

Arbitrators in Arbitration Proceedings: Bound by Precedent or Free to Decide?

Introduction

Recently, in **Datuk Bandar Kuala Lumpur v Sri Tinggi Sdn Bhd** [2025] MLJU 618, the High Court addressed the issue of whether an arbitrator is bound by the doctrine of *stare decisis*. The case arose from an application by Datuk Bandar Kuala Lumpur (“DBKL”) to set aside an arbitration award (“Award”) in Favor of Sri Tinggi Sdn Bhd (“STSB”). The court ultimately ruled that an arbitrator is indeed bound by *stare decisis*.

Case background

The dispute stemmed from a contract between DBKL, as the employer, and STSB, as the contractor, for the construction of a multi-level interchange at Jalan Ampang/Jalan Jelatek.

During arbitration proceedings, DBKL contended that clause 44 of the Conditions of Contract, which specified the period for claiming loss and expense, should be read in isolation. However, the arbitrator ruled that clause 44 must be interpreted alongside clause 43.

DBKL’s counsel referenced case law to advance the position that failure to comply with clause 44 was fatal, making STSB ineligible for its claim. The arbitrator, however, dismissed Malaysian case law on the interpretation of such clauses, asserting that:

1. The legal principle of *stare decisis* is only applicable to court proceedings, not arbitration.
2. Most case law submitted were from court decisions, not arbitration cases, and therefore are not strictly applicable.

DBKL sought to set aside the Award, arguing that the arbitrator had flagrantly disregarded established Malaysian law and substituted his own legal theories without allowing parties to address them.

Arbitration Update

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High Court decision

The High Court held that the arbitrator's decision not to be bound by the doctrine of *stare decisis* goes wholly against the law of the land. According to the High Court, the arbitrator had committed a denial of natural justice, conflicting with Malaysian public policy by wrongly disregarding and dismissing the doctrine of *stare decisis* merely due to his own belief that he was not bound by it.

In arriving to this decision, the High Court referred to, amongst others, the following decisions:

- (a) The Federal Court decision in **Kerajaan Malaysia v Tay Chai Huat** [2012] 3 MLJ 149 which emphasised the importance of adhering to the doctrine of *stare decisis* to maintain a stable legal system and ensure consistency and predictability in the law;
- (b) The decision in **UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd** [2020] 1 LNS 877 which applied the doctrine of *stare decisis* to arbitration proceedings and confirmed that arbitrators as "*inferior tribunals*" must follow binding precedent unless acting as *amiable compositeur* (which was not the case here); and
- (c) The case of **Ipoh Tower Sdn Bhd v Taki Engineering Sdn Bhd** [2016] MLJU 1509 here the court held that the arbitrator was bound to follow Malaysian court precedent and should not have disregarded the doctrine of *stare decisis*.

The High Court held that the Award contravened "*public policy*" as the arbitrator had acted on a frolic of his own by disregarding Malaysian case law and relying solely on Malaysian statutes.

The Court explained that under Article 160 of the Federal Constitution, the term "*law*" encompasses (i) written law and (ii) the common law as it operates in Malaysia. Given that Malaysian common law encompasses judicial precedents established by Malaysian courts, decisions of Malaysian courts must be applied in cases before inferior tribunals, including arbitration proceedings. The arbitrator was duty-bound to consider and analyse the case law presented to him before deciding whether to accept, disregard, or dismiss them.

The High Court further ruled that the arbitrator's refusal to apply precedent amounted to a breach of public policy and natural justice under sections 37 and 39 of the **Arbitration Act 2005**. The arbitrator had deprived the parties of their right to be heard on key legal points, failing to provide them with an opportunity to address his interpretation of the law.

In light of these findings, the High Court concluded that the Award ought to be set aside on the basis that the arbitrator had acted in excess of jurisdiction by failing to apply the doctrine of *stare decisis*.

Key takeaways

This decision serves as a reminder that:

- (a) Arbitrators in Malaysia cannot disregard judicial precedent, particularly when the governing law of the contract is Malaysian law.
- (b) Ignoring the doctrine of *stare decisis* can constitute a valid ground for setting aside an arbitral award.

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