

Court of Appeal: Section 42 of the Arbitration Act 2005 Revisited

Introduction

“The Arbitration (Amendment) (No. 2) Act 2018 was gazetted on 4 May 2018 and took effect from 8 May 2018. It was not expressed to take effect retrospectively. The removal of the ability of parties to an arbitration agreement to refer to the High Court a question of law arising from an arbitral award took effect prospectively.” — per Azizul Azmi Adnan JCA.

The Court of Appeal recently in **Luxor Holdings Sdn Bhd & Anor v SQA Builders Sdn Bhd** [2025] clarified the conflicting legal position on the effect of the repeal of section 42 of the **Arbitration Act 2005** (“AA 2005”), which took effect on 8 May 2018.

Section 42 of the AA 2005 allowed parties to refer questions of law arising out of an arbitral award to the High Court for determination. The Court of Appeal decision held that such references may only be made in respect of arbitral awards that were published before 8 May 2018.

Brief facts

Luxor Holdings Sdn Bhd and Luxor YRM Sdn Bhd (“the Appellants”) commenced arbitration proceedings against SQA Builders Sdn Bhd (“the Respondent”) arising from payment disputes. The notices of arbitration were issued on 26 September 2017, and the arbitral award was delivered in favour of SQA Builders on 30 July 2021, after the repeal of section 42 of the AA 2005.

Following the issuance of the award, Luxor Holdings Sdn Bhd and Luxor YRM Sdn Bhd filed an originating summons to refer questions of law to the High Court pursuant to section 42(1) of the AA 2005. SQA Builders raised a preliminary objection, contending that the repeal of section 42(1) of the AA 2005 rendered the originating summons incompetent. The High Court, however, dismissed the preliminary objection.

Arbitration Update

AUGUST 2025

Shearn Delamore & Co
7th Floor

Wisma Hamzah Kwong-Hing,
No 1, Leboh Ampang
50100, Kuala Lumpur, Malaysia

T: 603 2027 2727

F: 603 2078 5625

info@shearndelamore.com

www.shearndelamore.com

www.linkedin.com/company/shearn-delamore-&-co

On appeal, the Court of Appeal had to determine two issues:

- Issue 1: Whether the effect of the repeal of section 42 of the AA 2005 was in issue before the Court of Appeal; and
- Issue 2: If so, what was the effect of the repeal of section 42 of the AA 2005?

The Court of Appeal's decision

In addressing Issue (2) on the effect of the repeal of section 42 of the AA 2005, the Court of Appeal considered two (2) conflicting lines of High Court authorities:

- The first line of authority held that parties may still refer questions of law arising from arbitral awards issued after 8 May 2018, provided that the notice of arbitration was issued before that date.

The reason being that the repeal of section 42 of the AA 2005 does not operate retrospectively and should not extinguish the vested rights of parties arising from arbitration agreements concluded prior to the repeal. This position was supported in the High Court case of **Mammoth Empire Construction v Kenwise** [2020] MLJU 1473.

- The second line of authority held that the parties may only refer questions of law arising from arbitral awards issued before the repeal of section 42 of AA 2005 on 8 May 2018.

This view is based on the interpretation that Parliament intended to bar such references following the repeal. This position is reflected in several High Court decisions, including **AMDAC v BYD Auto Industry** [2020] 6 CLJ 625, **Tokio Marine Insurans v Hi-Poly Industries** [2020] MLJU 1446 and **Johawaki Development v Majlis Agama Islam Wilayah Persekutuan** [2020] MLJU 660.

Ultimately, the Court of Appeal adopted the latter position. The Court of Appeal in finding that questions of law arising out of an arbitral award may only be referred to the High Court for awards that were published prior to 8 May 2018, referred to the material portion of section 30(1)(b) of the **Interpretation Acts 1948 and 1967**, as follows:

“(1) The repeal of a written law in whole or in part shall not –

...

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law...”

Pursuant to section 30(1)(b) of the **Interpretation Acts 1948 and 1967**, the Court held that where a provision of law repeals any other written law, and in the absence of any express provision to the contrary, such repeal must be construed in a manner that does not adversely affect any right or privilege that has accrued or been acquired under the repealed law.

Against this backdrop, the Court then examined the wording in section 42(1) of the AA 2005 and held that section 42(1) conferred upon a party the right to refer a question of law arising out of an award, which presupposes that an award is already in existence.

“42 Reference on questions of law

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

As such, the right to refer a question of law under section 42 of the AA 2005 can only be said to have accrued or been acquired by a party once the award has been published.

For 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 of the AA 2005 was merely an inchoate right that cannot yet be exercised.

It was therefore a right that was contingent upon the arbitral award being published. For these reasons, questions of law could only be referred to the High Court in respect of awards published before 8 May 2018.

Key takeaway

The Court of Appeal’s decision in **Luxor Holdings Sdn Bhd & Anor v SQA Builders Sdn Bhd** [2025] provides much-needed clarity on the legal position following the repeal of section 42 of the AA 2005, in that the repeal of section 42 operates prospectively, and applies only in relation to arbitral awards published on or after 8 May 2018.

This arbitration update is prepared by [Haseena Elaine Kaur](#).

For more information, please reach out to your usual contact from our [Arbitration Practice Group](#):

[K. Shanti Mogan](#)

shanti@shearndelamore.com

[Rabindra S. Nathan](#)

rabindra@shearndelamore.com

[Rodney Gomez](#)

rodney@shearndelamore.com

[Dhinesh Bhaskaran](#)

dhinesh@shearndelamore.com

[Rajasingam Gothandapani](#)

rajasingam@shearndelamore.com

[Yee Mei Ken](#)

mkyee@shearndelamore.com

[Jimmy S.Y. Liew](#)

jimmyliew@shearndelamore.com

[Alexius Lee](#)

alexius@shearndelamore.com

[Lilien Wong](#)

lilien.wong@shearndelamore.com

[Hee Hui Ting](#)

huitinghee@shearndelamore.com

[Serena Isabelle Azizuddin](#)

serena.isabelle@shearndelamore.com

[Michelle Lim Wan Foong](#)

lim.wanfoong@shearndelamore.com

Copyright © 2025 Shearn Delamore & Co. All rights reserved.

This Update is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute any advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.