Protecting Arbitrator Discretion in Decision-Making: A Malaysian Take on Due Process Paranoia

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Due process paranoia remains a live issue in international arbitration. Arbitrators can feel under pressure to fulfil their duties to give parties an opportunity to present their case whilst also ensuring that they produce an enforceable arbitral award. This concern to be seen to have delivered due process can arguably be increased when coupled with added levels of judicial scrutiny in certain jurisdictions, potentially resulting in arbitrators exercising undue caution in their treatment of parties' arguments in the arbitration and in the final award.

The Malaysian High Court had a recent opportunity to test and dispel these fears in *Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch* ("Allianz"),[fn]*Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch*, Originating Summons No. WA-24NCC(ARB)-13-03/2018.[/fn] where it set a useful precedent for arbitrator discretion in relation to their deliberation process and the reasoning contained within their award. More significantly, *Allianz* provides an authoritative statement protecting the decision-making latitudes of Malaysian-based tribunals in the future, which further highlights Malaysia's alignment with the growing pro-arbitration trends in Southeast Asia.

Background Facts

Allianz concerned an application to set aside a majority arbitration award under Section 37(2)(b)(ii) of the Malaysian Arbitration Act 2005 ("MAA") for "*a breach of the rules of natural justice* [occurring] *in connection with the making of the award*" – a due process infraction.

Section 37 MAA replicates the setting aside grounds of Article 34 of the UNCITRAL Model Law but with a slight modification. The MAA, similar to the Singapore Arbitration Act, specifies non-exhaustive instances of when an arbitration award contravenes Malaysian public policy. One of these instances is where there has been a breach of the rules of natural justice.

The impugned majority award arose from a dispute concerning the subsistence and interpretation of two reinsurance contracts. The plaintiff was an insurer providing insurance cover for motor vehicles under an extended warranty programme. The defendant provided long-term reinsurance cover for the extended warranty programme that was recorded by two "treaty" arrangements between the two parties.

Both agreements contained express provisions on reinsurance coverage periods, which deemed a mutual intent to terminate the policies at their next anniversary dates through the automatic issuance of provisional notices of cancellation ("PNOC"), unless otherwise advised. A dispute arose regarding the actual meaning of the PNOC regime; whether both agreements were renewed; and whether there existed a duty of utmost good faith between the parties. This dispute subsequently went to arbitration seated in Malaysia before a three-member tribunal.

The majority of the tribunal dismissed the claim and issued a majority award in favour of the defendant. A separate dissenting award was issued by the remaining arbitrator. Dissatisfied with the majority award, the plaintiff applied to the Malaysian High Court to set it aside under, amongst others, Section 37(2)(b)(ii) MAA complaining that the tribunal's majority had breached natural justice requirements.

In its challenge, the plaintiff contended that the majority award failed adequately to address the issue and submissions on the duty of utmost good faith, which it

viewed as a fundamental issue to be determined by the tribunal. To substantiate this alleged failure, the plaintiff emphasised that the tribunal's majority had only made reference to the utmost good faith principles in four paragraphs of the majority award. The defendant denied that there had been any such alleged infraction by the tribunal.

High Court Decision

The Malaysian High Court dismissed the plaintiff's due process challenge against the majority award in its entirety, emphasising that natural justice does not entitle a party to receive an arbitrator's response to all submissions and arguments presented. It was sufficient that the parties were given a right to be heard on these matters.

The arbitrators were not bound to explain their disagreement with the plaintiff's position regarding the existence of an utmost good faith duty beyond the four paragraphs in the majority award. That they did not do so could not be an immediate basis to suggest a breach of natural justice and due process.

Affirming Arbitrator Discretion in Decision-Making

The court's finding gives significant comfort to Malaysian-seated tribunals. It underscores the latitude afforded to arbitrators under Malaysian law – aligned with international arbitral best practices – in determining what issues and arguments are essential in order to write the arbitration award. When identifying what is "essential", arbitrators are entitled to view that a reference can be disposed of without further consideration of certain issues.

Where an arbitrator does address an argument, *Allianz* makes clear that the arbitrator cannot legitimately be expected to "*religiously follow the stance or any specific arguments presented by one party or the other*" (see also *Intraline Resources Sdn Bhd v Exxonmobil Exploration and Production Malaysia Inc* [2017] MLJU 1299 at [88]). The tribunal has discretion to reformulate and refashion the way in which different arguments and concepts have been consolidated, and to make its own value judgements and conclusions between the range of contentions

made before it.

Although not raised in *Allianz*, the regional practice that issues need not be addressed expressly in an award would likely have found favour with the Malaysian High Court. Arbitrators can implicitly resolve issues, particularly those which outcomes flowed from the conclusion of a specific logically prior issue. In such event, the arbitrator could dispense with delving into the merits of the arguments and evidence for the former, making the decision-making process more efficient (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [72]-[74]).

Malaysia's Arbitration-Friendliness

Overall, *Allianz* demonstrates Malaysia's commitment to upholding arbitral awards. This is reflected in the Malaysian High Court's repeated emphasis that Section 37 MAA is not an appellate provision. Where invoked, and not just in cases concerning Section 37(2)(b)(ii) MAA, Malaysian courts must not sit in appeal over the arbitrator's decisions by re-examining and re-assessing the materials brought in the arbitration (see also *Antara Steel Mills Sdn Bhd v CIMB Insurance Brokers Sdn Bhd* [2015] 5 CLJ 1018).

This approach is particularly reassuring where a setting aside application is premised on an alleged breach of public policy, which could be an inherently amorphous assessment. *Allianz* makes clear that, in such cases, the Malaysian courts adopt a similar approach to that taken by other Model Law jurisdictions (see also *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 at [41]-[58]; *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608).

While the ultimate outcomes of recent public policy-based challenges before Malaysian courts have been very consistent, the way in which the Malaysian courts have interpreted the concept of public policy or phrased the test under Malaysian law has been far less consistent. The High Court in *Allianz* provided helpful guidance in summarising the current Malaysian approach to public policy-based challenges under the MAA:

- The concept of public policy, and breaches of it, have to be assessed narrowly and restrictively. This accords with the peremptory principle that

the court's curial intervention should be sparingly used, in keeping with Section 8 MAA (Article 5 UNICTRAL Model Law).

- The threshold to be met for a public policy-based challenge is a high one. By its nature, "*it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach*".
- The mere fact that an arbitration award is irrational or unreasonable will not justify its setting aside. When considering a public policy-based challenge, the concept of public policy must be one taken in the "*higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involved clear injury to public good or the integrity of the court's process and powers will thereby be abused*".

Malaysian courts should be slow in accepting arguments that a breach of public policy, including where the rules of natural justice are involved, occurred where this results in an arbitration award being set aside.

The lengthy judicial consideration of the Malaysian setting aside regime in *Allianz* is important, as it provides an encouraging restatement of Malaysia's arbitration-friendly philosophy in public policy-based challenges, particularly those involving elements of due process. Tribunals in arbitrations governed by Malaysian law can therefore rest with a degree of assurance – and perhaps discard any due process paranoia – when exercising their discretion in the deliberation of issues and their drafting of arbitration awards in making their arbitrations more efficient.