# REPEAL OF SECTION 42: THE QUESTION OF LAW ARISING OUT OF AN AWARD BY THE AMENDED ARBITRATION ACT 2005

by

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## Abstract

*One of the key amendments brought about by 2018 Amendments to the Arbitration Act 2005 (Amended 2011) is the repeal of s 42 based on the urgent request of the Malaysian Bar Council following the Federal Court judgment in Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1 . This article highlights the background and rationale for the request by the Malaysian Bar Council for the repeal. Essentially, it makes the mechanism of arbitration more efficient and less prone to costly and lengthy proceedings in court. The amendment brings Malaysia in tandem with approximately 41 jurisdictions which do not permit referrals to court on a question of law arising from an award. The grounds for setting aside an award in these jurisdictions are strictly limited to those in UNCITRAL Model Law 2006. It reinforces the principles of the finality of awards and the minimum intervention of the courts, which in turn enhances public confidence in the Malaysia's arbitration system.*

## INTRODUCTION

The Malaysian judiciary has burnished its credentials as being pro-arbitration with its arbitration-friendly judgments and in-built structures to support ADR. It included the setting up of the specialised Construction Court as part of the New Commercial Courts to deal with matters arising out of arbitration

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and statutory adjudication referred to the courts. The establishment of such specialised courts is in tandem with the development of the court structure of other developed regional jurisdictions and elsewhere.

The court's primary task is to determine the facts and apply the law to the facts as they are. This is to be contrasted with the Parliament's role of enacting legislation. After the enactment of the Arbitration Act 2005 (Amended 2011) ('the AA 2005'), there was a November 2017 judgment of the Federal Court seen by jurists and commentators as undermining the efficacy of arbitration and Malaysia as a safe seat.[2]

In response, Parliament passed the Arbitration (Amendment No 2) Act 2018 in April 2018 to ameliorate the perception. The Amendment No 2 Act by incorporating mainly the UNCITRAL Model Law 2006 revisions and other provisions for regional competitiveness was aimed at ameliorating this perception. The Amendment Act received royal assent and came into operation on 8 May 2018 ('2018 Amendments').

Most importantly, the 2018 Amendments have repealed ss 42 and 43 of the AA 2005. The repeal of s 42 of the Act has two important implications:

Firstly, parties will no longer be able to bring questions of law before the High Court after an award has been rendered. Rather if the parties, or the arbitral tribunal, require clarification on a question of law, they will have recourse to the High Court during arbitral proceedings pursuant to s 41 of the AA 2005.

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2 *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals* [2018] 1 MLJ 1; [2017] 8 AMR 313 (FC): The Federal Court held that under s 42 of the AA 2005, judicial intervention is warranted only where the award substantially affects the rights of one or more parties. A perverse, unconscionable and unreasonable award is not grounds to set aside the award under s 42. Further, s 42 provides no jurisdiction to deal with questions of fact. The Federal Court further held that a 'point of law in controversy' is not a question of law within the meaning of s 42, as there are points of law in controversy in every case. However, the Federal Court held that the construction of a document does constitute a question of law and that the arbitrator had not erred in its construction of the agreement. With respect to pre-award interest, the Federal Court agreed that the AA 2005 does not permit pre-award interest unless the arbitration agreement so provides. It further held that the arbitrator should not have granted post-award interest as it was not pleaded. The Federal Court ordered Far East to return all illegal dividends to KAOP and required the council to pay what was necessary in order to exercise its options to purchase the shares. The Federal Court took the approach that, in the absence of an express provision in the AA 2005, pre-award interest cannot be granted unless agreed to by the parties. Further, the award of such interest may be challenged. The question remains as to how this will be dealt with in international arbitrations where a s 42 challenge is unavailable.

Secondly, s 37 of the AA 2005 is now the only recourse parties may have in seeking to set aside an award. This is the provision which has been used by Malaysian courts to set aside arbitral awards. The grounds for setting aside an award under s 37 is similar to the grounds under article 34 of the UNCITRAL Model Law and the relevant provision of the New York Convention.

Following the repeal of s 42 of the AA 2005 by the 2018 Amendments, it was only appropriate that the former s 43 of the Act be also repealed given the interplay between the provisions. The former s 43 of the AA 2005 read as follows:

> *A decision of the High Court under* section 42 *shall be deemed to be a judgment of the High Court within the meaning of* section 67 of the Courts of Judicature Act 1964 [Act 91].

## THE FORMER SECTION 42

Prior to its deletion under the 2018 Amendments, s 42 of the AA 2005 read as follows:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award — (a) does not contain the arbitral tribunal's reasons; or (b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference — (a) confirm the award; (b) vary the award; (c) remit the award in whole or in part, together with the High Court's determination on the question if law to the arbitral tribunal for reconsideration; or (d) set aside the award, in whole or in part.

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) On a reference under subsection (1) the High Court may — (a) order the applicant to provide security for costs; or (b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

Based on the above, the High Court could actively participate in the substance of the domestic arbitration award[3] is through a reference on a question of law under s 42 of the Arbitration Act 2005. There is a conditional right of appeal on a question of law.[4]

Section 42 of the AA 2005 was amended in 2011 by way of which sub-s 42(1A) was introduced.[5] Subsection 42(1A) essentially limited the scope of reference to the High Court to questions of law which substantially affect the rights of one or more of the parties.[6]

The provision was broken down systematically with ss 42(1A), (2) and (3) laying down the requisites for invoking this provision. The remainder of the section dealt with the effect of determining an application made under it.

For a party to make an application under this section, the following elements were required to be present:

(1) an award must have been made;

(2) the application must refer to a question of law arising out of that award;

(3) the question of law must be of such a nature as to substantially affect the rights of one or more parties (this requirement was introduced in 2011 to limit the application of s 42);

(4) the award must contain sufficient reasons for the same. In the event, the High Court believes the award is devoid of, or lacks sufficient reason, then the court may order an arbitrator to provide the same; and

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3 Parties in a domestic arbitration expressly opt out of Arbitration Act 2005 s 42 as in the AIAC Arbitration Rules.

4 *Holland Leedon Pte Ltd (in liquidation) v Metalform Asia Pte Ltd* [2011] 1 SLR 517 at [5] where the court referred to the Singapore Arbitration Act (Cap 10) s 49 and held that the words 'final and binding' in an arbitration agreement do not exclude the right of appeal.

5 Arbitration (Amendment) Act 2011 (Act A1395).

6 See Sch 2, cl 2 of the New Zealand Arbitration Act 1996. This provision is similar to s 42 of the AA 2005 and stipulates the requirement that the 'question of law' must substantially affect the rights of the parties.

(5) such an application can only be made within 42 days of the publication and receipt of the award.

## FORMER SECTION 42 AS DISTINGUISHED FROM SECTION 37

The distinction between s 37 and the former s 42 may go unnoticed since both provisions were triggered once an award had been passed by an arbitral tribunal. The court in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*[7] acknowledged the issue of an overlap between s 37 and the deleted s 42. Parties seemed to use s 42 as an extension to s 37 of the AA 2005 to challenge awards. The interplay between ss 37 and 42 was however sufficiently dealt with in the above-mentioned case.[8]

The Court of Appeal held that the two sections were different as follows:

> An application to set aside an award under section 37 deals largely with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy. Section 42 on the other hand has nothing to do with the award making process but it addresses the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between sections 37 and 42 is that like of an apple and an orange.[9]

The court added that:

> The threshold to satisfy under section 37 is very low and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in section 37(6).[10]

The court also held that the threshold to satisfy s 42 of the AA 2005 was however very high. Therefore, if a party could not succeed under s 37 on the same facts, the general jurisprudence dictated that an application under s 42 would be futile as s 37 relates to the arbitral process and s 42 related to the arbitral award.[11]

The Court of Appeal's judgment was significant in developing the interpretation of s 42 of the AA 2005 since it not only laid down a clear understanding of the provision, but it also expressly prevented any extension of

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7 [2016] 2 MLJ 697.
8 *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697.
9 *Ibid* at [29].
10 *Ibid* at [31].
11 *Ibid* at [33].

s 37 being made into the provision.

## INTERPRETING 'SUBSTANTIALLY AFFECTS THE RIGHTS OF PARTIES'

Section 42(1A) introduced another layer to the parties' task when making an application under s 42 of the AA 2005. To succeed in an application before the High Court, a party was required to show that its rights would be substantially affected. This position was reflected by the English court in *Pioneer Shipping Ltd v BTP Tioxide Ltd v (The Nema) (No 2)*.[12] It also appeared to be inspired by Schedule 2, cl 2 of the New Zealand Arbitration Act 1996.

The courts will usually not interfere with the decision of an arbitral tribunal unless there is patent injustice and the law permits the court to interfere in clear terms.[13]

The position as to what would be considered as substantially affecting the parties' rights has not been laid down expressly. However, an inference of such circumstances may be made by way of analogy to the position of the courts in respect of remittance of awards under common law.

The court in *Sprague v Allan & Sons*[14] remitted an award since fresh evidence had been acquired after the award was made.[15] The court in *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd*[16] held that where there has been a mistake on the face of the award, the award must be remitted.[17] The court in *Re Becker, Shillan & Co and Barry Brothers*[18] remitted an award that did not exhaustively deal with the issue of costs.

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12 [1981] 2 Lloyd's Rep 239.

13 *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 2 AMR 151; [2010] 5 CLJ 83; *Sundra Rajoo Nadarajah v Mohamed Abd Majed & Anor* [2011] MLJU 1542; [2011] 6 CLJ 923; *Chip Lam Seng Bhd v RI International Pte Ltd* [2010] 1 LNS 64 (HC).

14 (1899) 15 TLR 150.

15 However, if the evidence was merely misunderstood or misperceived, the court will not interfere with the award: *Re Great Western Rail & Co and Postmaster-General* (1903) 19 TLR 636. Similarly, if the fresh evidence could not affect the conclusions arrived at in the award, the court will not remit the award: *NV Arnold (Otto) Meyer v Aune* [1939] 3 All ER 168.

16 [1933] AC 592 (HL).

17 See also *Barton v Blackburn* (1933) 150 LT 327; *Raja Lope Tan & Co v Malayan Flour Mills Bhd* [2000] 6 MLJ 228; [2000] 6 CLJ 194; *Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766

18 [1921] 1 KB 391; [1920] All ER Rep 644.

The High Court in *Kerajaan Malaysia v Tasja Sdn Bhd*[19] ruled on a s 42 application as regards the grant of pre-award interest in an arbitration. It relied on the decision of the Court of Appeal in *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang*[20] to concede that an arbitral tribunal does not have the power to award pre-award interest.

The court did not state whether the granting of pre-award interest by an arbitral tribunal would amount to substantially affecting the rights of the plaintiff. It went on to decide by relying on the Court of Appeal's judgment in *Far East Holdings*.

Thus, in determining what would constitute substantial injustice to one or more parties, a general reference may be made to the common law position on remittance of awards. These standards were endorsed by the court in *Lau Tiong Ik Construction Sdn Bhd v The Government of Malaysia*.[21]

## MANDATORY NATURE OF THE LIMITATION SPECIFIED IN SECTION 42(2)

The former s 42(2) read:

> 'A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.'

The use of the term 'shall' in the provision made it mandatory in nature. The court would not consider any s 42 application which was out of time.[22] Failure to comply with this mandatory requirement resulted in dismissal of the application.[23]

In *Perembun (M) Sdn Bhd v Binas BMK Sdn Bhd and another case*,[24] there was an indication that Perembun would seek to extend the time limit for making an application under s 42. However, owing to the mandatory nature of the provision, Perembun did not attempt to pursue the claim and the application under s 42 of the AA 2005 was abandoned altogether.

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19 [2016] MLJU 371.
20 [2015] 4 MLJ 766; [2015] AMEJ 1144; [2015] 8 CLJ 58.
21 [2008] 5 MLJ 604.
22 Sundra Rajoo, *Law, Practice & Procedure of Arbitration* (2nd Ed, Lexis Nexis, 2016) p 550.
23 *Chip Lam Seng Bhd v RI International Pte Ltd* [2010] MLJU 104.
24 [2015] 11 MLJ 447 at [12].

This means that the position was clear in that an application that was made after 42 days after the publication and receipt of the award, would be rejected and there was no scope to seek an extension beyond the specified period.

## THE QUESTION OF LAW

One of the important requirements of the former s 42 of the AA 2005 was the determination of the scope of the question of law. The courts were clear that their jurisdiction under s 42 was discretionary, save for when the precondition in s 42(1A) was not satisfied. The court had the discretion to decide what constitutes a valid question of law.

The court in *SDA Architects v Metro Millennium Sdn Bhd*[25] held that a proper and valid question of law is determined by 'considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator'.

The Court of Appeal in *Awangku Dewa bin Pgn Momin v Superintendent of Lands & Surveys, Limbang Division*[26] provided a less general approach on the issue and clarified that:

> The High Court in considering a s 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.

The court in *MMC Engineering Group Bhd & Anor v Wayss & Freytag (Malaysia) Sdn Bhd*[27] discussed the issue of the court's discretion in determining the question of law. It held that for a proper invocation of the court's powers under s 42, the question of law identified or presented must refer to a point of law in controversy which requires the opinion, resolution or determination of the court.

Such a question will include an error of law that involves an incorrect interpretation of the applicable law but will not include any question as to

25 [2014] 2 MLJ 627; [2014] 3 AMR 343; [2014] 3 CLJ 632 at para [12].
26 [2015] 3 MLJ 161 at para [27].
27 [2015] MLJU 477; [2015] 1 LNS 705.

whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence, or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

The Court of Appeal in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd*[28] has set out the principles applicable to s 42. While acknowledging that the law in this regard is yet to develop, it enumerated as non-exhaustive the following principles:

(1) the question of law must be identified with sufficient precision;[29]

(2) the grounds in support must also be stated on the same basis;

(3) the question of law must arise from the award, not the arbitration proceedings generally;[30]

(4) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(5) the question of law must be a legitimate question of law, and not a question of fact dressed up as a question of law.[31] The court in *Awangku Dewa bin Pgn Momin v Superintendent of Lands & Surveys, Limbang Division*[32] dismissed an application under s 42 on the basis that: '… what we find in the originating summons, are not concisely and clearly framed questions of law, but rather criticisms of the decisions of the learned arbitrator drafted in the manner that one normally finds in the 'grounds' of a memorandum (or petition) of appeal … ';

(6) The jurisdiction under s 42 is not to be lightly exercised, and should only be exercised in clear and exceptional cases;[33]

(7) The arbitral tribunal remains the sole determiners of questions of fact and evidence;[34] and

(8) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

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28 [2015] 6 MLJ 126; [2015] 1 CLJ 617.
29 *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; *Maimunah Deraman v Majlis Perbandaran Kemaman* [2011] 9 CLJ 689.
30 *Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd* [2011] 3 AMR 315; *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2013] MLJU 1202.
31 *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215.
32 [2015] 3 MLJ 161 at [27].
33 *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 8 CLJ 655.
34 *Gold and Resource Development (NZ) Ltd v Dough Hood Ltd* [2000] 3 NZLR 318.

## THE TURNING POINT

The Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang*[35] held that the test for the former s 42 of the AA 2005 was not whether an award might or might not be perverse, unconscionable, unreasonable, or the like.

The only matter was whether there was a question of law arising out of the award that substantially affected the rights of one or more of the parties. The Federal Court was also of the view that guidelines (6)–(8) set out in *Perwira Bintang* above were not in line with s 42 and should not be followed.[36]

However, the Federal Court set out a non-exhaustive list that would meet the paradigm of 'any question of law' in the former s 42:

(a) a question of law in relation to matters falling within (2) of Mustill J's three-stage test [*Vinava Shipping Co Ltd v Finelvet AG 'The Chrysalis'* [1983] 2 All ER 658];

(b) a question as to whether the decision of the arbitral tribunal was wrong (*The Chrysalis*);

(c) a question as to whether there was an error of law, and not an error of fact [*Micoperi Sr L v Shipowners' Mutual Protection & Indemnity Association (Luxembourg)* [2011] EWHC 2686 (Comm)]: error of law in the sense of an erroneous application of law;

(d) a question as to whether the correct application of the law inevitably leads to one answer and the arbitral tribunal has given another [MRI *Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm)];

(e) a question as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied [*Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748];

(g) a question concerning the legal effect to be given to an undisputed set of facts [*Carrier Lumber Ltd v Joe Martin & Sons Ltd* [2003] BCJ No 1602];

(h) a question as to whether the arbitral tribunal has jurisdiction to determine a particular matter [*Premium Brands Operating GP Inc v Turner Distribution Systems Ltd* [2010] BCJ No 349]: this may also come under s 37 of the AA 2005; and

(i) a question of construction of a document (*Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743).'[37]

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35 [2018] 1 MLJ 1.
36 *Ibid* at para [118].
37 *Ibid* at [150].

The Federal Court further held that the AA 2005 did not provide that the 'question of law' was to be the same as the one which the arbitral tribunal was asked to determine. Rather, s 42 of the AA 2005 contemplated '[a]ny question of law' which was wider than 'question of law'. This meant that s 42 of the AA 2005 contemplated a 'less narrow interpretation' of 'question of law':

> A less narrow interpretation of 'question of law' in s 42, as we might have given it, would not widen court intervention in international arbitration. But 'a point of law in controversy which has to be resolved after opposing views and arguments have been considered' is not a 'question of law' within the within the meaning of s 42. There would surely be 'a point of law in controversy' in every case. If 'a point of law in controversy' were a question of law, then there would be a 'question of law' arising in every award. And that, with respect, could not be right.[38]

The Federal Court decisively confirmed the same by expanding further the scope of matters which can be referred to the High Court pursuant to s 42 of the AA 2005.

It essentially meant that every question of law arising out of an award could now be ventilated at and revisited by the courts starting from the High Court and moving up to the Federal Court. The court played down the threshold test and in effect, allowed arbitral awards falling under Part III of the AA 2005 to be challenged on any question of law, therefore undermining the finality of arbitral awards.

Further, following the Federal Court's decision, there was a degree of overlap between s 37 and the former s 42 of the AA 2005, although the legislature most likely did not intend for such an overlap.

The extent of this overlap is apparent when considering the jurisprudence on s 37 and the former s 42 of the AA 2005 whereby, in a number of matters, a party had sought to set aside the arbitral award either on a s 37 ground, or in the alternative, under the former s 42.

There have been even suggestions that now there are concurrent jurisdiction of the courts to set aside arbitral awards: both under ss 37 and 42.[39] The existence and the exercise of such concurrent jurisdiction undermined the

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38 *Ibid* at [152].

39 See *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* (Court of Appeal No W-02 (NCVC)(A)-776–04 of 2017) (unreported) and *Bijak Teknik Sdn Bhd v Lembaga Pertubuhan Peladang* (Court of Appeal No W-02 (NCC)(A)-1429–07 of 2017) (unreported).

principles of finality of awards and minimum court intervention which underpinned the enactment of the AA 2005.

This, in effect, gave a party seeking to set aside an award two bites at the cherry. Indeed, the facts upon which an application under s 42 of the AA 2005 was pleaded would more often than not cover the same facts set out for an application under s 37, such that s 42 of the AA 2005 was used as a mechanism to extend the grounds in s 37.

This was arguably an unsolicited attack on the finality of an award where some parties would 'dress up' questions of fact as questions of law to have an award set aside under the former s 42 (and at times succeeding the first instance).

The judgment is to be compared with the court's observation in *MMC Engineering Group v Wayss & Freytag Malaysia Sdn Bhd*[40] that the statutory provision under s 42 is 'materially different' from the English and Singaporean provisions, not using the word 'appeal' as those jurisdictions do, and that a strict approach should therefore be followed.[41] The other jurisdictions use the term 'appeal on the questions of law' in describing similar provisions.[42]

The court held that there was no room for doubt that the curial function under s 42 was only intended to be extended to questions of law per se, and only that which would affect substantially the rights of one or the other party. Public law principles are also not in play in what is otherwise a private contractual dispute and the award must be viewed in its entirety in a fair and reasonable manner.[43]

However, an earlier commentary on the Arbitration Act 2005 had said that s 42 'provides for an appeal in all but name' and that it required a stricter approach to be adopted in the light of the omission of the leave requirement.[44]

In reality, the High Court and the Court of Appeal's valiant attempts to interpret the scope of s 42 restrictively had failed given the judgment of the

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40 [2015] 10 MLJ 689; [2015] AMEJ 873.

41 Section 42(1A) provides: 'The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties'.

42 English Arbitration Art 1996 s 69(2)(a); New Zealand Arbitration Act 1996, Sch 2, cl 5; Hong Kong Arbitration Ordinance (Cap 341) s 23(2)–(4); Singapore Arbitration Act s 49(1).

43 *MMC Engineering Group Bhd v Wayss Freytag Malaysia Sdn Bhd* [2015] 10 MLJ 689 at [88].

44 Rajoo and Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia*, (2007) at para [42.11]–[42.12].

Federal Court. It was ineffective in reducing litigation in challenging the finality of arbitration awards through the three tiers of appeal to the High Court, the Court of Appeal and the Federal Court.

There have been complaints that arbitration had effectively become the first instance hearing from which all domestic awards can be challenged until the Federal Court.[45]

Given this adverse development, the Malaysian Bar Council took a progressive and decisive stance on s 42. On 23 November 2017, the Malaysian Bar Council formally requested the then Minister in the Prime Minister's Department in charge of Legal Affairs to consider urgent changes to the AA 2005. A copy of this correspondence was also forwarded to the Director of the Asian International Arbitration Centre ('AIAC').

Specifically, the then President of the Malaysian Bar Council on behalf of the Council persuasively set out the case and requested an urgent change to the Arbitration Act 2005 in his letter dated 23 November 2017[46] as follows:

1. We refer to the above matter and the recent decision of the Federal Court in *Far East Holdings Bhd & Anor v Majlis Agarna Islam Dan Adat Resam* Melayu Pahang (FC Appeal No 02(f)-19–04/2016(W), 02(f)-20–04/2016(W), 02(f)-21–04/2016(W)) ('Decision').

2. In its judgment, the Federal Court has interpreted the 2005 Arbitration Act ('AA 2005') in a manner that undermines long-established principles of arbitration law in Malaysia.

3. First, the Federal Court has, at paragraph 187 of the Decision, held that section 33(6) of the AA 2005 removes the long-established power of arbitrators to grant pre-award interesting arbitrations, a practice of inextricable commercial importance to arbitrations locally and worldwide. This reverses a half-century of Malaysian and international jurisprudence. It means that arbitrators have less power than Malaysian courts, and

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45 Unfortunately, a similar phenomenon is seen in the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) where the Federal Court judgment in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2017] 8 AMR 167 shifted the burden of disproving the defences and set-offs as set out in the respondent's adjudication response, which was never raised in the payment response, to the claimant, who then had only five days to submit a reply. In essence, it changed what was envisioned by CIPAA 2012, put colloquially as 'Pay First and Argue Later', to a regime of 'Argue First and Pay Later'. What was envisaged as a summary and temporary process became a tiered appeal procedure with appeals from an inferior adjudication tribunal to the Construction Court, the Court of Appeal and finally, the Federal Court. It is not clear who the real beneficiaries are as there is now an economic dimension accompanying the legal arguments as it steers up the various courts.

46 The then President was Mr George Varughese. A copy of this letter can be accessed at https://www.aiac.world.

arbitrators in other jurisdictions including Singapore, to compensate litigants who have been deprived of the use of their money.

4. Second, as illustrated at paragraphs 123 and 150 of the Decision, the Federal Court has significantly expanded the scope for judicial intervention in domestic arbitral awards under section 42 of the AA 2005. The AA 2005 was intended to, and was hitherto understood as, bringing Malaysian arbitral law in line with international best practices of very limited intervention by courts in arbitrations, both domestic and international. The Federal Court has now, in effect, found that the AA 2005 has the opposite effect. The Federal Court appears to have equated its supervisory powers in domestic arbitrations, to an appeal on a question of law from a subordinate court. With respect, this undermines the finality of Malaysian arbitral awards, which is one of the key attractions of arbitration over courts.

5. With respect, this decision will seriously undermine the attractiveness of Malaysia as a destination for arbitration amid the intensifying competition amongst jurisdictions globally for such cases. The Bar Council anticipates that foreign and domestic investors will regard this as a comparative disadvantage for Malaysia, when considering Malaysia as an investment destination, and will also regard arbitration in Malaysia as an unattractive process.

6. Accordingly, we wish to express our support for efforts to expeditiously rectify the problems caused by this decision. We respectfully urge an immediate amendment to s 33(6) of the AA 2005 to restore the powers of arbitrators to award interest in line with Malaysian courts pursuant to section 11 of the Civil Law Act 1956. In addition to this, *we support an urgent re-consideration and reversal of the expansive powers now assumed by the Malaysian courts to intervene in arbitral awards, or to repeal* Sections 42 and 43 of the AA 2005. (Emphasis added)

Given the Malaysian Bar Council's request to urgently amend the AA 2015 especially the repeal of s 42, the AIAC took the opportunity to update the Malaysian arbitral regime by incorporating the UNCITRAL Model Law 2006 provisions. It worked in tandem with the Malaysian Bar Council and the Attorney General's Chambers to draft the amendments to the AA 2005.

On 2 January 2018, the AIAC convened a Consultative Workshop on the proposed amendments to the AA 2005. Over 30 participants from the public, private and regulatory sectors (including the Malaysian Bar Council) participated in a round-table talk.

It was part of the feedback mechanism on the proposed UNCITRAL Model Law 2006 amendments including relooking of ss 42 and 43 of the AA 2005 as requested by the Malaysian Bar Council and the proposal to include third-party funding in the AA 2005 to boost regional competitiveness.

The overall result of the Consultative discussion and participants' feedback reflected the participants' consensus to adopt the proposed amendments to the AA 2005 in an expeditious manner.[47]

The draft version of the 2018 Amendments was presented to the Attorney General's Chambers based on this consultative process by the then Minister in charge of Legal Affairs in the Prime Minister's Department.

The Attorney General's Chambers accepted all the remaining amendments to the AA 2005, save for the provision relating to third-party funding. The judiciary also accepted the amendments on the basis that law-making was for Parliament and its role was to interpret the law so passed. The draft Bill was then presented to Parliament for debate and enactment.

Parliament passed the Arbitration (Amendment No 2) Act 2018 in April 2018 which received royal assent and came into operation on 8 May 2018.

To recapitulate, the repeal of s 42 of the AA 2005 has two important implications in Malaysia.

Firstly, parties will no longer be able to bring questions of law before the High Court after an award has been rendered. Rather, if the parties, or the arbitral tribunal, require clarification on a question of law, they will have recourse to the High Court *during* arbitral proceedings pursuant to s 41 of the AA 2005.

The lack of recourse to the High Court under the former s 42 does not undermine the nature of arbitration in Malaysia. This is because Malaysian courts have only exercised their powers under the former s 42 on a handful of occasions.

Even when this has occurred, the courts have turned to s 42 to *vary* the award, or to remit the matter back to the arbitral tribunal, as opposed to setting aside the award under that provision.[48] Also, the Malaysian arbitral regime is now in tandem with 41 other jurisdictions including Hong Kong which do not permit referrals to court on a question of law arising from an award.

The only notable case where the Federal Court set aside an award (in part) under s 42 is that of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan*

47 The report can be accessed at https://www.aiac.world.
48 See *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697.

*Adat Resam Melayu Pahang*.[49] However, this decision widened the scope of the matters which could be considered 'questions of law' for the purpose of the former s 42 of the AA 2005, on the basis that there was no express limitation on the types of questions which could be referred under the provision. This meant that the restrictions to court intervention which had been promulgated in previous decisions were no longer good law.[50]

If s 42 of the AA 2005 had not been deleted, a party who had previously been unsuccessful in a s 42 application would have been armed with more reason to seek an appeal against the application. Further, it would have been unsurprising if the former s 42 was more frequently used by parties seeking to set aside an award and succeeding in the same.

Both actions would have undermined the finality of arbitral awards and they would have made the enforcement of an award arising from a domestic arbitration in Malaysia more vulnerable.

Section 37 of the AA 2005 is now the only recourse parties may have in seeking to set aside an award. This is the provision which has been used by Malaysian courts to set aside arbitral awards.

Although s 37 does not empower an arbitral tribunal to vary an award, the grounds for setting aside an award under the AA 2005 now aligned with article 34 of the UNCITRAL Model Law, and the New York Convention. This makes Malaysia a safer seat for arbitration.

Despite the High Court not having the power to vary an award under s 37 of the AA 2005, the parties can direct the court's attention to s 37(6). The provision enables the court to remit the matter being set aside to the arbitral tribunal for reconsideration.

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49 [2017] 8 AMR 313; [2018] 1 MLJ 1.

50 Courts have formerly held that there can be no reference under the former s 42 of the AA 2005 over an error of law under a specific reference (*Syarikat Pemborong Pertanian Sdn Bhd v Federal Land Development Authority* [1971] 2 MLJ 210). Rather, it has been held that a reference is permissible in the absence of illegality (*Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2011] 6 AMR 573; [2012] 3 CLJ 423), where there is patent injustice (*Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395), or a manifestly unlawful and unconscionable and/or perverse decision (*Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617).

The purpose of this provision is to negate the necessity to set aside the award. This would have a similar overall effect to the award being varied by the court pursuant to the former s 42 of the AA 2005.

For these reasons, the deletion of s 42 is a welcomed change to the AA 2005 in that it reinforces the finality of an award. As noted by the Federal Court of Malaysia in *Government of India v Cairn Energy India Pty Ltd & Anor*:[51]

> And as Scrutton LJ put it:
>
> ... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar, you must take Caesar's judgment ...[52]

In requesting the repeal of s 42, the Malaysian Bar Council explained clearly that the AA 2005 was intended to harmonise Malaysian arbitral law in line with international best practices.

It was clearly intended to limit the court's intervention in support of both domestic and international arbitrations and upholding the finality of Malaysian arbitral awards. The finality of Malaysian arbitral awards is now one of the key attractions of arbitration over the court litigation.

The Malaysian Bar Council lamented that the law as interpreted by the Federal Court in in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang*[53] has significantly expanded the scope for judicial intervention in domestic arbitral awards under s 42 of the AA 2005.

The judgment had the opposite effect in equating its supervisory powers in domestic arbitrations, to an appeal on a question of law from a subordinate court. As such, it was an apt case for legislative intervention to uphold the integrity of the Malaysian arbitral process.

## CONCLUSION

The repeal of s 42 of the AA 2005 as requested by the Malaysian Bar Council has made the grounds for setting aside an award in Malaysia aligned with the

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51 [2011] 6 MLJ 441; [2011] 6 AMR 573; [2012] 3 CLJ 423 (FC).
52 *Ibid* at 594 (AMR); [53] (MLJ).
53 [2018] 1 MLJ 1.

UNCITRAL Model Law. The deletion of this provision reinforces the principles of the finality of awards and the minimum intervention of courts.

In turn, it enhances public confidence in Malaysia's arbitration system. Although many jurisdictions still permit appeals to set aside an award on questions of law, Malaysia's repeal of the same will hopefully position it as a more arbitration-friendly jurisdiction.