[2001] 2 MLJ xvii - FUNCTION, POWERS AND DUTIES OF THE ARBITRAL TRIBUNAL

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Introduction

The first step in any arbitration proceeding is to notify the arbitrator that he or she has been appointed. Once validly appointed, the arbitrator then enters into a tripartite relationship with the parties. This relationship, in addition to conferring on the arbitrator various powers and rights, imposes upon him or her certain duties.

Function of an arbitrator

Arbitration is a reference of a dispute for hearing in a judicial manner. The function of an arbitrator is to resolve in a judicial manner every matter (dispute) that has been referred to him or her by the parties.

In carrying out this function, the arbitrator is required:

(a) To act fairly between the parties, avoid conscious and, so far as possible, unconscious bias;
(b) Not only to be impartial but be seen to be impartial;
(c) To pay close attention to any evidence or arguments presented by the parties and be clearly seen to be doing so; and
(d) To keep the parties fully advised as to what he or she is doing and proposes to do.

Duties of an arbitrator

The word 'duties' denote rules that an arbitrator ought to follow. An arbitrator has a duty to:

(a) Act judicially;
(b) Act fairly and in accordance with natural justice, that is, to be unbiased and to give each party a fair opportunity to present his case, to know the opposing case and to meet the opposing case;
(c) Act within the terms of his or her appointment;
(d) Act efficiently; and
(e) Give certainty and finality to the process.

The arbitrator is the master of the proceedings, subject to any rules that apply and to any joint directions from the parties. In general terms, the arbitrator can conduct the proceedings in any way he or she likes, provided each party is given a proper and equal opportunity to present their case. He or she must abide by the principles of natural justice.

The arbitrator has a duty to proceed with due diligence and reasonable expedition in making his award. Section 14(1) of the Arbitration Act 1952 (Revised 1972) provides that unless there is an express intention in the arbitration agreement, an award may be made at any time. However, under s 14(3), the court may remove an arbitrator who fails to use all reasonable dispatch in entering on, proceeding with an arbitration and making an award. The arbitrator who is so removed is not entitled to receive any remuneration in respect of his services.

Distinction between duties, powers and jurisdiction

The duties of an arbitrator are the minimum that he must do himself and the powers of an arbitrator are the maximum that he can compel the parties to do.

The powers of the arbitrator are the means that he possesses to ensure that when he exercises his discretion in a particular way, the parties will comply with his directions. However, in many instances, the arbitrator has powers that he is under no duty to exercise. For example, he can order discovery of documents, but it does not follow that he must do so.

The jurisdiction of the arbitrator, that is, the sphere within which his activity may take place, depends essentially upon the agreement of the parties, subject only to the substantive law which, in the case of disputes arising from a contract, will generally be the law of the contract. The general rule is that all matters in dispute involving personal property, real property or a civil wrong can be referred to arbitration. The arbitrator cannot deal with matters that are contrary to public policy, or deal with a question of criminal liability.

Sources of powers

The powers of an arbitrator are derived from three sources, namely:

(a) Statute law;
(b) Common law; and
(c) Private law (that is, the arbitration agreement, any specific contractual provisions and specific rules).

Nature of powers

Derived from statute

(a) Sections 13(1), (2) and (3) of the Arbitration Act 1952 (Revised 1972) (Conduct of proceedings, witnesses etc)

These subsections confer miscellaneous powers on the arbitrator, unless the arbitration agreement contains a contrary intention. Although set out at some length, these in summary amount to the fact that the arbitrator may take evidence on oath or affirmation, the parties and those claiming through them, unless entitled to object on legal grounds, must give evidence and produce all documents within their possession or power and they must also do whatever else is required of them by the arbitrator.

(b) Section 15 of the Arbitration Act 1952 (Revised 1972) (Interim awards)
Every arbitration agreement will be deemed to contain a provision that an arbitrator may, if he thinks fit, make an interim award unless a contrary intention is expressed in the agreement.

(c) Section 16 of the Arbitration Act 1952 (Revised 1972) (Specific performance)
Every arbitration agreement shall be deemed to contain a provision whereby the arbitrator may order specific performance of a contract other than a contract relating to land or any interest in land, unless a contrary intention is expressed in the agreement.

(d) Section 18 of the Arbitration Act 1952 (Revised 1972) (Power to correct slips)
The arbitrator shall have power to correct in his award any clerical mistake or error arising from an accidental slip or omission, unless contrary intention is expressed in the arbitration agreement.

(e) Section 19(1) of the Arbitration Act 1952 (Revised 1972) (Power to award costs)
The arbitrator has the discretion and power to award costs, that is, costs of the reference and of the award. The general principle is that 'costs follow the event', that is, the losing party pays the costs. The arbitrator must exercise his discretion judicially and according to settled principles, but the successful party should not be deprived of his costs unless there are very cogent reasons for doing so. The arbitrator also has the discretionary power to tax (that is, settle the amount payable by one party to the other) the costs himself.

(f) Section 21 of the Arbitration Act 1952 (Revised 1972) (Power to award interest)
Every arbitration agreement shall be deemed to contain a provision whereby the arbitrator shall have the discretionary power to award simple interest restricted to the situation described in the section.

Derived from common law

It is sometimes asserted that the arbitrator has procedural powers derived from common law analogous to those of a judge. Mustill & Boyd states in The Law and Practice of Commercial Arbitration in England [1] that this proposition is misconceived, as a voluntary arbitration is totally independent of the court. The court has certain supervisory powers over the reference and the award. However, these are exercised from outside the reference, whereas the arbitrator's own powers are exercised within the framework of the reference. Those powers are derived from an entirely difference source from that of the judge. The position of the arbitrator is therefore different from that of the court. Therefore, the arbitration agreement cannot be construed as conferring upon the arbitrator the same or similar powers to those of a judge.

However, there is an assumption, subject to three limitations, that an arbitrator will have such powers as are necessary for the discharge of his obligations. The three limitations are:

(i) No power to infringe the rules of public policy.
The parties themselves by the arbitration agreement cannot confer the arbitrator powers, the exercise of which would be contrary to public policy.

(ii) No jurisdiction over third parties.
Since the powers are created by the agreement of the parties, they cannot be exercised against persons who did not take part in that agreement.

(iii) No transfer of rights reserved by the courts.
There are certain powers that the court reserves for itself (for example, injunctive reliefs), and that the parties cannot confer even by express agreement.

In summary, the powers of the arbitrator as laid down by case law include the following:

(a) Power to order inspection of property that belonged to one party and subject matter of the arbitration; [2]

(b) Power to direct either party to make discovery of documents; [3]

(c) Power to direct a party to answer interrogatories on oath; [4]

(d) Power to allow amendments to statement of claim; [5]

(e) Power to depart from rules of evidence unless the rule of evidence violated is repugnant to natural justice and fairness; [6]

(f) Power to hasten the arbitration hearing in making interim awards.[7] The court held that the arbitrators were right and had not acted unfairly by refusing application for an adjournment and proceeding to grant the interim award.

(g) No power to make an interim award similar to a summary judgment; [8]

(h) No power to strike out claim for want of prosecution; [9]

(i) No power to engage independent legal counsel without prior consent of the parties; [10]

(j) No power to order two or more arbitrations to be consolidated; [11]

(k) No power to order a party to the arbitration to give security for costs; [12]

(l) Entitled to inquire into the issue as to whether he has jurisdiction in order to satisfy himself whether he ought to go on with the arbitration or not. [13]

Derived from arbitration agreements and rules

An important source of an arbitrator's powers can be the arbitration agreement. Raja Alzan Shah J in Cheng Keng Hong v Government of the Federation of Malaya [14] stated that 'an arbitrator derives his authority from the agreement between the parties and therefore his powers and duties are those that the parties have agreed to place upon him.'

Similarly, Anuar J in Hashim bin Majid v Param Cumaraswamy[15] explained that 'an arbitrator derives his authority from the agreement between the parties and that consequently, his powers and duties are those and only those that the parties have agreed to place upon him. Accordingly, if an arbitrator has no authority at the time of his original appointment to do any act, then he has no greater authority later to agree to waive the objection for that act having been done.' Thus, one has to look at the terms of the arbitration agreement to see whether or not an arbitrator has acted within the powers given to him or has exceeded the limits of such powers.

If an arbitration agreement does not specify any procedural requirements, and does not incorporate any body of rules laying down such requirements the arbitrator then has the power subject to statutory and common law restraints to conduct the proceedings as he sees fit provided that he gives each party a proper and equal opportunity to present his case and abides by the rules of natural justice. Lord Diplock in The Bremer Vulcan [16] expounded that the arbitrator is the master of the procedure to be followed in the arbitration.

The types of rules and procedure that are frequently incorporated within arbitration agreements are those published by the Regional Centre for Arbitration Kuala Lumpur, Pertubuhan Arkitek Malaysia (PAM), Institute of Engineers Malaysia (IEM), International Chamber of Commerce, Malaysian Institute of Arbitrators, etc.

Such rules or procedures usually give the arbitrator additional powers, although there is frequently the addition of the words 'subject to the extent that the law permits'. Some examples are as follows:

(i) Power to award security for arbitrator's costs;
(ii) Power to appoint expert(s);
(iii) Power to conduct such inquiries as may appear necessary or expedient;
(iv) Power to rule on his own jurisdiction; and
(v) Power to make summary awards.

Use of own expertise

An arbitrator is entitled to use his own expertise. Indeed it would be ridiculous if he could not or did not, especially if he has been appointed in the first instance because of his knowledge and experience.

There is one absolute condition. The arbitrator's knowledge must be treated as evidence given by himself; it must be subject to the same scrutiny by the parties and the same rules of evidence as any other. [17]

Inquisitorial and adversarial procedure and inquisitorial powers

The essential differences between inquisitorial and adversarial procedures are that under inquisitorial procedure the arbitrator can decide what evidence he wishes to hear, can initiate whether or not to receive expert evidence, and if so, to what extent. He questions the witness before they are questioned by the parties. There is not necessarily the equivalent of the discovery of documents.

The arbitrator's function under the inquisitorial procedure is to discover the truth, whereas under the adversarial system, his function is to decide the issues put to him on the basis of the evidence the parties place before him. In long and complex cases, the inquisitorial procedure is often more effective. For example, it is better for the arbitral tribunal to limit discovery in the first instance, to appoint its own experts and then to exercise control over the volume of discovery and the witnesses whom he wants to hear.

Under the adversarial procedure, an arbitrator is entitled to ask a relevant question he likes, when he likes. However, he must be prudent about interposing when the advocate is in the middle of a series of questions, clearly leading to a particular end. He must also always ensure that each party has an opportunity to comment or ask a supplementary question of a witness arising from the reply to his question. In the event, an arbitrator should be pro-active rather than sit 'po-faced' in front of the parties and their advocates.

There is much discussion on this subject, in particular as to what the precise position is and unfortunately, there is a tendency to discuss it on the basis that the procedure must be either totally adversarial or totally inquisitorial. If the parties agree to the arbitrator having inquisitorial powers, then there is no problem.

Watson J in Abu Dhabi Gas Liquefaction Ltd v Eastern Bechtel Corp [18] stated that the court could not impose conditions when appointing an arbitrator, and had no power to direct an arbitrator as to how he should thereafter conduct the arbitration.

Goft J in Carlisle Place Investment Ltd v Wimpey Construction (UK) Ltd [19] held that an arbitrator may limit the amount of evidence given provided he acts fairly. He stated that, generally speaking, the arbitrator is master of his own procedure.

On the other hand, this trend of authority, however, has not been fully in accord with the sentiments expressed by the court in Chilten v Saga Holidays plc. [20] In this case, an arbitration award published by a County Court Registrar was set aside on the ground that both the courts and arbitrator operate on an adversarial system and in absence of Rules of Court or agreement of the parties, it is fundamental that each party shall be entitled to tender its own evidence and to ask questions designed to test the accuracy of the other side's evidence.

Therefore, although the arbitrator has wide powers and a degree of discretion, it must be borne in mind that the parties have voluntarily entered into the arbitral process. There is a need for the arbitrator to administer the whole process (as far as is reasonable possible) to meet the convenience and wishes of everyone involved.

Conclusion

An arbitrator's powers are concluded when he becomes functus officio or when he is removed from office. 'Functus officio' literally means discharged from duty. In relation to arbitrators, the term is used to describe the position of an arbitrator once he has made his final award. At this point, his authority as an arbitrator has ended. He cannot rescind his award nor hear the case afresh.

Section 17 of the Arbitration Act 1952 (Revised 1972) provides, 'Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively'.

As usual, there are exceptions to this finality. These are as follows:

(a) After making a final award, the arbitrator can still be called upon to determine liability for the costs if he had not done so; [21]

(b) The arbitrator retains the power [22] to correct a clerical mistake or error in the award that arises from any accidental slip or omission, unless the arbitration agreement provides otherwise; and

(c) The court may on appeal remit the award for the arbitrator's reconsideration. [23]

Despite these exceptions, the important practical point is that an arbitrator has to take great care that he has in fact dealt with all the matters requiring to be dealt with by him before he issues his final award. When he has published it, he has effectively removed himself from the arena.

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1 (2nd Ed, 1989) at p 292.
2 see The Vasso [1983] 1 WLR 838.
3 see Kursell v Timber Operators & Contractors Ltd [1923] 2 KB 202.
4 see Kursell v Timber Operators & Contractors Ltd [1923] 2 KB 202.
5 see AK Construction Sdn Bhd v UKM [1991] 2 CU 1344.
6 see Jeuro Development Sdn Bhd v Teo Tech Huat (M) Sdn Bhd [1998] 6 MLJ 545.
7 see SL Sethia Liners Ltd v Naviagro Maritime Corporation (The Kostas Melas) [1981] 1 Lloyd's Rep 18.
8 see Modern Trading Ltd v Swale Ltd (1990) 24 Con LR 59.
9 see The Bremer Vulcan [1981] AC 909; The Hannah Blumenthal [1983] 1 AC 854; Allied Marine v Vale de Rio Navigacao [1985] 1 WLR 925; Food Corpn of India v Antelizo Shipping [1988] 2 All ER 513.

10 see Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 5 MLJ 137.

11 see Oxford Shipping Ltd v Nippon Yusen Kaisha [1984] 3 All ER 835.

12 see Re Unione Stearinerie Lanza and Wiener [1917] 2 KB 558.

13 see Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldvesitzer & Co [1953] 2 All ER 1039 at 1042 as per Devlin J, for example, qualification or disqualifications that might affect the validity of his appointment.

14 [1966] 2 MLJ 33.

15 [1993] 2 MLJ 20.

16 [1981] AC 909.

17 see Fox v Wellfair (1982) 19 BLR 52.

18 (1982) 21 BLR 117.

19 (1980) 15 BLR 109.

20 [1986] 1 All ER 841.

21 see s 19(4) of the Arbitration Act 1952 (Revised 1972).

22 see s 18 of the Arbitration Act 1952 (Revised 1972).

23 see s 23 of the Arbitration Act 1952 (Revised 1972).