383; [2010] 2 CLC 793 UKSC, SC (refd)

Datuk Haji Zainal Abidin bin Ahmad & Ors v Sarawak Plantation Agriculture Development Sdn Bhd [2015] MLJU 1941; [2015] 1 LNS 1495; [2016] MLRA 532, CA (refd)

Dixie v Royal Columbian Hospital [1941] 2 DLR 138 (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 6 AMR 609; [2017] 10 CLJ 529, FC (refd)

A *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693; [2017] 1 LNS 1695; [2017] 8 AMR 313; [2017] AMEJ 1401, FC (refd)
B *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012] 8 MLJ 585; [2011] 1 LNS 1631, HC (refd)
Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80, HC (refd)
Hamilton Gell v White [1922] 2 KB 422, CA (refd)
C *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539, HC (refd)
KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)
D *Kenderaan Bas Mara v Yew Bon Tew & Anor* [1980] 1 MLJ 311, FC (refd)
Lee Chow Meng v Public Prosecutor [1978] 2 MLJ 36, FC (refd)
Leong Ah Kew v Prisma Suria Sdn Bhd [2015] MLJU 713; [2015] 8 CLJ 300, HC (refd)
E *Lewis v Haverfordwest Rural District Council* [1953] 1 WLR 1486; [1953] 2 All ER 1599, QBD (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (folld)
London Export Corporation v Jubilee Coffee Roasting Co Ltd [1958] 2 All ER 411; [1958] 1 WLR 661, CA (refd)
F *Luke v Inland Revenue Commissioners* [1963] AC 557, HL (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585, CA (refd)
Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd [2009] MLJU 583, HC (refd)
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G *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2018] supp MLJ 33, FC (refd)
Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor [2006] 6 MLJ 314; [2006] 4 CLJ 31; [2006] 5 AMR 489, CA (refd)
Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another
H *appeal* [2014] 1 MLJ 461; [2013] 1 LNS 984, CA (refd)
PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and another appeal [2018] MLJU 151; [2018] 1 LNS 162, HC (refd)
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I *Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42; [1992] 3 WLR 1032, HL (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)
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SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627, CA (refd)
Sebiro Holdings Sdn Bhd v Bhag Singh & Anor [2015] 4 CLJ 209, CA (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)
TW Thomas & Co, Limited v Portsea Steamship Company, Limited [1912] AC 1, HL (refd)
Taki Engineering Sdn Bhd v Dynasty Streams Sdn Bhd [2015] MLJU 2174; [2015] 1 LNS 1503, CA (refd)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (refd)
The 'Fuji Hoshi Maru'; United Asian Bank Bhd v M/V Fuji Hoshi Maru, owners & Ors interested [1981] 2 MLJ 333 (refd)
The Government of India v Vedanta Ltd (legal successor to Cairn India Ltd) & Anor [2018] MLJU 630; [2018] 1 LNS 617, HC (refd)
VPN Marketing (M) Sdn Bhd v Datuk Saravanan a/l Murugan & Anor [2010] MLJU 2153; [2010] 1 LNS 1200, HC (refd)
Wasal Construction Sdn Bhd v Boh Huat Chan Timber Products Sdn Bhd [2014] 4 MLJ 294; [2013] 1 LNS 1269, CA (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1; [1983] 1 AC 553, PC (refd)

Legislation referred to

Agricultural Holdings Act 1908 [UK] s 11
Agriculture Act 1920 [UK] s 10
Arbitration Act 2005 ss 9(5), 18, 18(1), 20, 34, 37, s 37(1)(a)(iii), (1)(a)(iv), (1)(a)(v), (1)(a)(vi), (1)(b)(ii), (2)(b)(ii), 42, 42(1), 44, 44(1)(a)(i)
Contracts Act 1950 ss 38, 52, 53, 74
Interpretation Act 1889 [UK] s 38
Interpretation Acts 1948 and 1967 s 30, 30(1)(a), (1)(b), 77(b), (c)
Public Authorities Protection Ordinance 1948 s 2
Rules of the Supreme Court 1980 (repealed by the Rules of the Federal Court 1995) r 56

Shahabudin Shaik Alaudin (Rosnida Che Ibrahim with him) (Shahabudin & Rozima) for the plaintiff.
Lavania Kumaraendran (Mavinthra Jothy Thillainathan with her) (Thomas Philip) for the defendant.

Nantha Balan J:

INTRODUCTION

[1] Originating Summons No WA-24NCC (ARB)-39–09 of 2018 dated 27 September, 2018 (encl 1) ('OS39') is an application by AMDAC (M) Sdn Bhd ('AMDAC') pursuant to ss 37 and 42 of the Arbitration Act 2005 ('the Act') to set aside the final arbitration award ('the award') of the learned Arbitrator Dato' Azmi Mohd Ali ('the arbitrator'). The award is dated 18 July 2018 and was published on 20 August 2018. The defendant in OS39 is BYD Auto Industry Co Ltd ('BYD'). For convenience, I shall refer to the plaintiff and defendant as AMDAC and BYD respectively. The arbitration was conducted in accordance with the Kuala Lumpur Regional Center for Arbitration ('KLRCA') Arbitration Rules.

[2] In the arbitration proceedings, BYD was the claimant and AMDAC was the respondent. BYD's claim was for a sum of RM4.5m with interest and costs. AMDAC had filed a counterclaim dated 3 April 2017. AMDAC's counterclaim was for:

(a) Reimbursement of Preliminary Costs;

(b) The loss in the adjustment price per unit per bus for the 15 buses amounting to RM1,500,000.00;

(c) Damages for the maintenance and after-sales service contract to be assessed and once assessed to be paid by the claimant to the Respondent;

(d) The reimbursement of RM5 million Project Financing from MDV;

(e) Declaration that the business Agreement dated 24.01.2014; the Collaboration Agreement dated 08.04.2014; the Deed of Assignment dated 12.08.20 14 and the Deed of Assignment dated 22.09.2014 are all illegal, void and unenforceable;

(f) Interest;

(g) Costs;

(h) Further and/or other relief deem fit and proper by this Arbitral Tribunal.

[3] However, AMDAC did not pay the requisite deposit towards the arbitration costs vis a vis the counterclaim (RM132,277.24). As such, in accordance with r 13(6) of the KLRCA Arbitration Rules, the arbitrator consulted the Director of the KLRCA (now Asian International Arbitration Centre — AIAC) and terminated the counterclaim. The termination of the counterclaim was communicated via the arbitrator's letter dated 21 August 2017 which reads:

I respectfully refer to the above matter, the Arbitrator's Order dated No 2 dated 16.06.2017, my letter to the Director of KLRCA dated 21.07.2017, the response from the Director of KLRCA dated 27.07.2017 and the Claimant's letter dated 10.08.2017 on the proposed termination of the Respondent's counterclaim. *Order for Termination of the Respondent's Counterclaim*. After due consideration and consultation with the Director of KLRCA, I hereby order the TERMINATION of the respondent's Counterclaim.

[4] Apart from not paying the deposit for their counterclaim, AMDAC also did not (or could not) pay their portion of the costs vis a vis the claim by BYD. The arbitrator reserved that issue of costs (vis a vis BYD's claim) to be dealt with at the end of the arbitration. In regard to the question as to AMDAC's inability to pay the arbitration costs, it is I think relevant to mention that BYD's solicitor's, Messrs Thomas Philip had sent a letter dated 11 April 2016 to AMDAC's previous solicitors Messrs NK Tan & Rahim wherein a proposal was made to take the disputes to court instead of arbitration.

[5] The letter reads relevantly as, 'As spoken, we write to enquire whether your clients will be agreeable to have the matter litigated in court instead of proceeding to arbitration. *This may save both parties extensive time and costs*'. (Emphasis added.) (see: exh A3 encl 11). There was no response to the offer to take the dispute(s) out of arbitration and to have it litigated in court. The arbitration proceeded but only in respect of BYD's claim. BYD's claim was allowed and AMDAC was ordered to pay a sum of RM4.5m with interest thereon at the rate of 5%pa from the date of the award ie 18 July 2018 until the date of full and final settlement. AMDAC was also ordered to pay costs of RM325,000.

[6] BYD filed an application for the recognition and enforcement of the award via Originating Summons No WA-24NCC(ARB)-34–08 of 2018 ('OS34'). OS39 and OS34 came up for case management on 27 November 2018 wherein prayer (1) of encl 1 in OS34 was allowed and it was further directed that the present application (OS39) be treated as the application in prayer (2) of OS34. Before proceeding further, it is I think appropriate to reproduce the statutory provisions pursuant to which AMDAC is challenging the award.

[7] They are ss 37 and 42 of the Act. Section 37 of the Act (with emphasis to those parts which are relevant for purposes of OS39) provides as follows:

(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 connect ion 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.

(6) 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.

[8] Section 42 of the Act provides 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.*

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 detetmination of a reference — 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 if 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 matters remitted within ninety days of the date of the order for remi ssion 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 — 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.

[9] BYD has raised a preliminary point and contends that AMDAC are not entitled to mount a challenge under s 42 of the Act as that provision has been repealed with effect from 8 May 2018. In the present case, the Award is dated 18 July 2018 and was published on 20 August 2018. OS39 was filed on 27 September 2018 — after s 42 of the Act was repealed. I shall deal with the BYD's said objection in the later part of this judgment. The background to the dispute(s) and AMDAC's position (vis a vis OS39) is as follows.

A BACKGROUND — AMDAC'S POSITION

[10] On 3 January 2014 Sykt Prasarana Negara Bhd ('Prasarana') issued a letter of award ('the LOA') to BYD for the manufacturing, delivery, testing, commissioning and warranty of 15 units of step-less floor electric buses ('the project'). BYD and AMDAC (collectively 'the parties') formed a joint venture for profit in an enterprise as per the collaboration agreement dated 8 April 2014 ('the CA').

[11] Under the CA, the parties would undertake the project involving: (a) the base works portion amounting to RM20,671,425 ('the base works sum'); and (b) the option for after sales service amounting to RM3,642,000 ('the after sales option').

[12] The parties agreed to share the profit in the enterprise involving the base works sum where the BYD is to receive RM13,106,995 being 63.4% ('BYD's portion') and the remaining RM7,564,430 being 36.6% thereof belongs to AMDAC ('AMDAC's portion'). BYD's portion of 63.4% is clearly stated in the Addendum to the CA dated 2 September 2014, albeit that it is 'unsigned'.

[13] The arbitration agreement is contained in cl 14 of the CA which reads as follows:

> This Agreement shall be governed by the laws of Malaysia, excluding its conflicts of laws principles. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be submitted to and finally resolved by the Kuala Lumpur Regional Centre of Arbitration in accordance with the Rules of Arbitration for the time being in force. The place of arbitration shall be Kuala Lumpur and the award shall be final and binding upon the parties. The language to be used in the arbitration proceeding shall be English.

[14] A critical part of AMDAC's position in disavowing any liability or contractual obligation to make payments to BYD under the CA is that the payment arrangement for AMDAC to pay BYD's portion as per sub-cll 3.2(xi), 4.1 and 4.4 of the CA is on the basis of 'pay when paid' or 'pay if paid'. Thus, it is contended that AMDAC's payment obligation is contingent upon them being paid by Prasarana. AMDAC contends that the performance of its payment obligation became impossible because of two deeds of assignments pertaining to project financing.

[15] The parties executed a deed of assignment on 12 August, 2014 ('the first DOA') where BYD, as the assignor irrevocably assigned to AMDAC all the proceeds it was to receive from Prasarana under the LOA to enable AMDAC to apply to Malaysian Debt Venture Bhd ('MDV') for project financing. Pursuant

thereto via a deed of assignment dated 22 September 2014 AMDAC further assigned the receivables under the first DOA to MDV ('the second DOA') which resulted in all the payments which were due under the LOA *to be paid directly to MDV* and no longer to AMDAC as agreed in sub-cll 3.2(xi), 4.1 and 4.4 of the CA.

[16] It is contended by AMDAC that BYD has assigned the proceeds to AMDAC in the first DOA and are not privy to the second DOA between AMDAC and MDV. AMDAC contends that with the second DOA in place, the first DOA ceased to exist in law because BYD had effectively and absolutely transferred the chose in action and the right to sue on the proceeds to AMDAC. AMDAC further contends that pursuant to the assignments of proceeds which had been executed, first, between BYD and AMDAC and secondly, between AMDAC and MDV, the payment obligations per sub-cll 3.2(xi), 4.1 and 4.4 of the CA had *ceased.*

[17] AMDAC contends that in light of these assignments, BYD is without locus to maintain the claim in the arbitration. Counsel for AMDAC referred to *Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another appeal* [2014] 1 MLJ 461; [2013] 1 LNS 984 (para [7] and [17](a)) ('Osaka'). In *Osaka* the Court of Appeal held that in view of the assignments of two joint venture agreements, the appellant lacked the requisite *locus standi* to commence proceedings (see: *VPN Marketing (M) Sdn Bhd v Datuk Saravanan a/l Murugan & Anor* [2010] MLJU 2153; [2010] 1 LNS 1200 (HC)).

[18] The project had been successfully completed and all the electric buses were delivered to Prasarana. The dispute now pivots on the share of profit. AMDAC's position is that BYD's share of profit must be on the *net profit* after deducting the applicable costs and expenses incurred in the execution of the works in the project.

[19] BYD's position per the pleaded case in the points of claim is that AMDAC must pay a sum of RM13,106, 995.00 as per cll 3.2(xi) and 4.2 of the CA. Clause 3.2(xi) of theCA which states that AMDAC shall undertake the following obligations — 'pay the Claimant a sum of RM13, 106, 995 in respect of the Claimant's scope of work subject to the Respondent receiving the same from Sykt Prasarana' whereas cl 4.2 of the CA states 'Total amount which shall be received by BYD from AMDAC shall be Ringgit Malaysia Thirteen Million One Hundred Six Thousands (sic) Nine Hundred and Ninety Five (RM13,106,995) Only'.

[20] In the arbitration, BYD contended (paras 19 and 21 of the points of claim) that via a letter dated 19 October 2015 AMDAC had unilaterally

terminated the CA and wrongfully set off a sum of RM4.5m on the basis of an 'opportunity loss' it had suffered as a result of a failure on BYD's part to execute the after sales service agreement.

[21] AMDAC maintains that the obligation to pay BYD in both cll 3.2(xi) and 4.2 of the CA is not absolute but qualified in that it is a reciprocal promise for AMDAC to pay when paid or if paid (see: *Datuk Haji Zainal Abidin bin Ahmad & Ors v Sarawak Plantation Agriculture Development Sdn Bhd* [2015] MLJU 1941; [2015] 1 LNS 1495; [2016] MLRA 532 (CA) (paras [34] and [35]); *Leong Ah Kew v Prisma Suria Sdn Bhd* [2015] MLJU 713; [2015] 8 CLJ 300 (see: paras [43] and [47]).

[22] AMDAC filed defence and counterclaim and contended as follows: (a) the arbitrator has no jurisdiction over the alleged dispute; and (b) AMDAC's obligations in sub-cll 3.2(xi), 4.1 and 4.4 of the CA is not possible because of the successive 151 DOA and second DOA and no payments were received from Prasarana (see: pp 79–99, CCB); and (c) the parties in the collaboration are entitled to the share in the net profit, and not gross income. Before the arbitration could commence the arbitrator via letter on 21 August, 2017 terminated AMDAC's counterclaim due to their failure to pay the applicable costs and expenses set by the KLRCA.

SECTION 37 OF THE ACT

[23] Essentially, in so far as the challenge under s 37 of the Act is concerned, AMDAC relies upon s 37(1)(a)(iii), 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi), 37(1)(b)(ii) and 37(2)(b)(ii) of the Act and the grounds upon which these statutory provisions are invoked are that:

(a) they were unable to present their case effectively when the arbitrator arbitrarily terminated the counterclaim;

(b) the award had dealt with a dispute not contemplated or falling with the submission to arbitration;

(c) the award contains decisions beyond the scope of submission to arbitration; and

(d) the award is in fact in conflict with the public policy of Malaysia.

THE QUESTIONS OF LAW — SECTION 42

[24] The questions of law which were framed by AMDAC for purposes of the challenge under s 42 of the Act are as follows:

(a) whether as a matter of law (BYD) could continue to hold (AMDAC) liable to pay under cl 4 of the collaboration agreement despite having

successfully assigned its right to the payment under the main contract to (AMDAC) in the first assignment on 12 August 2014 and thereafter (AMDAC) to the project financier in the second assignment on 22 September 2014?

(b) whether it is correct in law for the arbitrator in response to a plea that it has no jurisdiction within s 18(1) of the Act and article 23(1) of the KLRCA UNCITRAL RULES to adjudicate the dispute to hold it has jurisdiction based upon cl 8 of the CA and s 74 of the Contracts Act 1950?

(c) whether as a matter of law, sub-cl 4 of the collaboration agreement contains reciprocal promise within ss 52 and 53 of the Contracts Act 1950 for (AMDAC) to pay (BYD) when paid by Prasarana?

(d) whether as a matter of law, the payment arrangement in cl 4 of the CA for (AMDAC) to pay the defendant must be construed in law to refer to the net payment of the profit after deducting all costs and expenses incurred in the implementation of the works in the BRT Line project? and

(e) whether as a matter of law [BYD] has no burden to prove the gain in the alternative claim based upon unjust enrichment as oppose to the compensatory claim in s 74 of the Contracts Act?

[25] In so far as the challenge under s 42 of the Act is concerned, AMDAC contends that the award is bad as a result of errors of law. AMDAC contends amongst others:

(a) that the assignments (via first DOA and second DOA) have effectively replaced AMDAC's obligation to pay BYD as per the CA;

(b) that in consequence thereof the arbitrator lacked the requisite jurisdiction to adjudicate upon the dispute;

(c) that on a true and proper construction of the terms in the CA, the agreed profit is not on gross payment received but rather it is based on the net profit after deducting the applicable costs and expenses which were paid to Gemilang Coachwork Sdn Bhd ('Gemilang') incurred in the execution of the works in the project; and

(d) that BYD had not proved their loss pursuant to s 74 of the Contracts Act 1950.

THE JURISDICTION POINT

[26] AMDAC submits that the arbitrator lacked jurisdiction to adjudicate the claim as pleaded in the points of defence and counterclaim. According to AMDAC, the mandate under cl 14 of the CA is confined to a dispute arising

A out of or in connection with the CA and none others. AMDAC submits that when the jurisdictional objection is viewed in totality, it is in fact an objection to the arbitral power to hear and determine which in itself a challenge to the jurisdiction wherein the arbitrator has failed to rule on his jurisdiction per s 18 of the Act (see: *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's* B *Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273 (FC) para [219]).

[27] According to AMDAC, the mandate relates to the alleged failure on the part of AMDAC to pay BYD's portion when paid or paid if paid as found in sub-cll 3.2(xi), 4.1 and 4.4 of the CA (see: pp 24–25, CCB). C

[28] Against this obligation it is in evidence that the second DOA had effectively ended AMDAC's obligation to pay BYD's portion when no payments were received from Prasarana. As such there is no dispute within the D mandate since sub-cll 3.2(xi), 4.1 and 4.4 of the CA were rendered inapplicable by the second DOA. In the absence thereof, the second DOA could not provide jurisdiction for the arbitration as there is no nexus or reference as provided in s 9(5) of the Act between the CA and the second DOA.

E **[29]** Counsel for AMDAC referred to *TW Thomas & Co, Limited v Portsea Steamship Company, Limited* [1912] AC 1 (PC) — where it was held that the arbitration clause was not incorporated in the bill of lading and *The 'Fuji Hoshi Maru'; United Asian Bank Bhd v M/V Fuji Hoshi Maru, owners & Ors interested* [1981] 2 MLJ 333 at p 334. Counsel also referred to *Albilt Resources* F *Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785; [2010] 3 AMR 721 (CA) at para [28] where the Court of Appeal referred to the issue of arbitration by reference.

[30] Reference was also made to the Federal Court's decision in *Ajwa for Food* G *Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625; [2013] 4 AMR 789; [2013] 7 CLJ 18 (FC) at para [26] which laid down the correct approach to s 9(5) of the Act. Likewise, it was enunciated in the case of *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 at p 557 MLJ; [1999] 4 CLJ 665; [1999] 4 AMR 4557 (CA) that 'whether an incorporation by H reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case'.

[31] Thus, according to AMDAC, the assignment in the second DOA had replaced the payment arrangement found in sub-cll 3.2(xi), 4.1 and 4.4 of the I CA and as such there could no longer exist any dispute or liability arising out of or in connection with the CA on the alleged amount owed. Further, AMDAC as the assignor in the second DOA assigned the chose in action in the proceeds to be vested in MDV and no longer has any residual rights to be exercised over the same.

[32] It was argued on behalf of AMDAC, that the arbitrator failed to consider this important aspect of liability which is clear and virtually inescapable in sub-cll 3.2(xi), 4.1 and 4.4 of the CA in that no payments were received from Prasarana. As such, the arbitrator exceeded the mandate to arbitrate the dispute and to hold that AMDAC continues to be liable by virtue of the second DOA. See: *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 — paras [39] and [45]. Counsel also referred to *Attorney-General for Manitoba v Kelly* [1922] 1 AC 268 (PC) (at p 276) and submitted that the arbitrator could not arrogate to himself a jurisdiction which did not exist.

[33] Counsel for AMDAC said that this court has the powers to fully review the failure of the arbitrator to rule on its own jurisdiction as found in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 All ER 485; [2010] UKSC 46; UKSC 2009/s0165; [2010] WLR (D) 279; [2011] Bus LR 158; 133 Con LR 1; [2011] 1 All ER 485; [2011] 1 AC 763; [2010] 2 Lloyd's Rep 691; [2010] 3 WLR 1472; [2011] 1 All ER (Comm) 383; [2010] 2 CLC 793 UKSC at para [26].

[34] Counsel for AMDAC also referred to *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd & Another Application* [2012] 8 MLJ 585; [2011] 1 LNS 1631 (HC) (para [67]) where the court extended its power and held such exercise is even possible during enforcement of the award as follows 'even if there were any determination of its jurisdiction by the Arbitral Tribunal, this court is not impeded in re-examining the issue afresh, examining any evidence now led and weighing the same against the relevant law'. Reference was also made to *The Government of India v Vedanta Ltd (legal successor to Cairn India Ltd) & Anor* [2018] MLJU 630; [2018] 1 LNS 617 (HC) (paras [77]–[79] and [81]).

[35] The contention by AMDAC is that there is a clear disconnect between the second DOA and the CA in that it was signed after the CA and was for project financing and has no clause referencing arbitration in the CA. More importantly such referencing is not possible as the second DOA is not with BYD but with MDV and that the dispute resolution in the second DOA is governed by the courts and not arbitration (see: s 10.05 in sub-s (2)(a)). The second DOA is therefore a security document created for the project financing which was provided by MDV and has nothing to do with the CA and the arbitration therein. Counsel for AMDAC submitted that the arbitrator missed this material aspect of the challenge to jurisdiction.

[36] Therefore in light of BYD's assignment (via the first DOA), of its right to receive from Prasarana the proceeds in the base work sum per cl 4 of the CA,

to AMDAC, who further assigned (via the second DOA) those rights to MDV, BYD had completely lost the right to arbitrate and no longer has any status in the contractual relationship in the CA.

[37] Counsel referred to *Bond M & E (KL) Sdn Bhd v Southern Cable Sdn Bhd & Ors* [2011] MLJU 541; [2012] 6 CLJ 134 (HC) (para [16]) and *VPN Marketing (M) Sdn Bhd v Datuk Saravanan a/l Murugan & Anor* [2010] MLJU 2153; [2010] 1 LNS 1200 (HC) (pp 7, 10, 29 and 35).

TERMINATION OF COUNTERCLAIM — BREACH OF NATURAL JUSTICE

[38] AMDAC contends that the arbitrator acted unfairly in the termination of AMDAC's counterclaim and acted against the rule of natural justice in breach of *audi alteram partem* rule. It was contended that:

(a) the counterclaim is in excess of the value of BYD's claim and AMDAC intended to make a deduction and set off in the event they are successful (see: *PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and another appeal* [2018] MLJU 151; [2018] 1 LNS 162 (HC), para [64]) where the court held a respondent in an arbitration may raise a set off founded on the claim arising out of the same contract which is the case in the present instance;

(b) the termination was because AMDAC could not pay the costs and expenses of the counterclaim set by the KLRCA;

(c) the arbitrator refused the request of AMDAC to deal with the issue of the applicable costs and expenses in the award at the end of the proceedings;

(d) when AMDAC was not able to pay for its portion of the deposit and costs involving the claim by BYD, the arbitrator was prepared to deal with the matter in the award but was not willing to do so in regard to the counterclaim; and

(e) ultimately in the award the arbitrator did make an order for AMDAC to pay BYD's substantial costs and expenses in the arbitration and could have likewise included such costs and expenses of the counterclaim.

[39] Counsel referred to *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539 (HC) at p 571 para [70] where the court held that issues relating to payment of the arbitrator's fees is not a substantial matter and does not amount to a miscarriage of justice.

[40] As such, it was argued that AMDAC's failure to pay the costs and expenses of the counterclaim should not be treated as a substantial breach warranting termination but could have been dealt with in the award as cost follows the event since the successful party is entitled to receive its costs (see: *Lewis v Haverfordwest Rural District Council* [1953] 1 WLR 1486; [1953] 2 All ER 1599 (QBD)).

[41] Further, AMDAC argued that there was a breach of natural justice and that it was contrary to the public policy as the termination of the counterclaim was not an independent decision of the arbitrator but was a 'tainted ' decision as KLRCA was 'consulted' on the matter. According to AMDAC, KLRCA should not be involved in the decision to terminate the counterclaim and should confine itself to its administrative role (see: *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* [2015] 4 CLJ 209 (CA) para [17]).

[42] Next it was argued that the termination proceeded without AMDAC being given an opportunity to address the arbitrator or to raise its concerns with KLRCA. It was also contended that the procedure agreed upon by the parties was for the arbitrator to decide the dispute relating to the counterclaim and not the KLRCA.

[43] Counsel for AMDAC referred to the case of *London Export Corporation v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411; [1958] 1 WLR 661 (CA) where the court held when the award was made in breach of the agreed procedure it is liable to be set aside.

[44] In so far as r 13(6) of the KLRCA Arbitration Rules is concerned, AMDAC contends that it is an affront to party autonomous arbitration. According to AMDAC, KLRCA whose duties are confined to the fixing of costs and expenses should not be involved in the decision-making process when one party is not able to pay the amount fixed.

FAILURE TO PROVE THE CLAIM OF RM4.5M

[45] AMDAC contends that BYD failed to provide a valid basis for their claim for RM4.5m and failed to prove the loss within the meaning of s 74 of the Contracts Act 1950. According to AMDAC, the evidence shows that the claim is taken from the set off for RM4.5m exercised by AMDAC, when BYD forfeited AMDACs' right to the five years after sales service. It was argued that BYD must prove both the fact and the amount of damages. According to AMDAC, BYD's claim did not take into account the deduction for the lawful costs and expenses incurred by AMDAC to generate the income. In other words, BYD is only entitled to profit but not gross income.

[46] In amplification, AMDAC contended that the undisputed cost of financing is RM7,578,888.74 and when this is deducted from the base works sum (RM20,671,425), the net sum is RM13,092,536.26 and it is this sum which is available to be shared and BYD is entitled to 63.4% thereof in the amount of RM8,300,667.98 and from this amount if a further RM1,040,625 is deducted for the agreed compensation, the balance is RM7,260,042.98.

[47] Further, against this amount of RM7,260,042.98 when the payments received amounting to RM4,465,636.39 is deducted, the net amount due is RM2,794,406.59. Therefore, on a conventional calculation based on the agreed figure for the costs of the project financing and the agreed compensation for loss of bus pricing, the amount stands at RM2,794,406.59. Further, if other costs such as direct payment to *Gemilang* for RM1,251,650, is added to RM2,794,406.59, then the actual amount owed to BYD is far less than what is now being claimed against AMDAC.

[48] Counsel for AMDAC refened to the case of *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2018] MLJU 968; [2018] 1 LNS 1053 (CA) where the Court of Appeal set aside the award as the arbitrator had exceeded his jurisdiction and had breached the rules of natural justice in his ruling in the loss of profit ruling and had acted against the equality rule in s 20 of the Act (see: paras [33]; [36]; [38] [43]; [44] and [45]).

[49] In that case, the Court of Appeal referred to the failure of the arbitrator to properly assess damages as per s 74 of the Contracts Act 1950 which is also the issue taken in the present application in that no evidence was tendered to prove the alleged loss of RM4.5m except for the scribbling on the white board in the re-examination of PW2. Counsel for AMDAC referred to the Court of Appeal's decision in *Taki Engineering Sdn Bhd v Dynasty Streams Sdn Bhd* [2015] MLJU 2174; [2015] 1 LNS 1503 (CA) (para [31]) where the court rejected the evidence/proof of loss as being self-serving. Likewise, in *Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor* [2006] 6 MLJ 314; [2006] 4 CLJ 31; [2006] 5 AMR 489 (CA) (paras [7]–[8] and [32]) the court held that the respondent is only entitled to profit and not gross income.

[50] In *Wasal Construction Sdn Bhd v Boh Huat Chan Timber Products Sdn Bhd* [2014] 4 MLJ 294; [2013] 1 LNS 1269 (para [23]) ('Wasal'), the Court of Appeal in allowing the appeal held that there is no evidence as to how the amount was arrived at and the maker was not called to explain and the account tendered was not signed. This case referred to an earlier Court of Appeal decision in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611, where the court held even if accounts are produced the amount outstanding stated in the statement of account mu st be proved.

[51] The case of *Wasal* also referred to the case of *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1 SC, where the Supreme Court held that:

> the mere fact that a summ ary of particulars was made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover, the record book upon which the maker based her summary mu st be in evidence ...

[52] As BYD failed to prove the compensatory loss in s 74 of the Contracts Act 1950, likewise there is no evidence tendered to prove the gain the alternative claim for unjust enrichment. The case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 ('Dream Property') (paras [108]–[136]) referred to by the arbitrator in fact makes it clear that the gain must be measured by referring to the need to assess the gain as much as loss is assessed in the compensatory regime (see: para [132]) and court ordered the restitution to be assessed based on market value of the mall (see: para [136]).

[53] Further, in a more recent decision of the Federal Court in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 6 AMR 609; [2017] 10 CLJ 529 (FC) the apex court referred to *Dream Property Sdn Bhd* and on the facts held that the ingredients of unjust enrichment as alleged was not made out (see: paras [152]–[154]).

BYD'S SUBMISSION

The jurisdictional challenge

[54] Briefly, AMDAC's challenge as to the *jurisdiction* of the arbitrator is as follows:

(a) the assignment of proceeds in the project to AMDAC ('first DOA') and subsequently to MDV ('second DOA'), had replaced/overtaken AMDAC's payment obligation in the CA; and

(b) there are no clauses in the first DOA and second DOA which provide for arbitration by reference within the meaning of s 9(5) of the 2005 Act — in the absence of which, there is no arbitration agreement to seize the arbitrator with jurisdiction to hear the dispute.

[55] The arbitration agreement in this matter is found in *cl 14 of the CA* which, inter alia, reads:

> *Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination*, shall be submitted to and finally resolved by the Kuala Lumpur Regional Centre for Arbitration in accordance with

A the Rules of Arbitration for the time being in force.

[56] It was submitted for BYD that on a plain reading, cl 14 was intended by parties to cover any dispute 'arising out of and/or in connection' with the CA. In this regard:

B

(a) at all material times, the CA was the operative agreement containing the terms and obligations of the parties vis a vis the project;

(b) the execution of the first DOA and second DOA did not amount to a variation/alteration in the respective obligations of the parties. Rather, the assignments were relevant merely towards the manner in which the proceeds in the project had flowed;

C

(c) in any event, the assignments were clearly envisaged by the parties as it was expressly contained in the CA (per the format of the assignment — Annex 2) that the proceeds in the project were to be assigned to AMDAC and subsequently to a third-party bank, MDV;

D

(d) further, it was a finding of fact by the arbitrator that the second DOA was executed towards AMDAC securing project financing for the project; and

E

(e) the arbitrator held that BYD's cause of action against AMDAC arose out of a breach of the CA, specifically AMDAC's act of setting off the sum of RM4.5m.

F **[57]** This was substantiated by the express clauses in the first DOA and second DOA which spelt out AMDAC's 'continuing obligation' under the CA. In view of the aforesaid matters, the arbitrator held that it was vested with the jurisdiction to hear the dispute within the meaning of cl 8 of the CA and s 74 of the Contracts Act 1950.

G

[58] Counsel for BYD referred to the Federal Court's decision in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 (FC) which had this to say on the issue of construction of arbitration clauses:

H

> *In determining what is the dispute or difference the parties intended to submit to arbitration, the arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the contract or agreement was made*. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit, to the commercial purpose of the arbitration clause.

I

[59] Counsel for BYD submitted that it is illogical for AMDAC to contend (para 36 of the defence) that BYD's recourse in this matter if any, lies against MDV in the event BYD does not receive its due payment under the CA. In this

regard, it is undisputed that there is no privity of contract between BYD and MDV as the former is not a party to the second DOA.

[60] Further and in any event, it is undisputed that MDV had terminated the project financing facility in September 2015 and had remitted the balance monies of RM1,004,390.27 and RM7,226,247.25 to AMDAC thereafter. It was the arbitrator's finding of fact that AMDAC's retention of the sum of RM4.5m was unjust and at the expense of BYD.

[61] On the issue of there being allegedly no arbitration by reference, it was submitted that the dispute between the parties falls squarely within the four comers of the CA and hence nothing turns on the issue of arbitration by reference. Nevertheless, counsel referred to the Federal Court's decision in *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625; [2013] 4 AMR 789; [2013] 7 CLJ 18 (FC) where it was made clear that arbitration by reference can exist in the absence of an express clause to that effect.

> *Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause*. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract (see the case of *Astel-Peiniger Joint Venture v Amos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328). *We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause.*
>
> There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

[62] Counsel for BYD also referred to *Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor* [2008] 3 MLJ 564; [2008] 2 AMR 741; [2008] 3 CLJ 741 (CA) where it was enunciated that arbitration by reference may also be implied from the conduct of the parties. As such, it was submitted that there was indeed arbitration by reference by reason of the following:

(a) the CA was expressly referred to in the preamble of the first DOA;

(b) the second DOA was expressly referred to in the first DOA; and

(c) further, AMDAC had taken the position by way of its letter dated 24 September, 2014 to Prasarana that it would continue to perform its

obligations under the project documents which must be taken to refer to the CA — this position was not challenged by AMDAC in the arbitration.

Scope of submission to arbitration

[63] AMDAC's challenge in this regard is mounted on s 37(1)(a)(v) of the Act where it is alleged that the arbitrator had acted in excess of its jurisdiction by dealing with matters beyond the scope of submission to arbitration.

[64] It was specific ally alleged that although the submission to arbitration was allegedly based solely on a breach of cl 4 of the CA, the arbitrator exceeded his juri sdiction by holding AMDAC liable to pay BYD by reason of the 'continuing obligation' clauses in the first DOA and second DOA.

[65] In response, it was submitted that BYD's claim was framed solely on cl 4 of the CA and not on the first DOA and/or the second DOA and BYD's cause of action at all material times was based on a fundamental breach of the CA specifically, AMDAC's *unlawful set off of the sum of RM4.5m*.

[66] In so far as the determination of the dispute by reference to the terms of the first DOA and second DOA is concerned, BYD submits that the same was an *agreed issue to be tried* in the arbitration. A determination was made by the arbitrator that AMDAC was not entitled to waive its obligations under the CA. Accordingly, AMDAC is estopped from contending that the determination by the arbitrator fell outside the scope of the submission to arbitration.

Termination of AMDAC's counterclaim

[67] AMDAC's contention on this issue is that the termination of the counterclaim amounted to a breach of natural justice as AMDAC was precluded from presenting evidence in support of its counterclaim and that the decision to terminate the counterclaim was not taken independently and impartially as KLRCA allegedly interfered with the said decision.

[68] It was submitted for BYD that AMDAC ought to be estopped from raising this issue as a ground of challenge as there was no complaint raised by AMDAC at the material time in August 2017 when the arbitrator issued the order terminating the counterclaim. In the absence of any challenge, AMDAC must be taken to have accepted the correctness of the decision made by the arbitrator.

[69] In any event, the procedural history concerning the payment of the fees and expenses of the arbitrator and KLRCA including AMDAC's default in

making payment thereof are not disputed by AMDAC. BYD submits that the termination of the counterclaim was at all material times carried out in accordance with applicable law and the arbitration rules agreed between the parties.

[70] In this regard s 44 of the Act provides that the costs and expenses of the arbitration shall be at the sole discretion of the arbitrator including the manner in which such sums are to be paid. Section 44(1)(a)(i) reads as follows:

> Unless otherwise agreed by the parties —
>
> (a) the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may —
>
> (i) direct to and by whom and in what manner those costs or any part thereof shall be paid;

[71] Counsel for BYD also referred to article 43 of the UNCITRAL Arbitration Rules — which provides as follows:

> If an appointing authority has been agreed upon or designated, and when a Party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits ...

[72] Counsel then referred to r 13(6) of the KLRCA Arbitration Rules 2013 which states, inter alia:

> ... If such payment is not made, *the arbitral tribunal may, after consultation with the Director, order the suspension or termination of the arbitral proceedings or any part thereof*.

[73] Counsel referred to some of the cases where the applicability of the foregoing provisions had been canvassed in some detail by the Malaysian courts.

[74] The cases referred to are:

(a) *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627 (CA):

> *the AA 2005 specifically states that costs and expenses of the arbitration shall be at the discretion of the arbitral tribunal. And to ensure that discretion is not made illusory, s 8 curtails the power of the court to intervene in the discretionary jurisdiction of the arbitrator.* As the court's role to decide on costs or quantum had been specifically taken away by virtue of s 8 and 44 of the AA 2005 it is difficult to fathom how the issue of costs in arbitral proceedings can be framed as a question of law for the determination of the High Court when the statute has specifically deprived the business of the High Court to deal with costs ...

(b) *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539 — which emphasised the position that matters concerning *costs and expenses in arbitral proceedings* do not amount to a breach of natural justice:

> For this reason, I tend to be of the view that the principle in *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd,* should not apply in the peculiar circumstances of this present dispute, since the Rules themselves provide that the KLRCA must have regard to the justice of the particular case in dispute and not only to technical compliance, and further, *any breach shall not affect the validity of legality of the arbitral proceedings unless there has been proven a substantial miscarriage of justice. I stress the word substantial.*
>
> *Any dispute on Arbitrators' Fees (after the event that), which to my mind is not beyond resolution by the immediate parties, cannot in fairness lead to any substantial miscarriage of justice, if at all.*

(c) *Magnificient Diagraph Sdn Bhd v JWC Ariatektura Sdn Bhd* [2009] MLJU 583 (HC):

> Costs and fees are matters which ought to have been stated in the agreement. In this case, the parties have failed to state the same. In addition, parties in this case have not agreed to this issue before the appointment of arbitrator. In consequence, the provision of section 44 will strictly apply ...
>
> *From the reading of the said section, it is clear that the jurisdiction to determine costs vests with the arbitrator. Courts will not ordinarily interfere with the jurisdiction of the arbitrator*

[75] In view of the above, it was submitted for BYD that there is nothing irregular in the arbitrator's decision to order the termination of AMDAC's counterclaim. The statutory provisions on the issue of costs of the arbitration which is the costs of reference and the award, are found in s 44 of the Act.

Revisiting agreed contractual terms

[76] AMDAC has raised a further issue on whether the payment arrangement in the CA ought to be revisited to take into account the costs and expenses incurred towards assembling the electric buses.

[77] However, counsel for BYD submitted that this issue was not raised by AMDAC as a ground of challenge pursuant to s 37 of the Act. This issue was raised purely as a question of law (question no 4). Further, a perusal of the agreed issues to be tried in the arbitration will show that this issue was not raised by AMDAC during the course of the arbitration. In the circumstances, it is submitted that AMDAC ought to be estopped from challenging the award on this basis. In any event, it is submitted that AMDAC's challenge is bound to

fail. The respective portions of the parties are set out expressly in the CA and the percentages are in the unsigned addendum.

[78] The arbitrator had conclusively held BYD's portion under the agreement was RM13,106,995 and AMDAC's corresponding portion was RM7,564,430 epresenting 63.4% and 36.6% of the base works respectively. During the evidence taking process, AMDAC's sole witness admitted to the aforementioned breakdown/agreed portions of the parties. Clause 11 of the CA constitutes an entire agreement clause which leaves no room for additional terms/variations to be implied and/or incorporated into the agreement. See: *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 (CA). Counsel for BYD submitted that the principle of sanctity of contract embodied in s 38 of the Contracts Act 1950 dictates that parties who enter into an agreement are duty bound to obey the terms of the agreement. See: *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2018] supp MLJ 33 (FC).

[79] In any event, it is submitted that the factual findings of the arbitrator ought not to be disturbed as it is trite law that *the arbitrator remains the 'master of the facts'*. The following are, inter alia, *factual findings made by the Tribunal:* see paras 37–38 of the award:

(a) pursuant to cl 3.2 of the CA, AMDAC undertook to manufacture the local parts and to assemble the electric buses; and

(b) there is no provision in the CA that provides that BYD has to bear the costs and expenses of the assembly of the electric buses.

BYD's objection — Repeal of s 42

[80] BYD contends that the law has been amended in that s 42 of the Act was repealed with effect from 8 May 2018 and AMDAC is therefore not entitled to apply under s 42 of the Act to challenge the award.

[81] It is undisputed that encl 1 was filed on 27 September 2018, which is after the coming into force of the Arbitration Amendment (No 2) Act 2018 which repealed s 42 of the Act.

[82] The Arbitration Amendment (No 2) Act 2018 Act came into force on 8 May 2018 upon its publication in the national *gazette*. In view of the repeal of s 42, it was submitted that this court no longer has jurisdiction to entertain AMDAC's reference on questions of law under the repealed s 42 of the Act.

[83] It was submitted on behalf of BYD that AMDAC cannot rely on s 30 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) Act

388, which reads as follows:

> Matters not affected by repeal
>
> (1) *The repeal of a written law in whole or in part shall not —*
>
> (a) *affect the previous operation of the repealed law* or anything duly done or suffered thereunder; or
>
> (b) *affect any right*, privilege, obligation or liability *acquired*, accrued or incurred *under the repealed law*; or
>
> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
>
> (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

[84] It was submitted on behalf of BYD that s 30(1)(b) of the Interpretation Acts 1948 and 1967 does not apply and AMDAC cannot maintain the challenge under s 42 of the Act as an 'accrued right' because s 42 of the Act states that 'any party may refer to the High Court any question of law *arising out of the award*'.

[85] Further, BYD relied on the Federal Court case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693; [2017] 1 LNS 1695; [2017] 8 AMR 313; [2017] AMEJ 1401 (FC) ('Far East Holdings') where the phrase, 'any question of law *arising out of the awared*' was interpreted by Jeffrey Tan FCJ para 157 in the following manner:

> 'Arising out of an award'
>
> [157] The scope of the words '*arising out of an award*' in s 42 was first enunciated in *Majlis Amanah Rakyat v Kausar Corp, citing Universal Petroleum Co v Handels und Transport GmbH* [1987] 1 WLR 1178, where Mohamad Ariff J, as he then was, said that '*A question of law must arise out of an award and not out of the arbitration*' (followed by *Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 10 MLJ 453; [2012] 7 CLJ 540, Sanlaiman, and Tune Insurance; see also The Arbitration Act 2005 at pp 200–201).

[86] It was accordingly argued that since the question of law must 'arise' out of the award, the right to refer questions of law under s 42 only accrues upon the happening of an event, in this case, the publication of the award.

[87] Counsel for BYD referred to the case of *Hamilton Gell v White* [1922] 2 KB 422 (CA) ('*Hamilton*'s case') in support of the said proposition. The case

arose out of a claim by a tenant following the termination of a yearly tenancy consequent upon the landlord's issuance of a notice to quit. A

[88] The facts of *Hamilton*'s case need to be examined in some detail. In this regard, the facts have been extracted from the judgment of Scrutton LJ and they are as follows. On *29 September 1920*, the landlord gave the tenant notice to quit. He gave that notice in view of a sale. At that time, s 11 of the Agricultural Holdings Act 1908 ('the 1908 Act'), was in force, and under that section the tenant upon quitting his holding would be entitled, in addition to compensation for improvements, to further compensation for loss consequent upon the removal. However, the section provided that the compensation should not be payable unless he gave notice of his intention to claim compensation within two months after receipt of notice to quit. B C

[89] *The tenant satisfied that condition by giving notice on 17 November 1920, of his intention to claim compensation under that section,* and if nothing else had happened the matter would have gone to arbitration, though he would have had to satisfy the *further condition of making his actual claim within three months after his quitting the holding.* On *1 January 1921,* the Agriculture Act 1920 ('the 1920 Act') came into force, which repealed s 11 of the 1908 Act. Section 10 of the 1920 Act provided that for the cases with notices to quit given after 20 May 1920 (which therefore covered the notice to quit in the present case) the tenant should in the circumstances therein specified be entitled to compensation for disturbance, subject to his satisfying certain conditions. But both the amount of the compensation and the conditions of the tenant's right to it differed from those indicated in the repealed section. D E F

[90] On the one hand, it fixed the minimum compensation for loss attributable to quitting the holding at one year's rent, and on the other it made it a condition of the tenant's getting that compensation that he should give notice of his intention to claim compensation under s 10 of the 1920 Act one month before the termination of the tenancy. No notice was here given by the tenant of intention to claim under s 10 of the 1920 Act. G

[91] The matter then went to arbitration, and the arbitrator stated a special case in which he asked two questions, first, whether the tenant, who had given no notice of intention to claim except under the 1908 Act, was entitled to compensation under the 1920 Act, and secondly, whether he could claim under s 11 of the Act of 1908, notwithstanding that that section was repealed. On the first question the county court judge held that the tenant could not recover under the 1920 Act of 1920. The Court of Appeal agreed with the county court. H I

[92] On the other question the county court judge held that by reason of the repeal of s 11 the tenant was precluded from recovering under the 1908 Act. He was of opinion that s 38 of the Interpretation Act did not apply, as the notice did not give any right at all under the 1908 Act. The tenant argued that his right to compensation was acquired *not* by his giving notice of intention to claim it, rather his right arose from the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by s 11 were conditions, not of the acquisition of the right, but of its enforcement.

[93] The tenant suggested that he had an 'acquired right' under s 11 of the 1908 Act which was preserved by s 38 of the Interpretation Act 1889, and therefore his acquired right was unaffected by its repeal. Section 38 says that repeal of an Act *shall not* (c) '*affect any right … acquired … under any enactment so repealed,*' or (e) 'affect any investigation, legal proceeding, or remedy in respect of any such right'.

[94] The Court of Appeal unanimously allowed the tenant's appeal and held that his right under s 11 of the 1908 Act was preserved pursuant to s 38 of the Interpretation Act 1889 and therefore notwithstanding the repeal of the s 11 of the 1908 Act, he was entitled to claim compensation from the landlord under that section. For present purposes it is relevant to refer to the judgment of Atkin LJ said (p 431) where he said:

> As far as the claim under the Act of 1920 is concerned I think it is untenable for the reasons that have already been given and which I need not repeat.
>
> As far as the claim under the Act of 1908 is concerned that depends on the proper construction of s 38 of the Interpretation Act, 1889, which provides that where an Act is repealed 'the repeal shall not affect any right, privilege, obligation or liability acquired, accrued, or incuned under any enactment so repealed.
>
> *It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act*, such for instance as the right of compensation for disturbance conferred upon tenants generall y under the Act of 1908, for if it were the repealing Act would be altogether inoperative. *It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute*.
>
> Here the nece ssary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circum stances the tenant has 'acquired a right,' which would 'accrue' when he has quitted his holding, to receive compensation.

[95] Counsel for BYD said that ultimately the outcome in *Hamilton*'s case was that the tenant was entitled to compensation notwithstanding the repeal of the 1908 Act because *his right to compensation was not in the abstract because his right had already crystallised as the landlord had given the notice to quit*. Counsel also made reference to the decision of HRH Raja Azlan CJ Malaya (as he then was) in *Kenderaan Bas Mara v Yew Bon Tew & Anor* [1980] 1 MLJ 311 FC

where *Hamilton*'s case was referred to. In *Yew Bon Tew,* the plaintiff was injured in a collision involving the defendant's vehicle. The accident occurred on 5 April 1972. The relevant time limit for instituting proceedings against the defendant was prescribed by s 2 of the Public Authorities Protection Ordinance 1948. As at the date of the collision, the section provided a period of 12 months. The plaintiff did not commence any action within the prescribed period. On 5 June 1974 that is to say a little more than two years after the collision and about a year after time had run against the plaintiff, Parliament enacted an amendment to the principal statute, extending the period of limitation to 36 months. On 20 March 1975, the plaintiff issued a writ claiming damages for the injuries received by him in the collision of 5 April 1972. At the trial, the defendant raised a preliminary objection on the maintainability of the action. At first instance, Mohd Azmi J ruled in the plaintiff's favour. The defendant appealed to the Federal Court which allowed the appeal and dismissed the suit.

[96] In the Federal Court, Raja Azlan Shah posited that a right under a statute accrued on the happening of an event. At p 313 of the judgment he said:

> We referred to those cases merely to illustrate how courts in different jurisdictions, with similar legislative provisions on the point, have approached problems of interpretation. *The criteria adopted in those cases in the process of determining 'accrued right' seem to be this. It must depend on the happening of an event which is specified in the statute*. (Emphasis added.)

[97] The plaintiff then appealed to the Privy Council which upheld the Federal Court's decision and dismissed the appeal (see: *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 AC 553 (PC)). However, the case of *Hamilton* was not referred to by the Privy Council. At any rate, the right which had accrued in *Yew Bon Tew*'s case was the *immunity* of the public authority from being sued after the expiry of the relevant period of limitation, which was 12 months from the date of the accident. On this point the Federal Court said (p 313):

> That section was designed to govern the rights of persons desirous of assetting claims against public bodies or persons performing public duties, and it controlled also the rights of the public bodies or persons to the limited protection which it conferred upon them. Prospective plaintiffs and prospective defendants were alike bound. There can be no distinction in principle between a right given by law to commence an action and a defence given by law which bars an action. In respect of causes of action already existing before the operation of Act A252, therefore, both prospective plaintiffs and prospective defendants possessed accrued rights on the happening of the necessary event as specified in the old Act.
>
> *The necessary event that had happened in the present case is this. On the failure of the respondents to commence action within the specified period the appellants had acquired an 'accrued right' which was designed to give them immunity for acts done in the*

discharge of their public duties. That right was well preserved by the Interpretation Act, 1967.

[98] It was argued for BYD that in the present case, prior to the issuance of the award, AMDAC's right was only in the abstract as there was no award yet that had been issued. As such, there was nothing for AMDAC to impugn by way of the questions of law, which for the purposes of s 42 of the Act must necessarily arise out of the award.

[99] Thus, based on *Hamilton*'s case as applied by the Federal Court in *Yew Bon Tew,* it was argued for BYD that for a right to accrue, there must be a 'trigger event' or the happening of an event in order for a right to accrue which did not happen prior to the issuance of the award.

[100] Counsel also referred to the following passage from the judgment of Edgar Joseph Jr FCJ in *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC) ('Lim Phin Khian') where he said (p 18):

> Now, in principle, it is the correctness of the judgment, order or decision, which is challenged on appeal. It can, therefore, be plausibly argued that since an appeal is a proceeding by which the correctness of the decision of the court below is under challenge before the appellate court. Parliament intended by the enactment of s 17 that *the right of appeal should arise, by its very nature, only when a judment, order or decision by which a litigant is aggrieved is given.*

[101] As such, in light of the above pronouncement by the Federal Court, it was argued for BYD that it is only upon the award being published that AMDAC could mount any legal challenge. On that premise it was contended for BYD that AMDAC could not resort to *s 42 of the Act* as that section had been *repealed as at 8 May 2018* and whereas the *award was only published on 20 August 2018*. And the present application via *OS39 was only filed on 27 September 2018*. Counsel for BYD submitted that at its highest, AMDAC's right to refer any question of law would have accrued on or after 20 August 2018 when the award was published.

[102] Since the Arbitration Amendment (No 2) Act 2018 Act came into force on 8 May 2018, it was submitted for BYD that AMDAC's s 42 reference is plainly unsustainable and ought to be dismissed in limine.

AMDAC's response — Repeal of s 42

[103] AMDAC's position IS that in as much as the amendments via the Arbitration Amendment (No 2) Act 2018 seeks to take away a substantive right, it must be read prospectively and not retrospectively.

[104] In making the distinction between substantive law and procedural law, reference was made to the Privy Council's decision in *Colonial Sugar Refining Company Limited v Irving* [1905] AC 369 ('Colonial Sugar') per Lord Macnaghten, who enunciated that legislation which deprives a litigant of his right of appeal, is not a matter touching upon mere procedure and is not retrospective, except where it is expressly enacted. Reference was also made to ss 30(1)(a) and (b) and 77(b) and (c) of the Interpretation Acts 1948 and 1967. It was contended on behalf of AMDAC that the arbitration commenced well before the repeal of s 42 of the Act and that they had an accrued 'right' to challenge the award under s 42 of the Act and that that right was unaffected by the repeal of the statutory provision.

[105] Counsel also referred to the Federal Court's decision (per Edgar Joseph Jr FCJ) in *Lim Phin Khian* (at p 17 of the judgment) which approved the following passage from the judgment of Sloan JA in *Dixie v Royal Columbian Hospital* [1941] 2 DLR 138 ('Dixie') where at pp 139 and 140 he summarised the principles of interpretation of amending statutes and said that unless the language used plainly manifests in express terms or by clear implication a contrary intention:

(a) a statute divesting vested rights is to be construed as prospective;

(b) a statute, merely procedural, is to be construed as retrospective; and

(c) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

[106] Counsel also referred to *Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal* [2018] 4 MLJ 640 (CA(paras [23]–[33]. Counsel for AMDAC submitted that even when the amendment relates to purely procedural matters it must not apply retrospectively if such application would cause unfairness (see: *Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor* [2017] 3 MLJ 394 paras [18]; [25]–[26]). Counsel also referred to the decision of the Singapore Court of Appeal in *ABU v Comptroller of Income Tax* [2015] 2 SLR 420; [2015] SGCA 4 (paras [52]–[76]) which was said to be instructive on the point under discussion in the present case.

DECISION OF THE COURT

Repeal of s 42 of the Act

[107] The plain issue here is whether the repeal of s 42 of the Act is to apply prospectively or retrospectively. In the present case, the arbitration process was initiated when BYD gave the notice of arbitration dated 20 April 2016. On 13 June 2016, BYD wrote to KLRCA requesting for the appointment of a sole

arbitrator. On 29 June 2016, the KLRCA appointed the arbitrator. The hearing before the arbitrator commenced on 3 October 2017 and was concluded on 22 February 2018.

[108] The written submissions of parties were filed in May 2018. The award was dated 18 July 2018 and published on 20 August 2018. It is relevant to mention that the repeal of s 42 of the Act came quick on the heels of the seminal decision by the Federal Court in *Far East Holdings.* In that case, Jeffrey Tan FCJ speaking for the Federal Court, said that a question of law for purposes of s 42 of the Act could arise:

(a) in relation to matters falling within the second test of Mustill J's three-stage test in *The Chrysalis;*

(b) if it is contended that decision of the tribunal was wrong;

(c) where there was an erroneous application of law;

(d) where there is a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another;

(e) when there is a question as to the correctness of the law applied;

(f) when there is a question as to the correctness of the tests applied;

(g) when there is a question concerning the legal effect to be given to an undisputed set of facts; and

(h) when there is a question as to whether the tribunal has jurisdiction to determine a particular matter.

[109] The Federal Court was quick to caution that these were not intended to be an exhaustive list of circumstances which could give rise to a question of law.

[110] At any rate, it goes without saying that a challenge under s 42 of the Act is wider than a challenge under s 37 of the Act, which is rather limited in its scope and ambit of challenge. It became wider after *Far East Holdings.*

[111] The judgment of the Federal Court was seen by jurists and commentators as undermining the efficacy of arbitration and Malaysia as a 'safe seat' for arbitration. It precipitated legislative intervention in the form of the Arbitration (Amendment) (No 2) Bill which gained Royal Assent on the 27 April 2018 and *gazetted* to take effect on 8 May 2018 as the Arbitration (Amendment) (No 2) Act 2018 ('the 2018 Amendment Act'). The 2018 Amendment Act repealed s 42.

[112] Hence with the repeal of s 42 of the Act, parties will no longer be able to bring questions of law before the High Court after an award has been rendered.

Section 37 of the Act is now the only recourse parties may have in seeking to set aside an award. But the repeal of s 42 of the Act is not without its critics. In criticising the repeal of s 42, Mr Gregory Das in his erudite article, *The Repeal of Section 42 of The Arbitration Act 2005: A Change Too Far?* [2019] 1 LNS (A) xlviii, argues quite forcefully that the repeal of s 42 of the Act was a mistake and that there is ample justification for that statutory provision to be reinstated to the statute book.

[113] The learned author argued that the repeal of s 42 'curtails an aggrieved party's right to access to the courtsfor relief and has completely ousted a party's right to challenge an arbitration award on its merits in our jurisdiction. There is now only the right to challenge an award on limited strictly procedural grounds under Section 37(1) of the Act'.

[114] He also said, 'arbitrators are not infallible. A perverse award on the merits that is replete with mistakes and contains faulty reasoning is now beyond challenge'. Finally, he opined that, '... arbitrators are not exemptfrom rule of law considerations'.

[115] On the other hand there are some who supported the repeal of s 42 of the Act. In his article — *Repeal of Section 42: The Question of Law Arising Out of an award by the Amended Arbitration Act 2005* [2019] 6 MLJ civ, Sundra Rajoo robustly defended the repeal of s 42 of the Act. He referred to *Far East Holdings* and said that the Federal Court held that s 42 of the Act did not provide that the 'question of law' was to be the same as the one which the arbitral tribunal was asked to determine. Rather, s 42 of the Act contemplated 'any question of law' which was wider than 'question of law'.

[116] As such, every question of law arising out of an award could now be ventilated and revisited by the courts starting from the High Court and moving up to the Federal Court. In the author's view, the Federal Court's decision in *Far East Holdings* 'had the effect of undermining the finality of arbitral awards'. Sundra Rajoo said that the decision of the Federal Court 'widened the scope of the matters which could be considered 'questions of law 'for the purpose of the former Section 42 of the Act on the basis that there was no express limitation on the types of questions which could be referred under the provision'. According to Sundra Rajoo, the Federal Court in *Far East Holdings* significantly expanded the scope for judicial intervention in domestic arbitral awards under s 42 of the Act.

[117] The learned author said that the judgment of the Federal Court in *Far East Holdings* undermined the efficacy of arbitration and Malaysia as a safe seat. According to the learned author, 'the repeal of s 42 of the Act has made the grounds for setting aside an award in Malaysia aligned with the UNCITRAL

Model Law. The deletion of this provision reinforces the principles of the finality of awards and the minimum intervention of courts'.

[118] The author expressed the view that the repeal of s 42 of the Act 'enhances public confidence in Malaysia's arbitration system' and that it 'will hopefully position (Malaysia) as a more arbitration-friendly jurisdiction'.

[119] In advocating the concept of party autonomy and finality of arbitration awards, the learned author opined that those who agree to have their disputes determined via the arbitration route must accept the decision of the arbitrator as final and binding. He quoted Scrutton LJ in *African & East Malaya Ltd v White Palmer & Co Ltd* (1930) 36 Ll L Rep 113 (at p 114) where he said:

> ... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment.
>
> The first point to note is that the Explanatory Note to the 2008 Arbitration (Amendment) Bill states that Section 42 of the Act is to be deleted to 'promote arbitration as an alternative form of dispute resolution.

[120] Next, based on the Hansard dated 3 April 2018, it is clear that the legislative intent behind the amendment is to promote Malaysia's profile on the international and regional arena as a safe-seat and arbitration friendly jurisdiction. In his Parliamentary speech (in Bahasa Malaysia), the Deputy Minister said:

> Cadangan pindaan ini juga dilihat dapat *meningkatkan daya persaingan timbangtara dalam arena antarabangsa* serta bertujuan menjadikan Malaysia sejajar dengan Negara maju yang lain dan *meningkatkan statusnya sebagai destinasi penyelesaian pertelingkahan yang boleh dipercayai atau safe seat*.
>
> Berdasarkan faktor-faktor di atas dan langkah *penyeragaman peruntukan undang undang Malaysia dengan UNCITRAL*, pindaan yang dicadangkan ini bertujuan untuk rnengguna pakai sernakan semul a undang model 2006 untuk membawa Malaysia selaras dengan 23 negara yang timbangtara telah mengamalkannya.
>
> Pindaan yang dicadangkan khususnya berhasrat untuk menstrukturk an semula bidang kuasa mahkamah dan *memastikan penetapan award timbang tara yang bersifat muktamad.*
>
> ...
>
> *Seksyen 42 dipotong untuk menggalakkan timbangtara sebagai satu bentuk alternative penyelesaian pertikaian*.

[121] In the present case, parties agreed that the right of a party to seek recourse to the High Court under s 42 of the Act is not a matter of procedure but rather it is a substantive right. Thus, the starting position is one that is in favour of AMDAC's position (*of prospective repeal*) since any legislation which repeals a substantive right only operates prospectively and not retrospectively. On that premise, it can be argued that s 42 of the Act remains extant and applicable to all arbitrations which were on foot prior to 8 May 2018 and recourse to a challenge under s 42 of the Act may still be made, notwithstanding its repeal.

[122] It is obvious enough that the (AMDAC) interpretation, ie the repeal of s 42 of the Act prospecti vely will necessarily mean that the repeal will not apply to arbitrations which had commenced prior to 8 May 2018 regardless of whether the arbitration had conclud ed or the award had been published. On a practical and realistic level, it means that it will be several years (*decades even*) before the repeal of s 42 of the Act will truly take effect since it will (*based on the theory of prospective repeal*) only apply to arbitrations which commenced after 8 May 2018. That essentially is the problem at hand.

[123] There are no easy answers to the conundrum. However, my considered view and approach to the vexed question is as follows. Section 42(1) of the Act provides that, 'Any party may refer to the High Court *any question of law arising out of the award'.* BYD's argument (per *Hamilton*'s case) is that in the present case, prior to the issuance of the award, AMDAC's right was only in the abstract as there was no award yet that had been issued. As such, it is argued that there was nothing for AMDAC to impugn by way of questions of law, which for purposes of s 42 of the Act must necessarily arise out of the award. And as for the definition of the phrase 'arise of the award', counsel for BYD referred to the Federal Court's decision in *Far East Holdings* (para 157).

[124] Thus, based on *Far East Holdings* and *Hamilton*'s case as applied by the Federal Court in *Yew Bon Tew,* it was argued for BYD that for a right to accrue, there must be a 'trigger event' or the happening of an event in order for a right to accrue, which did not happen prior to the issuance of the award.

[125] On that premise it was contended for BYD that AMDAC could not resort to s 42 of the Act as that section had been repealed as at 8 May 2018 and whereas the award was only published on 20 August 2018. And the present application via OS39 was only filed on 27 September 2018.

[126] Thus the key question of law of fundamental importance here is — did Parliament repeal s 42 of the Act with the intention that it should only apply

prospectively in respect of arbitrations which commenced after 8 May 2018 or was the repeal intended to apply 'retrospectively' to all arbitrations which were still pending as at 8 May 2018?

[127] It is now appropriate and necessary to turn to the case of *Lim Phin Khian* which in my view, provides the answer to the problem at hand. But, first, it is necessary to allude to the problem that was presented in that case. In *Lim Phin Khian,* the judgment under appeal was a judgment of the High Court and was pronounced on 7 June 1994. Under r 56 of the then existing Rules of the Supreme Court 1980, the appellant had one month from the date of that decision to bring his appeal to the Supreme Court (later, the Federal Court). On 24 June 1994, the appellant filed and served his notice of appeal. Meanwhile, Parliament created the Court of Appeal on 24 June 1994, with the coming into force of the Courts of Judicature (Amendment) Act 1994 ('the Amending Act of 1994'), and vested it with jurisdiction to hear and determine all appeals from decisions of the High Court after the date of its creation.

[128] When the appeal came on for hearing before the Federal Court on 25 September 1995, counsel for the respondent took a preliminary objection as to the competency of the appeal. It was contended that as the notice of appeal in this case was filed on 24 June 1994, the appeal lay not to the Federal Court but to the Court of Appeal, and that the Federal Court had no jurisdiction to entertain this appeal.

[129] Responding to these submissions, the appellant's counsel argued that the appeal was competent, because the appellant had a substantive right vested in him to approach the Federal Court at the date of the decision by the High Court, and that the Amending Act of 1994 did not operate to deprive the appellant of that right. Edgar Joseph Jr FCJ overruled the respondent's objection and held that the appeal was competent. He took a particular analytical route to arrive at his decision.

[130] Gopal Sri Ram JCA (as he then was) also overruled the objection and held that the appeal was competent. But he took a different route. With all due respect, I prefer the reasoning of Gopal Sri Ram JCA. At p 20 of the judgment, Gopal Sri Ram JCA quoted Suffian LP in *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36 (FC) at p 37, where it was said,

> A statute dealing with *procedure* has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v Lucas* (1878) 3 App Cas 582 at p 603:
>
> > ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the

> new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

On the other hand, a statute dealing with rights has effect only for the future, and is not to be construed retrospectively, it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear indication to the contrary. This was so stated by Jessel MR in *Re Joseph Suche & Co Ltd* (1875) 1 Ch D 48 at p 50 in the following words:

> It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.
>
> ...

It is thus clear that *a statute that allows a person to appeal to a superior court is not merely dealing with a matter of procedure but with rights*. This is borne out by a Privy Council case *Colonial Sugar Refining Co v Irving* [1905] AC 369. There an application was made to the Judicial Committee to dismiss an appeal from the judgment of the Supreme Court of Queensland, on the ground that the power of the court below to give leave to appeal had been abrogated by s 39 of the Australian Commonwealth Judiciary Act 1903.

The action in which the appeal was brought had commenced on 25 October 1902, and the leave to appeal was given on 4 September 1903. In the meantime, the 1903 Act had been passed. The Judicial Committee dismissed the application, Lord MacNaghten saying:

> As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the [Judiciary] Act, it was conceded that in accordance with a long line of authorities from the time of Lord Coke to the present day the appellant [the Sugar Co] would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to his Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their lordships that the question does not admit of doubt. To deprive a suitor *in a pending action* of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

[131] At p 22 of the judgment Gopal Sri Ram JCA referred to the Privy Council's decision in *Colonial Sugar Refining Company Limited v Irving* [1905] AC 369 and said:

> In *Colonial Sugar Refining Company Limited v Irving* [1905] AC 369, there appears the following passage immediately after that quoted by the learned Lord President in his judgment at p 372:
>
> In principle, their Lordships see no difference between abolishing an appeal

A altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

B The opinion of Lord Macnaghten in the *Colonial Sugar Refining Co* case ('the *Macnaghten* test') has been applied in a number of other Malaysian and Singaporean cases in the context of retrospectivity of criminal statutes. See, *Teo Cheng Leong v PP* [1970] 2 MLJ 275; *Phang Chin Hock v Public Prosecutor (No 2)* [1980] 1 MLJ 213; *Public Prosecutor v Hun Peng Khai & Ors* [1984] 2 MLJ 318.

C It has been applied in Canada: see, for example, *Doran v Jewell* 49 SCR 88; *AG & Ors v Murray* (1968) 70 DLR (2d) 52; *Province of New Brunswick v Budovitch* 1 NBR (2d) 661.

The *Macnaghten* test has been read, as I think it should, as establishing the proposition that *a right of appeal vests in a litigant at the time of institution of the* D *original proceedings and not merely as a consequence of an adverse decision against the putative appellant*. See, *Hoosein Kasam Dada (India) Ltd v State of Madhya Pradesh* AIR 1953 SC 221; *Garikapati v Subbiah Chaudhry* AIR 1957 SC 540; *State of Bombay v Supreme General Films Exchange* AIR 1960 SC 980; *Kasibai v Mahadu* AIR 1965 SC 703; *Jose DaCosta v Bascora Narcorn im* AIR 1975 SC 1843.

E In other words, the point of time at which it is to be determined whether a right of appeal exists is, unless there are reasons to conclude to the contrary, the date on which the original action or other proceeding was instituted, and not the date on which the notice of appeal is filed and served.

F Any alteration in the law relating to appeals, whether it is an abolition of the right, or a transfer of the right to another tribunal (in the present case to the Court of Appeal) after institution of original proceedings, is presumed not to be retrospective.

The presumption against retrospectivity of legislation is based upon the judicial G philosophy that Parliament does not intend an unjust result. See *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 at p 31.

[132] At p 24 he said:

H Thus, in any given case, the task to be undertaken by a court is to examine the particular statute that has fallen for interpretation and to ascertain what Parliament intended. In the context of the present case, the question that falls for determination is whether the prima facie presumption against retrospectivity has been displaced by contrary Parliamentary intention, and if so, to what extent.

I

[133] And at p 25, the learned judge said:

The Amending Act of 1994 does not, however, contain any provision in respect of suits pending before the High Courts as at the date of the amendment. *There is, therefore, no express provision in the Amending Act of 1994 displacing the MacnaKhten*

test. Whether it has been displaced by necessary implication is a matter I shall touch upon later.

In the light of the foregoing, if the *Macnaghten* test is applied to the present case, in the absence of a contrary intention — and as I have said I find no contrary intention expressly stated in the Amending Act of 1994 — it would mean in that in respect of *all* suits and other proceedings which had been instituted in a High Court *before* 24 June 1994, appeals would lie directly to this court and *not* to the Court of Appeal.

The result would be that all orders made upon applications and appeals in respect of matters heard and disposed of by the Court of Appeal since its establishment were made without jurisdiction, and are therefore nullities. If that is the true consequence intended by Parliament, then I must, despite the honendous consequences that would follow, adhere to its will and hold accordingly.

Now, there is a presumption of great antiquity which operates in the sphere of statutory interpretation. It is an inebuttable presumption.

It is that Parliament is presumed to know all the relevant law upon the particular subject upon which it legislates. In the context of the present dispute, Parliament is presumed to have known the nature and content of the *Macnaghten* test.

While there may be no express saving provision in the Amending Act of 1994, I find that *there is room for implying a contrary intention out of necessity. I am convinced that the hiatus in the Amending Act of 1994 was an oversight and unintentional,* just as it was in *Chellapah v Malayan Railway Administration* [1948] MLJ Supp 173.

[134] At pp 25–26 of his judgment the learned judge said:

Now, there are, without a doubt, several pronouncements by eminent jud ges in this country and in other common law juri sdictions to the effect that the intention of Parliament is to be gathered solely from the words used in a statute. That is, as I apprehend the law, one of the guidelines for statutory construction. There are several other such guidelines, some of them expressed in the form of presumptive statements. But they are, as I have said, merely guidelines, and *the meaning and effect to be given to a statute or to one or more of its provisions must depend upon the terms of the particular enactment and its objective aim. In ascertaining that aim, it is the duty of the court, to have regard to the consequences that would ensue from holding a statute to be retrospective or prospective and to avoid any construction that would produce absurd results.*

I think that it is a perfectly proper approach for a judicial interpreter to take by asking himself, as I have done in this case, whether the legislature could have contemplated so a strange a result as that adverted to.

Indeed that is the very question that Lord Mustill asked him self in *'The Boucraa'* [1994] 1 All ER 20 at pp 28–29. He answered that question in the negative. Upon the terms of the statute before me, I would do likewise.

In my judgment, *the correct approach is to look at the substance and general purpose of the legislation in order to discover its objective aim or purpose. And when I do that, I am much moved to the conclusion that Parliament could not have intended those horrendous*

consequences of which I spoke a moment ago.

To hold otherwise would mean that Parliament went through the elaborate process of creating the Court of Appeal and endowing it with all the appellate powers and jurisdiction th eretofore enjoyed by the Supreme Court, only to leave it bereft of any business.

It would mean that Parliament was legislating in vain. With respect, I do not think that it is open for me to reach such a conclusion.

I may mention in passing, that in the course of considering the preliminary objection, I called for and read the explanatory statement to the Bill which was presented in Parliament, and which was passed as the Amending Act of 1994. In doing so, I proceeded by analogy, acting upon the landmark decision of this court in *Chor Phaik Har v Farlim Propert ies Sdn Bhd* [1994] 3 MLJ 345 at p 360, where a dynamic extension of the relevant interpretative principles was effected by the judgment of Edgar Joseph Jr FCJ. However, I have derived no real assistance from the explanatory statement to the Bill and its contents have in no way influenced my decision upon this matter.

When viewed from the standpoint that I have adopted, it is clear that Parliament intended to displace the Macnaghten test to this extent; that the cut-off date with regard to the appellate jurisdiction of this court in respect of cases decided by a High Court is the date of the decision and not the date of the institution of the proceedings.

...

[135] At p 28 of the judgment the learned judge said:

Further, *one must not lose sight of the historical background which required s 17 of the 1995 Act to be placed on the statu te books.*

...

In resorting to the historical background to the section, I have been persuaded by what Lord Griffith said in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032, a case upon which much reliance was placed by my learned brother Edgar Joseph Jr FCJ in the *Farlim* case to which I referred earlier in this judgment. The passage in the speech of Lord Griffith appears in [1993] AC 593 at p 617; [1993] 1 All ER 42 at p 50; [1992] 3 WLR 1032 at p 1040, of the report and in it he says this:

The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are p repared to look at much extraneous material that bears on the background against which the legislation was enacted.

I must confess that I have done likewise when arriving at my decision upon the point taken in the present appeal.

[136] The decision of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1994] 4 CLJ 285; [1994] 3 AMR 2103 FC

('Farlim') (at pp 359–360) (per Edgar Joseph Jr FCJ) is also relevant for present purposes as it enunciated that a court may validly refer to the reports in the Hansard of proceedings in Parliament as an aid to the construction of legislation which is *ambiguous or obscure or the literal meaning of which leads to an absurdity.*

[137] The Federal Court referred to and expressly adopted the principle that was established in *Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42; [1992] 3 WLR 1032 (HL) where the House of Lords had cautioned that references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.

[138] With above principles in mind, we now proceed to examine the current problem. Based on the timelines relevant to the commencement of the arbitration and the issuance/publication of the award in the present case, it is clear that the repeal of s 42 of the Act occurred whilst the arbitration between AMDAC and BYD was pending or on-going.

[139] The first question is whether AMDAC only had an 'abstract' right (per *Hamilton*'s case) or did they have an 'accrued' right.

[140] Based on the principles that may be culled from the case of *Lim Phin Khian* (per Gopal Sri Ram JCA) the right which AMDAC had vis a vis s 42 of the Act was a right which was vested in them at the time of institution of the original arbitration proceedings and not merely as a consequence of an adverse decision ie the award.

[141] Thus, I hold that contrary to the position that was articulated on behalf of BYD, AMDAC did not just have an 'abstract' right. On the contrary, they had the right to challenge any award that was to be given by the arbitrator (*albeit that it was inchoate and had yet to be formulated and published*) and such a right existed from the commencement of the arbitration proceedings and not upon publication of the award.

[142] The next point of importance is that based on the case of *Colonial Sugar* (per Lord Macnaghten) any legislation which causes the demise of a right of appeal is one which interferes with a substantive right. And based on the cases of *Dixie* and *Lee Chow Meng,* clear statutory words are necessary if such substantive rights are to be repealed retrospectively.

[143] Here, there are no words whatsoever in the 2018 Amendment Act to signify one way or the other whether the repeal is prospective or retrospective.

A Based on first principles, the rule is that since the amending legislation is silent, the demise of a substantive right is to be construed as taking effect prospectively and not retrospectively.

B **[144]** However, the enquiry does not end there, because having regard to the obvious consequence of construing the repeal of s 42 of the Act as having prospective effect, the court is enjoined to examine the legislative history, the Explanatory Statement to the 2018 Bill and (per *Farlim*) the content of the Parliamentary speech, if any which may shed light on the intention of Parliament. It is important to emphasise the principle that Parliament does not C legislate in vain, and is deemed to be aware of the *Macnaghten* test.

[145] Thus, it is imperative to take into consideration the Explanatory Statement which states that the amendment was to 'promote arbitration as an alternativeform of dispute resolution' and (per the Hansard dated 3 April D 2018) that the legislative intent behind the amendment is to promote Malaysia's profile on the international and regional arena as a safe-seat and arbitration friendly jurisdiction.

E **[146]** At the same time, it would be naive and artificial to ignore the reality that Federal Court's decision in *Far East Holdings* was the immediate catalyst for the repeal. Thus, it is quite clear that the legislative intention was to do away with challenges to arbitral awards under s 42 of the Act and it would be horrendous to think that the amendment was done whilst allowing awards that F are made under pending arbitrations (*which commenced prior to 8 May 2018*) to take the s 42 route. Such an eventuality would defeat the very purpose for which the repeal was undertaken, which is to insulate arbitral awards from wide ranging challenges (per *Far East Holdings*) pursuant to s 42 of the Act.

G **[147]** As such, the view that I take is that although the 2018 Amendment Act does not state anything about the repeal having retrospective effect, looking at all the circumstances, there is room for implying (*out of necessity per Lim Phin Khian's case*) an intention on the part of Parliament that the repeal of s 42 of the Act was indeed to have retrospective effect.

H

[148] As stated earlier, the *Macnaghten* test may in certain circumstances be displaced by necessary implication as it was the intention of Parliament that awards are to be final ('muktamad') and are not to be re-opened via the 'widened' judicial door of error of law.

I

[149] Were it otherwise, then there will be a multitude of awards in pending arbitrations which will keep coming to the High Court through the s 42 route and this process will go on for several years (*probably decades*) until *all the pre-8 May 2018 arbitrations have run their course* and it will be several years later

before the proverbial 'Section 42 door' is 'shut'. That would lead to a rather invidious and uncertain situation which is not what was intended by Parliament.

[150] It is important to emphasise that there is a duty on the part of the court to have regard to the consequences that would ensue from holding a statute to be retrospective or prospective and to avoid any construction that would produce *absurd* results.

[151] Similarly, the court also has the duty of giving effect to the intention of Parliament, if it be possible, even though the process requires a strained construction of the language used or the insertion of some words in order to do so; see *Luke v Inland Revenue Commissioners* [1963] AC 557, per Lord Reid at p 577.

[152] The point was also well put by Mr Justice Ungoed-Thomas in *Re, Maryon-Wilson's Will Trusts, Blofield v St Hill* [1968] Ch 268 at p 282, where he said:

> If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed Parliament ary concern for common sense and justice.

[153] In my view, upon examining all the circumstances holistically, the true (and only possible) intention of Parliament by repealing s 42 was for the repeal to apply retrospectively and to close the door to a s 42 challenge with effect from 8 May 2018 in respect of any award that is published on or after 8 May 2018. The award here falls in that category. In the result, AMDAC's complaints pursuant to s 42 of the Act are accordingly dismissed *in limine.* But nevertheles s, I have something to say about the questions of law that were framed under the repealed section of the Act and these are found in the later part of this judgment.

Merits (OS39)

[154] I tum now to the merits of OS39. In this regard, AMDAC has sought to set aside the award under ss 37 and 42 of the Act. I had earlier ruled that the challenge under s 42 is not maintainable as the repeal operates retrospectively. Nevertheless, despite my ruling on the retro spectivity of the repeal of s 42 of the Act, I will (*for the sake of completeness*) give my reasons on the challenge under s 42 of the Act as well.

[155] I propose to first deal with the challenge that was taken under s 37 of the Act. AMDAC's grounds for purposes of the challenge under s 37 of the Act are that:

(a) they were unable to present their case effectively when the arbitrator arbitrarily terminated the counterclaim;

(b) that the award had dealt with a dispute not contemplated or falling with the submission to arbitration;

(c) that the award contains decisions beyond the scope of submission to arbitration; and

(d) the award is in fact in conflict with the public policy of Malaysia.

[156] I shall first deal with AMDAC's complaint that they were unable to present their case effectively when the arbitrator arbitrarily terminated the counterclaim. There is of course, no doubt that AMDAC did not pay the deposit which was imposed with respect to their counterclaim. The consequences that follow in the event of default by one party in paying the requisite deposit is provided in r 13(6) of the KLRCA Arbitration Rules which states:

> If the required deposits are not paid in full, the Director of the KLRCA shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal, after consultation with the Director of the KLRCA, may order the suspension or termination of the arbitral proceedings or any part thereof.

[157] That rule provides that the arbitrator is to consult the Director of the KLRCA and may then determine (as a matter of discretion) whether the arbitral proceedings (vis a vis the counterclaim) are to be suspended or terminated. Here, as a consequence of non-payment of the deposit, the arbitrator invoked r 13(6), consulted the Director of the KLRCA, and then exercised his discretion to terminate the counterclaim.

[158] I do not agree with AMDAC's submission that termination of the counterclaim can only be done via s 34 of the Act. In my view, since the parties had agreed that their dispute is to be referred to arbitration which is to be conducted in accordance with the KLRCA Rules of Arbitration, it does not lie in the mouth of AMDAC (as the defaulting party) to avoid the consequence of non-payment by invok ing s 34 of the Act.

[159] In any event, s 34 of the Act caters for termin ation under different situations and the present situation (non-payment of deposit) is one which is plainly covered by the very rules of arbitration which the parties had agreed to be bound by.

[160] It is material to note that by letter dated 12 May 2017, KLRCA had apportioned the costs and expenses in respect of the counterclaim whereby AMDAC (as the claimant in the counterclaim) was ordered to pay RM132,277.24 ('AMDAC's portion of costs') and BYD (as respondent in the counterclaim) was ordered to pay RM40,954.07 ('BYD's portion of costs'). BYD's portion of costs was duly paid, whereas *AMDAC's portion of costs for the counterclaim remained unpaid.* AMDAC implored upon the arbitrator to defer to payment of AMDAC's portion of costs (since BYD had paid their portion) and to deal with AMDAC's portion subsequently in the award.

[161] AMDAC's contention is that the arbitrator's decision to terminate the counterclaim is 'tainted' because he 'consulted' the Director of the KLRCA. On this issue, my view is that first, the fact that the arbitrator consulted the Director of the KLRCA is not sinister as this is exactly what he is supposed to do pursuant to r 13(6) and secondly, 'consult' does not connote or suggest that the Director of the KLRCA had asserted any authority over the arbitrator or that the latter is bound by any views that the Director may have on the matter. Ultimately, it was a matter of discretion for the arbitrator to decide whether to suspend the arbitration vis a vis the counterclaim or to terminate the counterclaim. There is no evidence that the Director of the KLRCA had 'called the shots', so to speak.

[162] Further, the fact that the arbitrator had directed the issue of AMDAC's non-payment of deposit vis a vis BYD's claim to be dealt with at the end of the arbitration proceedings and did not do the same in respect of AMDAC's non-payment of the deposit vis a vis their counterclaim does not reek of bias, unfairness or double standards as is being insinuated by AMDAC.

[163] In my view, the arbitrator was fully entitled to exercise his discretion in one manner when it concerned AMDAC's non-payment of deposit vis a vis BYD's claim and dealing with their non-payment of deposit for their counterclaim in a totally different manner.

[164] The fact that the discretion was exercised differently is not unexpected or surprising because AMDAC's non-payment of deposit for the counterclaim meant that as the protagonist of the counterclaim, AMDAC was not even paying the deposit to prosecute the arbitration of their own counterclaim.

[165] In any event, it is important to emphasise that pursuant to s 44 of the Act, costs and expenses of the arbitration shall be at the discretion of the arbitral tribunal and there should be no court intervention on these matters. See: *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627.

A **[166]** Lastly, I think that it is not out of place to mention that in April 2016, BYD had proposed that the dispute(s) be taken to court instead of arbitration. Had BYD's proposal been accepted, AMDAC's impecuniosity and inability to pay the deposit towards arbitration costs would not have been a hindrance and BYD's claim and AMDAC's counterclaim could have both been expeditiously, efficiently and economically prosecuted via the court process.

[167] Since, BYD's proposal to have the disputes litigated in court was not accepted by AMDAC, it meant that they were desirous of having the dispute being dealt with via arbitration.

[168] As such, AMDAC must bear the consequences of their decision not to take the couti litigation route and this necessarily meant that they would have to abide by the KLRCA Rules of Arbitration in every respect. There is just no legal or factual basis for AMDAC to assert that there was a breach of the rules of natural justice by reason of the arbitrator's decision to terminate the counterclaim.

[169] The next complaint that was taken under s 37 is that the award had dealt with a dispute not contemplated or falling within the submission to arbitration and contains decisions beyond the scope of the submission to arbitration. Lastly, AMDAC asserts that the award is in conflict with the public policy of Malaysia.

[170] A key complaint that was advanced by AMDAC is that the arbitrator had gone beyond his jurisdiction by deciding on AMDAC's liability by referencing to the provisions of the first DOA and/or the second DOA which speaks of AMDAC's continuing obligations towards BYD under the CA. The question is, did the arbitrator really embark on a curial exercise and travelled outside the parameters of the issues in dispute between the parties or did he decide on matters that were reserved for him by the parties? In this context, it is important and imperative to note that issue 1(b) (of the issues to be tried) as may be seen from p 24 of the award is: 'Whether (AMDAC) was entitled to waive its obligations under the (CA) by reason of the is' DOA and/or the second DOA?

[171] It is clear from the issues to be tried, that the parties had agreed that the arbitrator was enjoined to deal with and decide whether the first DOA and/or the second DOA had 'relieved' AMDAC from its payment obligations under the CA. And that is exactly what the arbitrator had done as may be seen from the award. He examined the CA, the first DOA and the second DOA and made his conclusions and findings as to AMDAC's obligation under the CA. AMDAC contended that the first DOA was entered between BYD and AMDAC where BYD assigned to AMDAC all the proceeds that it was to

receive from Prasarana and via the second DOA, AMDAC (*as contemplated by cl 3 of the first DOA*) assigned to MDV the right to receive all proceeds from Prasarana and the sole purpose of the second DOA was for project financing to assist in the performance of the contract for the supply of the 15 units of electric bus.

[172] According to AMDAC, there were no payments from Prasarana to AMDAC and that all payments came from MDV. The payments under the project which were paid by MDV to AMDAC were payments made under the project financing arrangement between AMDAC and MDV. AMDAC also asserts that the irrevocable terms of the first DOA as per cl 5 provides for all the suppliers and subcontractors to be paid and to exclude such amount paid before BYD is paid its portion of the profit and that this is only possible if AMDAC received payments from Prasarana. AMDAC relies upon cl 5 of the first DOA and asserts that AMDAC and BYD's profit portions must be net profit after the costs and expenses incurred in the execution of the works (*including payments to Gemilang*) are ascertained, deducted and paid out accordingly.

[173] It is relevant to note that cl 3.01 of the second DOA stipulates, 'that nothing in this Assignment is to be construed or deemed as an assignment to MDV of the obligations and liabilities of (AMDAC) under the respective Project Documents'. But AMDAC argues that 'Project Documents' in cl 3.01 of the second DOA is a reference to the main contractual documents between BYD and Prasarana and is not a reference to AMDAC's obligations under the CA.

[174] According to the arbitrator, the assignment of rights, titles and/or interest (from BYD to AMDAC) under the first DOA and (from AMDAC to MDV) under second DOA, do not waive or eliminate AMDAC's obligations under the CA. Further, the express terms and conditions of the first and second DOAs provide that AMDAC owes a continuing obligation to BYD under the CA.

[175] The arbitrator made reference to cll 6, 10 and 11 of the first DOA which provide as follows:

> Clause 6
>
> For avoidance of doubt, the Assignee shall pay the value of the BYD Contracts from the monies due and payable to the assignor under the Contract in accordance with the terms and conditions of the Contract.
>
> Clause 10
>
> However, Assignee shall always be obligated to make payment to Assignor in accordance with this Deed of Assignment and the terms and conditions of the

Contract, until Assignor actually received relevant payment from Assignee, except for the cases Prasarana have not paid the due and payable amount to Assignee.

Clause 11

The Assignee undertakes to do all things and acts necessary and reasonable to ensure that the Assignor receives the moneys due and payable under the Contract in respect of the BYD Contracts executed by the Assignee.

[176] The arbitrator also referred to cl 5 of the second DOA which reads as follows:

It is further agreed and declared that notwithstanding this Assignment:

(1) The *customer shall remain fully liable to perform all its obligations assumed under the Project Documents* and MDV shall not be under any obligati ons of any kind whatsoever under the Project Documents or be under any liability whatsoever in the event of any failure by the customer to perform its obligations thereunder.

(2) *MDV shall not be obliged to assume or be under any obligation in any manner to perform or fulfil any obligations of the customer under or pursuant to the Project Documents,* to make payment thereunder, to enforce any term, covenant or condition or the Proj ect Documents or to make enquiry as to the nature or sufficiently of any payment received under or pursuant to the Project Documents.

[177] It is significant to note that it was also conceded by AMDAC's first witness (RW1), that AMDAC had an overriding duty under the first DOA and second DOA to ensure that BYD shall be paid all sums due and owing to it under the CA. The evidence of RW1 (referred to in the notes of evidence as 'DMR') was as follows:

MAVIN	Payment by assignee to assignor for BYD contract. So just for clarity, BYD contract is defined in Clause C earlier as the Collaboration Agreement. Now, would you agree that Clause 6 stated that AMDAC shall pay the value of the BYD contract to BYD as assignor?
DMR	Yes.
MAVIN	So this is a condition of the assignment that AMDAC have the obligation to pay BYD under the Collaboration Agreement?
DMR	Yes.
MAVIN	Now look at Clause 11 at the bottom of the page, would you agree with me that it states the assignee is to undertake all things that are reasonable and necessary to ensure that Prasarana pays BYD the value of the contract and the Collaborat ion Agreement?
DMR	Yes.
MAVIN	And the assignee undertakes to do all things that are reasonable and necessary to ensure that BYD received payment?
DMR	Yes.

[178] As for the second DOA, RW1 conceded as follows:

MAVIN	So now, I refer you to the 2nd assignment, same bundle at page 156? So, we had the 1st assignment between BYD and AMDAC.
DMR	But this assignment is between BYD and AMDAC.
MAVIN	Correct, so earlier it was AMDAC and BYD. This one I'm referring at 156 is between AMDAC and MDV.
DMR	So which one?
MAVIN	The 2nd Assignment, page 156
SSK	Okay so this is the 2nd Assignment, the first one is the 1st assignment. Don't get confused. They just want to get the basis correct.
DMR	The first one is between AMDAC and BYD.
SSK	Yeah.
DMR	Eh, between AMDAC and MDB?
SSK	No no, AMDAC and BYD.
DMR	That is the 1st assignment? So, this one is the 2nd assignment?
SSK	Yes, get the base correct.
DMR	Okay, so this one between AMDAC and BYD and BYD is the 1st assignment.
SSK	Okay so now we are talking on 2nd assignment okay?
DMR	Okay.
MAVIN	Now, would you agree that notwithstanding this 1st Assignment, 2nd assignment, the parties are bound to comply with the terms of the original Collaboration Agreement?
DMR	Okay, yes.
MAVIN	Would you agree that notwithstanding this 2nd Assignment with MDV, AMDAC still owes an obligation to ensure that BYD is paid the amount due to be paid under the Collaboration Agreement?
DMR	Yeah.
MAVIN	Which earlier this morning we establish was RM13.1 million, right?
DMR	Yes

[179] AMDAC had also submitted on the issue of the project financing under the second DOA which was utilised to pay for the costs and expenses such as contractors who had supplied the bus body and the related component namely *Gemilang* as referred in the CA. AMDAC contended that therefore the base work sum was out of their control and was entirely within MDV's control.

[180] The arbitrator disagreed that AMDAC was entitled to warve its obligations under the CA (to pay BYD's portion of the base work sum) by reason of the first DOA and/or the second DOA. In this regard, the arbitrator held that pursuant to cl 3.2 of the CA, AMDAC undertook to manufacture the local parts and to assemble the electric bus and to purchase the necessary.

[181] Significantly, the arbitrator found as a fact that there is no provision in the CA that provides that BYD has to bear the costs and/or expenses of the assembly of the electric buses. As such, the arbitrator found that AMDAC is not entitled to waive its obligations under the CA by reason of the first DOA and/or the second DOA.

[182] The arbitrator found as a fact that AMDAC had breached the CA by setting off the sum of RM4.5m. Based on the evidence that was presented during the arbitration, the arbitrator determined that BYD's claim for RM4.5m is the outstanding sum due to them in respect of the BRT Line Project.

[183] The finding of the arbitrator was that whilst BYD had agreed to the deduction of the adjusted amount of RM1,040,625, there was no concurrence whatsoever on their part with the RM4.5m deduction made by AMDAC as per AMDAC's letter dated 19 October 2015 ('AMDAC's letter'). AMDAC's letter (relevantly) reads as follows:

> Date: 19th October 2015
>
> Senior Regional Manager,
>
> BYD AUTO INDUSTRY COMPANY LIMITED
>
> No 3009, BYD Road, Pingshan
>
> Shenzern, 518118
>
> P.R. China
>
> (Attn: Mr. Zhao Yue)
>
> Dear Sir,
>
> *MANUFACTURE DELIVERY TESTING, COMMISSIONING AND WARRANTY OF FIFTEEN (15) UNITS OF STEPLESS FLOOR ELECTRIC BUSES FOR BUS RAPID TRANSIT SUNWAY LINE (PRASARAN A/GCS/CTT /2.0481/20 13)*
>
> We refer to our meeting on 12th October 2015 at our Sri Hartamas office pertaining to the above matter.
>
> BYD Auto Industry Company Limited (BYD) agreed to collaborate with AMDAC (M) Sdn Bhd (AMDAC) to introduce BYD K9 electric bus for the evaluation by Syarikat Prasarana Negara Sdn Bhd (Prasarana) for the said bus to be in service. In furtherance to this initiative, AMDAC advised BYD to provide one (1) unit of the electric bus for trials of which all expenses for the trials in Malaysia, the shipment of the electric bus and the lodging of BYD's personnel be borne by AMDAC as part of our partnership's contribution.
>
> Leading to the trials, we achieved and secured the Tender from Prasarana for 15 units of the BYD electric buses to be in service for the BRT Sunway operations. In this collaboration, BYD would supply the chasis to AMDAC for an amount of RM750,000.00 per unit. AMDAC was supposed to complete the production of the

body of the bus in Malaysia, obtain the approvals from the relevant authorities and executing maintenance & after sales services.

Prasarana being an anchor bus operating in Malaysia and with its acceptability over the BYD's electric bus, it would similarly be accepted by other bus operators.

Upon getting the contract, both parties signed the Collaboration Agreement. AMDAC was responsible to localise the product ion of the body of the buses and deliver the said buses to Prasarana of which AMDAC had delivered all the buses on 23rd June 2015.

Upon signing the Letter of award issued by Prasarana, BYD had made price adjustment from a sum of RM750,000.00 to RM850,000.00 per unit of which the pricing was to be in line with the European market price structure adjustment: AMDAC agreed with BYD on the new price adjustment of RM850,000.00 per unit because BYD promised and assured AMDAC that BYD would compensate the said price adjustment. Instead, after nearly a year of requesting the compensation for the price adjustment, we were only be given a sum of RM1,040,000.00 in exchanged, we need to forfeit our maintenance & after sales services business in the collaboration. In relation to this, BYD executed the maintenance and after sales services on its own.

Since 23rd June 2015, the buses were in full operation but we were not allowed and need to forfeit the maintenance & after sales services of which the said maintenance & after sales services were to be done by BYD.

In the collaboration of both parties, we had agreed on the mutual intention and the spirit of the Collaboration Agreement ofwhich we were in believe that we would be doing the continuous future business maintenance & after sales services.

Since BYD had changed the structure of the said Agreement, it was deemed right that the twenty four (24) months Retention Sum be paid much earlier as we could not be part of the said Agreement because our end of the project was at the full delivery of the electric buses to Prasarana on 23rd June 2015.

Since we have jointly developed the business together but we are not allowed to execute the future ma intenance & after sales services of BYD will be doing it on your own. So, it is deemed right that we need to claim the costs of the present and the future as it had been adjusted from the Collaboration Agreement.

In relation to the last two payments from Prasarana, we proposed that the said amount should be paid by Prasarana directly to BYD and inevitably should be paid by Prasarana directly to BYD and inevitably should offset AMDAC's outstanding sum with BYD. Therefore, we believe that we should eventually put to an end to the validity and enforceability of the said Agreement.

Below is our payment proposal to BYD, based on our records:

		RM
Contract Amount		20,071,42.01
AMDAC Portion	36.6%	7,664,430.01
BYD Portion	63.4%	13,106,995.00
(-) Payment Paid to BYD through MDV		3,142,056.61

Balance Payment to be paid to BYD	9,664,938.39
Payment Proposal to BYD:-	
1) Opportunity Loss of Maintenance and Services	4,500,000.00
2) Agreed Adjusted Price for Bus	1,040,625.00
3) Balance Payment from Prasarana (direct payment to BYD)	
- Milestone 9a	1,653.714.00
- Milestone 9b (Retention Sum)	1,447,029.61
Total amount to be paid by AMDAC	1,323.569.78

We have written to MDV to allow all payment to Prasarana be made directly to BYD from now onwards. We append herewith the Telegraphic Transfer slip from AlRajhi Bank to BYD Malaysia Sdn Bhd dated 26th October 2015 and our letter to MDV dated 20th October 2015 for your perusal.

Thank you in advance for your due consideration.

Thank you.

[184] In my view, AMDAC's letter has a very significant bearing on the issue of BYD's entitlement under the CA. It is material to note that the sum of RM1,323,569.78 referred to in AMDAC's letter, was duly remitted to BYD. Looking at all the circumstances (*including the CA, the unsigned Addendum and AMDAC's letter*), it is plain and unarguable that BYD's entitlement was for the specific sum of RM13,106,995 and the balance amount (*after deduction for amounts paid directly by MDV to B YD and the agreed adjusted price for the units of bus and the sum of RM1,323,569.78 and the payment for milestone 9(a) and 9(b)*) that is due and payable by AMDAC to BYD under the CA is RM4.5m.

[185] The arbitrator made a correct and valid finding of fact that BYD never agreed or acquiesced to any set off. The so-called set off was a unilateral act on AMDAC's part. It has no effect whatsoever as it was an 'unlawful' set off. It does not bind BYD.

[186] What AMDAC's letter reveals quite unequivocally is an express, if not an implicit admission by AMDAC, that BYD's entitlement under the CA was/is RM13,106,995 and after taking into account the amounts that were *paid by MDV directly to BYD* including payment for milestone 9(a) and 9(b) *(which came later)* and the sum of RM1,323,569.78, the amount which is ultimately due and payable by AMDAC to BYD is the shortfall of RM4.5m.

[187] The question of AMDAC's purported entitlement to a set off as part of their counterclaim etc is a plain non-starter as the counterclaim had been terminated. At any rate, even as a stand-alone defence, the so-called set off is unsustainable as it was unilaterally done by AMDAC and relates entirely to the question of AMDAC's alleged entitlement to participate in the option for after

sales service amounting to RM3,642,000. According to AMDAC the after sales service portion was 'hijacked' by BYD and given to their locally incorporated entity, namely BYD Malaysia Sdn Bhd. In my view, the after sales portion of the project cannot be conflated with BYD's pre-eminent entitlement under the CA which is that they should be paid the agreed sum of RM13,106,995.

[188] Thus, in my view, quite apart from all the other factual findings that were made by the arbitrator, AMDAC's letter is the proverbial 'smoking gun' document, wh ich says plenty about the payment arrangement between the parties per the CA and the unsigned addendum.

[189] Indeed, it is proof of the amount that BYD was entitled to. There is no doubt at all that in the arbitration, BYD was claiming for the sum RM4.5m which is what they were entitled to under the CA and which AMDAC had wrongfully set off. The conduct of AMDAC in doing a set off of the sum of RM4.5m, was a manifestation of breach of the CA on the part of AMDAC.

[190] The question of sharing the net profit after payment of expenses incurred (*including payments to Gemilang*) by AMDAC does not arise as this is not provided for in the CA. At the end of the day, it is clear that BYD is entitled to full payment of RM13,106,995 per the CA. Indeed, this is even tacitly acknowledged in AMDAC's letter.

[191] Thus, but for the unlawful and unilateral set off, the balance sum payable to BYD is RM4.5m. That is the clear and unmistakable contractual obligation (liability) of AMDAC as per the CA. As rightly opined by the arbitrator, these obligations remained with AMDAC and were not assigned under the first DOA and/or the second DOA.

[192] Indeed, in law, only benefits can be assigned whereas liabilities are not assignable. (See: *Resolution Alliance Sdn Bhd v Binabaik Sdn Bhd & Anor* [2015] 3 MLJ 420; [2015] 5 CLJ 813; [2014] 1 LNS 1736 (CA) at para [33] — 'Resolution Alliance'). In any event, in so far as the assignments are concerned, it is clear that under the CA (per cl 3.1(v) thereof) the parties had agreed that BYD will provide an assignment (as per format in Annex 2).

[193] The first critical point to be noted here is that it was only an assignment to AMDAC of BYD's rights to recei ve the proceeds (*from Prasarana*) under the project. It was not an assignment of AMDAC's liabilities or obligations. Those liabilities or obligations was always with AMDAC, both under the CA and pursuant to cl 6 of the first DOA.

[194] The first DOA clearly stipulated that AMDAC was assigned the

receivables to MDV 'solely' for purposes of project financing. Clause 3.02 of the second DOA states that the assignment is intended to be by way of security. Clause 3.01 of the second DOA states that the assignment is not to be construed as an assignment to MDV of AMDAC's obligations and liabilities under the respective project documents. Clause 5.02 of the second DOA states that AMDAC shall remain fully liable to perform all its obligations assumed under the Project Documents.

[195] The term 'Project Documents' is defined in item 3 of the First Schedule to the second DOA and it reads as:

> Valid contract(s),letter(s) of award, purchase order(s) or other similar contract documents issued from time to time by the Employer in respect of the contract to Manufacture, Delivery, Testing, Commissioning and Warranty of 15 units of Step-Less Floor Electric Buses for rapid Transit Sunway Line (Contract No PRASARANA /GCS/CTT/2.048112013) as per letter of Award dated 3rd Janaury, 2014 issued by Syarikat Prasarana Negara Berhad to BYD Auto Industry Company Limited ('BYD'), *including but not limited to any subsequent contract document signed between the Employer and BYD/the customer* and any amendment s, revisions, addendums, supplements or variations thereto acceptable to MDV.

[196] AMDAC's argument is that the definition of project documents does not include the CA and as such, they have no obligations under the CA. I disagree. First, despite the looseness of the definition, I think that the term project document is wide enough to cover the CA.

[197] Secondly, AMDAC issued a letter to Prasarana dated 24 September 2014 giving them notice of the assignment to MDV under the second DOA of their rights, title and interest in and to the 'assigned proceeds'. Significantly, AMDAC (by para 3 of that letter) stated that, 'We shall remain liable to perform all my (sic) obligations under the Project Documents and MDV shall not assume any obligation to perform the obligations imposed on my (sic) thereunder'.

[198] Thirdly, and in any event, as a matter of law, there could not have been any assignment of AMDAC's obligations towards BYD (under the CA) either under the first DOA or the second DOA. The obligation to make payment to BYD (per cll 3.2(xi) and 4.2 of the CA) was not capable of being assigned and always remained with AMDAC notwithstanding the first DOA and/or the second DOA. See: *Resolution Alliance*.

[199] I turn next to the argument that since the proceeds (from Prasarana) under the project had been assigned to MDV and as there was no payment by Prasarana to AMDAC, the obligation to pay never arose because of the 'pay when paid' effect of cl 3.2(xi) of the CA. No doubt, cl 3.2(xi) of the CA is a pay

when paid clause and Prasarana never directly paid AMDAC as all payments went to MDV (per the second DOA). But MDV thereafter made payments to AMDAC and also to BYD. When the project financing was fully settled, AMDAC sent a letter dated 20 October 2015 to MDV for the facility to be cancelled.

[200] The project financing facility was fully settled on 11 September 2015. As at 21 September 2015 MDV had refunded a sum of RM8,870,334.45 to AMDAC.

[201] And in so far as MDV/BYD is concerned, MDV had directly made payment of RM3,142,056.61 to BYD. AMDAC took the position (para 36 of the defence) that BYD should not look to AMDAC but should take the matter up with MDV as AMDAC 'had assigned the benefit of all payments to MDV ...'.

[202] As rightly submitted by counsel for AMDAC, there is no privity of contract between MDV and BYD. BYD's claim is to be found in the CA and it was and is extant against AMDAC, notwith standing that MDV had made direct payments to BYD and AMDAC. Although no payments were made directly by Prasarana to AMDAC, it cannot be said that AMDAC did not receive payments under the project. In fact they did receive payments under the project and these were by way of the MDV refunds. This was merely the circuitous route of payment by Prasarana through MDV, and was the by-product of the first DOA and second DOA.

[203] As such, AMDAC's contention that they are not obliged to make payment as per the CA because no monies were routed directly by Prasarana to them is at best, disingenuous.

[204] In my view, the MDV refunds is to be construed as indirect payments by Prasarana and as such, it follows that AMDAC remained liable to make full payment to BYD for the amounts as stipulated in the CA.

[205] On that analysis, AMDAC's failure to pay the sum of RM4.5m to BYD constituted a breach of the CA and BYD's claim in the arbitration was unmistakably predicated on AMDAC's breach of the CA in failing to pay the sum of RM4.5m.

[206] In the result, for the several reasons alluded to in the preceding paragraphs of this part of the judgment, I am constrained to hold that there is *no merit* in AMDAC's complaint under s 37 of the Act that:

A (a) they were unable to present their case effectively when the arbitrator arbitrarily terminated the counterclaim;

(b) the award had dealt with a dispute not contemplated or falling with the submission to arbitration;

B (c) the award contains decisions beyond the scope of submission to arbitration; and

(d) the award is in fact in conflict with the public policy of Malaysia.

C *Section 42 of the Act*

[207] AMDAC's complaints for purposes of challenging the award under s 42 of the Act are:

D (a) that the assignments (via first DOA and second DOA) have effectively replaced AMDAC's obligation to pay BYD as per the CA;

(b) that in consequence thereof the arbitrator lacked the requisite jurisdiction to adjudicate upon the dispute;

E (c) that on a true and proper construction of the terms in the CA, the agreed profit is not on gross payment received but rather it is based on the net profit after deducting the applicable costs and expenses which were paid to *Gemilang* incurred in the execution of the works in the project; and

F (d) that BYD had not proved their loss pursuant to s 74 of the Contracts Act 1950.

[208] To recapitulate, I had earlier ruled that the repeal of s 42 of the Act operates retrospectively. However, I shall nevertheless deal with the questions of law for the sake of completeness. This is also to cater for the possibility that G on appeal, my ruling on the retrospectivity of the repeal of s 42 may not be upheld.

[209] Now, although the Federal Court in *Far East Holdings* had widened the scope for questions of law which arise out of the award, I find that upon an H examination of the questions that were crafted on behalf of AMDAC, the questions are in substance questions of fact which have been creatively drafted or dressed up in such a manner as it to give them the appearance that they are questions of law.

I **[210]** At any rate, I am of the view that my analysis of the grounds of challenge under s 37 of the Act adequately and comprehensively answers the issues raised via the so-called questions of law. I therefore need do no more than just adopt and repeat my said analysis (stated above) as the basis for rejecting these questions of law.

[211] Further, and for avoidance of doubt, it is necessary to emphasise that the first DOA and the second DOA did not replace AMDAC's payment obligations as per the CA. BYD's claim was predicated on a breach of the CA, to wit, AMDAC's unlawful set off of RM4.5m. As such, this gave rise to a dispute which eminently fell within the scope of the arbitration agreement (per cl 14 of the CA) and this was well within the arbitrator's jurisdiction.

[212] The next issue pertains to whether BYD's portion is to be taken from the gross profit or from net profit (*after deduction of expenses*). This is not a question of law. Instead, this is plainly and patently a question of fact for the arbitrator to decide. And the arbitrator found as a fact (rightly in my view), that there is nothing in the CA which permits any deduction for expenses such as, but not limited to payment to *Gemilang*.

[213] Clearly, AMDAC was attempting to 're-visit' the agreed contractual terms per the CA. Based on the entire agreement clause (cl 11 of the CA) it is impermissible for AMDAC to rely on any other nebulous (and unproven) basis for maintaining their stand that deductions should be made and that the apportionment is to be done on the net amount rather than the gross amount. It may be re-called that AMDAC's own witness, RW1 agreed during cross-examination that notwith standing the first DOA and second DOA, AMDAC *remained liable* to ensure that BYD is paid the amount due to be paid under the CA.

[214] The last question deal with the issue as to whether BYD are required to prove their loss. Again, I refer to my views and conclusions when dealing with the matters that were brought up under s 37 of the Act.

[215] The arbitrator was satisfied on the evidence that AMDAC had unjustly enriched themselves by unilaterally setting-off the sum of RM4.5m. In this regard, it may be noted that AMDAC's own letter dated 19 October 2015 makes reference to BYD's portion as being RM13,106,995. It also states that RM4.5m has been deducted (offset) from the amount that is due to BYD.

[216] The reason for the set off (as contended by AMDAC) is that they are entitled to claim for 'opportunity loss of maintenance and services.' But that is matter which falls within the ambit of the counterclaim which was terminated. The so-called claim for opportunity loss of maintenance and services cannot therefore come within the equation.

[217] In any event, this was an amount which the arbitrator had found as a fact, was due and owing by AMDAC to BYD as per the terms of the CA. It was not an amount which the arbitrator 'plucked from the air'. Ultimately, the

arbitrator is the 'master of facts'. And any which way that one looks at it, this issue does not qualify as a question of law.

OUTCOME

[218] In the result, I hold that AMDAC's application via encl 1 to set aside the award is without merit and is hereby dismissed with costs of RM10,000 (*subject to 4% allocator*).

Order accordingly.

Application dismissed with costs of RM10,000.

Reported by Nabilah Syahida Abdullah Salleh