

# The Emerging Role of Pleadings in Determining Arbitrators' Jurisdiction

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**Abstract**— Arbitration was borne out of desire of parties to settle their dispute expeditiously, privately and devoid of the adversarial publicity and delays inherent in litigation. The benefits of settling disputes by means of arbitration is being eroded in recent times due to protracted litigation by parties that had hitherto embraced arbitration as they often resort to litigation, having failed to resolve their dispute via arbitration. One of the issues that is often contended by the parties has been that arbitrator exceeded his jurisdiction because award dealt with pleadings (matters) not covered by the submission to arbitration. The objective of the research therefore, is to ascertain the extent that pleadings delineate jurisdiction of the arbitrator. Cases on attacks on the award of the arbitrator with respect to jurisdiction and pleadings formed the focus of the study. The research is legalistic and entails the adoption of case-law based approach of research methodology. Cases were prioritized in their analysis and preference given to international arbitration cases, particularly case laws reported in The United Nations Commission on International Trade Law on Arbitration (UNCITRAL) Digest of Cases Laws, and Lexis Malaysia law report. The study revealed that arbitrator's jurisdiction is not strictly within pleadings.

**Keyword**— Arbitration; Arbitration Agreement; Award; Jurisdiction; Pleadings; Setting-aside award

## 1 INTRODUCTION

Arbitration is a process whereby the parties to a dispute agree to settle the dispute by an independent third party and to be bound by the decision he makes known as award.

The award of the arbitrator is usually prepared based on the submissions of parties in a process known as pleadings. Pleadings refer to a statement of facts which sets the basis of the plaintiff's claim of his or her action against the defendant. It is also used to refer to the statement of fact setting out the defence against the claims and any reply thereafter.

Pleadings provide the arbitrator with the jurisdiction to arbitrate on disputes referred to him. It is the only source of the arbitrator's powers that usually provides specific guide and direction to the arbitrator in all arbitral proceedings. Pleadings are also the only source of the arbitrator's jurisdiction that enables him to correctly delineate issues in all arbitral proceedings, especially in complex and complicated disputes.

Consequently, pleadings have accounted for the numerous attacks by aggrieved parties who usually contend that the arbitrator was unfair or that they were denied equity and natural justice because the arbitrator either did not take into cognizance all the issues pleaded by them or that he deliberately decided his award on issues that were not pleaded.

The jurisdiction of the arbitrator refers to his authority, mandate or competence [1]. It means the power of the arbitrator to arbitrate on disputes referred to him by parties in a legally binding arbitration agreement.

Despite the plethora of case laws and courts decisions on controversies pertaining to the jurisdiction of the arbitrator with regard to pleadings, there appears to be no

end to disputes and controversial court decisions and pronouncements with regard to attacks on arbitration awards and jurisdictional powers of the arbitrator by parties to arbitration agreement.

Therefore, this study has set out to find the extent that pleadings define the jurisdiction of the arbitrator against the backdrop of other sources that confer jurisdictional powers on the arbitrator.

### 1.2 Objective of the Research

To ascertain the conditions precedent for a recourse to a court against an arbitral award because it dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration can be upheld by Courts.

### 1.3 Research Questions

The question that this study seeks to proffer answer is; why are Courts reluctant to uphold an attack to set aside arbitral award on the grounds that the award dealt with a dispute not contemplated or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

### 1.4 Scope and Limitation of the Study

The study is confined to the study of the practice of arbitration proceedings with particular reference to pleadings of parties in dispute and how their pleadings delineate and define the roles and functions of the arbitrator globally.

The research is legalistic and will entail the adoption of case-law based approach. Cases will be prioritized in their analysis and preference given to international

arbitration cases, particularly case laws reported in UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration. Other sources of case laws are law report from states, regional arbitration institutions and Lexis Nexis group.

**1.5 Significance of Study**

This study has become imperative in order to cut down on arbitration time, cost and strain on business relationships by contending parties who revert automatically to litigation because the award dealt with matters not contemplated by or not falling within the terms of the submission to arbitration,

**2. RESEARCH DESIGN**

Legal case laws emanating from Courts judgments on Article 34(2)(iii) of *UNCITRAL Model Law on International Commercial Arbitration* domiciled in states and international arbitration rules and judgements of courts globally will be selected and analyzed to ascertain the legal doctrines applied in the decisions of the Courts.

**3. RESEARCH METHODOLOGY**

The legal doctrinal research methodology include the following:

- A Literature Review
- Historical Analysis of court judgements
- Content Analysis: Reading judgments, legislation and policy documents

**3.1. Literature review**

The submissions of parties in dispute define the strict and exact application of the powers of the arbitrator in respect of the issues pleaded [1]. The arbitrator is generally required by the rules of evidence to adhere to the pleadings of parties in the preparation of his award. Jurisdiction is the lifeblood of all legal proceedings [2]. Where a court or tribunal lacks jurisdiction the entire proceedings would be a nullity no matter how well

conducted. The legal principle that “you cannot put something on nothing and expect it to stand” remains trite and applicable to arbitral proceedings.[3]

**3.2 Data collection**

In order to achieve the objective of the research, data was sourced from the Malaysia Law Journal (MLJ) via the Lexis Nexis website. Extensive reference to the UNCITRAL case report was also made to obtain judgments of decided cases on arbitrator’s jurisdiction and pleadings. Secondary sources of data such as articles, journals, textbooks and other sources and related internet platforms were consulted. The number of cases collected, year and sittings of the cases are shown in the table below:

Table 1: Number of cases collected and sittings of the cases

Sittings of cases	Number of cases	Year of cases
New Zealand	1	1999
Mexico	1	2001
Singapore	2	2012
Zimbabwe	1	2013
Malaysia	1	2013
Ireland	1	2015
South Wales	1	2015
United States of America	3	2012, 2015

**3.3 Data analysis**

Law reports on arbitration proceedings in High Courts and Appeal Courts were collected and thoroughly studied and filtered to ensure that the cases analyzed were relevant to the issues of delineations of the arbitrators’ jurisdiction. Particular attention was given to the analysis and understanding of the legal principles and rules underlying the arbitrator’s awards and courts’ decisions in instances where cognizance of submissions of parties where taken by arbitrators and courts in arriving at their awards and decisions respective

Table 2: Summary of analysis of Cases and Courts’ judgement on attack to set aside an arbitral award because it dealt with a dispute not contemplated or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration

Country	Case	Year	Facts of case	Decision of Courts
New Zealand	<i>Trustees of Rotoarai Forest Trust v. Attorney-General</i> [1999] 2 NZLR 452	1999	The plaintiff sought to set aside the award for breach of natural justice, alleging lack of opportunity to be heard.	The court dismissed the application to set aside the award and held that the plaintiff had enough opportunities to submit additional evidence and allegation, but decided not to do so.

Mexico	<i>Grupo Carce, S.A. de C.V v Pipetroniz, S.A. de Mexico</i> . Seventh Civil Collegiate Court of the First Circuit, RC-1542/2001, 6 <sup>th</sup> December 2001, Original in Spanish (Unpublished)	2001	Appeal against a decision of a lower court that overturned the setting aside of an arbitral award on pleadings related issues.	Held: an action to set aside an arbitral award was to be considered as a procedure to ascertain the existence and validity of the arbitral award itself, and not as a recourse against the award.
Singapore	<i>CRW Joint Operation v PT Perusahaan Gas Negara</i> [2011] 4 SLR 305, 319	2011	The appellant approached the high court to overturn the decision of a high court which had validated an award of arbitration tribunal because it had dealt with a dispute not pleaded	Held: Court is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it.
Singapore	<i>PT Prima International Development v Kempinski Hotels SA</i> [2012] 4 SLR 98	2012	Appeal against the verdict of a high court which had set aside an arbitration award because arbitrator made reference to an unpleaded issue in the preparation of the award.	Held: High court judge interpreted Art 34(2)(a)(iii) of the UNCITRAL model law narrowly
Singapore	<i>Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd</i> [2012] 4 HKLRD 569	2012	An action for Appeal court to set aside arbitral award because the appellant was not given proper notice of the arbitral proceedings and was also unable to present his case and the arbitral proceedings were contrary to the arbitration agreement	The Court held that it may refuse to set aside an award if a violation of the Article 34 UNCITRAL Model Law had no effect on the outcome of the arbitration
Malaysia	<i>Perwira Bintang Holdings Sdn Bhd v Kerajaan Malaysia</i> [2013] MLJU 1458	2013	Arbitrator demanded to know the quantity of excavation in rock and contractor petitioned the court because the arbitrator had considered an unpleaded issue in preparing his award.	Held: Award set aside because it was manifestly unlawful and unconscionable to subsist and the conclusions reached by the Arbitrator are patently and obviously illogical and perverse.
Ireland	<i>Delargy v Hickey</i> [2015] IEHC 436	2015	An application to set aside an award because arbitrator dealt with issues not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.	Held: The grounds to set aside and/or resist enforcement under Article 34 and 36 of the Model Law respectively are discretionary in nature.
New South Wales	<i>Colin Joss &amp; Co Pty Ltd v Cube Furniture Pty Ltd</i> [2015] NSWSC 735	2015	Joss had petitioned the court that arbitrator exceeded his authority (jurisdiction) and had not expressed a discernible methodology of reasoning, and had given reasons which were illogical, incoherent, inadequate, inconsistent, and ambiguous and had acted	Held: The applicant must demonstrate real unfairness or real practical injustice on how the arbitration was conducted or resolved by reference to established principles of natural justice or procedural fairness.

			unreasonably and irrationally.	
United States of America	<i>Private Assured Inc v Accessdata Corporation Limited</i> [2015] US Dist. LEXIS 53994	2015	AccessData approached the court to vacate the Arbitrator's award because arbitrator made an award on a claim beyond his contractual authority as the issues were not pleaded.	The Court held that despite any deficiencies in the Arbitrator's opinion about whether the Agreement was unambiguous, the court must uphold the Award because the Arbitrator arguably "interpreted the parties' contract."
Zimbabwe	<i>Gold Driven Inv. (Pot) Ltd v TelOne (Pot) Ltd &amp; Another</i> [2013] ZWSC 9	2013	It is an appeal against the judgment of the High Court dismissing an application for review of an arbitral award which the applicant argued that the award ended up dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration as envisaged among other issues.	Held: Award did not constitutes a palpable inequity in the proportions envisaged and magnitude described by the applicant

**4. FINDINGS**

Findings from the research revealed that the jurisdiction of an arbitrator is determined by matrix of factors and peculiarity of the dispute. It is the resultant effect of the interplay of these matrix of factors that determine his jurisdiction and the extent that pleadings affect his jurisdiction as well.

1. The courts in recent times have adopted very strong pro-arbitration stance and principle of minimal court intervention in arbitration and can only intervene only in circumstances where award is manifestly unlawful, unconscionable and the conclusions reached by the Arbitrator are patently and obviously illogical and perverse.
2. An award must be serious, even egregious such that a party has been denied due process before a violation of Article 34(2) of the Model Law
3. The Court may refuse to set aside an award if a violation of the Article had no effect on the outcome of the arbitration.

**5. CONCLUSION**

The study revealed that a party that “attacks” arbitration award to set it aside solely because the award dealt with matters not covered by the submission to arbitration has an arduous task of convincing the Courts to uphold such attack.

The Courts have also held that the provisions in arbitration laws that conferred powers on the Courts to set aside arbitration awards must be treated with minimal interference and not construed narrowly.

**6. RECOMMENDATION**

The researcher recommends that parties to arbitral agreement should not have recourse to set aside an arbitrator’s award solely predicated on jurisdiction of the arbitrator with regard to pleadings,

**ACKNOWLEDGMENT**

The inputs of academic staff saddled with responsibilities of anchoring the Construction Contract Management programme of Universiti Teknologi Malaysia (UTM) are appreciated.

**REFERENCES**

- [1] Chow Kok Fong, “An outline of the law and practice of the construction contract claims”. 1<sup>st</sup> Edition (Longman Singapore publishers, 1988), pp 422
- [2] Sundra Rajoo, “Law, Practice and Procedure for Arbitration”. 1<sup>st</sup> Edition. (LexisNexis, 2003), pp 391 [6] Sundra Rajoo, Dato’ WSW Davidson and Ir. Harbans Singh KS. “The PAM 2006 Standard Form of Building Contract”. 1<sup>st</sup> Edition (LexisNexis Malaysia Sdn Bhd), pp 837
- [3] B. Osadare, “Jurisdiction and Powers of Arbitral Who decides”, March 21, 2016 [Online]. Available: <https://www.scribd.com/document/305482811/Jurisdiction-and-Powers-of-Arbitral-Award-Who-Decides>. [Accessed: July 15, 2015].
- [4] Lord Denning M.R. in *McFoy v. UAC LTD.* [1961] 3 WL

