

IFLR

INTERNATIONAL FINANCIAL LAW REVIEW

INTERNATIONAL BRIEFINGS 2015



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Challenging arbitration awards

As in most other jurisdictions which seek to preserve the sanctity of the arbitration process, Malaysia's Arbitration Act 2005 limits the grounds on which a party can seek to reverse an arbitration award. Section 42 of the Act allows for a party to challenge an award on a question of law.

Until the recent decision of the Court of Appeal in *Government of Malaysia v Perwira Bintang Holdings Sdn Bhd* there was some confusion as to when the court should exercise its discretion to set aside an award on a question of law. In this decision, the Court of Appeal set out the following criteria in order to determine whether an award should be set aside on this ground:

- The question of law must be identified with sufficient precision;
- The question of law must arise from the award, not the arbitration proceedings generally;
- The court must be satisfied that the determination of the question of law will substantially affect a party's rights;
- The question of law must be a legitimate question of law, and not a question of fact dressed up as a question of law;
- The jurisdiction should be only exercised in clear and exceptional cases; and,
- The court can intervene if the award is manifestly unlawful and unconscionable.

Whilst this Court of Appeal decision has clarified the position when dealing with an application under section 42 of the Act, the inclusion of the sixth criteria on manifestly unlawful and unconscionable awards is a departure from the strictly non-interventionist

approach taken by many other jurisdictions. The implication is that if an arbitrator has incorrectly applied the law, the court can in appropriate cases set aside the award.

The Court of Appeal reaffirmed the view that the arbitral tribunal remains the sole determiner of questions of fact and evidence. The Court holds that whilst the findings of fact and the application of legal principles may be wrong, it should not interfere unless the decision is perverse. This remains consistent with the approach adopted in other jurisdictions.

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International Financial Law Review

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