

**REPEAL OF SECTION 42 ARBITRATION ACT 2005 –  
DOES IT AFFECT ARBITRATION AWARD PUBLISHED BEFORE 8 MAY  
2018?**

In the case of **Luxor Holdings Sdn Bhd & Anor (Appellants) v SQA Builders Sdn Bhd (Respondent) (Civil Appeal No. B-02(C)(A)-2395-12/2022)**, the Court of Appeal has recently clarified the conflicting position of law on the precise effect of the repeal of Section 42 Arbitration Act 2005.

In summary, the Court of Appeal held that a question of law arising out of an arbitral award may only be referred to the High Court if the award had been published prior to 8 May 2018.

**Brief Facts**

Pursuant to 2 separate letters of award, the Respondent was appointed by the Appellants for the construction of offices on a technology park in Kota Damansara.

Payment disputes arose between the parties, and the disputes were referred to be resolved in an arbitration proceeding.

On 30 July 2021, the arbitrator delivered his award, whereby the Appellants were ordered to pay RM2,279,718.85 to the Respondent.

**High Court**

Before the High Court:

- (a) The Respondent filed an application at the High Court to enforce the arbitral award pursuant to section 38 of the Arbitration Act 2005 (“Enforcement Application”).

**The Enforcement Application was allowed in part.**

- (b) The Respondent filed an application to tax the costs of the arbitration proceedings pursuant to section 44 of the Arbitration Act 2005 (“Taxation Application”).

**The High Court held that the Respondent was entitled to RM300,000.00 as arbitration costs.**

- (c) The Appellants filed an application to refer ten questions of law to the court, pursuant to section 42(1) of the Arbitration Act 2005. Seven of the ten questions of law were subsequently amended, and an additional question added (“Section 42 Application”).

**The High Court had found (amongst others) that the questions of law posed did not fulfil the threshold requirements under subsections 42(1) and 42(1A). Accordingly, the High Court held that there arose no necessity for the questions of law to be addressed;**

- (d) The Appellants also filed an application to set aside the arbitral award, pursuant to section 37 of the Arbitration Act 2005 (“Setting Aside Application”).

**The Setting Aside Application was dismissed.**

The Appellants had amongst others, appealed against the High Court’s decision on the Section 42 Application. In dismissing the Appellants’ appeal against the Section 42 Application, the Court of Appeal held amongst others, as follows:

- (a) Section 42(1) conferred upon a party the right to refer to the High Court a question of law arising out of an award, which presupposes that an award is in existence. Thus, this right can only be said to

have accrued or been acquired by a party once the award has been published. As long as an arbitral award had not yet been published, the right of a party to avail itself of the provisions of section 42 was merely an inchoate right that cannot yet be exercised. It was a right that was contingent upon the award being published, and cannot be said to be an acquired or accrued right within the meaning of section 30(1)(b) of the Interpretation Acts 1948 and 1967.

(b) In order to ascertain whether the right of a party to an arbitration agreement to refer a question of law has accrued or been acquired by the party, the following question needs to be asked: Could the party have referred a question of law prior to the publication of the award? Clearly it could not, because no award had been published yet, and thus there could not be said to exist any question that arose from the award. If it could not, then clearly it was not possessed of any right to do so at the material time, and hence section 30(1)(b) has no application in the circumstances. For this reason, a question of law may only be referred to the High Court if the arbitral award had been published prior to 8 May 2018, being the date of the repeal of section 42.

## **Conclusion**

The Court of Appeal's decision provides a much-needed clarity to the legal uncertainty surrounding the repeal of Section 42 of the Arbitration Act 2005. By affirming that the right to invoke Section 42 of Arbitration Act 2005 only arises upon the publication of an arbitral award, the ruling effectively limits such references to awards published before 8 May 2018. This decision upholds the legislative intent behind the repeal, reinforces the principle of minimal judicial intervention in arbitration, and strengthens the finality of arbitral awards in Malaysia.

Read the full Grounds of Judgment here:

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