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TAMAN BANDAR BARU MASAI SDN BHD

v.

DINDINGS CORPORATIONS SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER JC
[ORIGINATING SUMMONS NOS: R3-24-28-2009
& R3-24-48-2009]
11 SEPTEMBER 2009

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ARBITRATION: *Award - Setting aside - Breach of trust - Allegation of - Arbitration Act 2005, ss. 37 and 42 - Failure to intitule appropriate subsection - Failure to set out facts leading to grounds in a concise manner - Averments in affidavits lumped up unintelligibly - Substantial level of*

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prolixity - Whether plaintiff's application and affidavits in breach of rules of court - Whether plaintiff's application should be dismissed in limine - Arbitration Act 2005, ss. 9, 3, 38, 39

ARBITRATION: *Award - Enforcement - Application for - Plaintiff objected to defendant's application on ground arbitrator acted outside his*

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jurisdiction - Whether issues dealt by arbitrator were within subject matter of arbitration agreement - Minimum interference by court - Whether compulsory for courts to respect decision of arbitrators - Arbitration Act 2005, ss. 9, 36, 37, 38, 39, 42

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The defendant, Dindings Corporation Sdn Bhd (claimant in the arbitration) had commenced arbitration proceeding in relation to a dispute for works done by the defendant as contractor for the employer, ("the plaintiff") Taman Baru Masai Sdn Bhd. An interim award was granted with costs and was duly paid by the plaintiff. The

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plaintiff submitted there were apparent and serious irregularities in the making of and on the face of the final award and filed an application under to set aside and/or vary the arbitrator's award dated 14 April 2009 which also incorporated the interim award dated 8 May 2008. The plaintiff made this application under the

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Arbitration Act 1952 (AA 1952) or in the alternative Arbitration Act 2005 (AA 2005).

It was the plaintiff's submission (i) the arbitration agreement was made on 24 June 2005 that was before the coming into force of AA

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2005 which date was 15 March 2006 and thus the arbitration had to be in accordance with the old Act; (ii) as the arbitration was commenced under the new Act, it was illegally commenced and in

consequence the final award could be enforced; (iii) the defendant's contention that the plaintiff by conduct had agreed to the application of the new Act and in consequence was estopped from raising the objection, was not correct as there could not be estoppel against a statute (iv) if the new Act applied the plaintiff would rely on ss. 37 and 42 of the AA 2005 for the purpose of this application. A B

The defendant also filed an application for registration and enforcement of the final award pursuant to s. 38 of AA 2005. The plaintiff strenuously objected to the defendant's application on the grounds that the final award dealt with a dispute not contemplated by or not failing within the terms of submission to arbitration and the final award was in conflict with the public policy of Malaysia and relied on s. 39(1)(a)(iv) and (v) and s. 39(1)(b)(ii) of AA 2005. C

Held (dismissing the plaintiff's application with costs and allowing the defendant's application with costs): D

(1) In the instant case, the provisions of the AA 2005 was applicable notwithstanding the arbitration agreement was made before the AA 2005 came into force on 15 March 2006. Even assuming that the AA 1952 applied, the facts stated by the plaintiff did not permit the intervention of court. *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* (foll). (para 13) E

(2) The general intitulement in respect of ss. 37 or 42 reliefs in the plaintiff's application would not be sufficient if the subsection the plaintiff relied on was not spelled out. It is a condition precedent, when a party relies on any of the sub-sections under s. 37 of the AA 2005, there is a duty and obligation in law to clearly identify the sub-section and set out the facts leading to the grounds which is recognized in the said section. This was not done in the instant case. The averments in the affidavits were all lumped up unintelligibly paving the path to prolixity. Prolixity is not condoned by courts. The plaintiff's application and affidavits were not only in breach of the salient provision of the rules of court, the provisions of AA 2005 but must also be dismissed *in limine* for prolixity. *Merino-ODD Sdn Bhd v. Pecd Construction Sdn Bhd* (refd); *Bauer (Malaysia) Sdn Bhd v. Embassy Court Sdn Bhd* (refd); *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd* (refd); *Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd* (foll). (para 17) F G H I

(3) The plaintiff's complaint fell within the scope and jurisdiction of the arbitrator. The AA 2005 does not permit the court to intervene in matters which do not strictly fall within any of the sub-sections of s. 37. In consequence general allegations are not sufficient as it is a mandatory requirement for the need of proof. In this case the plaintiff alleged breach of rules of natural justice without setting out the prejudice suffered and proof thereof. Further, almost all rules of natural justice are now incorporated in the Federal Constitution, relevant Acts, as well as rules of court etc. Thus, the complaint now must in almost all cases relate to one of the breaches of the Constitution, or any Act of Parliament, rules of court etc. General complaint of breach of natural justice *per se* in this time and era will stand as an embarrassing plea. The Court does not ordinarily entertain the plea and has placed various strictures. *Bintang Merdu Sdn Bhd v. Tan Kau Tiah @ Tan Ching Hai & Anor* (refd). (para 23)

(4) With regard to relief sought pursuant to s. 42 AA 2005, s. 42 makes it mandatory for the question of law to be framed. There is a duty and obligation to state the question of law arising from the award in a concise manner, and state the grounds on which the reference is sought. In addition, the facts leading to grounds must also be stated failing which the relief will not be granted. Here, the plaintiff had adopted the allegation and grounds relating to the relief they were attempting to claim under s. 37 and repealed the issues as questions of law. The manner the issues were framed showed substantial level of prolixity and ought to be dismissed *in limine*. Accordingly the plaintiff's application was dismissed with costs. *Tarapore and Co v. Cochin Shipyard Ltd Cochin* (refd). (para 23)

(5) There was not much merit in the plaintiff's argument in opposing the defendant's application as it is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters. To succeed pursuant to s. 39 of AA 2005 it must be proved that the arbitrator acted outside his jurisdiction. In the instant case, the facts clearly showed that the issue dealt by the arbitrator was essentially within the subject matter of the arbitration agreement. In essence, if it is covered by the subject matter of arbitration a complaint that it is not part of, the pleaded case

carries little weight. Further, s. 39(1)(a)(iv) and (v) must be read in the right perspective and cases which have not dealt with such provisions do not stand as binding authority on the subject matter as the primary object of AA 2005 is to allow minimum interference of the court. In essence, if the issue is one which originates from the underlying contract the arbitrator is vested with jurisdiction, pleadings *per se* is not the determining factor pursuant to s. 39(1)(a)(iv) and (v). AA 2005 makes it compulsory for courts to respect the decision of arbitrators and only minimum intervention is allowed. It is the parties who selected the arbitrator and s. 36 of AA 2005 makes the award final, binding and conclusive. Real proof is required to be shown before the court can meddle with the award. Consequently, the defendant's application under s. 38 of AA 2005 was allowed with costs. (paras 29, 30, 31, 33, 34, 35, 36 & 37)

Case(s) referred to:

Bauer (Malaysia) Sdn Bhd v. Embassy Court Sdn Bhd [2009] 1 LNS 848 HC ***(refd)***

Bintang Merdu Sdn Bhd v. Tan Kau Tiah @ Tan Ching Hai & Anor & Another Cases [2009] 1 LNS 621 HC ***(refd)***

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791 CA ***(foll)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd [2009] 1 LNS 619 HC ***(foll)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125 HC ***(refd)***

Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd [2009] 1 LNS 849 HC ***(refd)***

Lesotho Highland Development Authority v. Impregilo Spa [2005] UKHL 43 ***(refd)***

Merino-ODD Sdn Bhd v. Pecd Construction Sdn Bhd [2009] 1 LNS 718 HC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd [2008] 10 CLJ 437 HC ***(refd)***

Rosenizam Maharam v. PP [2002] 1 LNS 260 HC ***(refd)***

Tarapore and Co v. Cochin Shipyard Ltd Cochin [1982] 25 SCC 680 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 9, 36, 37, 38, 39(1)(a)(iv), (v), (1)(b)(ii), 42, 51
Delegation of Powers Act 1956, s. 3
National Language Act 1963/1967, s. 6

Other source(s) referred to:
Malhotra, *Arbitration*, 2006, p 632

For the plaintiff - Ashok Kumar (Shannonrajan with him); M/s Skrine
For the defendant - John Clark (Alvin Lai with him); M/s Sidek Teoh Wong & Dennis

Reported by Susheila Sreedharan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiff's application to set aside and/or vary the arbitrator's award dated 14 April 2009 which also incorporates the interim award dated 8 May 2008. The defendant has also filed for registration and enforcement of the final award pursuant to s. 38 of Arbitration Act 2005 (AA 2005). The applicant is making this application under the Arbitration Act 1952 or in the alternative AA 2005. The applicant had not intituled the appropriate sub section of the 2005 Act which is relied upon and that could be fatal for reasons which I shall adumbrate further in my judgment. In addition, the plaintiff has not set out the facts leading to the grounds in a concise manner within the spirit and intent of the relevant sub sections of ss. 37 and 42 which gives no option to the court but dismiss the application *in limine*. This judgment is for Originating Summons R3-24-28-2009 as well as Originating Summons R3-24-48-2009.

[2] The plaintiff's prayer *inter alia* reads as follows:

(1) that the award made between the above named parties to the abovementioned Arbitration by Mr. Tiong Kian Boon dated 14 April 2009, which incorporates the interim award dated 8 May 2008 (hereinafter referred to as the "final award") be set aside pursuant to s. 24(2) of the Arbitration Act 1952;

(2) alternatively, that the final award be set aside pursuant to s. 37 of the Arbitration Act 2005;

(3) alternatively, pursuant to s. 42 of the Arbitration Act 2005:

(a) determining the following questions of law arising out of the final award:

(i) whether the final award is bad in law and is of no effect in that the arbitral proceedings were commenced and completed in accordance with Arbitration Act 2005 and not Arbitration Act 1952;

(ii) whether statements made by the plaintiff's representative at the first preliminary meeting and before the commencement of the arbitral as evidence and/or an admission in law;

(iii) whether the arbitrator in admitting the plaintiff's representative's statements made at the first preliminary meeting and before the commencement of the arbitral hearing proper and admitted the same as an admission of liability on the part of the plaintiff constituted a breach of the rules of natural justice;

(iv) whether the arbitrator has misconducted himself and/or the proceedings by deciding evidence which was inadmissible, in particular, by construing correspondence from the plaintiff to the arbitrator and the plaintiff during the arbitral proceedings as an admission of liability on the part of the plaintiff without due and proper process;

(v) whether the arbitrator was entitled to form a preconceived view of the plaintiff's liability before the commencement of the arbitral hearing proper;

(vi) whether there was apparent bias or partiality on the part of the arbitrator towards the defendant in the arbitration proceedings to the detriment of the plaintiff;

(vii) whether the arbitrator was entitled to the rule that there were no grounds for the plaintiff's counterclaim in the counterclaim simply because the counterclaim is a reiteration of the plaintiff's defence in the arbitration;

(viii) whether the defendant was entitled to an extension of time in completing the works and/or that the completion date was set at large on the ground that the plaintiff had failed to comply with the stipulated time for honouring payment of the interim certificates under the contract;

A (ix) whether the arbitrator was entitled to make finding based on his own professional experience *vis a vis*, in holding that the Quantity Surveyor and Consultants will always independently verify and certify the quantities and value of any works resulting from any instructions;

B (x) whether the arbitration was wrong in law in finding that there was no certificate of non-completion issued in accordance with cl. 22.1 of the contract;

(xi) alternatively, whether the arbitrator was wrong in law in setting aside the certificate of non-completion;

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(xii) whether the arbitrator had exceeded the jurisdiction by deciding on matters which were not referred to him by the parties *vis a vis* on the matters relating to draft statement of final accounts and the release of the money of the retention sums under the contract.

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and

(b) the final Award be set aside and/or varied in whole or in part.

E (4) that the sum paid by the plaintiff to the defendant in the sum of RM273,905.98 (RM253,905.98 being the alleged undisputed sum and RM20,000.00 being party cost) pursuant to the interim award dated 8.5.2008 be refunded to the plaintiff by the defendant;

F (5) interest;

(6) the costs of and incidental to this application to be borne by the defendant;

G (7) such further relief or other relief and/or directions as deemed fit and proper by this Honourable Court.

Brief Facts

[3] The defendant (claimant in the arbitration) had commenced H arbitration proceeding in relation to dispute for the works done by the defendant as contractor for the employer, the plaintiff. An interim award was granted with costs and was duly paid by the plaintiff.

I **[4]** The plaintiff says there are apparent and serious irregularities in the making of and on the face of the final award *inter alia* on

the following grounds namely (i) the arbitrator had considered that there was an admission of liability on the part of the plaintiff based essentially on statement made by the plaintiff's representative and this resulted in breach of natural justice; (ii) the interim award was made under protest and in consequence it was wrong for the defendant to contend that since payment for interim award has been made, it constituted an estoppel to challenge the final award; (iii) the arbitrator had made findings based on his own professional experience as opposed to making findings based on evidence.

[5] As a preliminary point, the plaintiff says (i) the arbitration agreement was made on 24 June 2005 that was before the coming in force of AA 2005 which date is 15 March 2006. And relies on the case of *Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd* [2008] 10 CLJ 437 HC, where it was held that the commencement of the arbitration have to be in accordance with the old Act if the arbitration agreement was made before the coming into of the new Arbitration Act; (ii) as the arbitration was commenced under the new Act, it was illegally commenced and in consequence the final award cannot be enforced; (iii) the defendant's contention is that the plaintiff by conduct had agreed to the application of the new Act and in consequence is estopped from raising the objection; is not correct as there cannot be estoppel against a statute. And will rely on the case of *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125; (iv) if the new Act applies the plaintiff will rely on ss. 37 and 42 of the AA 2005 for the purpose of this application.

[6] Section 37 states as follows:

> 37. Application for setting aside.
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> (1) An award may be set aside by the High Court only if:
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> (a) the party making the application provides proof that:
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> (i) a party to the arbitration agreement was under any incapacity;
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> (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;
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> (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;

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(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

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(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

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(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;

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or

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

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(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

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(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

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

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(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.

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(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.

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(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

[7] Section 42 reads as follows:

42. Reference on questions of law.

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

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award:

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

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

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

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

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

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

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

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

(b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

Preliminaries

[8] In the instant case, the final award was made pursuant to AA 2005. The plaintiff's argument that the AA 1952 ought to apply is based on the case of *Putrajaya Holdings (supra)* where the court relied on the Bahasa Malaysia text. However, the court did acknowledge that for the purpose of AA 2005 the authoritative text was the English text, but gave effect to the Bahasa Malaysia version which was absent in the English text and that is the words 'Perjanjian Timbangtara dibuat'. It is trite that interpreting an Act of Parliament, the intention of the legislature must be taken into account. That does not necessarily mean a wrong version of a translation must be given effect. First and foremost it must be remembered that Act 2005 *per se* is not a product of our Parliamentary Draftsmen. The Act 2005 has an international origin and was adopted in Malaysia. And similar Act has come into force in various countries. It is quite obvious that Parliament must have intended for the English version of the Act to apply and not the erroneous version accidentally inserted by our draftsmen. If the erroneous version is adopted it is quiet likely the courts for a long time have to deal with AA 1952 and that could not have been the intention of Parliament for introducing AA 2005. In addition, Parliament had deemed the English text as being authoritative and the Bahasa Malaysia version is rendered as a translation only.

Support for the proposition is found in (i) s. 6 of the National Language Act 1963/1967; (ii) Prescription under s. 6 of the National Language Act 1963/1967; (iii) PU 33/68, s. 3 of the Delegation of Powers Act 1956.

[9] Section 6 states as follows:

> 6. Authoritative text of laws
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> The texts:
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> (a) of all Bills to be introduced or amendments thereto to be moved in Parliament or the legislative assembly of any State;
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> (b) of all acts of Parliament and all subsidiary legislation issued by the Federal Government;
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> (c) of all Enactments and subsidiary legislation issued by any State Government; and
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> (d) of all Ordinances promulgated by the Yang di-Pertuan Agong,
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> shall be in the national language and in the English language, the former being authoritative unless the Yang di-Pertuan Agong otherwise prescribes generally or in respect of any particular law or class of laws.

[10] Gazette dated 9 March 2006 reads as follows:

> in exercise of the powers conferred on the yang di-Pertuan Agong by section 6 of the National Language Acts 1963/67 (Act 32) and delegated to the Prime Minister under P.U. 33/68, the Prime Minister prescribes that the authoritative text of the Arbitration Act 2005 (Act 646) and any subsidiary legislation made under it is the text in the English Language.

[see (i) *Rosenizam Maharam v. PP* [2002] 1 LNS 260 HC; (ii) *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143 FC].

[11] Further, Hansard report dated 7 December 2005, captures what the Minister said in Parliament in respect of s. 51 of AA 2005 and it reads as follows:

> Fasal 51 memperuntukkan mengenai pemansuhan Akta Timbang Tara 1952 dan Akta Kovensyen Mengenai pengiktirafan dan Penguatkuasaan Award Timbang Tara Asing 1985 serta peruntukan kecualian.

A Akta ini tidak terpakai kepada prosiding timbang tara yang telah dimulakan sebelum permulaan kuat kuasa akta ini. Walaubagaimanapun, akta ini akan terpakai kepada perjanjian timbang tara yang dibuat sebelum permulaan kuat kuasa akta ini di mana prosiding timbang tara yang dimulakan lagi.

B **[12]** There are number of authorities which say that it is permissible for the court to resort to the Hansard as an aid to interpretation of the legislation (see *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 FC; (ii) *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn* C *Bhd & Anor* [2002] 2 CLJ 57 FC).

[13] I have no hesitation in saying that in the instant case the provision of the AA 2005 is applicable notwithstanding the Arbitration agreement was made before the AA 2005 came into force D ie, the date being 15 March 2006. Even assuming that AA 1952 applies, the facts stated by the plaintiff do not permit the intervention of court as Justice KN Segara sitting in the Court of Appeal in the case of *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791, CA have in an articulate E manner, in practical terms, put a stop to the interference of court by stating that:

> The final award of an arbitrator must be viewed in its totality and any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and F unconscionable to subsist and, thereby, justify the award being set aside. On the facts of this instant appeal, there was no error of law on the face of the final award for the High Court to review. When an arbitrator does not accept any submission made by counsel with regard to any proposition of law, such act or conduct does not G render the award infected with an error on its face. Clearly, there was no legal proposition by the arbitrator, forming the basis of the award, which was erroneous.

[14] The other appellate judges have readily concurred making the decision a formidable authority in this area of law in contrast to H earlier apex decisions.

Failure To Intitule

[15] In the instant case, the plaintiff is relying on ss. 37 and 42 I of AA 2005 without stating the sub-section. This is fatal because ss. 37 and 42 spell out different maladies and relief in a very

restrictive manner. Order 7 makes it mandatory for the originating summons to be intituled by the particulars of the rule of court and the provisions of the relevant laws the court is moved. Gopal Sri Ram JCA (as he then was) in *Cheow Chew Khoon v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127 had this to say:

> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

[16] It is clear the plaintiff has clearly failed to state with sufficient particularity the relevant sub-section of the statute which in this case is of utmost importance. The failure results in embarrassment as adumbrated by the Court of Appeal. This is so for various reasons:

(a) Section 8 of AA 2005 makes it clear that court can only intervene in any of the matters governed by the Act, thereby restricting the scope of intervention to the approved issues only.

(b) The reading of s. 37 will show that in a restricted manner, there are number of instances the court can intervene and that intervention is subject to proof provided.

(c) The subsection to s. 37 is not inter-related as a whole and almost in all cases stands independent to one another. In consequence, the plaintiff is obliged to set out the subsection it relies upon, failing which the intitulement stands as embarrassing and ought to be struck out *in limine*.

[17] In my view, the general intitulement in respect of ss. 37 or 42 for the matter even for s. 11, reliefs will not be sufficient if the subsection which the plaintiff relies on is not spelled out. I have dealt with the scope and jurisprudence of s. 11 in various cases. To name a few are as follows: (i) *Merino-ODD Sdn Bhd v. Pecd Construction Sdn Bhd* [2009] 1 LNS 718, (ii) *Bauer (Malaysia) Sdn Bhd v. Embassy Court Sdn Bhd* [2009] 1 LNS 848 HC (High Court Civil Suit No. R3-24-31-2009); (iii) *Jiwa Harmoni Offshore Sdn Bhd*

v. Ishi Power Sdn Bhd [2009] 1 LNS 849 HC (Originating Motion No: R3-24-76-2009). It is not necessary to repeat the same. In the instant case, notwithstanding the failure which is fatal, I have taken the safer approach to deal with the merits of the case.

[18] For the purpose of the instant case, it must be noted that s. 9 of AA 2005 is very much relevant. Section 9 reads as follows:

> 9. Definition and form of arbitration agreement.
>
> (1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
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> (3) An arbitration agreement shall be in writing.
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> (4) An arbitration agreement is in writing where it is contained in-
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> (a) a document signed by the parties;
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> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement;
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> or
>
> (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[19] This section gives a wider meaning to the definition and form of arbitration agreement unlike the previous Act. For example, the inclusion of the phrase, "whether contractual or not", in s. 9 gives wider jurisdiction to the arbitrator to even cover a dispute arising out of tort. In essence, this section gives or attempts to give wider jurisdiction to the arbitrator to deal with all issues relating to the parties which arises in consequence of the arbitration agreement. Thus, parties to the arbitration cannot complain that the arbitrator has exceeded his jurisdiction by simply relying on Pre-AA 2005

cases. This section will also go to show Parliament has in its wisdom given wider powers to the arbitrator to bring to an end all issues whether pleaded or not as long as it is relevant and arises in consequence of the arbitration agreement to reach its finality. The court's jurisdiction to intervene is almost prohibited. The AA 2005 must be seen to be a new chapter to the law, practice, and intervention of court etc in arbitration proceedings. The jurisdiction to ensure that courts do not intervene and meddle with arbitration proceedings is clearly set out in various provisions of the Act. Pre-2005 cases which provide room for interference with arbitrator's decision must now be treated as otiose, as AA 2005 has been shrewdly worded to ensure that courts ordinarily do not interfere with arbitration awards.

[20] I will say that draftsmen of provisions such as ss. 8, 9, 37 and 42 have with great ingenuity asserted that court should not interfere with arbitrator's award without out rightly saying so. If they have said so out rightly, it will stand to be unconstitutional. Thus, it will appear that it is going to be difficult to frame any question of law pursuant to AA 2005 when the subject matter of complaint is one which is restricted by ss. 9, 37, or 42 etc. It is now for the courts themselves to restrain from interference unless it is a case of patent injustice which the law permit the court in clear terms to intervene. It is trite that AA 2005 is meant to promote one-stop adjudication. In *Lesotho Highland Development Authority v. Impregilo Spa* [2005] UKHL 43, Lord Steyn sitting in the House of Lords had this to say:

> I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed; it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point.

[21] The moral of the story is that once parties have agreed to arbitration agreement they must be prepared to be bound by the decision and refrain from approaching the court to give hair splitting decision arising from ingenious arguments which often results in

A erroneous judgments not anticipated by Parliament. Constant interference of the court as was the case in the past will defeat AA 2005 which is for all intent and purpose to promote one-stop adjudication in line with International mandate.

B **[22]** It also must be noted in the instant case; from reading of the award the plaintiff has taken a cavalier approach in the conduct of the arbitration proceedings which has warranted the arbitrator to specifically mention such instances. Having taken a cavalier approach the plaintiff's complaint in relation to the conduct of the C arbitrator in dealing with certain issues should not be ordinarily entertained by court as appropriate representation and presentation before the arbitrator has been lacking.

[23] I have read the application, affidavits, exhibits and the submission of the parties in detail. I take the view that the D application must be dismissed. My reasons *inter alia* are as follows:

(a) It is a condition precedent, when a party relies on any of the sub-section under s. 37 of AA 2005 there is a duty and obligation in law to clearly identify the sub-section, set out the E facts leading to the grounds which is recognized in the said section. This was not done in the instant case. The averments in the affidavits are all lumped up unintelligibly paving the path to prolixity. Prolixity is not condoned by courts. I have set out the jurisprudence and related case laws in *Engineering* F *Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd* [2009] 1 LNS 619 which reads as follows:

> I note that for a simple application such as striking out, the applicant has managed to churn out the ground to about G 70 pages which I will *prima facie* say is an abuse of the process of court. The ground stated lacks focus, clarity and is embarrassing, and ought to be dismissed *in limine* for prolixity. I have dealt with this area of jurisprudence in the case of *See Hua Realty Bhd v. See Hua News* [2007] MLJ 525, where I have stated:
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> The petition in this case is drafted in a manner that runs to 72 pages. This petition is, as if an entire set of complaints, whether or not they fall within the purview of s. 181, have all been hurled into the court with the duty foisted on the court to pick and choose to allow the petition. The court is not a I filter of debris (see *Watson v. Rodell* 3 Ch D 380). Where a petition is nothing more than a jangled mass of complaints all lumped together over which the court is unable to make any

finding at all, of either oppression or undue prejudice, because the petition is nothing more than an exercise in prolixity, then it must fall. It has long been held that where the cause papers are so framed as be too prolix, where they disclose immaterial facts, and set out at great length documents which could not be material to the issues at hand, such as to as embarrass the opposite party (see *Cashin v. Cradock* 3 Ch D 376), such pleadings are liable to be, and have, on occasions, been struck out (see *Davy v. Garret* [1877] 7 Ch D 473).

My observation in the above case will equally apply to the instant case with such modification as necessary. However, I have taken a safer approach to consider the merits of the case by scrutinizing the grounds of the award and all related affidavits and exhibits.

I take the view that the plaintiff's application and affidavits is not only in breach of the salient provisions of rules of court, the provision AA 2005, but also must be dismissed *in limine* for prolixity.

(b) In addition the complaint of the plaintiff plainly falls within the scope and jurisdiction of the arbitrator. The AA 2005 does not permit the court to intervene in matters which does not strictly fall within any of sub-section of s. 37. In consequence general allegations are not sufficient as it is mandatory requirement for the need of proof. For example, in this case the plaintiff alleges breach of rules of natural justice without setting out the prejudice suffered and proof thereof. Further, almost all rules of natural justice are now incorporated in the Federal Constitution, relevant Acts, as well as rules of court etc. Thus, the complaint now must in almost all cases relate to one of the breaches of the Constitution, or any Act of Parliament, rules of court etc. General complaint of breach of natural justice *per se* in this time and era will stand as an embarrassing plea. Court does not ordinarily entertain the plea and has placed various strictures. I have dealt with this area of jurisprudence and the relevant case laws in *Bintang Merdu Sdn Bhd v. Tan Kau Tiah @ Tan Ching Hai & Anor & Another Cases* [2009] 1 LNS 621. The relevant part reads as follows:

In *Malloch v. Aberdeen Corporation* [1971] 1 A11 ER 1278, Lord Wilberforce asserted that a breach of procedure, whether called a failure of natural justice, or an essential

A administrative fault cannot give a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. In *R v. Secretary of State for Transport, ex parte Gwent County Council* [1978] 1 All ER 161, the Court of Appeal held that unless prejudice is established to have resulted in the procedural impropriety, the appellate court will not interfere in the decision. In *R v. Secretary of home Department, ex parte Mugha*l [1973] All ER 796, it was stated that the rules of natural justice should not be allowed to be exploited as a purely technical weapon to undo a decision which does not in reality cause substantial injustice. Further, the court asserted that the rules of natural justice must not be stretched too far.

(c) The plaintiff is also seeking relief pursuant to s. 42. Section 42 makes it mandatory for the question of law to be framed. In the instant case, the plaintiff has adopted the allegation and grounds relating to the relief they were attempting to claim under s. 37 and with some level of ingenuity repeats the issues as questions of law. The manner the issues are framed shows substantial level of prolixity and ought to be dismissed *in limine.*

(d) When relief under s. 42 is sought there is a duty and obligation to state the question of law arising from the award in a concise manner, and state the grounds on which the reference is sought; in addition, I will say, must state the facts leading to grounds, failing which the relief will not be granted. In the instant case, the requirement of s. 42 was not satisfied. (see *Tarapore and Co v. Cochin Shipyard Ltd Cochin* [1982] 25 SCC 680). The question of law framed *prima facie* must not also be in relation to matters the court is prohibited to interfere within the spirit and intent of AA 2005. I will go to the extent of saying that when questions of law are framed the applicant must also clearly explain in the affidavit that the said question is permissible pursuant to AA 2005. This will ensure court's time is not unnecessarily wasted by the necessity of going into the merits of the application when the applicant in the first instance cannot pass the threshold test.

(e) In the instant case, I have gone through the arbitral award in detail and taken note of the argument relating to the interim award. I find no reason to grant the relief claimed by the plaintiff and much of the defendant's submission has merits and it will serve no useful purpose to repeat the same (see s. 36 of AA 2005).

[24] In addition I will say procedural skirmishes before the arbitrator cannot be allowed to prevail in the pretext of natural justice or public policy consideration when in essence the matters complained of falls within the jurisdiction of the arbitrator. It is a strict test and court is not allowed to ordinarily meddle with the arbitration award under AA 2005 as was done in the past, based on English decisions, which often displayed distrust on arbitration proceedings. The aim of AA 2005 is partly to narrow down this anathema in the strictest manner and form. Courts are duty bound to give effect to the emergence of this jurisprudence which has an international mandate see (AA 2005; UNCITRAL Rules).

[25] For reasons stated above, I dismiss the plaintiff's application with costs. The costs are fixed in the sum of RM15,000 to be paid by the plaintiff to the defendant.

[26] I hereby order so.

R3-24-48-2009

[27] The respondent/claimant/defendant (dinding) in the above suit had filed an application Originating Summons R3-24-48-2009 to enter judgment in terms of the award as set out in s. 38 of AA 2005.

[28] It must be noted that the court is not obliged to enter judgment if the party opposing the application can prove that one of the criteria set out in any of the sub-section of s. 39 is satisfied. In the instant case, the plaintiff/respondent/Taman strenuously objects to the application in reliance of s. 39(1)(a)(iv) and (v) and s. 39(1)(b)(ii) of AA 2005. The said s. 39 reads as follows:

> 39. Grounds for refusing recognition or enforcement.
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> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:
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> (a) where that party provides to the High Court proof that-
>
> (i) a party to the arbitration agreement was under any incapacity;

A

(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
B 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;
C

(v) subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral
D 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

E

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

F (b) if 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

G

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

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to
H in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

I

[29] In essence, Taman says (i) the final award deals with a dispute not contemplated by or not falling within the term of submission to arbitration; and (ii) the final award is in conflict with the public policy of Malaysia. A

[30] And complain that in the instant case, the arbitrator exceeded his jurisdiction by deciding on issues, which were not referred to the arbitrator by the parties, ie, matters concerning draft statement of final accounts and the release of the moiety of the retention sums under the contract. B

[31] And says a plain reading of the final award will reveal that the arbitrator had expressly admitted that he was deciding on a matter not specifically pleaded by the parties. And gives some extract of the arbitrator's award which reads as follows: C

> (i) except for references to the Final Certificate and to the Retention Sum during the arbitration proceedings the declaration of a Statement of Final Accounts, Final Certificate and the release of retention sum had not been specifically asked and as such I lack the jurisdiction to make such an award; D E
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> (ii) I am concerned a particular unresolved matter that had surfaced during the course of this arbitration, that is the lack of a Final Certificate and the release of the final moiety of the retention sum but not specifically pleaded I had heard sufficient evidence and sighted sufficient documents to be of the opinion that all the ingredients for the final certificate to be issued is in place; a draft final accounts, disputed only by the claimant with respect only to the LAD amount, Certificate of Practical Completion and evidence that the defects within the Defects Liability Period had been attended to; and F G
>
> (iii) By granting this relief not specifically pleaded, I am of the opinion; all disputes arising out of this contract will truly be addressed and settled.

[32] And concludes the above are cogent evidence of the arbitrator exceeding his jurisdiction. H

[33] I have given much thought to Taman's argument even at the earlier stage even though I did not adumbrate in the above judgment as I have to do now in relation to this application and I do not find much merit in the submission. My reasons *inter alia* are as follows: I

(a) it is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters. If the award is made out of jurisdiction it is subject to judicial scrutiny and it may not be registered as judgment pursuant to s. 39. To succeed pursuant to s. 39 of AA 2005 it must be proved that the arbitrator acted outside his jurisdiction. In the instant case, the facts will clearly show the issue dealt by the arbitrator was essentially within the subject matter of the arbitration agreement. In essence, if it is covered by the subject matter of arbitration, a complaint that it is not part of, the pleaded case carries little weight. It is *inter alia* the language of the arbitration agreement as well as the conduct of the parties which determines whether the arbitrator has jurisdiction to deal with the dispute. The learned author Malhotra (2006) at p. 632 makes the following observations:

> the term jurisdiction has been comprehensively defined in Stroud's Judicial Dictionary in the following words:
>
> > 'Jurisdiction' is a dignity which a man hath by power to do justice in causes of complaint made before him (Termes de la Ley). In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue or (ii) to the persons between whom the issue is joined or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense, it embrace also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances.

(b) in addition, s. 39(1)(a)(iv) and (v) must be read in the right perspective and cases which have not dealt with such provisions do not stand as binding authority on the subject matter as the primary object of the AA 2005 is to allow minimum interference of the court. In essence, if the issue is one which originates

from the underlying contract the arbitrator is vested with jurisdiction, pleadings *per se* is not the determining factor pursuant to s. 39(1)(a)(iv) and (v).

(c) Taman says the arbitrator's breach of natural justice and attitude of biasness warrants the court not to register the award as judgment on the grounds of public policy in reliance of s. 39(1)(b)(ii). And relies on pre-2005 cases which do not deal with AA 2005. I will say AA 2005 makes it compulsory for courts to respect the decision of arbitrators and only minimum intervention is allowed. In this respect, it must not be forgotten that it is the parties who selected the arbitrator and s. 36 of AA 2005 makes the award final, binding and conclusive. And real proof is required to be shown before the court can meddle with the award. In the past, it was easily meddled. No more under AA 2005, without proof.

(d) on the facts of the instant case, there is much merit in Dinding's submission that the award does not deal with the dispute not contemplated or not falling within the terms of the submission to the arbitration and the award also does not contain decision on matter beyond the scope of the submission to the arbitration.

[34] In this case, the learned counsel for the plaintiff had emphatically stated as follows:

> this Honourable Court must bear in mind that the Act is still in its infancy and any decision made by this Honourable Court will set a precedent for the future cases of commercial arbitration in Malaysia. There is to date no reported Malaysian decision on the application of section 37 of the Act. In this regard, it is imperative that the Court exercises its discretion judiciously taking into account the object and purpose of the act and the well established principles of law relating to arbitration widely accepted in all modern jurisdictions which have adopted the UNCITRAL Model Law.

[35] I have taken full cognizance of the importance of this decision. I will say parties are always at liberty not to have arbitration clause in their agreement if they have no faith in arbitration. If they chose to do so, they are bound to accept the decision of the arbitrator as final, binding and conclusive. This is what has been emphasized by AA 2005 which court must take note and give full effect to make arbitration as one-stop adjudicating

process and to arrest the "find fault mission of the arbitrator" through a judicial process. Lord Mustill in the 1st edition of Malhotra's book on *Arbitration* has this to say:

> It is however equally important that the balance is maintained by a recognition by the courts that just as arbitration exists only to serve the interests of the community, so also their own powers are conferred only to support, not supplant, the extra-judicial process which the parties have chosen to adopt. Anyone who has been faced in judicial capacity with a decision which seems wrong can sympathise with the impulse to decide the issues again, this time correctly; yet in the field of arbitration it is an impulse which must at all costs be resisted, except in those instances where the legislature has explicitly created right of appeal. The parties have chosen arbitration, and (directly or indirectly) the arbitrator, as the medium for resolving their disputes. The court must respect this choice, and if the outcome proves unsatisfactory this is the price which must be paid, however painful it may be for the court to stand by and do nothing.
>
> Precisely the same considerations apply to procedures in the arbitration. The parties have chosen to arbitrate, not litigate. By doing so they have selected the procedures laid down by the relevant legislation or institutional rules. If there are none, then they have deliberately entrusted the choice of procedures to the arbitrator himself. This is another choice which the court must respect. The judge may think, and think rightly, that the choice was unwise, that a different procedure would better have suited the disputed in hand. Or he may believe, again rightly, that what the arbitrator did was inefficient or even in a degree unjust. But his or her task is not to re-try the case, but simply to ensure that the method of dispute resolution on which the parties agreed is what they have in the event received. Moreover, only where the departure from the agreed method is of a degree which involves real injustice is the court entitled to intervene, and even then the intervention must be so crafted as to cause the minimum interference with the forward momentum of the process.

[36] *En passant*, I will say it will be in the interest of the parties to ensure that sole arbitrator are not appointed to adjudicate the dispute as a wrong choice may create hardship in light of strict provisions for intervention of court set out in AA 2005. To eliminate any form of injustice which may arise by the appointment of a single arbitrator, parties can agree to the appointment of an umpire and nominate one junior arbitrator each, to sit, to provide

the required check and balance, rather than appointing one single arbitrator and thereafter cry foul which AA 2005 does not entertain. Appointment of junior arbitrators or its like may be prudent as well as costs effective to promote just, effective and economical arbitration mechanism.

[37] For reasons stated above, except para 22, I allow Dinding's Construction application under s. 38 of AA 2005 with costs. The costs is fixed in the sum of RM5,000 to be paid by Taman, to Dindings.

[38] I hereby order so.