

**JUDICIAL INTERPRETATIONS ON
“ERROR OF LAW ON THE FACE OF ARBITRATION AWARD”**

YAP POY YEE

UNIVERSITI TEKNOLOGI MALAYSIA

**JUDICIAL INTERPRETATIONS ON
“ERROR OF LAW ON THE FACE OF ARBITRATION AWARD”**

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**A master’s project report submitted in fulfillment of the
requirements for the award of the degree of
Master of Science in Construction Contract Management.**

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*To my beloved parents for giving me such a good start,
and to my siblings for your love and the countless hours of laughter and joy we shared throughout
the years.*

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ABSTRACT

In making an arbitration award, the arbitrator must define it clearly, unambiguously, justly and enforceability. Once the award is made and published, is a final and binding document and enforceable as a judgment of the High Court. However, the award can still be challenged when an arbitrator had committed a clear error of law on the face of an award where a court can set aside or remit the award to the arbitrator for further consideration. There is no provision in both 1952 Act and 2005 Act to limit and no clear definition as to what exactly means by “error of law on the face of award”. Thus, it does not provide guidelines for the losing party to decide whether the award is error on the face of it and should they challenge the arbitral award under this ground. Normally it is for the court to decide. Hence, this research intends to determine the judicial interpretations on “error of law on the face of arbitration award”. This research was carried out mainly through documentary analysis of law journals and law reports. Results show that there are four judicial interpretations for “error of law on the face of award”. The first interpretation is when the award not satisfies the essential features of a valid award. Second, appears by the award that the arbitrator has proceeded illegally for instance decided using evidence which the law was not admissible or using principles of construction which the law did not countenance. Next interpretation is the error must be such that it can be found in the award, or in a document actually incorporated with it. Lastly, there is an error of law on the face of award when there is found some legal proposition which is the basis of the award and which is erroneous. It is recommended that the four judicial interpretations should be included in the Arbitration Act so that it can be the guidelines for the party who wish to challenge the award under the ground of error of law on the face of award.

ABSTRAK

Seorang penimbang tara perlu menghasilkan satu award dengan secara jelas, tepat, dan boleh dikuatkuasakan. Award adalah muktamad dan mengikat setelah dibuat dan diterbitkan serta berkuatkuasa seperti keputusan Mahkamah Tinggi. Namun demikian, award tersebut masih boleh dicabar apabila seorang penimbang tara telah melakukan kesalahan undang-undang yang jelas pada muka award di mana mahkamah boleh mengetepikan atau meremit award kepada penimbang tara untuk dipertimbangkan semula. Tidak ada peruntukan dalam kedua-dua Akta 1952 dan Akta 2005 untuk menghadkan dan tidak ada definisi yang jelas mengenai apa sebenarnya ertinya dengan "kesalahan undang-undang yang jelas pada muka award". Jadi, ia tidak mengandungi garis panduan bagi pihak yang kalah untuk memutuskan sama ada award tersebut terdapat kesalahan pada mukanya dan adakah mereka harus mencabarkan award atas perkara tersebut. Biasanya perkara ini diputuskan oleh mahkamah. Oleh itu, kajian ini bertujuan untuk mengenalpasti tafsiran hakim terhadap "kesalahan undang-undang pada muka award". Kajian ini dijalankan melalui analisis dokumen, iaitu laporan dan jurnal undang-undang. Kajian ini menunjukkan bahawa terdapat empat tafsiran hakim. Tafsiran pertama adalah mengenai award tidak memenuhi ciri-ciri penting tentang anugerah yang sah. Kedua, perlakuan penimbang tara adalah haram yang timbul pada muka award, contohnya menggunakan bukti yang tidak diterima atau prinsip-prinsip pembinaan yang tidak diakui di sisi undang-undang. Tafsiran seterusnya adalah kesalahan tersebut mestilah boleh didapati dalam award atau pada dokumen yang benar-benar berkaitan dengannya. Akhirnya, kesalahan undang-undang pada muka award boleh didapati apabila terdapat kesalahan dalam kenyataan undang-undang yang merupakan dasar award. Oleh itu, semua tafsiran tersebut haruslah dimasukkan dalam Akta Timbang Tara supaya boleh dijadikan sebagai garis panduan bagi pihak yang berharap mencabarkan award di mana terdapat kesalahan undang-undang pada muka award.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
AD & E	Adolphus & Ellis, Reports
All ER	All England Law Reports
AMR	All Malaysia Reports
App Cas	Appeal Cases
BC	Before Christ
B & S	Best & Smith, Reports
Build LR	Building Law Reports
CB	Common Bench
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
Cr & M	Crompton & Meeson, Reports
ER	Equity Reports
HL	House of Lords
H & N	Hurlstone & Norman, Reports
ICC	International Chamber of Commerce
Jur	Jurist Reports
KLRC	Regional Centre for Arbitration Kuala Lumpur
KB	King Bench
L.J. Ex	Law Journal Reports, Exchequer
Lloyd's Rep	Lloyd's List Reports

LR	Law Reports
LT	Law Times Reports
LTOS	Law Times Reports Old Series
MLJ	Malayan Law Journal
M & W	Meeson & Welsby, Reports
PC	Privy Council
QB	Queen Bench
SLR	Singapore Law Report
TASSC	Supreme Court Tasmania
WLR	Weekly Law Report
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER 1

INTRODUCTION

1.1 Background of Study

The 1952 Act and 2005 Act do not define arbitration. Arbitration as a means of resolving (construction industry) disputes must however be distinguished from other means of dispute resolution. For example, in *Sports Maska Inc v. Zittner*,¹ the Canadian Supreme Court observed that the courts are not bound by the language used and what is described as an expert determination is in reality an arbitration. Further, arbitration as a means of resolving disputes must also be distinguished from other processes such as valuation or certification. In the case of *Ajzner v Cartonlux Pty Ltd*,² it has been held that a process involving a reference to a person described as an “arbitrator” was not an arbitration but a reference to a valuer to make a determination in accordance with that person’s skill and knowledge.

¹ [1988] 1 SCR 564

² [1972] VR 919

In *Collins v Collins*³, Romilly MR said, “An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference or dispute between the parties ...”⁴ This is a broad definition which is not very useful. It is better to list the attributes which collectively identify arbitration, like what Lord Wheatley did in *Arenson v Arenson*.⁵ He listed the following attributes which point towards arbitration:

*“(a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person [i.e. the arbitrator] to resolve in such manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.”*⁶

Most Malaysian construction disputes are resolved via arbitration. This is because there is always an arbitration agreement found in the standard form of construction contract for e.g. clauses 34 and 54 of the PAM and JKR forms of contract respectively.⁷ The courts also support arbitration by limiting refusal of stay application of court actions brought in breach of arbitration agreement.⁸ Besides there is a the perception that it simply takes too long to litigate a construction dispute and wherever possible, the parties try to agree to move the forum the courts to arbitration if even if there is the absence of an arbitration agreement particularly in sub contract disputes.⁹

³ 28 LJ Ch 184.

⁴ *Ibid.* at pp.186-187.

⁵ [1977] AC 405.

⁶ *Ibid.* at p. 428.

⁷ Lim. C. F. (2010). *Handling Construction Dispute Resolution*. Retrieved 7th May 2010 from http://www.agc.gov.my/agc/onlinesys/KnowledgeSharing/pdf/Penasihat/Jan2010/Handling_Construction_Dispute_Resolution

⁸ Section 6 Arbitration Act 1952; *Tan Kok Cheng & Sons Realty Sdn Bhd v Lim Ah Pat* [1995] 3 MLJ 273; see also Section 10 Arbitration Act 2005.

⁹ Lim. C. F. (2010). *Handling Construction Dispute Resolution*. Retrieved 7th May 2010 from http://www.agc.gov.my/agc/onlinesys/KnowledgeSharing/pdf/Penasihat/Jan2010/Handling_Construction_Dispute_Resolution

With the increasing popularity of arbitrations as a mode of dispute resolution, recently Malaysia enacted a new Arbitration Act 2005 (Act 646) based on the United Nations Commission on International Trade Law (*UNCITRAL*) Model Law on International Commercial Arbitration. It received the Royal Assent on December 30, 2005 and will be applicable to all arbitration commenced after March 5, 2006, while arbitrations commenced prior to that date will remain governed by the old Arbitration Act 1952. The new act, besides brings changes to the arbitration practice, it also provide clarity and certainty in the law as well as finality in the arbitral process and enforceability of awards.¹⁰

It is an established principle that an arbitration award must be made in accordance with the law. An award may take one of several forms such as a final award¹¹, an interim award¹² or a temporary award¹³. Generally, an award is of practical importance because an accurate classification may determine,

1. Whether the decision is enforceable by domestic or foreign court.
2. Whether the decision is susceptible of appeal or other intervention by a court, and if so by what means.
3. Whether the decision is binding on the parties and the arbitral tribunal.
4. As regard the latter, the categorization of the decision may determine whether and to what extent the arbitral tribunal can validly recall or vary its decision.¹⁴

¹⁰ Davidson, W.S.W. & Sundra Rajoo. (2006). *The New Malaysian Arbitration Act 2005*. The Chartered Institute of Arbitrators. London: Sweet & Maxwell Limited,

¹¹ The Arbitration Act 1952, s 17; Arbitration Act 2005, s36

¹² The Arbitration Act 1952, s 15

¹³ Halsbury's Laws of Malaysia, (2002). *Arbitration Companies*. Vol 13. Kuala Lumpur: Malayan Law Journal Sdn Bhd. pp.177

¹⁴ Mustill and Boyd. (2001). *Commercial Arbitration, Companion*. 2nd Edition, pp 105

According to Grace Xavier (2001), an arbitrator's award is not final and binding and thus can still be challenged by any of the parties, until it is registered and accepted as a judgment by leave of the High Court.¹⁵ An arbitrator's award that did not comply with the said requirements may be set aside or remitted by the court. Matters that may constitute misconduct justifying the setting aside of an award are those capable of causing a substantial miscarriage of justice. Another major area relates to an argument that there is a defect in the award, that is, on it. The arbitrator, in such cases, is alleged to have made an error of law that is on the face of the award, or that the error is incorporated into the award from other material.¹⁶

However, the court must not be over ready to set aside awards unless there has been something radically wrong or the proceedings had been conducted in an unjust manner.¹⁷ In fact, a court would be extremely reluctant to disturb the findings of an arbitrator where he had acted fairly and in reliance upon the facts presented to him.¹⁸ Only where an arbitrator had committed a clear error of law on the face of an award may a court set aside or remit the award to the arbitrator for further consideration, for instance, where an arbitrator had not considered all the issues that had arisen before him.¹⁹

Thus, under section 23 and 24 of the 1952 Act, the circumstances leading to an arbitrator's award being remitted or set aside by the court arise basically from two avenues, namely²⁰:

¹⁵ Grace Xavier. (2001). *Law And Practice Of Arbitration In Malaysia*. Malaysia: Sweet & Maxwell Asia. pp 180

¹⁶ [2002] 1 MLJ. Sundra Rajoo. *Arbitration Award*.

¹⁷ *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51

¹⁸ *Syarikat Pembinaan Binaken v Perbadanan Pembangunan Bandar* [2001] 2 AMR 2145.

¹⁹ *Malaysian National Insurance Sdn Bhd v Tan Kok Hua Brothers Construction Sdn Bhd* [1984] 2 CLJ 222 (Rep); [1984] 2 CLJ 181.

²⁰ [2002] 1 MLJ. Sundra Rajoo. *Arbitration Award*

1. The conduct of the reference, for example the denial of natural justice to the parties; and
2. The award, for example, where an error of law is alleged on the face of the award, either expressly or being incorporated in the award.

Whereas, in the Arbitration Act 2005, section 42 which is not in the Model Law and is in Part III of the new Act is a provision for setting aside an arbitral award. This section provides for appeals post-award on a question of law not fact. It is trite that the arbitral tribunal's findings of fact are conclusive.²¹

The general principles which are normally applied in determining if there is an error on the face of the record are as follows: "an arbitrator's award may be set aside for error of law appearing on the face to it, although the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into count when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that it can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous."²²

²¹ [2009] 2 MLJ. SUNDRA RAJOO. *Law, Practice And Procedure Of Arbitration - The Arbitration Act 2005 Perspective*.

²² Halsbury's Laws of England, 4th ed, Vol 2, paragraph 623, p334

1.2 Problem of Statement

The English Act for the first time introduced a qualified system for appeals on question of law, by providing that such appeals could only be brought by the consent of the other parties to the reference or with the leave of the court and also contains statutory guidelines for the court to consider when dealing with leave applications.²³ In the case of *BTP Tioxide Ltd v Pioneer Shipping Ltd*²⁴, the question of how the court should exercise its discretion in granting leave was discussed, and led to the famous “Nema guidelines”. In the case of *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*²⁵, the New Zealand the Court of Appeal laid down its own guidelines for the exercise of the discretion to grant leave. These parallel but are not same as the Nema guidelines which were applied in England under the Arbitration Act 1979 until the passing of the 1996 Act.²⁶

It is noted that in the New Arbitration Act 2005, section 42, the trend outlined above to limit the scope of appeals on a point of law has not been followed in Malaysia. According to Sundra Rajoo (2009), section 24 of the 1952 Act and section 42 of the 2005 Act is vaguely worded to allow the raising to the High Court of any question of law ‘arising out of an award’ but does not provide the necessary guidelines to filter out frivolous applications designed merely to delay proceedings and enforcement.²⁷ There is no requirement to obtain leave, no provision to limit or define the question of law and no apparent discretion vested in the court to entertain or not to entertain the reference.²⁸

²³ Sundra Rajoo and Davidson W.S.W. (2007). *The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia*. Malaysia: Sweet & Maxwell Asia. pp197

²⁴ [1981] 2 Lloyd’s Rep 239

²⁵ [2000] NZCA 131.

²⁶ Sundra Rajoo and Davidson W.S.W. (2007). *The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia*. Malaysia: Sweet & Maxwell Asia. Pp197

²⁷ [2009] 2 MLJ. SUNDRA RAJOO. *Law, Practice And Procedure Of Arbitration - The Arbitration Act 2005 Perspective*

²⁸ Sundra Rajoo and Davidson W.S.W. (2010). *Malaysia Law Conference, Arbitration Act 2005: Malaysia Joins the Model Law*. Retrieved 6th May 2010, from http://www.malaysianbar.org.my/adr_arbitration_mediation/arbitration_act_2005_malaysia_joins_the_model_law.html?date=2010-05-01

Both 1952 Act and 2005 Act also no provision to limit and no clear definition as to what exactly it means by “error of law on the face of award”. Therefore it is very difficult for the losing party to decide whether the award is error on the face of it and should they challenge the arbitral award under this ground. Normally it is for the court to decide. This raises concern that the section may reverse the current trend and lead to opening of the floodgates with the consequential result of delaying implementation of arbitral awards.

Hence, the issues derived from the statement above are what are the judicial interpretations of “error of law on the face of the arbitration award”?

1.3 Objective of Research

Following the issues stated above, this research attempts to:-

1. To determine the judicial interpretations of “error of law on the face of the arbitration award”.

1.4 Scope of study

The following are the scopes for this study: -

The approach adopted in this research is case law based. Only cases related to error of law on the face of arbitration award will be discussed in the research. This research will focus on the provision pertaining setting aside and remitting award for the error of law on the face of the award in Arbitration Act 1952 and Arbitration Act 2005.

This study is conducted by law cases which obtained from Lexis Nexis and Malayan Law Journal (MLJ). The study also refers to cases in other countries such as United Kingdom, Singapore, Australia and Hong Kong.

1.5 Previous Research

A research was done by Vanitha Annamalai (2008) which entitled Comparative study of arbitration act 2005 and 1952 arbitration award, enforcement and challenge. The objective of the research is to compare the provisions in Arbitration Act 1952 and Arbitration Act 2005 pertaining to award, enforcement and challenge and identify the differences and similarities.

Another research “Arbitration: Challenging the Arbitral Award (Certiorari)” is undertaken by Norhafizah binti Yusof (2007), which the author study on the basic ground and circumstances that civil action; certiorari will be available to the losing parties who are unhappy with the arbitrator’s award in a construction contract.

1.6 Significant of study

The importance of this study is to give an insight of judicial interpretations on what are the circumstances considered as “error of law on the face of the award” in arbitration. This study may help the parties in the arbitration to consider whether the arbitrator is competent to decide all legal issues at hand. Besides, this study also clarify the basic grounds and circumstances that available for the losing party in the arbitration refer to the High court to remit or setting aside the award if there is an error of law on the face of the award.

1.7 Methodology

In order to achieve the research objective, a systematic research process had been drawn up and adhered to. The research process consists of four major stages, namely, identifying the research issue, data collection, data analysis and writing. Each stage is shown in detail below. (Refer to Figure 1).

1.7.1 Identifying the Research Issue

The initial stage is to identify the area of study and research issue. Initial literature review was done in order to obtain the overview of the particular research topic. It involved reading on various sources of published materials for example, articles, journals, seminar papers, related cases, previous research and other related research materials. Then, the next step is to formulate a suitable objective and designing a scope of study.

1.7.2 Data Collection

The second stage is to develop research design and data collection. The main purpose of research design is to determine the important data to be collected and the method to collect it. The data will be collected through documentary study on the Court cases form MLJ, Building Law Report and other law journals form Lexis Nexis. Next data also will collected through published resources, like books, journals, articles, varies standard form of contract and related statutory are the most helpful sources in collecting primary and secondary data. Data collection stage is an important stage where it leads the researcher towards achieving the main objectives.

1.7.3 Data Analysis

During this stage, the case laws collected and all the relevant information will be specifically arranged and analyze and also interpreted based on the literature view is converted into information that is useful for the research. Researcher will carefully

reviewed the relevant case laws collected and also with special attention on the facts of the case, issues and judgments presented by each case law.

1.7.4 Writing

In the last stage, process of writing up and checking will involves to complete the report. A conclusion will be made up and at the same time recommendations that related to the problem may be made in this stage. The author had also reviewed the whole process of the research to identify whether the research objective has been achieved.

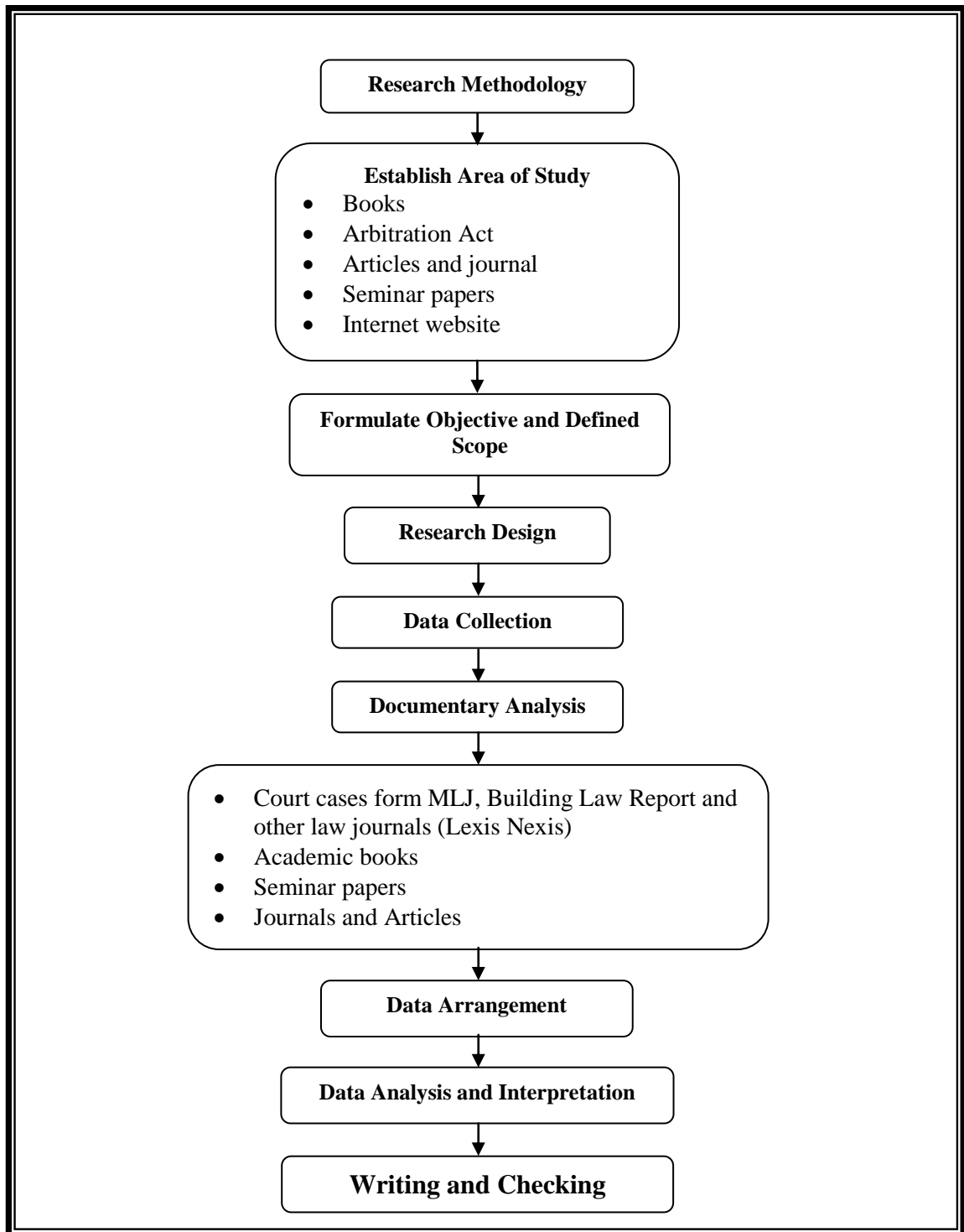


Figure 1: Research Methodology Flowchart

1.8 Chapter Organization

Chapter 1

This chapter set out the background of the study and identified the research issues. It also consists of objective of the research that stated the aims of the study, scope and limitation of the study, research methodology to be carried out to reach the objective of the dissertation and the organization of chapter.

Chapter 2

This chapter discusses the theoretical framework of the definition and purpose of an award, type of award, requirements of an award, structure of a reasoned award, requirements for an award to be enforced.

Chapter 3

Basically is the literature review on the theoretically study of the availability recourse for the losing party to challenge the arbitral award under the error of law on the face of an award to the court. This chapter will discuss the circumstances and grounds that considered as an error of law on the face of an award enable to set aside the award (based on books, journals, articles, seminar paper and internet websites).

Chapter 4

This chapter is concentrate on the court cases review and analysis in order to discuss the judicial interpretation on the ground and circumstances that considered as error of law on the face of the award in arbitration.

Chapter 5

This is the final part of the whole report it concluded the finding for the whole research. This chapter this chapter will includes the summary on the research findings, conclusion and recommendations and suggestions for further research.

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