SMU
SINGAPORE MANAGEMENT UNIVERSITY

Singapore International Dispute Resolution Academy

REVIEW OF THE

SINGAPORE

INTERNATIONAL ARBITRATION ACT

(2024)

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ABOUT SIDRA

The Singapore International Dispute Resolution Academy (SIDRA) is a platform for thought leadership in international dispute resolution theory, practice and policy. A research centre at the Singapore Management University School of Law, SIDRA leads the way through projects, publications and events that promote dynamic and inclusive conversations on how to constructively engage with and resolve differences and disputes at global, regional and national levels. In particular, SIDRA differentiates itself through its focus on applied research that has practical impact on industry and legislation.

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GLOSSARY

Abbreviation	Meaning
AA	Singapore Arbitration Act 2001
AIAA	Australia International Arbitration Act 1974
ASA	Arbitration (Scotland) Act 2010
BCLP	Bryan Cave Leighton Paisner Arbitration Survey 2020
BGG	Bundesgerichtsgesetz (Swiss Federal Court Act, from the 17th June 2005)
CIETAC	China International Economic and Trade Arbitration Centre
CPR	English Civil Procedure Rules 1998
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Arbitration Institute)
EAA	English Arbitration Act 1996 (Cap 23)
HKAO	Hong Kong Arbitration Ordinance (Cap. 609, 2011)
HKCFI	Hong Kong Court of First Instance
HKCJR	Hong Kong Civil Justice Reform
HKROC	Hong Kong Rules of the High Court (Cap. 4A, 1998)
HKIAC	Hong Kong International Arbitration Centre
IAA	International Arbitration Act 1994 (2020 Rev Ed)
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
JAMS	Judicial Arbitration and Mediation Services
JC	Judicial Commissioner
KCAB	Korean Commercial Arbitration Board
Law Commission	Law Commission of England and Wales
LCIA	London Court of International Arbitration
LRC	Singapore Academy of Law Law Reform Committee
MAA	Malaysia Arbitration Act 2005
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958
NZAA	New Zealand Arbitration Act 1996
PILA	Swiss Federal Private International Law of 18 December 1987
PRC	People's Republic of China
ROC 2014	Singapore Rules of Court 2014
ROC 2021	Singapore Rules of Court 2021
SAA	Swedish Arbitration Act of 1999
SAL	Singapore Academy of Law
SCC	Stockholm Chamber of Commerce
SCJA	Singapore Supreme Court of Judicature Act 2007
SIAC	Singapore International Arbitration Centre
SICC	Singapore International Commercial Court
SICC Rules	Singapore International Commercial Court Rules 2021
SIDRA	Singapore International Dispute Resolution Academy
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

1 In Singapore, international arbitration is regulated by the Singapore International Arbitration Act (IAA) which first came into force on 1 January 1995. The IAA was enacted to provide a legal framework for the conduct of international arbitration proceedings in Singapore, aligning its practices with international standards and promoting Singapore as a preferred destination for international arbitration. Principally, the IAA did so by adopting the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 (Model Law).

2 With the 30th anniversary of the coming into force of the IAA, the Singapore International Dispute Resolution Academy (SIDRA) was commissioned by the Singapore Ministry of Law to embark on a research project. The project considers to what extent the IAA remains state of the art, in support of Singapore as one of the top choices by parties to seat their international arbitrations. The review, among others, draws upon the newly proposed revisions to the English Arbitration Act (EAA) and compare developments in other leading arbitration jurisdictions.

3 Specifically, SIDRA was commissioned to examine the following issues:

Issue 1: Whether to confer on the court the power to make costs orders for the arbitral proceedings following a successful setting aside.

Issue 2: Whether separate costs principles are necessary in setting aside applications.

Issue 3: Whether to introduce a leave requirement for appeals to the Court of Appeal following an unsuccessful application to set aside an arbitral award in the High Court.

Issue 4: Whether the time limit to file a setting aside application should be reduced.

Issue 5: Whether a right of appeal (including variations of the same) on questions of law is desirable.

Issue 6: How to ascertain the governing law of the arbitration agreement.

Issue 7: Whether the review of the tribunal's jurisdiction should be conducted by way of an appeal or a rehearing.

Issue 8: Summary disposal.

4 In terms of the methodology adopted, SIDRA convened a team of adjunct researchers (comprising dispute resolution practitioners) to deliberate, research and produce a draft Report. The draft Report was circulated to a focus group comprising practitioners, arbitrators, institutions, and in-house counsel. A discussion between SIDRA and the focus group was convened to collate views and feedback. SIDRA's final Report records and incorporates the views and feedback received from the focus group.

5 Each of the issues above constitutes a chapter in SIDRA's Report. By way of summary, SIDRA's recommendations on each of the issues are as follows:

Issue 1: We recommend enacting an express provision in the IAA giving the courts the discretion to make an order in respect of only the costs of the arbitration proceedings following a successful set-aside application; the courts' discretion will extend to apportioning, but not varying, the arbitral tribunal fees and institutional fees.[1] We further recommend that the courts should also have the discretion to remit the issue of the costs of the arbitration proceedings, but remission should only be ordered as an exceptional remedy when (a) all parties to the award agree to the remission; and (b) it is in the interests of justice to do so.

[1] This means the courts cannot revise the quantum of the tribunal and institutional fees payable, but can otherwise re-allocate the proportion each party has to bear.

Issue 2: We do not recommend any reform to the IAA. Separate costs principles are not necessary for unsuccessful applications to set aside international arbitral awards in Singapore. The costs regime in the SICC typically allows a successful respondent in a setting-aside application to recover more than what it would if costs were assessed at the High Court on a standard or indemnity basis. As the SICC grows to hear more international arbitration-related disputes, the issue of whether indemnity costs should be imposed as a default for setting-aside applications will become less relevant.

Issue 3: We recommend a more straightforward rule where parties must obtain permission of the appellate court to appeal against any decision of the High Court on both setting aside and resisting enforcement applications (whether successful or otherwise). The appellate court shall grant any permission to appeal without a hearing unless it is of the view that a hearing is required.

Issue 4: We do not recommend reducing the three-month time limit for setting aside applications. We also do not recommend giving the courts general discretion to extend the time limit. However, we recommend enacting a new provision in the IAA giving the courts discretion to extend the time limit in setting aside applications involving fraud or corruption under section 24(a) of the IAA.

Issue 5: We recommend that the IAA should be amended to provide parties with an opt-in right to appeal to the court on points of law. The Ministry of Law's 2019 proposal should be adopted with modifications, such as:

(a) expressly requiring appeals to be decided on the basis of the findings of fact in the award;

(b) defining questions of law to expressly include questions of foreign and international law;

(c) preventing an automatic waiver of the right of appeal under institutional rules;

(d) making provision for the costs of the court and arbitral proceedings; and

(e) providing that applications for permission to further appeal from the High Court shall be determined by the appellate court.

Issue 6: We recommend that Singapore should enact a new statutory choice of law approach for determining the governing law of an arbitration agreement to replace the existing Singapore common law approach. The new provision should provide as follows:

Law applicable to arbitration agreement

1. The law to which the parties have subjected their arbitration agreement shall be the law that the parties expressly designate as applicable to the arbitration agreement.

2. In the absence of an express designation under subsection (1), the law to which the parties have subjected their arbitration agreement shall, subject to contrary agreement, be the law that the parties expressly designate as applicable to any contract which contains that arbitration agreement. If no law has been expressly designated by the parties as applicable to any contract which contains the arbitration agreement, subsection (3) shall apply.

3. In all other cases, the law applicable to the arbitration agreement shall be the law of the seat of arbitration.

4. In the absence of (i) any agreement between the parties on a seat; and (ii) any rules of arbitration agreed to or adopted by the parties which provides for a default seat, the General Division of the High Court (or the appellate court) may, for the purposes of subsection (3), determine the seat of arbitration by having regard to the circumstances of the case, including the convenience of the parties.

Issue 7: On the standard of review, we recommend that a tribunal's ruling on jurisdiction should continue to be subject to a rehearing before the courts (instead of an

appeal), without any deference granted to the tribunal's findings. Insofar as the scope of review is concerned, parties should not have an unfettered right to introduce new evidence. Instead, the court should have the discretion to decide what evidence to receive and how the evidence is to be received, whether by way of affidavit or *viva voce*. Whilst we do not recommend any changes to the IAA, we recommend the introduction of new Rules of Court requiring parties to identify new arguments and new evidence sought to be introduced before the courts.

Issue 8: We recommend that section 19A of the IAA should be amended to expressly provide that the arbitral tribunal has the power to summarily dispose of matters in dispute by way of an award, unless the parties agree that the arbitral tribunal shall not have such a power, along the following lines:

Awards made on different issues and summary determination

19A.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may:

(a) make more than one award at different points in time during the arbitral proceedings on different aspects of the matters to be determined; or

(b) make one or more awards on a summary basis.

(2) The arbitral tribunal may, in particular, make an award relating to —

(a) an issue affecting a claim or defence; or

(b) a part only or the whole of the claim, counterclaim, cross-claim or defence, which is submitted to it for decision.

(3) If the arbitral tribunal makes an award under this section, it must specify in its award, the issue, claim or defence, which is the subject matter of the award.

(4) For the purposes of sub-section (1), an arbitral tribunal makes an award on a summary basis in relation to an issue, claim or defence if the tribunal has exercised its powers under Article 19 of the Model Law with a view to expediting the proceedings on that issue, claim or defence. [underline added]

6 The principal author of the Report is A/Prof Darius Chan, Deputy Director of SIDRA. He led a team of co-authors comprising the following (in alphabetical order of their last names):

i. Su Jin Chandran
ii. Louis Lau
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7 All views (and any errors) herein are the authors' alone and should not be attributed to their respective organisations.

8 SIDRA records its deep appreciation and gratitude to members of the focus group in contributing their time and views to the development of the Report. They are named in Annex E of the Report. SIDRA acknowledges the assistance of the Singapore Corporate Counsel Association in nominating i n-house counsel to the focus group.

9 SIDRA gratefully acknowledges the support provided by the Singapore Ministry of Law.

ISSUE 1: WHETHER TO CONFER ON THE COURT THE POWER TO MAKE COSTS ORDERS FOR THE ARBITRAL PROCEEDINGS FOLLOWING A SUCCESSFUL SETTING ASIDE

I. Introduction

1 There is a perception that arbitration has grown to be more costly.[2] It is thus in the interest of successful parties in an arbitration to preserve the recoverability of their legal costs. Where an award is set aside either in whole or in part and the tribunal no longer has the mandate to preside over the dispute, the recoverability of the arbitrating parties' legal costs becomes of keen concern.

2 In the context of a jurisdictional challenge, section 10(7) of the IAA empowers the Singapore courts to consider and, if the circumstances permit, to make an order in respect of the costs of an arbitration proceeding against any party.

3 However, in the context of a setting aside application, neither section 24 of the IAA nor Article 34 of the Model Law, contain a similar provision. Accordingly, the Singapore courts are presently not legislatively empowered to make an order in respect of the costs of the arbitral proceedings in a successful setting-aside application.

4 In sum, we recommend enacting new provisions in the IAA giving the courts the discretion to make orders in respect of the costs of the arbitration proceedings following a successful set-aside application. The courts' discretion will extend to apportioning, but not varying, the fees and expenses of the arbitral tribunal and arbitral institution that may have been determined by the tribunal or institution. We further recommend that the courts should also have the discretion to remit the issue of the costs of the arbitration proceedings, but remission should only be ordered as an exceptional remedy when (a)

[2] Philip Jeyaretnam, "Controlling Time And Costs In Arbitration" (2013) *Singapore Business Review* <https://sbr.com.sg/professional-serviceslegal/commentary/controlling-time-and-costs-in-arbitration-0> (accessed 31 July 2024).

all parties to the award agree to the remission; and (b) it is in the interests of justice to do so.

II. Current position under Singapore Law on awarding costs of the arbitration following a successful setting aside

5 That section 24 of the IAA and/or Article 34 of the Model Law contained no provisions for the curial court to make an award of costs in the appropriate circumstances, is an issue identified by the Singapore Court of Appeal in *CBX v CBZ* ("***CBX v CBZ***").[3]

6 There, the court determined that the awards concerned were to be partially set aside to the extent the issues considered in the award exceeded the tribunal's mandate and the parties had no opportunity to be heard.

7 The court further determined that the tribunal's decision on costs ought also to be set aside because "costs awards are usually ancillary to and reflective of the outcome of the substantive issues";[4] if parts of the substantive awards were set aside, then the costs orders made by the tribunal which were contingent on those state of affairs and conclusions ought also to be set aside.[5] In *CBX v CBZ* itself, the court observed that the tribunal's decision on costs was influenced by the substantive parts of the award set aside.

8 The court observed that there was no provision in either the IAA or the Model Law vesting the Singapore courts with the power to remit the issue of costs to the tribunal for reconsideration.[6] The court thus opined that it would be "a matter of regret" if "it were not possible in one way or another to find a means, where appropriate, for a party to seek and for some tribunal (or even court) to make a valid costs order, where appropriate according to the circumstances",[7] and that law reform may be warranted.

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[3] [2022] 1 SLR 47.

[4] *CBX v CBZ*, *id*, at [75].

[5] *CBX v CBZ*, *id*, at [72] and [73]

[6] *CBX v CBZ*, *id*, at [78].

[7] *CBX v CBZ*, *id*, at [85].

III. Cross-jurisdictional comparison

9 In England, the EAA does not statutorily provide for the recovery of costs incurred by arbitrating parties after a successful setting aside. Neither section 32[8] nor sections 67 and 68[9] of the EAA provides a statutory power for the English courts to consider the costs of the arbitration proceedings following a successful jurisdictional challenge (in the case of section 32) or a successful setting aside action (in the case of sections 67 and 68).

10 As the English High Court observed in *Crest Nicholson (Eastern) Ltd v Western* following a successful challenge against the tribunal's assumption of jurisdiction, any power to award costs for the arbitration proceedings below must be statutorily provided for:[10]

> [T]he court has no jurisdiction to make any order in relation to costs incurred by the parties in those proceedings. There is nothing in the [EAA] which suggests that the court has jurisdiction in relation to such costs … If the purported arbitration proceedings were invalid, the court could only have power to make an order in relation to those costs if there was some clear statutory power to do so. There is no such power.

11 The English courts, however, have sought to overcome this by utilising the statutory power to remit to the tribunal[11] the issue of the costs of the arbitral proceedings for further consideration under the EAA.[12] As noted in *CBX v CBZ*, this option is not open to the Singapore courts; the IAA and the Model Law do not empower the Singapore courts to remit awards to the tribunal save under Article 34(4) of the Model Law, which was designed to avoid setting aside an award.[13]

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[8] The statutory equivalent of section 10 of the IAA.

[9] The statutory equivalent of section 24 of the IAA.

[10] [2008] EWHC 1325 (TCC).

[11] See, e.g., sections 68(3) and 69(7) of the EAA.

[12] See, e.g., *Martin and others v Harris* [2019] EWHC 2735 (Ch), where the English High court had, after allowing the award to be set aside for error of law, ordered that the decision on costs be remitted to the arbitrator for reconsideration. The court reasoned (at [39]) that the arbitrator is more familiar with the course of the arbitration and had considered a number of issues in relation to costs; it would therefore be the cheapest way for the arbitrator to consider the issue of costs.

[13] *CBX v CBZ*, *supra* n 3, at [78].

12 The laws of Hong Kong, France, and Switzerland similarly do not contain provisions that allow their courts the power to grant costs of the arbitration proceedings after a successful setting aside:

(a) Articles 16 and 81 of the HKAO (which mirror sections 10 and 24 of the IAA) do not contain any provision empowering the Hong Kong courts to make an order on the costs of the arbitration proceedings.

(b) Articles 1518 read with 1524 of the French Code of Civil Procedure do not contain any provisions empowering the Parisian courts to award costs of the arbitration proceedings following a successful setting aside.

(c) Article 190 located in Chapter 12 of the PILA does not contain any provisions empowering the courts in Geneva to award costs of the arbitration proceedings following a successful setting aside.

IV. Arguments for and against reform

A. Arguments in support of reform

13 This is not the first time the issue of whether the Singapore courts ought to be empowered to make a costs order was considered.

14 A 2019 report published by the LRC has considered this issue in detail ("**2019 Report**").[14] The 2019 Report concluded that reform was necessary, and proposed amendments to section 24 of the IAA permitting the court to make an order in respect of the costs of the arbitral proceedings in the event an award was set aside.[15]

15 The 2019 Report began by noting the complexities involved when dealing with the costs of the arbitration proceedings in a setting-aside challenge. Whether a tribunal remains empowered to consider the costs of the arbitral proceedings following a setting-aside proceeding depends on: (a) whether the setting-aside challenge succeeds; (b) if

[14] Law Reform Committee, Singapore Academy of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related court Proceedings* (February 2019) (Members of the Costs in Arbitration-Related Court Proceedings Subcommittee: Jordan Tan & Colin Liew) ("**2019 Report**").

[15] 2019 Report, *id*, at Chapter 1, paras 4 and 6(c).

so, whether the nature of the challenge is such as to deprive the tribunal of its jurisdiction to determine further matters in the arbitration; and (c) whether the tribunal is *functus officio*.

16 The 2019 Report raised two scenarios where the tribunal is deprived of an opportunity to revisit the question of costs, and in which the Singapore courts lack the power to deal with the question of the arbitrating parties' costs:[16]

(a) The first is where a tribunal has made a decision on costs in its award and the entirety of the award is set aside, in which case the tribunal is not entitled to revisit the question of costs since it is already *functus*.

(b) The second is where a tribunal has not made a decision on costs, and the setting-aside challenges succeed on the basis that the tribunal lacks jurisdiction, in which case the tribunal lacks the competence to determine any further residual issues in the arbitration, including that of costs.

17 This stands in contrast to the court's power under section 10(7) of the IAA when reviewing a tribunal's preliminary decision on jurisdiction. Section 10(7), however, does not apply where the tribunal exercises its discretion to determine the issue of jurisdiction as part of its award on the merits.

18 Consequently, if a tribunal chooses not to determine the issue of jurisdiction as a preliminary issue, any award debtor can raise a jurisdictional challenge only at the post-award stage, for instance under section 24 of the IAA read with Article 34 of the Model Law. Assuming the award debtor succeeds, "logically the question of costs will need to be reopened".[17] Yet the Singapore courts cannot do so, only because the tribunal chose not to decide the issue of jurisdiction as a preliminary issue.[18]

19 The 2019 Report thus concluded that no good reason exists for maintaining this asymmetry,[19] and reform is required "to bring consistency to the law" and "to protect

[16] 2019 Report, *id*, at Chapter 3, para 3.2.

[17] 2019 Report, *id*, at Chapter 3, para 3.2.

[18] 2019 Report, *id*, at Chapter 3, para 3.5.

[19] 2019 Report, *id*, at Chapter 3, para 3.5.

all parties who are wrongfully pursued in arbitration".[20] The 2019 Report further opined that "once the foregoing argument is accepted, it follows that the court should be able to make the same costs orders following non-jurisdictional challenges under section 24 or article 34(2) of the Model Law".[21]

B. Arguments against reform

20 We are aware of various competing views raised against reform.

21 First, the assumption underlying the support for reform assumes that an award creditor is necessarily at fault for creating the situation ultimately giving rise to the annulment. According to opponents of reform, this is incorrect.

22 Unlike a jurisdictional challenge under section 10 of the IAA, a setting aside application under section 24 of the IAA is not an appeal involving the reassessment of the merits of the underlying arbitration. Rather, it directs the curial courts to scrutinise the integrity of the arbitral process and the conduct of the tribunal.[22]

23 The absence of any merits-based analysis in a setting-aside challenge means it is unsuitable for the curial courts to determine the allocation of costs to the arbitrating parties.

24 This comports with the nature of a decision on costs, which is an order "that reflects the overall justice of the case"[23] and which is guided by the general principle that the unsuccessful party on the merits of the dispute is ordered to pay the costs of the successful party.[24] This also comports with the view that the arbitral tribunal is

[20] 2019 Report, *id*, at Chapter 3, para 3.11.

[21] 2019 Report, *id*, at Chapter 3, para 3.6.

[22] This scrutiny ensures, among others, that: (a) the arbitration agreement is valid and enforceable; (b) the dispute submitted to arbitration and adjudicated upon by the tribunal accords with the parties' arbitration agreement and the scope of their submission to arbitration; (c) the proceedings are carried out fairly and in accordance with due process; (d) the subject matter of the dispute is arbitrable; and (e) the award is not contrary to public policy.

[23] See *Travellers' Casualty v Sun Life* [2006] EWHC 2885 (Comm) at [11].

[24] See ROC 2014, O 59 r 3(2) and ROC 2021, O 21 r 3(2). The question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole and the overall merits of the dispute: see *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119 at [143]. See also *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2022] 5 SLR 525 at [27]–[28], where the General Division of

empowered and thus responsible for determining the merits of the parties' dispute and, incidental to this determination, the costs of the underlying arbitration.

25 In most cases where an award is set aside, the arbitrating parties can hardly be faulted for the resultant consequence. It is thus not possible, in such circumstances, to characterise the arbitrating parties as "successful" or "unsuccessful" to permit the courts to proceed with an assessment of costs. The entire proceeding is, strictly speaking, a nullity.

26 Where the award was set aside because the tribunal erred in the determination of the merits (and hence the underlying decision on costs), it is legislatively accepted that the tribunal bears no fault.[25] Even if, practically speaking, the tribunal was at fault for the setting aside, this does not easily lend itself as a factor that the curial courts may consider when deciding an award of costs to the arbitrating parties.

27 All of this therefore engenders difficulties for courts, as a matter of principle, to determine how costs should be allocated in the traditional sense. It may also result in an award creditor being effectively penalised for the tribunal's exercise of its procedural powers.

28 Second, it has traditionally been the case that parties equally bear the risk that arbitral proceedings may go wrong. And should that risk materialise, it is accepted as a matter of practice that the parties will each bear their costs of the arbitration.

29 This flows from the principle of party autonomy, which permeates and is the driving force behind any arbitral process. Thus, parties who select arbitration as their preferred mode of dispute resolution for all its benefits must also bear the associated risks.

30 This includes the risk that the entire process may, for reasons beyond their control or otherwise, be an exercise in futility if the final award on the merits is set aside.

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the High Court held that the exercise of awarding costs requires a determination as to the overall outcome of the litigation and to identify whose favour the event went in litigation therefore requires asking which party in substance and reality won the litigation, looking at its outcome in a realistic and commercially sensible way.

[25] Indeed, a tribunal is not liable for any negligence or mistake it makes in the arbitration: see IAA, section 25.

31 It also includes the risk that they may not obtain an enforceable decision on costs at all, let alone a satisfactory one. After all, arbitrating parties are no more entitled to a "correct" decision on costs than a correct decision on the merits. Put another way, arbitrating parties must accept the risk that the loss should lie where it falls.

32 Third, opponents of reform suggest it is incorrect to sustain the justification of reform, in part, on the perceived lacuna or asymmetry in the IAA regime caused by the introduction of section 10(7) of the IAA and the corresponding absence of any similar provision under section 24 of the IAA.

33 Section 10(7) of the IAA was introduced as part of IAA reforms in 2012 which saw the expansion of the court's power to hear an appeal from a tribunal's negative jurisdictional ruling. In requiring curial courts to determine the question of costs after it finds the tribunal lacks jurisdiction, this assessment is likely to be relatively confined to the costs attributable to the jurisdictional issue itself. Moreover, the tribunal would, in some cases, already have determined the party's costs. Although not binding, the tribunal's costs assessment would assist and thus make it relatively more straightforward for the courts to determine the issue of costs.

34 Even if the tribunal did not have the opportunity to assess the costs of any jurisdictional challenge, the nature of a jurisdictional appeal as *de novo* means the court is well-placed to determine the question of costs. In contrast, a court that decides to set aside an award on the basis of a procedural defect would not have assessed the merits of the decision and would thus be unfamiliar with the issues at hand. And the court does not have the benefit of witnessing first-hand how the arbitrating parties conducted their case. The court would therefore face some difficulty in assessing the award of costs based on the parties' conduct in the arbitration.

35 The introduction of section 10(7) of the IAA was therefore likely to be deliberate, taking into account the nature of an appeal against a tribunal's jurisdictional ruling and the stage of the proceedings where the courts are required to determine the issue of costs, if necessary. There is arguably no unintentional lacuna or asymmetry supporting the need for reform.

36 Fourth, neither the Model Law nor developed international arbitration regimes (whether Model Law jurisdictions or otherwise) have legislatively empowered their courts to award costs following a successful setting aside application. This may be explicable on the basis that there is unlikely any sound policy reason justifying this reform.

37 On the contrary, such reform may create opportunities for abuse. Award debtors may be incentivised to mount spurious and possibly unmeritorious applications to set aside an award, in the hopes of not paying the legal costs of the arbitration and possibly recovering their costs from the award creditor.

V. Recommendation

38 The arguments are finely balanced. However, in our view, we think that, as a first-order question, there are deserving parties in deserving scenarios who should be permitted to recover costs of the arbitral proceedings following the setting aside of an award (whether in whole or part). Who and how the power to decide costs should be exercised are second-order questions.

39 The starting point, as *CBX v CBZ* identified, is the need to avoid injustice:[26]

> … it would appear to be a matter of regret if, after the setting aside in whole or part of an award, accompanied consequentially by the setting aside of a costs order, it were not possible in one way or another to find a means, where appropriate, for a party to seek and for some tribunal (or even the court) to make a valid costs order, where appropriate according to the circumstances. The area is one which those having an oversight of arbitration law might wish to consider.

This injustice identified by the court was particularly apt on the facts of *CBX v CBZ* itself.

40 *CBX v CBZ* involved a situation where part of the tribunal's final award was set aside because those parts involved the tribunal's determination of issues that fell beyond the scope of submission to arbitration. It was apparent to the court that the decision on costs rendered by the tribunal was premised, to a significant degree, on the tribunal's

[26] *CBX v CBZ*, *supra* n 3, at [50].

consideration of those issues. The court therefore concluded there was no good reason for the decision on costs to stand. However, this did not mean the award creditor was entirely unsuccessful. The award creditor was simply successful, albeit to a lesser extent than it would have been before part of the award was set aside.

41 In this context, the court noted the unsatisfactory conclusion that neither side could obtain any costs and that "it would be unfair if matters simply lay where they fall"; in the court's view:[27]

> The present case differs from all these cases, because only part of the substantive award is in excess of jurisdiction and so set aside and the costs order made took into account a range of considerations, including considerations relating to substantive aspects of the award not set aside, the conduct of the case and the overall costs.
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> …
>
> ***[this] approach cannot guarantee a fair result, since it may leave a respondent who has justifiably resisted jurisdiction without apparent recourse in respect of the arbitral costs.*** Had the objection succeeded before the arbitrator, whose jurisdiction was invoked by the claimant and so had jurisdiction to rule on its existence, the respondent could probably have expected a costs order in its favour.
>
> In the present case, there is no question about the Tribunal's jurisdiction over the parts of the Phase II Partial Awards which are not set aside. Had the Tribunal appreciated the proper scope of its jurisdiction and remembered the agreed change of position by the parties in relation to Compound Interest, ***the Tribunal would still have made a costs award, albeit very likely not the one it actually made. It is therefore particularly obvious that it would be unfair if matters simply lay where they fall after the setting aside of that Costs Award.*** [emphasis and bold added]

42 In our view, justice requires assisting deserving arbitrating parties, in deserving situations, to obtain recovery of their legal costs incurred in the arbitration. As in *CBX v CBZ* itself, if the tribunal had not decided on the issues that it had no jurisdiction over,

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[27] *CBX v CBZ*, *id*, at [72] and [76]–[77].

it would nevertheless have rendered an award in favour of the award creditor. There was thus an expectation on the award creditor's part that it was entitled to receive an award of costs relating to the parts of the award upheld. There would also have been a corresponding expectation by the award debtor that the parts of the award set aside for being outside the tribunal's jurisdiction would be taken into account in determining the extent to which the award creditor was entitled to its costs.

43 Balanced against the need to do justice is, as discussed above, the competing view that arbitrating parties are to assume the risks of having a decision on costs made in their favour set aside, should the award on the merits be set aside (in whole or in part). On this view, there is no inherent unfairness to arbitrating parties who voluntarily assume the risk that they would have to bear their own costs of the arbitration, in the event the arbitration process is defective.

44 In our view, this argument is too blunt. Because there are different grounds upon which an award could be set aside, the courts should be empowered to decide whether the justice of each case calls for appropriate orders to be made on the costs of the arbitral proceedings.

45 It is not possible to specify all the scenarios where such orders should be made. Some potential scenarios would include: (a) an arbitrating party prevailing, before the curial court, on its argument in the arbitration that the arbitral tribunal had no jurisdiction or exceeded its jurisdiction; (b) an arbitrating party prevailing, before the curial court, on its argument in the arbitration that the arbitral tribunal had breached rules of natural justice; (c) an arbitrating party's conduct of its case in a "scorched earth" manner that is wholly disproportionate to the dispute; or (b) an arbitrating party's procurement of an award by way of fraud or corruption.

46 The last situation is of particular concern. In the context of section 24(b) of the IAA, "fraud" has been defined as including "procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award".[28]

[28] *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 ("***Bloomberry (SGCA)***") at [41].

47 The English High Court's decision in *The Federal Republic of Nigeria v Process & Industrial Developments Limited* is illustrative.[29] There, the court upheld a challenge to a US$11 billion arbitration award rendered against the award debtor, Nigeria, on grounds that it was obtained fraudulently, contrary to public policy under section 68(2)(g) of the EAA.

48 The court condemned the award creditor's procurement of the award "by practising the most severe abuses of the arbitral process".[30] The court found, amongst others, that the award creditor had: (a) bribed a Nigerian official in order to secure the latter act as a witness of fact and to give favourable evidence; (b) through one of its key witnesses provided knowingly false information in his evidence in the arbitration; and (c) improperly retained and shared with the award creditor's solicitors and legal counsel more than 40 privileged and confidential legal documents setting out Nigeria's strategy, both on its defence and on settlement.

49 If a similar case had been before the Singapore courts, and assuming the setting-aside challenge succeeds, it is difficult to justify why the award debtor should be made to bear the costs of contesting the arbitration, the legitimacy of which was thoroughly compromised by the improper conduct of the award creditor in the arbitration.

50 We are aware that the determination of costs following a setting aside of an award presents significantly greater complexities, unlike at the jurisdictional stage. The court may encounter difficulties isolating the costs of arguing a particular issue before a tribunal, which was set aside, from the costs incurred in arguing other issues and the overall costs of the arbitration. This exercise may likely lead to delays, increased costs, and additional litigation.

51 It may be impossible to achieve scientific precision in awarding costs.[31] But this issue plagues any assessment of costs, whether in litigation or arbitration. The courts are no

[29] [2023] EWHC 2638 ("***Nigeria v PID (2023)***").

[30] *Nigeria v PID (2023)*, *id*, at [516].

[30] *Telemedia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another* [2017] 3 SLR 47; [2016] SGHC(I) 6 at [63]: "The exercise of the discretion to award costs, particularly where it is appropriate to apportion costs or to fix a percentage, is far from an exact science. It is necessary to take into account the realities of the outcomes and to make an assessment of the successful parties' entitlements where some of the claims were unsuccessful."

stranger to having to adopt a broad-brush approach in assessing costs. After all, the goal is to arrive at a costs order which reflects the overall justice of the case.

52 We think that our recommendation will strengthen the confidence in Singapore as a seat. Parties who agree to seat their arbitrations in Singapore can be assured that if an award is ultimately set aside, deserving parties may be able to obtain recovery of the costs of the arbitral proceedings.

VI. Proposed amendment to the IAA

A. Recommended provisions

53 In our draft report, we recommended amending the IAA to include provisions giving the courts the discretion to remit or make an order in respect of costs of the arbitration proceedings following a successful set-aside application. Remission should only be ordered if (i) parties agree to the remission or the court is otherwise satisfied that the tribunal has jurisdiction; and (ii) it is in the interests of justice to do so.

54 In formulating this draft amendment, we had two considerations in mind. The first is that the court's consideration of the costs of the arbitration following the setting aside of an award is ultimately guided by the need to do justice in the circumstances of each case. There is therefore no requirement that the court must grant costs of the arbitral proceedings in every case.

55 The second is the practical difficulties the court may face in assessing the costs of the arbitration proceedings. One way in which the court can mitigate this practical difficulty is to remit the issue of costs to the arbitral tribunal. However, we think there should be limits on remission, e.g., parties must agree to the remission or the court is otherwise satisfied that the arbitral tribunal has jurisdiction. We think that, unless parties agree otherwise, it is logically inconsistent to require parties to return to the arbitral tribunal for a decision if, for instance, the court has already determined that the tribunal does not have jurisdiction in the first place.

56 Where an award is set aside but the tribunal has not yet issued a decision on costs, the arbitral tribunal is not *functus* on the issue of costs.[32] There is therefore no need for remission.

57 If the tribunal has already issued a decision on costs (whether in the same award or in a separate decision), the setting aside of the award means the decision on costs falls away.[33] Remission on the issue of costs as permitted by legislation would revive the tribunal's mandate to deal with the issue of costs. New legislation would be required because remission as contemplated under Article 34(4) of the Model Law is a curative option that is available when the court considers that it may be possible to avoid setting aside the award (*AKN v ALC*[34] at [34]). Unlike remission under Article 34(4), remission of the issue of costs is different because: (a) it is considered in a situation where an award is already set aside; and (b) only the issue of costs is remitted to the tribunal, as opposed to the merits of the parties' dispute. If this power of remission on the issue of costs is exercised by the court, the effect is to "confer further jurisdiction on that tribunal, enabling it to consider the matters [of costs] remitted" (*AKN v ALC* at [18]).

B. Potential concerns

58 There may be uncertainty as to when a situation calls for remission. This is especially so given the varied situations in which an award may be set aside.

59 In our view, the existence of some degree of uncertainty does not entail that we should discount the tool of remission altogether. Rather than prescribe exhaustive grounds delineating the situations calling for remission, which necessarily engenders a level of inflexibility that is undesirable, it is preferable to leave it to the court's judgment, aided by counsel, to determine whether the situation in each case calls for remission. The possibility of remission was foreshadowed by the court in *CBX v CBZ*:[35]

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[32] [2001] 2 SLR(R) 273; [2001] SGCA 46 at [36]: "[U]ntil such a final award [including on issues of costs] is given, the arbitral tribunal's mandate still continues; it is not functus officio."

[33] *CBX v CBZ*, *supra* n 3, at [75].

[34] *AKN v ALC* [2015] SGCA 18 ("***AKN v ALC***").

[35] *CBX v CBZ*, *supra* n 3, at [85].

> … it would appear to be a matter of regret if, after the setting aside in whole or part of an award, accompanied consequentially by the setting aside of a costs order, it were not possible in one way or another to find a means, where appropriate, **for a party to seek and for some tribunal (or even the court)** to make a valid costs order, where appropriate according to the circumstances … [bold added]

60 Further, any perceived uncertainty in remission is dealt with (to some degree) by expressly prohibiting remission where the tribunal lacks jurisdiction. If the tribunal lacks jurisdiction, then that is the end of the matter and the court need not concern itself with the question of remission. This mirrors the position under section 10(7) of the IAA where there is no possibility of remission.

61 The possibility of remission strikes a balance between the need to avoid injustice on one hand, and the policy of minimal curial intervention. As *CBX v CBZ* noted:

(a) Once a decision on costs is set aside solely on the basis that it was consequentially invalid upon the setting aside of a part of the substantive award, the tribunal's jurisdiction to determine this issue would be enlivened.[36]

(b) A decision on costs is normally integral to the outcome of the arbitration and so the tribunal is charged with exercising its discretion to deal with this issue. It would not be ideal if this issue was litigated as a separate claim or in a separate arbitration.[37]

62 We are aware that our recommendation for the court to have the power to remit the issue of costs at the setting aside stage creates an asymmetry with section 10(7) of the IAA (which does not provide for remission).

63 At the early stages of the arbitration where the sole issue determined is that of the tribunal's jurisdiction, the determination of costs is relatively not as complex. That explains why the courts can deal with the issue of costs under section 10(7), without the need for any remission. On the other hand, assuming the arbitration proceeds, the

[36] *CBX v CBZ*, *id*, at [84].

[37] *CBX v CBZ*, *id*, at [81].

duration and complexity of the proceedings increases. In some cases, parties may wish for the tribunal, who is more familiar with the procedural history and issues, to determine the issue of costs. It may thus be useful to have remission feature as an option (subject to certain requirements). For instance, in circumstances where a merits award is partially set aside, as in *CBX v CBZ*, parties may prefer the tribunal to deal with the question of costs instead of the courts, given the tribunal's familiarity with the matter.

VII. Focus Group

64 In our draft report, we recommended new provisions in the IAA giving the courts the discretion to remit or make an order in respect of costs of the arbitration proceedings following a successful set-aside application. Remission should only be ordered if (a) parties agree to the remission or the court is otherwise satisfied that the tribunal has jurisdiction; and (b) it is in the interests of justice to do so.

65 The focus group generally favoured providing arbitrating parties with an avenue for recourse to the costs of the arbitration proceedings following a successful setting aside. This is especially so in deserving cases where the award is set aside through deliberate wrongdoing on the part of an arbitrating party (as in *Nigeria v P&ID (2023)*), or where the costs award is set aside because part of the merits award was set aside, yet it is still possible to determine an overall victor of the arbitration (as in *CBX v CBZ*). The focus group members agreed that it would prevent an all-or-nothing outcome.

66 Some focus group members pointed out that the generality of the language adopted in the draft recommendation engendered uncertainty. Specifically, it was unclear when the court should exercise its discretion to award the costs of the arbitration proceedings below. Thus, parties who have successfully setting aside an award will inevitably ask for costs of the arbitration proceedings regardless of the circumstances of the case. This creates further opportunities for satellite litigation, leading to wasted time and costs. Accordingly, it was suggested that the grounds for invoking the courts' power to make an award of costs be specifically enumerated, such as where the award is set aside on grounds of jurisdiction or fraud.

67 Other focus group members responded by pointing out that generality is preferred because the context and facts in which setting aside is too varied to be legislated.

Moreover, it gives the courts flexibility to respond to deserving situations where the justice of the case supports the making an order for costs of the arbitration proceedings. Finally, any concerns regarding the time- and cost-consuming nature of satellite litigation may be overstated given that issues of costs may not necessarily be overly complex.

68 We agree that generality is to be preferred:

(a) In time, case law will provide parties with greater clarity on the circumstances under which a costs order may be appropriately made by the court.

(b) In most cases, parties are likely to have already prepared relevant submissions on costs and cost schedules for the purposes of the arbitration proceedings. If the court determines that it is appropriate to make a cost order of the arbitration proceedings following a successful setting aside, most parties may be able to adapt their earlier submissions on costs and cost schedules with suitable modification. This should mitigate the amount of time and costs incurred.

69 The key debate amongst the focus group centred on whether remission should be the primary mode by which the costs of the arbitration proceedings should be determined.

70 The focus group members identified numerous practical difficulties with remission. In particular, the tribunal may not have incentive to hear the matter again. Parties may encounter delays in obtaining the tribunal's availability to determine the issue of costs, or one party may vehemently resist or oppose the reconstitution of the tribunal. The focus group strongly preferred the court to make a decision so that the dispute can resolved without delay, instead of relegating the decision to the tribunal.

71 Separately, the focus group raised the issue of how the costs of arbitration proceedings are to be determined. Costs in arbitration usually comprise two categories: (i) the costs of the arbitration (i.e., fees and expenses of the tribunal and institution, as applicable); and (ii) legal costs (i.e., legal fees and expenses incurred). It was suggested that the court should not disturb the quantum of the costs of the arbitration (i.e., fees and expenses of the tribunal and institution) that may have already been determined.

72 Concerns were also raised regarding the difference between the principles underlying recovery of legal costs in litigation and arbitration. In particular, it was noted that the principles governing the recovery of legal costs in litigation are stricter. Accordingly, there is uncertainty as to whether the courts would apply similar principles when determining the variation or apportionment of costs between arbitrating parties. The focus group therefore queried whether the costs scales applied by the Singapore courts should be updated to take into account this proposed recommendation.

73 We agree with the comments and concerns raised by the focus group members. In particular, we accept the practical difficulties that may be encountered in remission. For that reason, we think that remission should be granted by the courts only in exceptional circumstances, i.e., where all parties agree to the remission, and the court is of the view that it is in the interests of justice to do so.

74 We also agree that the existing costs guidelines used in domestic litigation are not compatible with the approach to assessing costs of international arbitration proceedings. To this end, we think the SICC's costs regime may be more appropriate. The SICC's approach, based on principles of proportionality and reasonableness[38], generally mirrors the approach to assessing legal costs incurred in international arbitration. Costs which are sensibly and reasonably incurred are generally recoverable.[39]

75 That being said, we do not think it necessary for these costs principles to be legislated in our proposed amendments. Rather, it is sufficient, for present purposes, to reflect this by way of costs guidelines or practice directions to be issued by the Singapore courts.

76 We therefore fine-tuned our draft recommendation in the following way:

(a) The new provisions expressly confer a discretion on courts to grant an order as to costs of the arbitral proceedings following a successful set aside. Only if parties agree and if it is in the interests of justice to do so will the courts have the discretion to remit the issue of costs. Tightening the availability of remission

[38] See Order 22 rules 3(1) and 3(2) of the SICC Rules 2021. See also *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10 at [189].

[39] *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10 at [32]

as an exceptional remedy is deliberate in light of the feedback from the focus group.

(b) A new provision will clarify that the courts shall not vary the fees and expenses of the arbitral tribunal or institution that had been fixed by the tribunal or institution.

77 Accordingly, we recommend the following new provisions in the IAA, for instance as part of section 24:

> (2) Where an award is set aside in whole or in part pursuant to this section or Article 34(2) of the Model Law, the General Division of the High Court or the appellate court (as the case may be) may make an order against any party as to —
>
> (a) costs of the proceedings under this section or Article 34(2) of the Model Law; and
>
> (b) costs of the arbitral proceedings, which may modify or replace, in whole or in part, any costs orders given by the arbitral tribunal.
>
> (3) In respect of subsection (2)(b), the General Division of the High Court or the appellate court (as the case may be) may apportion but shall not vary the fees and expenses of the arbitral tribunal or arbitral institution that had been determined by the tribunal or institution.
>
> (4) Notwithstanding subsection (2)(b), the General Division of the High Court or the appellate court (as the case may be) may remit to the arbitral tribunal the issue of costs of the arbitral proceedings for consideration provided:
>
> (a) all parties to the award agree to the remission; and
>
> (b) it is in the interests of justice to do so.

VIII. Conclusion

78 In sum, we recommend new provisions in the IAA giving the courts the discretion to make an order in respect of the costs of the arbitration proceedings following a

successful set-aside application. However, the court's discretion will not extend to varying the fees and expenses of the arbitral tribunal or institutional fees that had been determined by the tribunal or institution. We further recommend giving the courts the discretion to order remission of the issue of costs as an exceptional remedy when (a) all parties to the award agree to the remission; and (b) it is in the interests of justice to do so.

79 In light of our proposed amendments, it may be necessary to consider two further amendments to the IAA. While these amendments are outside the scope of this Report, they may be considered (and if necessary, for a separate study to be conducted) to give full efficacy to our proposed amendments. The first is the definition of an "award" under section 2(1) of the IAA. The second is to empower the arbitral tribunal to decide the issue of costs. We elaborate on each of these two amendments in Annex A.

ISSUE 2: WHETHER SEPARATE COSTS PRINCIPLES ARE NECESSARY IN SETTING ASIDE APPLICATIONS

I. Introduction

1 This chapter discusses whether separate costs principles are necessary for setting aside applications in Singapore. After a review of the major seats, the specific issue that arises for consideration is whether costs should be assessed on an indemnity basis as a default against an unsuccessful applicant in a setting-aside application.

2 Proponents for such reform typically cite the need to deter dilatory tactics in the enforcement of arbitral awards as the primary reason for the introduction of separate costs principles.[40] The LRC published a Consultation Paper in January 2018 ("**2018 LRC Paper**") seeking feedback on whether the legal position on the assessment of costs in unsuccessful setting-aside applications needs to be reformed.[41] The project was subsequently put on hold.[42]

3 We have considered the issue afresh in light of subsequent developments, including the formation of the SICC. On balance, we do not recommend any reform to the IAA in this regard. As the SICC grows to hear more international arbitration-related disputes, the issue of whether indemnity costs should be imposed as a default for setting-aside applications should become less relevant.

II. Costs regimes in Singapore

4 Since the formation of the SICC, there are two costs regimes that may apply to arbitration-related court proceedings in Singapore, depending on whether the matter is heard by the High Court or by the SICC.

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[40] Gourav Mohanty & Shruti Raina, "Use of Indemnity Costs to Combat Dilatory Tactics in Arbitration: Advocating the Hong Kong Approach" (2014) 3(1) IJAL 101.

[41] Law Reform Committee, Singapore Academy of Law, *Consultation Paper on Certain Issues concerning Arbitration Related Court Proceedings* (January 2018) (Members of Law Reform Sub-Committee on Arbitration-Related Court Proceedings: Chou Sean Yu & Jordan Tan) ("**2018 LRC Paper**").

[42] Singapore Academy of Law, "Law Reform E-Archive" <https://www.sal.org.sg/Resources-Tools/Law-Reform/Certain-Issues-concerning-Arbitration-Related-Court-Proceedings> (accessed 24 July 2024).

A. High Court

5 When the High Court is required to conduct an assessment of costs, it can do so on one the following two bases:

(a) On a standard basis where "a reasonable amount in respect of all costs reasonably incurred is to be allowed, and any doubts … as to whether the costs were reasonably incurred or were reasonable in amount are to be resolved in favour of the paying party";[43] or

(b) On an indemnity basis where "all costs are to be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred, and any doubts … as to whether the costs were reasonably incurred or were reasonable in amount are to be resolved in favour of the receiving party".[44]

6 The default position in Singapore is for party and party costs to be awarded to a successful litigant on a standard basis.[45] Costs may generally only be awarded on an indemnity basis in the presence of exceptional circumstances[46] such as when an action is brought in bad faith or where it is speculative, hypothetical or clearly without basis.[47]

7 Costs assessed on an indemnity basis are usually around one third more than costs assessed on a standard basis,[48] albeit usually less than the actual legal expenses incurred by the successful party.[49] Any reform that increases the chances of costs being assessed on an indemnity basis will have an impact on parties' appetite for litigation.

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[43] ROC 2021, O 21 r 22(2).

[44] ROC 2021, O 21 r 22(3).

[45] *BTN and another v BTP and another* [2021] SGHC 38 ("***BTN v BTP***") at [8].

[46] *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 ("***Airtrust v PH Hydraulics***") at [17].

[47] *Airtrust v PH Hydraulics*, *id*, at [23].

[48] *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [83].

[49] *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2023] 4 SLR 77 ("***Lao Holdings v Lao Government (2023)***") at [40].

B. SICC

8 For matters heard by the SICC, O 22 of the SICC Rules affords a wide discretion to the SICC to make the appropriate costs orders (if any) in every given case. O 22 r 3(1) of the SICC Rules sets out the general position that "a successful party is entitled to costs and the quantum of any costs award will generally reflect the costs incurred by the party entitled to costs, subject to the principles of proportionality and reasonableness". The SICC Rules do not provide for costs to be awarded on a standard or indemnity basis.[50] Instead, the SICC Rules provide for a separate regime that is governed by O 22 of the SICC Rules, which includes considerations of proportionality and reasonableness.

9 O 22 r 3(2) of the SICC Rules sets out a non-exhaustive list of factors that the court may take into account in considering what proportionality and reasonableness require in any given case, including the following:

(a) the complexity of the case and the difficulty or novelty of the questions involved;

(b) the conduct of the parties, including in particular —

(i) conduct before, as well as during the application or proceeding;

(ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(iii) the manner in which a party has pursued or contested a particular allegation or issue;

(iv) whether the conduct of the parties, including conduct in respect of alternative dispute resolution, facilitated the smooth and efficient disposal of the case; and

(c) the amount or value of the claim.

10 The costs regime in the SICC Rules also does not differentiate between "party and party" costs and "solicitor and client" costs. Instead, O 22 r 1(2) of the SICC Rules provides

[50] *CPIT Investments Ltd and Qilin World Capital Ltd and another* [2018] 4 SLR 0038 at [30] and [37]; *Larpin, Christian Alfred and another v Kaikhushru Shiavax Nargolwala and another* [2022] 4 SLR 146 at [18].

that the term "costs" in O 22 includes "charges, disbursements, expenses, fees and remuneration".

11 As the SICC hears international commercial matters and international commercial arbitration matters, the Singapore courts have recognised that parties in SICC proceedings can be reasonably expected to be "relatively sophisticated" and that most of them are "better-resourced and better-advised than the run-of-the-mill litigant".[51] The SICC costs regime is intended to mirror the costs regime employed by international arbitral tribunals.[52] Successful parties are more likely to be able to recover a greater quantum of the costs incurred as compared to costs assessed on an indemnity basis.[53] The court's reasoning is that the need to promote access to justice to all (which undergirds the costs regime in the High Court) is less important in the context of the SICC (in light of the nature of the disputes heard by the SICC).[54]

III. Position in Singapore on indemnity costs for setting aside applications

12 At the time of the 2018 LRC Paper, the Singapore courts had not dealt with the issue of whether separate costs principles were necessary for unsuccessful setting-aside applications. However, since then, both the High Court and the Court of Appeal (to avoid doubt, not the SICC) have held that there are no separate costs principles applicable to such applications before the Singapore courts. Presently, indemnity costs will only be awarded to a successful respondent to a setting-aside application if there are exceptional circumstances justifying the imposition of such costs. We have not located a reported decision where the Singapore courts awarded indemnity costs against an unsuccessful applicant in setting-aside proceedings. In *BTN v BTP*,[55] the applicant unsuccessfully applied to set aside a partial arbitral award. The defendants sought indemnity costs for the High Court proceedings on the basis that the claimant had put the "defendants to considerable costs to fend off what were unmeritorious proceedings that ought not have been brought in the first place bearing in mind that the parties had

[51] *Lao Holdings v Lao Government (2023)*, *supra* n 49, at [56].

[52] *Lao Holdings v Lao Government (2023)*, *id*, at [60].

[53] *Lao Holdings v Lao Government (2023)*, *id*, at [60] to [68].

[54] *Lao Holdings v Lao Government (2023)*, *id*, at [62].

[55] *BTN v BTP, supra* n 45.

agreed to resolve their disputes in arbitration and to honour any award made in the arbitration".[56]

13 The High Court declined to grant indemnity costs on the basis that unexceptional circumstances did not exist to "warrant a departure from the usual course of awarding costs on a standard basis".[57] The claimants were found to have conducted their case "in an economical way without undue prolongation of the hearings or submissions".[58]

14 In *CDM v CDP*,[59] the respondent contended at first instance that it should be entitled to indemnity costs for successfully resisting a setting-aside application. By the time the matter reached the Court of Appeal, the respondent abandoned this position.[60] Nevertheless, the Court of Appeal cited *BTN v BTP* with approval for the proposition that indemnity costs will only be imposed in exceptional circumstances.[61] This requires an overall assessment of the circumstances of the case and whether a party has behaved unreasonably.[62]

15 While the Singapore courts have not imposed indemnity costs in unsuccessful setting-aside applications to date, the courts have indicated that indemnity costs will be more readily granted where court proceedings are initiated in breach of an arbitration agreement.[63] In *Sumito v Antig (SGCA)*, the Court of Appeal awarded indemnity costs against a party which attempted to initiate court proceedings in breach of an arbitration agreement.[64] That, however, remains the exception. The Singapore courts have on other occasions ordered costs to be assessed on a standard basis notwithstanding a finding that the arbitration agreement had been breached by the losing party.[65]

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[56] *BTN v BTP*, *id*, at [5].

[57] *BTN v BTP*, *id*, at [8] and [14].

[58] *BTN v BTP*, *id*, at [16].

[59] *CDM and another v CDP* [2021] 2 SLR 235 ("***CDM v CDP***").

[60] *CDM v CDP*, *id*, at [48].

[61] *CDM v CDP*, *id*, at [53].

[62] *CDM v CDP*, *id*, at [56].

[63] *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861 ("***Sumito v Antig (SGHC)***") at [9] to [10]; *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("***Sumito v Antig (SGCA)***") at [71].

[64] *Sumito v Antig (SGCA)*, *id*, at [71].

[65] *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [66].

IV. Hong Kong

A. Prevailing Hong Kong position

16 The Hong Kong courts grant indemnity costs as a default when an arbitral award is unsuccessfully challenged, unless special circumstances can be shown.

17 This practice can be traced to the HKCFI decision in *A v R*. In *A v R*, the HKCFI found that awarding costs on a standard basis to a respondent in an unsuccessful setting-aside application would in effect result in the respondent "subsidising the losing party's abortive attempt to frustrate enforcement of a valid award".[66] This is despite the fact that respondent had already successfully underwent arbitration and obtained an award in its favour.[67] To award costs on a standard basis, in the HKCFI's view, would "only encourage the bringing of unmeritorious challenges to an award".[68] In arriving at this view, the HKCFI also considered the fact that parties had an obligation under the HKCJR to assist the court in the "just, cost-effective and efficient resolution of a dispute".[69]

18 *A v R* has been consistently affirmed since.[70] In *Gao Haiyan & anor v Keeneye Holdings Ltd & onr (No 2)*, the court described this to be a "salutary practice".[71]

19 There does not appear to be much guidance on what kind of exceptional circumstances warrants a departure from the default position of imposing indemnity costs. In *Gao Haiyan & anor v Keeneye Holdings Ltd & onr (No 2)*, the fact that the unsuccessful applicants' case was "not unarguable" was insufficient.[72] Similarly, in *Pacific China v*

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[66] *A v R* [2010] 3 HKC 67 ("***A v R***") at [70].

[67] *A v R*, *id*, at [70].

[68] *A v R*, *id*, at [71].

[69] *A v R*, *id*, at [69].

[70] *Gao Haiyan & Anor v Keeneye Holdings Ltd & Onr (No 2)* [2012] 1 HKC 491 ("***Gao Haiyan & anor v Keeneye Holdings Ltd & onr (No 2)***") at [12] to [13]; *Pacific China Holdings Ltd (In Liq) v Grand Pacific Holdings Ltd (No 2)* [2012] 6 HKC 40 ("***Pacific China v Grand Pacific***") at [15]; *Maeda Kensetsu Kogyo Kabushiki Kaisha also known as Maeda Corporation and another v Bauer Hong Kong Ltd* [2019] HKCU 1573 at [69]; *Q v F* [2023] HKCFI 647 at [29].

[71] *Gao Haiyan & anor v Keeneye Holdings Ltd & onr (No 2)*, *id*, at [13].

[72] *Gao Haiyan & anor v Keeneye Holdings Ltd & onr (No 2)*, *id*, at [14].

Grand Pacific, the court held that, even if the applicant's application was "reasonably arguable", this fact alone cannot justify a departure from the default position.[73]

B. Observations by the Singapore courts on the position in Hong Kong

20 In *BTN v BTP* and *CDM v CDP*, the Singapore courts expressly considered but declined to follow the Hong Kong approach.

21 In *BTN v BTP*, the High Court found that the Hong Kong approach "contradict[ed] the costs principles set out in O 59 of [ROC 2014]".[74] The court found that an unsuccessful setting-aside application is not treated as a category of exceptional circumstances which warrant the imposition of indemnity costs by a Singapore court.

22 The court also emphasised that the Hong Kong approach was premised on the underlying aims of the HKCJR, specifically the aim to facilitate the "cost-effective and efficient resolution of a dispute".[75] The court in *BTN v BTP* acknowledged that such considerations are also relevant in Singapore but are not "absolute trumps".[76]

23 In *CDM v CDP*, the Court of Appeal took the view that it was not persuaded by the Hong Kong approach and instead affirmed the decision in *BTN v BTP* (namely, that indemnity costs are to only be imposed in exceptional circumstances). The court opined that "it would do violence to the notion of such circumstances having to be "exceptional" if every instance of an award being challenged unsuccessfully could be said to, at least presumptively, be an "exceptional" circumstance warranting indemnity costs".[77] In the court's view, there was nothing in case law or the Rules of Court that suggested that an "entire area should be presumptively hived-off as attracting costs on an indemnity basis purely because of the subject matter it concerns" (emphasis omitted).[78] On a conceptual level, the court found that setting-aside applications engaged the jurisdiction of

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[73] *Pacific China v Grand Pacific*, *supra* n 70, at [22].

[74] *BTN v BTP*, *supra* n 45, at [9].

[75] *BTN v BTP*, *id*, at [6].

[76] *BTN v BTP*, *id*, at [9].

[77] *CDM v CDP*, *supra* n 59, at [53].

[78] *Ibid*.

Singapore courts and it was "neither appropriate nor permissible" for parties to insist on differential treatment in terms of costs for such applications.[79]

24 The Court of Appeal also observed that Hong Kong case law "fail[ed] to recognise that limited avenues available to challenge an arbitral award are statutorily provided for in the same way as a right of appeal against a decision of the court below" (emphasis omitted).[80] In the Court of Appeal's view, there was no basis to distinguish between the two in assessing the applicability of indemnity costs.[81]

V. Positions in other jurisdictions

25 The position in Hong Kong on this issue has been described as an "exception".[82] The positions in other jurisdictions largely follow the Singapore position, namely, that costs are awarded on a standard basis for unsuccessful setting-aside applications in the absence of special or exceptional circumstances.

26 In England, indemnity costs are not awarded as a default, but only when the case is one which takes it "out of the norm".[83] Cases warranting the imposition of indemnity costs include those where the court finds that an applicant's grounds for seeking to set aside or resist enforcement of an arbitral award are wholly unmeritorious.[84] In *Konkola Copper Mines plc v U&M Mining Zambia Ltd*, the court ordered costs to be assessed on an indemnity basis because of the applicant's conduct in choosing not to participate in a hearing before the tribunal, and subsequently seeking to set aside the resulting arbitral award on the basis that inter alia the tribunal had refused to adjourn the

[79] *CDM v CDP*, *id*, at [54].

[80] *CDM v CDP*, *id*, at [55].

[81] *Ibid*.

[82] 2018 LRC Paper, *supra* n 41, at [8].

[83] See for instance *A v B and others (No 2)* [2007] EWHC 54 at [12] and [65]*; Koshigi Ltd and another v Donna Union Foundation and another* [2019] 1 Costs LR 51 at [51].

[84] *Exfin Shipping (India) Ltd Mumbai v Tolani Shipping Co Ltd Mumbai* [2006] EWHC 1090 (Comm) at [1] and [13]; *Shackleton and Associates Ltd v Shamsi and others* [2017] 2 Costs LO 169 at [36]; See also Ong Chin Kiat, "Indemnity Costs in Unsuccessful Challenges to Arbitral Awards" (May 2021) <https://lawgazette.com.sg/feature/indemnity-costs-in-unsuccessful-challenges-to-arbitral-awards/> (accessed 24 July 2024) ("**Ong**") at [33] to [34].

hearing.[85] The court's imposition of indemnity costs in that case was on the basis that the case was sufficiently "out of the norm".[86]

27 For completeness, Order 8.6 of the UK Commercial Court Guide provides that it is "astute" for the court to dismiss challenges of arbitral award without a hearing where the court considers that the claim has "no real prospect of success".[87] However, it is open to an applicant to challenge the court's decision to dismiss the claim without a hearing.[88] Order 8.7 of the UK Commercial Court Guide provides that if the applicant is unsuccessful in its application after a hearing is held, the court may consider "whether it is appropriate to award costs on an indemnity basis".[89] The UK Commercial Court Guide does not otherwise state when it may be appropriate to award costs on an indemnity basis.

28 In Australia, there is no practice of granting indemnity costs as a default in setting-aside applications (although there is some uncertainty).[90]

29 The court in *IMC Aviation v Altain* considered but rejected the position in *A v R* on the basis that there was nothing in the AIAA or the nature of the proceedings therein that warranted separate costs principles in the context of the resisting of an arbitral award.[91] The court further held that the mere fact that the merits of the award debtor's case failed to persuade the court cannot itself be grounds for the imposition of indemnity costs.[92]

30 The court in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* found that the lack of reasonable prospects of success in an application may constitute special circumstances warranting the award of indemnity costs (regardless of whether

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[85] *Konkola Copper Mines plc v U&M Mining Zambia Ltd* [2014] 2 Lloyd's Rep 649 ("***Konkola v U&M***") at [111].

[86] *Konkola v U&M*, *id*, at [112].

[87] United Kingdom Judiciary, "The Business and Property Courts of England & Wales The Commercial Court Guide" 11th Edition 2022 (2023 Rev Ed) <https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/litigating-in-the-commercial-court/commercial-court-guide/> (accessed 24 July 2024) ("**UK Commercial Court Guide**") at Order 8.6.

[88] UK Commercial Court Guide, *id*, at Order 8.7.

[89] *Ibid*.

[90] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] 282 ALR 717 ("***IMC Aviation v Altain***") at [324]; *Colin Joss and Co Pty Ltd v Cube Furniture Pte Ltd (NSW)* at [5], [11] to [12].

[91] *IMC Aviation v Altain*, *id*, at [335].

[92] *IMC Aviation v Altain*, *id*, at [336].

the applicant knew or ought to have known this at the inception of the challenge).[93] However, this line of reasoning has been questioned by a subsequent decision for being inconsistent with precedent and policy.[94]

31 In Canada, there is no practice of granting indemnity costs as a default in setting-aside applications. The Ontario courts have on at least two such occasions applied the general rule that costs should be awarded at a "partial indemnity" scale for unsuccessful setting aside applications (which was the default position for party and party costs).[95] In both cases, the court focussed on the parties' conduct in the proceedings as opposed to the merits of the application in deciding that the default position should not be departed from.[96]

32 In Malaysia, there is no practice of granting indemnity costs as a default in setting-aside applications, but the Malaysian court has recognised that the discretion to award indemnity costs is "unfettered" and that all that is required is an appropriate case warranting such an award.[97] The Malaysian court declined to impose indemnity costs against an unsuccessful applicant in a setting-aside application where the applicant was found not to have "acted unreasonably and overly aggressive in pursuit of its challenges".[98]

VI. Recommendation

33 In the 2018 LRC Paper, the LRC was considering a reform that indemnity costs should be awarded as a default in unsuccessful setting-aside applications. This was based on the reasons given by the Hong Kong courts and for the following reasons:[99]

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[93] *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* [2016] FCA 1169 ("***Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)***") at [26].

[94] *Winslow Constructors Pty Ltd v Head, Transport for Victoria* [2021] VSC 74 at [27] to [28].

[95] *Nasjjec Investments Ltd. v Nuyork Investments Ltd.* [2015] O.J. No. 5778 ("***Nasjjec v Nuyork***") at [187] and [193]; and *Electek Power Services Inc. v Greenfield Energy Centre Limited Partnership* [2022] O.J. No. 2006 ("***Electek v Greenfield***") at [27].

[96] *Nasjjec v Nuyork*, *id*, at [187]; *Electek v Greenfield*, *id*, at [32].

[97] *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181 at [9].

[98] *JY Creative Sdn Bhd v MEACS Construction Sdn Bhd and another case* [2022] MLJU 941 at [74].

[99] 2018 LRC Paper, *supra* n 41, at [13].

(a) the fact that the successful party should not be put to bear substantial costs out-of-pocket in an unsuccessful challenge;

(b) indemnity costs would deter parties from mounting unmeritorious challenges to the enforcement for an award or to set aside an award; and

(c) the fact that the quantum of costs payable by the unsuccessful party for international arbitral proceedings is closer to the quantum of costs assessed on an indemnity basis than costs assessed on a standard basis.

34 There is force in the argument that a default imposition of indemnity costs for setting-aside applications discourages unmeritorious applications by increasing the likely costs of said applications for the applicant. However, the effectiveness of such a deterrent will depend on the sums awarded in the arbitral award. By way of illustration, the average sum in dispute for cases administered by the Singapore International Arbitration Centre in 2023 was around US$39.65 million.[100] It is likely that any indemnity costs the average unsuccessful applicant may incur will be less than US$39.65 million. While indemnity costs may deter award debtors facing awards of relatively modest value, indemnity costs may not deter award debtors facing awards for significant sums.

35 As the court in *CDM v CDP* reasoned, there are good reasons for not imposing separate costs principles for unsuccessful setting-aside applications. It is inconsistent for indemnity costs to be imposed as a default for setting-aside applications, when the same is not done for every civil appeal against decisions of lower courts.[101] Both processes are statutorily provided avenues for challenging the decision of a court and/or tribunal.

36 A party which initiates court proceedings against another assumes the risk that even if it is successful at first instance, the other party may appeal the decision of the lower court (and that this will result in increased costs for both parties).

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[100] Singapore International Arbitration Centre, "SIAC Annual Report 2023" (1 April 2024) <https://siac.org.sg/wp-content/uploads/2024/04/SIAC_AR2023.pdf> (accessed 24 July 2024) ("**SIAC Annual Report 2023**").

[101] *CDM v CDP*, *supra* n 59, at [55].

37 In the same manner, when parties enter into arbitration agreements, the means of challenging any subsequent award are clear to both parties from the outset. The parties thus assume the risk that even if an award is issued by a tribunal in their favour, it will be open to the other party to challenge the award before the seat court (by way of a setting aside application) or in enforcement proceedings.

38 In both situations, parties are taken to know from the outset that there is a chance that the first instance judgment or award may not be the end of the dispute and that there may be further proceedings to challenge the validity of the first instance judgment or award. One aspect of arbitration's appeal as a dispute resolution mechanism is precisely the fact that there is curial oversight to the arbitral process and that parties have some measure of recourse if the arbitration process is not conducted properly.[102]

39 There is thus no basis for presumptively penalising a party for exercising its valid statutory right to challenge an arbitral award based on the limited grounds set out in the IAA and Model Law. Naturally, in a case where a party abuses its statutory right by bringing an unwholly unmeritorious application before the court, the court can exercise its discretion to impose indemnity costs.[103] But that should be the exception rather than the rule.

40 Contrast setting-aside applications with situations where an arbitration agreement has been breached (for instance by a party initiating court proceedings in respect of a dispute that is subject to an arbitration agreement). The Singapore courts have stated that in such situations, the court will more readily award indemnity costs. This has been justified on the basis that the party which "deliberately ignores an arbitration clause so as to derive from its own breach of contract an unjustifiable procedural advantage misuses judicial facilities; and such behaviour merits judicial discouragement".[104]

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[102] See Judith Prakash JA, "The Critical Role of the Courts In Arbitral Disputes: Conceptualizing the Relationship Between the Courts and Arbitration", *Plenary Address at the Singapore International Arbitration Centre Symposium 2023* (28 August 2023) <https://www.judiciary.gov.sg/docs/default-source/sicc-docs/news-and-articles/speech-by-justice-judith-prakash-at-the-siac-symposium-2023---the-critical-role-of-the-courts-in-arbitral-disputes-conceptualising-the-partnership-between.pdf> (accessed 24 July 2024) ("**SIAC Symposium 2023**").

[103] *Airtrust v PH Hydraulics*, *supra* n 46, at [23].

[104] *BWF v BWG* [2020] 3 SLR 894 at [72].

41 This line of reasoning is not engaged in the setting-aside context, where a party seeks to exercise its statutory right to attempt to set aside an arbitral award (which is not in breach of the arbitration agreement between the parties).[105]

42 If the issue of indemnity costs for setting-aside applications is of significant concern to parties, it remains open for parties to stipulate in their arbitration agreements that the costs of any unsuccessful setting-aside application should be borne by the losing party on an indemnity basis. The Singapore court has enforced such agreements on the assessment of costs.[106]

43 Additionally, the adoption of the Hong Kong approach in Singapore may not be fully compatible with the objectives of Singapore's recent Civil Justice Reform.

44 While the Hong Kong courts have consistently followed the decision in *A v R*, the practice of the courts is not based on any legislative provision or statute. In particular, O 62 r 5 of the HKROC sets out a list of matters that the court is to take into account in exercising its discretion as to costs. However, there is nothing in this list that stipulates that the court must take into account whether or not an application is one that seeks to set aside an arbitral award. To use the words of the court in *CDM v CDP* in relation to the Singapore Rules of Court, there is nothing in the HKROC that suggests that "an entire area should be presumptively hived-off as attracting costs on an indemnity basis purely because of the subject matter it contains" (emphasis in original).[107]

45 Instead, the approach in Hong Kong has been justified by the objectives of the HKCJR, one of which is the cost-effective and efficient resolution of a dispute.[108]

46 As the court observed in *BTN v BTP*, these objectives are not strangers to the Singapore civil justice system.[109] The ROC 2021 (which came into effect after the decisions in *BTN v BTP* and *CDM v CDP*) seek to achieve the following five ideals:[110]

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[105] See Ong, *supra* n 84, at [24] to [28].

[106] See for instance *Wingcrown Investment Pte Ltd v Mannepalli Gayatri Ram* [2023] 5 SLR 583 at [21] to [28].

[107] *CDM v CDP*, *supra* n 59, at [53].

[108] *A v R*, *supra* n 66, at [69].

[109] *BTN v BTP*, *supra* n 45, at [9].

[110] ROC 2021, O 3 r 1(2).

(a) fair access to justice;

(b) expeditious proceedings;

(c) cost-effective work proportionate to —

(i) the nature and importance of the action;

(ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises;

(iii) the amount or value of the claim;

(d) efficient use of court resources; and

(e) fair and practical results suited to the needs of the parties.

47 All five ideals are meant to apply conjunctively and there is no hierarchy among them.[111] Indeed, imposing indemnity costs as a default may hinder parties' fair access to justice. Finally, amending the IAA to specify that indemnity costs should be awarded as a default presents complications if proceedings are commenced in or are transferred to the SICC. The concept of assessing costs on a standard or indemnity basis does not apply in the SICC Rules.

48 In any event, the costs regime in the SICC would typically allow a successful respondent in a setting-aside application to recover more than what it would if costs were assessed at the High Court on a standard or indemnity basis. As the SICC grows to hear more international arbitration-related disputes, the issue of whether indemnity costs should be imposed as a default for setting-aside applications will become less important. Indeed, it could be argued that when parties agree to an international arbitration, they agree to accept the costs principles that come along with such a regime. By extension, the principles for assessing costs in the arbitration ought to apply to the setting-aside context as well (which is how the SICC costs regime is intended to operate).

[111] *Indian Trading Pte. Ltd. v De Tian (AMK 529) Pte Ltd* [2023] SGHCR 3 at [29] and [63].

49 If costs considerations are especially important to parties, parties can agree to a choice of court clause providing that the SICC will have jurisdiction as the curial court. Alternatively, respondents in setting-aside applications can also apply for applications brought before the High Court to be transferred to the SICC, although any transfer is subject to court approval.

VII. Focus Group

50 The focus group was generally in favour of our recommendation, i.e., as a default costs should not be assessed on an indemnity basis against an unsuccessful applicant in a setting-aside application. The focus group highlighted that the default costs regime in the High Court (i.e., that costs are awarded on a standard basis unless in exceptional circumstances) has been applied to other types of disputes with their own unique policy considerations, such as insolvency disputes and intellectual property disputes.

51 The focus group expressed a preference for setting-aside applications being heard by the SICC and for considerations of proportionality to be taken into account in the issuance of costs orders against unsuccessful applicants. While the focus group noted the importance of promoting access to justice, they noted that international arbitration typically involves parties with sufficient means to enforce their legal rights. The focus group was of the view that the SICC's costs regime may be more suitable in setting-aside applications where the recoverability of costs may be greater than indemnity costs awarded in non-SICC proceedings. However, the focus group was generally of the view that legislative reform was not necessary, and that the matter can be dealt with through practice directions instead.

VIII. Conclusion

52 In sum, we do not recommend having separate costs principles for setting-aside applications. The costs regime in the SICC typically allows a successful respondent in a setting-aside application to recover more than what it would if costs were assessed at the High Court on a standard or indemnity basis. As the SICC grows to hear more international arbitration-related disputes, the issue of whether indemnity costs should be imposed as a default for setting-aside applications should become less relevant.

ISSUE 3: WHETHER TO INTRODUCE A LEAVE REQUIREMENT FOR APPEALS TO THE COURT OF APPEAL FOLLOWING AN UNSUCCESSFUL APPLICATION TO SET ASIDE AN ARBITRAL AWARD IN THE HIGH COURT

I. Introduction

1 Under the SJCA, a High Court Judge's decision on the setting aside of an arbitral award is appealable as of right.[112]

2 This chapter discusses whether a leave requirement should be introduced for appeals to the Court of Appeal following an unsuccessful application to set aside an arbitral award in the High Court.

3 Although the issue as framed relates only to unsuccessful attempts to set aside an award before the High Court, we recommend a more straightforward rule. Parties must obtain permission of the appellate court to appeal against any decision of the High Court on both setting aside and resisting enforcement applications (whether successful or otherwise). The appellate court shall grant any permission to appeal without a hearing unless it is of the view that a hearing is required.

II. Purpose of the leave requirement and position in other jurisdictions

4 Generally, the purpose of a leave requirement is to ensure that unmeritorious and vexatious appeals are sieved out at the outset.[113] The leave stage ensures that all parties and the court are aware of the issues being contested well before the preparation of the appeal.[114] This reduces unnecessary delays in the resolution of disputes by

[112] See SCJA, sections 29 and 29A, read together with the Fourth and Fifth Schedule.

[113] *Singapore Parliamentary Debates, Official Report* (26 November 1998) vol 69 at cols 1629-1630 (Prof. S. Jayakumar, Minister for Law).

[114] *Midill (97PL) Ltd v Park Lane Estates Ltd and* another [2008] EWCA Civ 1227 at [17].

arbitration,[115] and also ensures that the court's resources are efficiently utilised.[116] Major arbitral seats have imposed a leave requirement for appeals to an appellate court following a first instance decision on a setting aside or enforcement application.

A. Hong Kong

5 In Hong Kong, section 81(4) of the HKAO imposes a leave requirement for any appeal from a decision of the first instance Court in relation to the setting aside of an arbitral award.[117] Similarly, under section 84(3) HKAO, the leave of the court is required for any appeal against a decision of the first instance court on an enforcement application.[118] Under both these provisions, leave to appeal has to be sought from the first instance court.

6 The leave requirement under these sections reflect the legislative intention that a decision of the court on a setting aside or enforcement application should be accepted as final save in exceptional circumstances where the court takes the view that a matter ought to be further considered on appeal.[119]

7 Prior to the enactment of section 81(4) HKAO, the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law sought views on whether the decision of the Court of First Instance to set aside an arbitral award should be subject to appeal with leave.[120]

8 The majority of responses to the consultation paper supported the proposal that a decision of the HKCFI to set aside an arbitral award should be subject to appeal with

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[115] *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339, per May L.J. ("***Amec v SST***") at [9].

[116] Makoto Hong Cheng & Wong Huiwen Denise, "Raising the Bar: Amending the threshold for leave in judicial review proceedings" (2016) 28 SAcLJ 527 ("**Makoto & Wong**") at [3].

[117] HKAO, section 81(4).

[118] HKAO, section 84(3).

[119] *C v D* [2022] HKCU 4220 at [8].

[120] Hong Kong Department of Justice, *Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (LC Paper No. CB(2)261/08-09(02), December 2007) at para 9.3.

leave.[121] For example, the Hong Kong General Chamber of Commerce provided the following response:

> "We strongly believe that such a decision should be subject to appeal with leave. The main danger is that a single judge may one day inappropriately set aside an award, thereby damaging Hong Kong's reputation as an arbitration seat. Retaining the possibility for the Court of Appeal to intervene to correct such errors is important and would facilitate the development of the law. And if one grants the possibility of an appeal upon the setting aside of an award, one cannot very well refuse such possibility in the event that setting aside is refused."

9 Similar responses were also provided in support of section 84(3) HKAO.[122] The leave requirement in sections 81(4) and 84(3) is meant to provide a limited right of appeal in order to strike the appropriate balance between ensuring finality in arbitration on one hand, and ensuring that parties have a fair chance of ventilating their case on the other.

B. England

10 In the UK, challenges to set aside an arbitral award are regulated by sections 67 to 69 of the EAA.[123] Each of these sections provide different basis for a party to set aside an arbitral award:

(a) Section 67 allows a party to apply to set aside an arbitral award on the basis that the arbitral tribunal lacked substantive jurisdiction; [124]

(b) Section 68 allows a party to set aside an arbitral award if there has been some serious irregularity affecting the tribunal, the proceedings, or the arbitral award; and[125]

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[121] Hong Kong Department of Justice, *Summary of submissions and comments on the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (LC Paper No. CB(2)2469/08-09(03), September 2009) ("**HK Consultation Paper Summary**") at [70]-[75].

[122] Hong Kong Consultation Paper Summary, *id*, at [76]-[78].

[123] EAA, sections 67 - 69.

[124] EAA, section 67.

[125] EAA, section 68.

(c) Section 69 enables a party to appeal on a question of law arising out of an arbitral award.[126]

11 All three sections expressly provide that leave of the court of first instance is required for any appeal from a decision of that court.[127] Similar to Hong Kong, the leave requirement imposed by these sections is meant to reflect the legislative intention and public sentiment that a high degree of finality is of fundamental importance in arbitration.[128]

12 The leave requirement is also consistent with the policy of the EAA, which "does not encourage second appeals which in general delay the resolution of disputes by the contractual machinery of arbitration".[129]

13 Commentators have observed that the policy of the EAA suggests that leave to appeal a decision rejecting a setting aside application will "very rarely be given",[130] and the act of seeking leave to appeal against an unsuccessful setting aside application "smacks of something not too far from desperation".[131]

14 Similar to Hong Kong, the EAA also imposes a leave requirement for appeals against a first instance decision on an enforcement application.[132] Leave to appeal may be sought from either the court of first instance or the Court of Appeal.[133]

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[126] EAA, section 69.

[127] EAA, sections 67(4), 68(4) and 69(8).

[128] *Interprods Ltd v De La Rue International Ltd* [2015] EWCA Civ 374 at [4]. See also *Itochu Corp v Johann MK Blumenthal GMBH* [2012] 2 Lloyd's Rep 437, per Gross LJ at [17]-[18].

[129] *Amec v SST*, *supra* n 115, at 2340E.

[130] David St. John Sutton *et al., Russel on Arbitration* (Sweet & Maxwell, 24th Ed, 2015) at para 8-083.

[131] Robert Merkin QC & Louis Flannery QC, *Merkin and Flannery on The Arbitration Act 1996* (Routledge, 6th Ed, 2020) ("**Merkin & Flannery**") at para 68.21.

[132] EAA, sections 66 and 101.

[133] Merkin & Flannery, *supra* n 131, at para 66.14.

III. Discussion

15 This section discusses the key advantages and disadvantages of imposing a leave to appeal requirement for both setting aside applications and applications to resist enforcement.

A. Key advantages

16 Over the years, Singapore has established itself as an internationally preferred seat of arbitration.[134] This is achieved through legislation that supports the policy of minimal curial intervention,[135] which engenders considerations of party autonomy and the finality of the arbitration process.[136]

17 The Singapore courts have acted consistently with this policy of minimal curial intervention. In setting aside applications, the courts' approach is to read the arbitral award supportively and "in a manner which is likely to uphold the award rather than to destroy it".[137] Given the high threshold for setting aside arbitral awards,[138] it is unsurprising that only a small proportion of setting applications succeed at first instance,[139] and even less succeed on appeal.[140]

18 In enforcement applications, the role of the court is also to "uphold the arbitral process and facilitate the enforcement of arbitral awards whenever possible".[141]

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[134] *Singapore Parliamentary Debates, Official Report* (5 October 2020) vol 95 (Edwin Tong Chun Fai, Second Minister for Law).

[135] *COT v COU* [2023] SGCA 31 ("***COT v COU***") at [1].

[136] *COT v COU*, *ibid*.

[137] SIAC Symposium 2023, *supra* n 102, at [25].

[138] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [59].

[139] SIAC Symposium 2023, *supra* n 102, at [26]; See also, *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [2], where the Court of Appeal stated that approximately only 20% of applications to set aside arbitral awards have been allowed.

[140] In 2023, 3 out of 3 reported decisions by the Court of Appeal showed that the Court of Appeal affirmed the High Court's decision in refusing to set aside the arbitral award. In 2024, as of the date of this paper (31 May 2024), 2 out 2 reported decisions by the Court of Appeal showed that the Court of Appeal affirmed the High Court's decision in refusing to set aside the arbitral award.

[141] *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd* [2022] 2 SLR 115 at [116].

19 Overall, the imposition of a leave requirement for appeals to the appellate court following a first instance decision on a setting aside application and an application to resist enforcement is consistent with Singapore's policy of minimal curial intervention. By imposing a leave requirement, parties who fail in their setting aside application or application to resist enforcement do not obtain an automatic right to a second bite of the cherry. Instead, only meritorious applications which cross the threshold for leave would justify further judicial intervention.

20 Beyond its overall consistency with Singapore's policy on arbitration, the key advantages of imposing the leave requirement are two-fold.

21 First, the leave requirement serves as an important filtering mechanism to weed out unmeritorious setting aside applications or applications to resist enforcement that impinge on judicial resources.[142] As the number of appeals on setting aside applications and/or applications to resist enforcement increase in Singapore, the limited resources of the appellate court may be stretched. With the leave requirement, the resources of the appellate court can be utilised more efficiently. In England and Hong Kong, leave to appeal will only be granted in exceptional circumstances.[143] Judicial resources are only channelled to more meritorious applications which warrant an appellate court's intervention.

22 Relatedly, the imposition of a leave requirement may result in costs savings for the parties. Generally, leave hearings relate to legal points or affidavit evidence as opposed to factual disputes.[144] The courts can more expediently deal with such leave applications at limited cost.[145]

23 Secondly, the imposition of a leave requirement for appeals against a first instance decision on a setting aside application and an application to resist enforcement

[142] Makoto & Wong, *supra* n 116, at [3].

[143] See paragraphs 66 and 14 above.

[144] Makoto & Wong, *supra* n 116, at [4].

[145] Makoto & Wong, *ibid*.

promotes congruence with the leave requirement for appeals against a High Court's decision on a jurisdictional challenge under section 10 of the IAA.

24 In *PT First Media TBK*,[146] the Court of Appeal explained the availability of both "active" and "passive" remedies under the Model Law, and the design of the Model Law in promoting a "choice of remedies" for parties.[147]

25 The court characterised a jurisdictional challenge under section 10 of the IAA read with Article 16(3) of the Model Law as falling under the same basket of "active remedies" alongside setting aside,[148] while the remedy of resisting enforcement falls under the ambit of a "passive" remedy. The court also expressed the view that it would be surprising if an award debtor retained its right to bring an application to set aside an arbitral award despite failing to trigger earlier active remedies under Article 16(3) of the Model Law.[149]

26 Under section 10 of the IAA, a party can challenge the arbitral tribunal's ruling on its jurisdiction before the High Court. Any party who is unsatisfied with the High Court's decision can bring an appeal against the court's decision with the permission of the appellate court under section 10(4).[150]

27 There is asymmetry in a party's right to appeal against the High Court's decision in respect of a jurisdictional challenge under section 10, versus a party's right to appeal against the High Court's decision in respect of a setting aside application or an application to resist enforcement. In the latter situation, the unsuccessful parties are presently entitled to appeal as of right. [151]

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[146] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("***PT First Media TBK***").

[147] *PT First Media TBK*, *id*, at [65]-[67].

[148] Darius Chan & Claire Neoh, *"*To boycott proceedings or not? Recourse against arbitral awards on jurisdictional grounds by different categories of respondents under the Model Law" (2020) 36(4) Arb Intl 529 ("**Chan & Neoh**") at 539.

[149] *PT First Media TBK*, *supra* n 146, at [130].

[150] IAA, section 10(4).

[151] Darius Chan, Paul Tan & Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (SAL Publishing, 2022) ("**Chan, Tan & Poon**") at [5.78]–[5.79].

28 If a respondent who objects to the jurisdiction of the arbitral tribunal chooses not to participate in the arbitral proceedings, that respondent has an automatic right of appeal in any subsequent setting aside application. On the other hand, if that same respondent participates in the arbitral proceedings and the arbitral tribunal decides on the issue of jurisdiction as a preliminary matter, that respondent who brings the issue of jurisdiction for curial review under section 10 of the IAA does not have an automatic right of appeal. The imposition of a leave requirement for setting aside applications removes this asymmetry.

29 For consistency, a leave requirement should also be imposed for appeals against a first instance decision on an application to resist enforcement. As mentioned above, under Singapore law a party who seeks to challenge an arbitral award has the option of actively invalidating the award or passively resisting enforcement. It would be incongruent if a party who actively seeks to set aside an award is subject to a limited right of appeal, while a party who passively resists enforcement of that same award is entitled to an automatic right of appeal.

30 The imposition of a leave requirement for appeals against a decision on a setting aside application and an application to resist enforcement is not novel in major arbitral seats. As mentioned above, both Hong Kong and the UK similarly require leave to appeal against all first instance decisions on setting aside and enforcement applications.

B. Key disadvantages

31 The main disadvantage of imposing a leave requirement is the addition of a further procedural step in the appellate process, which entails time and costs.[152] To reduce the impact of time and costs, we recommend that the appellate court determines whether to grant leave without a hearing, unless it appears to the court that a hearing is required.

[152] J.M. Barendrech *et al*, *Appeal Procedures: Evaluation and Reform* (Tilburg Law & Economics Center Discussion Paper No. 2006-031) at 20.

IV. Recommendation

32 We recommend that a leave requirement should be imposed for appeals against a first instance decision on a setting aside and/or enforcement application, and that the application for leave ought to be heard by appellate court.

33 Under section 10(4) of the IAA, an appeal against the High Court's decision on a challenge against the ruling of an arbitral tribunal's jurisdiction may be brought only with the permission of the appellate court.[153] The appellate court referred to is the Court of Appeal.[154]

34 For consistency, applications for leave to appeal against a first instance decision on a setting aside and/or enforcement application should similarly be heard by the appellate court. This recommendation is consonant with the legislature's intention to streamline and simplify the process for leave applications.[155]

35 In determining whether to grant leave, the appellate court can be guided by the following three disjunctive limbs set out in *Lee Kuan Yew v Tang Liang Hong*:[156]

(a) *Prima facie* case of error;

(b) Question of general principle decided for the first time; and

(c) Question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

36 In *BQP v BQQ*,[157] the High Court was faced with an application for leave to appeal under section 10(4) of the IAA. The court held that an applicant seeking leave to appeal

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[153] IAA, section 10(4).

[154] IAA, section 10(11) read with section 29C(2) of the SCJA and the Sixth Schedule of the SCJA.

[155] *Singapore Parliamentary Debates, Official Report* (5 November 2019) vol 94 (Edwin Tong Chun Fai, The Senior Minister of State for Law).

[156] *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 at [16].

[157] *BQP v BQQ* [2018] 4 SLR 1364 ("***BQP v BQQ***").

must demonstrate that there exists questions falling within at least one of the abovementioned three limbs.[158] We see no reason to depart from this position.

37 For completeness, we have considered whether to restrict the leave requirement only to unsuccessful setting aside and/or to successful enforcement applications before the High Court. However, in our view, we prefer a more straightforward approach which does not depend on the result of the application before the High Court. There is no such similar distinction made in the context of civil litigation, nor in the arbitration legislation of other major seats.

V. Focus Group

38 In our draft report, we recommended enacting in the IAA a requirement that parties must obtain permission of the Court of Appeal to appeal against any decision of the High Court on both setting aside and resisting enforcement applications. We also recommended that the Court of Appeal grant any permission to appeal without a hearing unless it is of the view that a hearing is required. The focus group was largely in support of the recommendations made.

39 Members of the focus group who supported imposing a permission to appeal stage for setting aside and resisting enforcement applications expressed the view that the permission to appeal stage would serve as a useful sieving mechanism to weed out unmeritorious appeals.

40 Some members of the focus group highlighted that appeals against a decision on a setting aside or resisting enforcement application generally doubled the length of court proceedings. They were in favour of imposing a permission to appeal stage to deter and reduce obstructionist challenges which unduly lengthened the litigation process.

41 Members of the focus group who were against imposing a permission to appeal stage expressed concerns that the permission to appeal stage would add another layer of unnecessary costs and fetter a party's right to ventilate key arguments in their case.

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[158] *BQP v BQQ*, *id*, at [108].

42 One of the key reasons for our recommendation was to remove the asymmetry in a party's right to appeal against the High Court's decision in respect of a jurisdictional challenge under section 10 of the IAA, versus a party's right to appeal against the High Court's decision in respect of a setting aside application or an application to resist enforcement. There were members of the focus group who expressed doubt over whether such an asymmetry had to be removed.

43 Our view is that there is no principled reason for maintaining such an asymmetry. Currently, a party's right of appeal against the High Court's review of a tribunal's jurisdiction differs depending on whether the tribunal decides jurisdiction as a preliminary question or in an award on the merits. In the former situation, a party has to seek the Court of Appeal's permission to appeal against the High Court's decision on jurisdiction. In the latter situation, a party does not have to seek permission. We see no principled reason for such a distinction to exist.

44 Additionally, there were members of the focus group who raised the possibility of having an enlarged coram hear the setting aside or resisting enforcement application, but leaving the parties with no right of appeal against the decision of that coram. These members were of the view that such a "one-shot" model saves valuable time and costs. This suggestion did not gain traction because the "one-shot" model requires an extensive restructuring of existing court rules and structures, which did not otherwise exist for other areas of the law.

45 On balance, the focus group was largely in favour of imposing a permission to appeal requirement in order to reduce unwarranted delay in proceedings for setting aside and resisting enforcement applications.

VI. Conclusion

46 We recommend that parties must obtain permission of the appellate court to appeal against any decision of the High Court on both setting aside and resisting enforcement applications (whether successful or otherwise). The appellate court shall grant any permission to appeal without a hearing unless it is of the view that a hearing is required.

47 A summary of our recommendations is set out in the table below:

	Current state of the law	**Proposed amendments to IAA**
Section 10 IAA	(4) An appeal from the decision of the General Division of the High Court made under Article 16(3) of the Model Law or this section may be brought only with the permission of the appellate court. (5) There is no appeal against a refusal for grant of permission of the appellate court.	An appeal from the decision of the General Division of the High Court made under Article 16(3) of the Model Law or this section may be brought only with the permission of the appellate court. <u>The appellate court shall determine whether permission ought to be granted without a hearing unless it is of the view that a hearing is required</u>. <u>There shall be no appeal against the appellate court's refusal to grant permission.</u>
Section 24 IAA (setting aside)	An appeal from the decision of the General Division of the High Court to the Court of Appeal can be made as of right.	<u>An appeal from a decision of the General Division of the High Court made under this section or Article 34 of the Model Law may be brought only with the permission of the appellate court. The appellate court shall determine whether permission ought to be granted without a hearing unless it is of the view that a hearing is required.</u> <u>There shall be no appeal against the appellate court's refusal to grant permission.</u>
Section 19 / Section 31 IAA (enforcement)	An appeal from the decision of the General Division of the High Court to the Court of Appeal can be made as of right.	<u>An appeal from a decision of the General Division of the High Court made under sections 19 or 29 of this Act may be brought only with the permission of the appellate court. The appellate court shall determine whether permission ought to be granted</u>

		without a hearing unless it is of the view that a hearing is required. There shall be no appeal against the appellate court's refusal to grant permission.

ISSUE 4: SHOULD THE TIME LIMIT FOR FILING SETTING ASIDE APPLICATIONS BE REDUCED

I. Introduction

1 Under Article 34(3) of the Model Law, the time limit for filing a setting aside application is three months from "the date on which the party making that application had received the award or, if a request had been made under [A]rticle 33, from the date on which that request had been disposed of by the arbitral tribunal".

2 This chapter considers the three-month limit. Specifically, this chapter considers whether (i) the 3-month time limit should be shortened with no discretion to extend, (ii) shortened with discretion to extend the time limit; and (iii) regardless of whether the time limit is revised, there should be a separate regime for exceptional cases like fraud.

3 In sum, we do not recommend reducing the three-month time limit for setting aside applications. We also do not recommend giving the courts general discretion to extend the time limit. However, we recommend enacting a new provision in the IAA giving the courts discretion to extend the time limit in setting aside applications involving fraud or corruption under section 24(a) of the IAA.

II. Comparative review

A. Approaches in Model Law jurisdictions

4 The idea behind the implementation of the Model Law is to harmonise national laws and should reflect a "worldwide consensus on the principles and important issues of international arbitration practice".[159] Model Law jurisdictions are advised against amending the Model Law, and that such changes should be kept minimal.[160] This is intended to instil confidence in foreign parties. Nevertheless, the practice within Model Law jurisdictions continues to differ.

[159] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 ("**UNCITRAL Explanatory Note**") at 23-24.

[160] *Ibid*.

(1) Singapore

5 Singapore courts have affirmed that courts have no discretion to extend the time limit for applications to set aside arbitral awards,[161] even where fraud is concerned.[162]

6 In interpreting Article 34(3) of the Model Law, the courts, citing the *travaux preparatoires* of the Model Law, have held that the 3-month time limit cannot be extended (notwithstanding the term "may not" used in Article 34(3)).[163]

7 The time limit in setting aside applications involving fraud or corruption under section 24(a) of the IAA is also strictly three months.[164] The courts cited the Model Law *travaux preparatoires*, which provide that "allowing a considerably longer period of time in which to apply for setting aside an award on the grounds of fraud, or that evidence was false or discovered only later, … was contrary to the need for the speedy and final settlement of disputes in international commercial relationships".[165] This was despite the court agreeing that to allow otherwise would mean that fraudsters and corrupt parties could take advantage of this procedural technicality and benefit from their wrongful conduct.[166] Innocent parties should instead resist recognition and enforcement as an appropriate remedy against the tainted award.[167]

8 The courts have also held that Article 5 of the Model Law, which circumscribes the scope of court intervention to only remedies as provided by the Model Law, takes

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[161] *ABC Co v XYZ Co Ltd* [2003] SGHC 107 ("***ABC v XYZ***"); see also *PT Pukaufu Indah v Newmont Indonesia Ltd* [2012] SGHC 187 ("***PT Pukaufu v Newmont***"); see also *BXS v BXT* [2019] SGHC(I) 10 ("***BXS v BXT***"); see also *BXY and others v BXX and others* [2019] SGHC(I) 11 ("***BXY v BXX***").

[162] *Bloomberry (SGCA)*, *supra* n 28.

[163] *Bloomberry (SGCA)*, *id*, at [76]; see also *ABC v XYZ*, *supra* n 161, at [9]; see also *PT Pukaufu v Newmont*, *supra* n 161, at [30]; see also *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636, at [97]; see also *BXS v BXT*, *supra* n 161, at [39]-[41]; *BXY v BXX*, *supra* n 161, at [83].

[164] *Bloomberry (SGCA)*, *supra* n 28.

[165] *Bloomberry (SGCA)*, *id*, at [87]; see also *Bloomberry Resorts and Hotels Inc and others v Global Gaming Philippines LLC and others* [2020] SGHC 01 ("***Bloomberry (SGHC)***"), at [28]; see also UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, U.N. Doc. A/40/17 (1985) ("**Eighteenth Session**") at paras 299-300.

[166] *Bloomberry (SGHC)*, *id*, at [45].

[167] *Bloomberry (SGCA)*, *supra* n 28, at [97].

precedence over domestic laws.[168] This means that, other than what is provided for under the IAA, the courts have no power to extend the time limit for setting aside applications, whether under their inherent jurisdiction or otherwise.

(2) Hong Kong

9 Recent Hong Kong cases have affirmed that courts have no discretion to extend the time limit for applications to set aside arbitral award.[169] They deviate from earlier cases which have held that courts have discretion to extend the time limit of three months but subject to exceptional circumstances.[170]

10 Earlier cases referred to case precedents interpreting the term "may" in Article 34(2) of the Model Law as conferring discretion on the judges to decline to set aside an award even if any of the grounds specified for setting aside are satisfied. This reasoning was extended to Article 34(3), with the understanding that the phrase "may not" in Article 34(3) similarly gave judges the discretion to extend the time limit for setting aside applications.

11 The threshold for establishing a case for extension of time for setting aside applications is high. In *Sun Tian Gang v Hong Kong & China (Gas) Jilin Ltd*,[171] the plaintiff succeeded in his setting aside application even though it was late by eight years, as he was incarcerated and therefore incommunicado.

12 Nevertheless, recent cases have deviated from this position by considering the impact of Article 2A(1) of the Model Law.[172] The article (adopted by UNCITRAL in 2006) provides for the consideration of the Model Law's international origin and the need for uniformity.[173] Additionally, Article 5 of the Model Law restricts court intervention to

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[168] *BXS v BXT*, *supra* n 161, at [40].

[169] *AW and ors v PY and anor* [2022] HKCFI 1397l ("***AW v PY***").

[170]*Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKCFI 1611; see also *U v S* [2018] HKCFI 2086; see also *A and ors v D* [2020] HKCFI 2887; see also *K v T* [2022] HKCFI 1194.

[171] [2016] HKCFI 1611.

[172] *American International Group, Inc and anor v X Company* HCCT 60/2015, unreported, 30 August 2016, cited with approval by *AW v PY*, *supra* n 169, at [61].

[173] *AW v PY*, supra n 169, at [61].

only what is provided under the Model Law.[174] Article 5 was not considered in earlier cases. Recent cases have considered that, because of Article 5 of the Model Law, local rules of court cannot be invoked to extend the time limit provided for in Article 34(3).[175]

B. Approaches in non-Model Law jurisdictions

(1) England

13 Courts in England have discretion to extend time limits for setting aside applications.

14 Under section 70(3) of the EAA, a setting aside application must be made within 28 days of the date of the award or the date when an applicant is notified of the result of any arbitral appeal (if any). The relatively short period of 28 days is meant to give effect to the principle of speedy finality underpinning the EAA.[176] The party applying to extend this time limit need to prove that the "interests of justice require an exceptional departure from the timetable laid down by the [EAA], [and] any significant delay beyond 28 days is to be regarded as inimical to the policy of the [EAA]".[177]

15 The factors taken take into consideration by the English courts when determining whether to extend the time period for setting aside are:[178]

(a) Length of delay;

(b) Whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all circumstances;

(c) Whether the respondent to the application or the arbitrator caused or contributed to the delay;

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[174] *AW v PY*, *id*, at [66].

[175] *Suen Hung Shan v Commissioner of Inland Revenue* [2020] HKCU 4249, cited with approval by *AW v PY*, *id*, at [65]-[67].

[176] EAA, section 1(a); see also *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm) ("***Terna v Kamil***") at [27(i)].

[177] *Terna v Kamil*, *id*, at [27(i)].

[178] *AOOT Kalmenft v Glencore International AG* [2001] EWHC QB 461; see also *Terna v Kamil*, *ibid*; see also *Ali Allawi v The Islamic Republic of Pakistan* [2019] EWHC 430 (Comm).

(d) Whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(e) Whether the arbitration has continued during the period of delay and, if so, what might impact the progress of the arbitration or the costs incurred might now have in respect of the determination of the application by the court;

(f) The strength of the application; and

(g) Whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

16 Unlike Model Law jurisdictions, the English courts are statutorily required under section 80(5) of the EAA to apply rules of court regarding the issue of time limit for setting aside applications. This means the English courts can utilise their general powers of management under the CPR to extend the time period for setting aside applications.[179]

17 A more noticeable length of delay can be accepted by the English courts if coupled with other significant reasons, such as fraud.[180] The threshold appears high, with *Nigeria v PID (2020)* highlighting a unique set of circumstances that led to a successful application to extend the time limit. This was despite the applicant waiting for three and five and a half years for the two arbitral awards respectively before applying to the English courts to set aside the awards.

18 The series of fraudulent acts in this case was so "complex in character and continuing",[181] with a smokescreen carefully established by the defendant to hide the deception. The applicant could not have discovered such acts reasonably.[182] First, the defendant's counsel had managed to "improperly [obtain] and [retain] privileged and confidential legal documents, which enabled [the defendant's counsel] … to track

[179] CPR, Rule 62.9.

[180] Michael Hwang SC & Kevin Tan, "The Time Limit to Set Aside an Award under Article 34(3) of the Model Law: A Comparative Study", (2021) 38(5) J. Int'l Arb. 553 ("**Hwang & Tan**") at 593-594; see also *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm) ("***Nigeria v PID (2020)***").

[181] *Nigeria v PID (2020)*, *id*, at [260].

[182] *Nigeria v PID (2020)*, *id*, at [264].

Nigeria's case strategy during the arbitration".[183] Second, the defendant's counsel also submitted false evidence knowingly, especially in relation to the contract between the parties that was procured via bribing a Nigerian official. They paid off the Nigerian official to "buy her silence" on the matter.

19 While the mere fact that a contract was obtained through corruption is insufficient to set aside the award, the series of acts by the defendant's counsel in obtaining a favourable award resulted in a "serious irregularity" that caused Nigeria "substantial injustice" within the scope of section 68 of the EAA.[184] The judge found that these acts would have painted an entirely differently picture for the tribunal had they come to light during the arbitration.[185]

(2) Switzerland

20 In Switzerland, the time limit for setting aside awards is 30 days. There is generally no discretion to modify the time limit for setting aside applications, other than narrow exceptions set out in legislation.

21 The 30 day-limit was adopted despite discussions on whether it should be extended to 60 or 90 days. The 30-day time limit was intended to maintain the "short and streamlined annulment proceedings … [as] an important selling point for arbitration in Switzerland".[186] The time lime starts running from the date of the award being communicated.[187] The 30-day time limit cannot be extended. However, there are a few

[183] Simon Sloane, Emily Wyse Jackson & Yin Yee Ng (Fieldfisher), *Tackling Corruption in the Arbitral Process: Reflections on Nigeria v Process and Industrial Developments Limited*, Kluwer Arbitration Blog (3 March 2024), <https://arbitrationblog.kluwerarbitration.com/2024/03/03/tackling-corruption-in-the-arbitral-process-reflections-on-nigeria-v-process-and-industrial-developments-limited/> (accessed 22 July 2024); see also *Nigeria v PID (2020)*, *id*; see also *Nigeria v PID (2023)*, *supra* n 29, at [217], [253]-[254] and [404].

[184] *Nigeria v PID (2023)*, *id*, at [512].

[185] *Nigeria v PID (2023)*, *id*, at [316].

[186] Explanatory Note to the Draft Bill for the Federal Act on Private International Law of 18 December 1987 at [15]-[17], <https://www.swissarbitration.org/wp-content/uploads/2021/05/ASA-Comments-Chapter-12-PILA.pdf> (accessed 30 May 2024).

[187] PILA, Article 190(4).

narrow statutory exceptions, such as when the last permissible day falls on a weekend, a public or court holiday. [188]

22 For awards tainted by criminal acts or fresh evidence that could have affected the outcome of the arbitral proceedings, Article 190a(1) of the PILA codified practice from case law.[189] It provides a regime whereby parties can apply to review the award, and such applications must be made within 90 days of the party becoming aware of the relevant grounds for review.[190] As long as there are criminal proceedings or some form of other proof establishing that the "arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour", it is sufficient.[191] There does not need to be a conviction by the criminal court. The party would need to prove that they were unaware of these new significant facts despite exercising due diligence.[192] Article 190a(2) of the PILA caps the overall time limit to no more than 10 years after the award becomes legally binding, except for awards corrupted by criminal acts where the absolute deadline of 10 years does not apply.

(3) France

23 Under Article 1519 of the French Code of Civil Procedure, parties have one month to apply to set aside the arbitral award from the date of notification of the award. The right to pursue annulment is extinguished if parties do not seek to exercise this right within one month of notification of the award.[193] If the applicant is domiciled abroad, the time

[188] BGG, Article 45(1) and 77(1). The official court holidays run from the seventh day before Easter until the seventh day after Easter, as well as from 15 July to 15 August and from 18 December to 2 January.

[189] Inserted by No. 1 of the FA of 19 June 2020, in force since 1 Jan. 2021 (AS 2020 4179; BBI 2018 7163); see also BGer, 4A/386/2015, at para 2.1.

[190] PILA, Article 190a(2).

[191] PILA, Article 190a(1)(b).

[192] PILA, Article 190a(1)(a).

[193] French Code of Civil Procedure, Article 1494(2), <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA000006135898/?anchor=LEGIARTI000034747123#LEGIARTI000034747123> (accessed 30 May 2024).

limit is three months.[194] There is no suggestion in the French Code of Civil Procedure that the courts have discretion to extend this time period further.[195]

24 Articles 1502 and 1506(5) of the French Civil Code of Procedure provide a review regime for fraudulent awards. The applicant may ask the tribunal to review such awards within two months from the date they are alerted to the grounds for review that they are relying on.[196] The Paris Court of Appeal has allowed parties to apply to review fraudulent awards even after the lapse of the time limit (which then ultimately led to the annulment of the award).[197]

III. Recommendation

A. Time limit

25 The Working Group noted a general consensus during discussions that the time limit for challenging arbitral awards under the Model Law should be fairly short, and that three months was a suitable duration for doing so.[198] They agreed that there should be sufficient time provided to parties for the preparation and translation of the requisite documents and materials.

26 We see no strong reasons to depart from the Working Group's consensus of three months. Maintaining the duration of three months will allow Singapore to remain consistent with other Model Law jurisdictions.

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[194] French Code of Civil Procedure, Articles 1527 and 643(2).

[195] Freshfields Bruckhaus Deringer, *Consider this when selecting seat: a strict time limit for challenging awards in Singapore*, <https://www.lexology.com/library/detail.aspx?g=3afb07ea-d429-4f22-be6d-94b887a445e2> (accessed 30 May 2024).

[196] French Code of Civil Procedure, Article 596.

[197] Court of Appeal of Paris, 17 February 2015, *Tapie*, appeal no. 13/13278; this is a domestic arbitration as it ultimately involves a French bank and its French clients in France and the alleged failures committed by the French bank. The applicable law then was the 2011 French Arbitration Law which only allowed revision for domestic fraudulent awards. However, this distinction was removed after the law was revised and parties may now apply for revision of a fraudulent award that is either domestic or international. The point made still stands. See Aceris Law LLC, *Revision of Arbitration Awards under French Law*, <https://www.acerislaw.com/revision-of-arbitration-awards-under-french-law/> (accessed 30 May 2024).

[198] United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the Work of its Fourth Session*, U.N. Doc. A/CN. 9/232 (1985) ("**Fourth Session**") at para 22.

27 As international arbitrations seated in Singapore increasingly involve foreign language, foreign law, foreign counsel or foreign counterparties (without any substantive connection to Singapore other than Singapore being the seat), three months remain an appropriate period in our view for award debtors to engage local counsel and seek the necessary advice for any setting aside application. Having a shorter time limit may result in award debtor filing ill-considered or poorly formulated setting aside applications. This increases the workload on the courts.

28 We appreciate that, in general, shorter timelines have the benefit of providing speedy finality. However, consistent with the Law Society of Singapore's Guidance Note 8.9.1 on Sustainable Practice, we think it is preferable for parties and their legal representatives to have adequate time to consider whether the setting aside challenge is in fact warranted, instead of parties rushing to file an application in order to meet a shorter time limit.

B. Discretion to extend time

29 The Report of the UNCITRAL on the work of its Eighteenth Session adopted the time limit of three months for setting aside applications and decided against making this time limit subject to contrary agreement by the parties.[199] It has been suggested that since UNCITRAL did not intend for parties to be able to vary the time limit under Article 34(3) of the Model law, a reasonable inference would be that UNCITRAL similarly did not intend for domestic courts to be able to do the same.[200]

30 While the time limit in non-Model Law jurisdictions such as England (28 days) is generally shorter, they provide for some form of discretion for the courts to extend the time limit.

31 On balance, we do not recommend giving the courts a general discretion to extend the time limit for all setting aside applications. Such an approach creates uncertainty over the finality of an award in an overly inclusive number of cases. Instead, we recommend

[199] Eighteenth Session, *supra* n 165, at para 304.

[200] Hwang & Tan, *supra* n 180, at 575.

enacting a new provision specifically to cater for applications brought on the ground that the award may be tainted by fraud.

32 In the Eighteenth Session, there were differing opinions on whether a separate regime with a much longer time period should be established for cases of fraud or false evidence which may materially affect the outcome of the arbitration.[201] The report ultimately concluded that doing so would be "contrary to the need for the speedy and final settlement of disputes in international commercial relationships".[202]

33 This is also the current position in Singapore.[203] In *Bloomberry (SGHC)*,[204] the court considered whether the three-month time limit extended to setting-aside applications brought under section 24 of the IAA. Section 24 of the IAA sets out additional grounds for setting aside an arbitral award beyond the grounds provided in Article 34 of the Model Law. These additional grounds are, namely, when the making of the award was induced by fraud or corruption (section 24(a)), or a breach of the rules of natural justice occurred (section 24(b)).

34 The court ultimately held that the three-month time limit extended to setting-aside applications under section 24 as well. The court was mindful not to create inconsistency between the timelines for setting aside applications brought under section 24 of the IAA versus Article 34 of the Model Law.[205] The court observed that, while fraud or corruption under section 24(a) may only be discoverable some time post-award, breaches of natural justice under section 24(b) are generally apparent and discoverable at the arbitral hearing itself. The court found no reason to extend the reasoning for section 24(a) to section 24(b), especially since the latter has a wide scope and corresponds considerably with the "otherwise unable to present its case" ground in Article 34(2)(a)(ii) of the Model Law.

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[201] Eighteenth Session, *supra* n 165, at para 299.

[202] Eighteenth Session, *id*, at para 300.

[203] *Bloomberry (SGCA)*, *supra* n 28.

[204] *Bloomberry (SGHC)*, *supra* n 165, at [37].

[205] *Bloomberry (SGHC)*, *id*, at [45].

35 Given the court's reasoning, the court was not opposed to extending the timeline for section 24(a) as much as it was opposed to extending the timeline for section 24(b).[206] To resolve this difficulty, we recommend enacting a separate provision in the IAA specifically for applications involving fraud and corruption under section 24(a).

36 In New Zealand, courts similarly accept that they do not have the power to extend the time limit for setting aside applications.[207] The Court of Appeal in *Todd Petroleum Mining v Shell (Petroleum Mining)* clarified that this time limit was "firm in the sense that there is no discretion to extend them".[208]

37 However, where awards may be tainted by fraud or corruption, the NZAA modified Article 34(3) of the Model Law to exclude the application of the three months' time limit:

> An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. ***This paragraph does not apply to an application for setting aside on the ground that the award was induced by fraud or affected by fraud or corruption*** [emphasis and bold added].[209]

38 To allow the impugnment of an award tainted by fraud is to balance "finality in an arbitral award and [to retain] powers to remedy the consequences of an award which has been tainted by fraud or corruption".[210] In our view, it is not an answer that victims of fraud can still resist enforcement of the award even if the time limit for setting-aside the award has elapsed. It is unfair to deprive a victim of fraud of an opportunity to set aside an award and subject the victim to potentially multiple enforcement applications

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[206] *Bloomberry (SGHC)*, *id*.

[207] Hwang & Tan, *supra* n 180, at 563; see also *Opotiki Packing & Coolstorage v Opotiki Fruitgrowers Co-operative* [2003] 1 NZLR 205, Auckland CL/32/98; see also *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NLZR 554; see also *Todd Petroleum Mining v Shell (Petroleum Mining)* [2014] NZCA 507; see also *Kyburn Investments v Beca Corporate Holdings* [2015] NZCA 290.

[208] *Todd Petroleum Mining v Shell (Petroleum Mining)* [2014] NZCA 507 at 57.

[209] NZAA, Article 34(3), sch 1 ch 7.

[210] New Zealand, Law Commission, *Report No. 20 (Arbitration)* (NZLC R20, October 1991) at [400].

by the award creditor. That cross-border fraud is becoming increasingly sophisticated (and hence more difficult to detect) since the time of the Working Group discussions is another reason why the courts should have the discretion to extend the three-month time limit in an appropriate case.

39 A similar approach is taken in other key seats. English courts are more accepting of a longer delay if coupled with reasons such as fraud.[211] Swiss courts allow parties to review their awards within 90 days of becoming aware of the relevant grounds for review if the award is tainted by criminal acts or fresh evidence that could impact the outcome of arbitral proceedings.[212] French courts provide a timeline of two months for parties to apply to review fraudulent awards after their attention is brought to the grounds for revision.[213]

40 For these reasons, we recommend a new subsection under section 24:

> The General Division of the High Court may extend the time limit in Article 34(3) of the Model Law for the filing of an application under [section 24(a)].

41 We do not think it is necessary to impose any further time limits in this new provision, such as requiring the award debtor to file an application within 60 or 90 days of discovering the relevant facts. As the circumstances of the fraud perpetuated may vary greatly between cases and the gathering of relevant evidence especially across borders may take time, imposing an arbitrary timeline may produce unjust results and hamper access to justice. In our view, our courts should have unfettered discretion, on the facts of every application brought under section 24(a), whether the time limit for that application (if expired) should be extended. If our recommendation is accepted, corresponding changes should also be made to the O 48 r 2(3) of the ROC 2021.

[211] *Nigeria v PID (2020)*, *supra* n 180.

[212] PILA, Article 190a(1).

[213] French Civil Code of Procedure, Articles 1502 and 1506(5).

42 As Singapore matures into a leading seat for international arbitrations which may not otherwise have a connection to Singapore, our judicial processes should correspondingly grow increasingly robust. There is a need to ensure that our judicial processes are not abused by fraudsters to "rubber stamp" arbitral awards, for instance in cases such as *Nigeria v PID (2023)*. The regime in England allowed the court to set aside the fraudulent awards that were obtained by "practising the most severe abuses of the arbitral process".[214] Should a similar case present itself in Singapore, courts are presently unable to set aside such an egregious award once the time limit has elapsed. In our view, the balance between finality and justice is struck by maintaining the 3-month time-limit for all applications for setting aside, save for an application under section 24(a) of the IAA where the court should have the discretion to extend the time-limit.

IV. Focus Group

43 In our draft report, we recommended maintaining the time limit for challenging awards at three months. Courts should not have discretion to extend this timeline, except for applications under section 24(a) of the IAA involving fraud or corruption. This exception is to be legislated as a new provision under the IAA. The focus group was largely in support of our recommendations.

44 The focus group was generally in favour of maintaining the three months' time limit with no discretion to extend the time limit, in contrast to jurisdictions such as England and Switzerland. While cognisant of the benefits that come with a shorter deadline, the focus group was concerned that it may be too short to determine any meritorious reason for a challenge. In-house counsels emphasised that they need time for the relevant decision makers to be briefed, to make the relevant decisions, and to instruct external counsel.

45 There were more views concerning our recommended exception for applications under section 24(a) of the IAA involving fraud or corruption. There were concerns about the abuse of section 24(a) challenges. It was suggested that, instead of legislative reform, it could be left to case law to develop any exceptions to the three-month time limit. At

[214] *Nigeria v PID (2023)*, *supra* n 29, at [516].

the same time, some members of the focus group observed that the threshold for section 24(a) applications is very high. Singapore has seen a very small number of section 24(a) applications over the years, much less challenges that were successful. Our view is that the courts may shy away from fashioning an exception by way of case law because Article 5 of the Model Law limits court intervention. Legislative reform is therefore recommended.

46 Some members of the focus group expressed concern over how enforcement proceedings in other jurisdictions may be concluded before any belated setting aside application is brought. However, this was generally thought to be an unavoidable outcome. Our view is that any concluded enforcement proceedings should not be an overriding factor when deciding the availability of the setting aside regime for awards involved fraud or corruption.

47 The focus group discussed including other types of exceptions to the time limit, such as the arbitrators' failure to disclose conflict of interest within a certain time period. This ultimately did not gain traction because it was difficult to achieve consensus on what other scenarios should qualify as exceptions.

V. Conclusion

48 In sum, we do not recommend reducing the three-month time limit for setting aside applications. We also do not recommend giving the courts general discretion to extend the time limit. However, we recommend enacting a new provision in the IAA giving the courts discretion to extend the time limit in setting aside applications involving fraud or corruption under section 24(a) of the IAA.

ISSUE 5: WHETHER A RIGHT OF APPEAL (INCLUDING VARIATIONS OF THE SAME) ON QUESTIONS OF LAW IS DESIRABLE

I. Introduction

1 Presently, the IAA does not provide for the possibility of a judicial review of awards in arbitrations governed by the IAA, save in respect usual matters such as appeals on jurisdictional rulings[215] and setting aside applications,[216] even if the tribunal had made a serious error in its final award. In a 2019 public consultation, the Singapore Ministry of Law sought feedback[217] on the possibility of including a right of appeal on points of law which "mirrors the rubric for appeals under the [AA], save that this will only be available on an opt-in basis".[218] Ultimately, the proposed provisions were not implemented, and the Ministry of Law stated that it would "continue to study" this proposal.[219]

2 This chapter considers (1) whether, under the IAA, arbitral parties ought to have the right to appeal to the High Court on points of law, and if so then (2) how such right should operate.

3 In sum, we recommend that the IAA be amended to provide parties with an opt-in right to appeal to the court on points of law. This right should be a limited one, in view of the policy objectives concerning arbitration. We recommend that the proposed

[215] IAA, section 10.

[216] IAA, section 24.

[217] See e.g. Law Reform Committee, Singapore Academy of Law, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law* (February 2020) (Members of the Subcommittee on Limited Appeals from Arbitral Awards: Jordan Tan & Colin Liew) ("**2020 SAL Report**"); see also Tan Liang Ying & Christine Sim, "Appeals on Questions of Law in International Arbitration – A Comparative Perspective from New York" (2020) SAL Prac 18.

[218] Ministry of Law, "Public Consultation on International Arbitration Act" (26 June 2019), <https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-international-arbitration-act/> (accessed 31 July 2024) ("**2019 Consultation Paper**").

[219] Ministry of Law, "Enhancing the Regime for International Arbitration through the International Arbitration (Amendment) Bill" (1 September 2020), <https://www.mlaw.gov.sg/news/press-releases/international-arbitration-amendment-bill/> (accessed 31 July 2024).

provisions recommended in the Ministry of Law's 2019 Consultation Paper[220] should be adopted with modifications, such as:

(a) expressly requiring appeals to be decided on the basis of the findings of fact in the award;

(b) defining questions of law to expressly include questions of foreign and international law;

(c) preventing an automatic waiver of the right of appeal under institutional rules;

(d) making provision for the costs of the court and arbitral proceedings; and

(e) providing that applications for permission to further appeal from the High Court shall be determined by the appellate court.

II. Comparative review

4 This section sets out a summary of the prevailing approach in England, Hong Kong and France.

A. England

5 English law provides an optional right of appeal from arbitral awards on questions of law, on an opt-out basis.[221]

6 Several requirements must be met before the English court will grant leave to appeal, including that the decision of the tribunal on the question is "*obviously wrong*" or the question is "of general public importance and the decision of the tribunal is at least open to serious doubt".[222]

7 On appeal, the English courts may confirm, vary or set aside (in whole or in part) the award, or remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination.[223] The English courts appear to take a generally

[220] 2019 Consultation Paper, *supra* n 218, Appendix A, New Sections 24A to 24D.

[221] EAA, section 69.

[222] EAA, section 69(3).

[223] EAA, section 69(7).

restrictive view of appeals, and have stated that "in cases of uncertainty the court will, so far as possible, construe the award in such a way as to make it valid rather than invalid".[224] Parties must seek the court's leave to appeal against (i) the court's decision on whether to grant leave to appeal; and (ii) the court's decision on the appeal itself.[225]

8 There are also supplemental legislative provisions which, for example, empower the court to order the applicant or appellant to provide security for costs, and require any application or appeal to be brought within 28 days of the date of the award or of notification of the result of any arbitration process of appeal or review.

B. Hong Kong

9 Similar to England and Wales, Hong Kong law also provides for an optional right of appeal from arbitral awards on points of law, albeit on an opt-in basis.[226] The requirements for leave to appeal mirror those under the English legislation, save that there is no express requirement for it to be "just and proper in all the circumstances for the court to determine the question".[227] The Hong Kong courts have stated that "the threshold [for leave to appeal] is high" and that there is a "policy of minimal curial intervention".[228]

10 Unlike the English legislation, the Hong Kong legislation also expressly specifies that "the Court must decide the question of law which is the subject of the appeal on the basis of the findings of fact in the award".[229] But similar to England, parties must seek the court's leave to appeal against (i) the court's decision on whether to grant leave to appeal; and (ii) the court's decision on the appeal itself.[230]

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[224] *Alegrow SA v Yayla Agro Gida San ve Nak A.S* [2020] EWHC 1845 (Comm) ("***Alegrow v Yayla***") at [48].

[225] EAA, sections 69(6) and (8).

[226] HKAO, section 99(e) read with Schedule 2, section 6.

[227] HKAO, Schedule 2, section 6(4).

[228] *Employer v Contractor* [2023] HKCFI 2911 ("***Employer v Contractor***") at [9] and [10].

[229] HKAO, Schedule 2, section 5(3).

[230] HKAO, Schedule 2, sections 5(8) and 6(5).

C. France

11 French law does not grant parties in international arbitrations a right of appeal on points of law.[231] This appears to be part of the "minimalist" approach to the review of arbitral awards under French law.[232]

III. Balancing policy considerations

12 This section sets out the key competing policy considerations. It explains why, on balance, an opt-in right of appeal on points of law should be implemented in Singapore.

A. Finality, certainty and party autonomy

13 Finality is one of the key benefits of arbitration, given that there is usually very limited scope for appellate intervention in the arbitration process compared to court litigation. Indeed, the available empirical data demonstrates that finality is often a crucial reason why contracting parties opt for arbitration.[233] There are three reasons why an opt-in right of appeal would be a well-calibrated approach to address the inherent tension between an appeal process and finality.

14 First, the proposed reform would rightly give parties greater autonomy to decide the parameters of arbitration.[234] Arbitration is founded on the consent of parties; finality, whilst important, is a benefit of arbitration and not its premise. As noted in the 2020 SAL Report,[235] the Court of Appeal has explained that the nature of arbitration is "inherently private and consensual",[236] and parties might not always prioritise finality.

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[231] Christophe Seraglini & Quentin Herruel, "Challenging and Enforcing Arbitration Awards: France (Response to Question 3)" (7 March 2024) <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/france> (accessed 31 July 2024).

[232] Albert Henke & Lisa Beisteiner, "Annex, Conference Report – Vienna Arbitration Days 2012", in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration 2013* (Manz'sche Verlags- und Universitätsbuchhandlung 2013) at 202.

[233] Nadja Alexander *et al*., "SIDRA International Dispute Resolution Survey: 2022 Final Report" <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/24/index.html> (accessed 31 July 2024) ("**2022 SIDRA Survey**") at [5.7].

[234] See also 2019 Consultation Paper, *supra* n 218, at [12]. The Ministry of Law explained that the proposed reform will "*enhance party autonomy and their ability to exercise control as well as designate with greater precision the degree of finality they expect*".

[235] 2020 SAL Report, *supra* n 217, at [2.34].

[236] *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [34].

Accordingly, a more flexible approach to finality based on parties' specific needs for each transaction would be more closely aligned with the fundamental basis of arbitration.

15 Second, as disputes referred to international arbitration become increasingly higher value[237] and presumably more complex, certainty and correctness may gain precedence over finality where parties wish to minimise risk, so as to guard against the possibility of serious errors in a tribunal's decision.[238] Parties who place a premium on the correctness of arbitral awards would benefit from the option of added recourse to the courts. Further, tribunals would be more strictly "bound" by judicial precedent (to the extent that a departure from precedent may result in an award being varied). This would give contracting parties greater comfort regarding the predictability of dispute outcomes.

16 Third, finality will remain a benefit of arbitrations under the IAA in general, even where parties opt for a right of appeal. This is because the proposed amendments replicate the strict requirements for permission to appeal under the AA.[239] The High Court in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* has emphasised that, under the AA, there are "stringent … conditions before leave to appeal against an arbitral award is granted" and that the AA seeks "to promote finality of the arbitration process and awards".[240] A similarly restrictive view of appeals appears to be taken in other jurisdictions,[241] including that courts would generally seek to uphold arbitration awards,[242] and that awards would be "read by the courts generously".[243]

17 The effectiveness of this approach is confirmed by empirical evidence. According to a report published by Osborne Clarke in 2021, a review of reported English cases with

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[237] See e.g. SIAC Annual Report 2023, *supra* n 100, at 35: the average value for new case filings was around S$49.25 million; compared to around S$32.84 million only five years prior in 2018 (SIAC Annual Report 2018 <https://siac.org.sg/wp-content/uploads/2022/06/SIAC_AR2018-Complete-Web.pdf> (accessed 21 October 2024), at 16), before adjusting for inflation or exchange rate fluctuations.

[238] See also the 2020 SAL Report, *supra* n 217, at [2.28] – [2.29].

[239] AA, section 49(5).

[240] *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] SGHC 81 at [19].

[241] See EAA, section 69(3) and HKAO, Schedule 2, section 6(4).

[242] See e.g., *Alegrow v Yayla*, *supra* n 224, at [48].

[243] See e.g., *Employer v Contractor*, *supra* n 228, at [10].

references to the EAA reveals that from 2010 to 2020, there were only 143 reported appeals against an award on an error of law,[244] which was a "*miniscule*" amount compared to the total number of arbitrations commenced in London.[245] Notably, a very substantial 34% (44) of the 126 decided appeals were successful. Separately, the English Commercial Court Annual Report 2022-2023 reported that there were 46 applications for permission to appeal on a point of law under the EAA made in 2023. As of October 2023, nine applications had resulted in permission being granted, 20 applications were awaiting a permission decision and six appeals had been dismissed.[246]

18 On balance, we think this generally supports the view that with the right safeguards in place, the majority of awards are unlikely to be appealed. At the same time, the appeal mechanism will be highly useful for the minority of cases where an appeal is deemed necessary. In most cases, finality would accordingly remain a key benefit of arbitration.

B. Competitiveness of Singapore as a seat of arbitration

19 Introducing an opt-in right of appeal will contribute to the improvement of Singapore's competitiveness as a seat of arbitration.[247]

20 First, empirical data suggests that an appropriately limited and optional right of appeal would be desirable to many arbitration users (namely clients). In the BCLP Annual Arbitration Survey 2020 on a right of appeal in International Arbitration,[248] which sought the views of 123 respondents comprising inter alia in-house counsel, external lawyers and arbitrators, the following results (amongst other) were obtained:

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[244] Osborne Clarke, "Arbitration in Court: Observations on over a decade of arbitration-related cases in the English Courts (2021)" ("**2021 Osborne Clarke Report**") at 7. Out of these 143 reported appeals, 126 resulted in a decision.

[245] 2021 Osborne Clarke Report, *id*, at 2.

[246] The English Commercial Court Annual Report 2022-2023 <https://www.judiciary.uk/wp-content/uploads/2024/03/14.448_JO_Commercial_Court_Report_2223_WEB.pdf> (accessed 5 October 2024), at [3.1.2].

[247] See e.g. Ministry of Law, "Enhancing the Regime for International Arbitration through the International Arbitration (Amendment) Bill" (1 September 2020), <https://www.mlaw.gov.sg/news/press-releases/international-arbitration-amendment-bill/> (accessed 31 July 2024), at [3].

[248] BLCP, "Annual Arbitration Survey 2020 - A right of appeal in International Arbitration A second bite of the cherry: Sweet or Sour?" <https://www.bclplaw.com/a/web/186066/BCLP-Annual-Arbitration-Survey-2020.pdf> (accessed 31 July 2024) ("**BCLP Annual Arbitration Survey 2020**").

(a) Would a right of appeal make arbitration more or less attractive: Less attractive – 71%. More attractive – 24% (rising to 46% when only considering in-house counsel responses).

(b) If a right of appeal is adopted, should it be broad or narrow in scope: Limited scope – 89%. Unfettered – 9%.

(c) Direct experience of an arbitral tribunal making a decision on the substance of the dispute that was obviously wrong: No experience – 51%. Experience in 1 to 5 cases – 46%.

(d) In some cases, the consequences of an incorrect decision are so serious as to make the lack of an appeal mechanism unacceptable: Agree – 51%.

(e) How important is it that parties to an international arbitration agreement have the right to include express provision for a right of appeal against an award: Important – 52%. Not very important – 29%. Not important at all – 12%.

(f) Should national arbitration laws permit an appeal at the seat of arbitration in every case where parties have agreed to a right of appeal against an award: Yes – 60%. No – 29%.

21 In short, most survey respondents did not prefer a *general* right of appeal. However, over half of the respondents also thought that if parties expressly agree, the right (albeit limited in scope) should then be available.

22 The 2020 SAL Report similarly observed that there was "increasing demand for a right of appeal on questions of law". In particular, the report noted the following:

(a) "[i]n a survey conducted by the Cornell-Pepperdine/Straus Institute of in-house counsel in Fortune 1000 companies, one of the most frequently cited reasons for not utilising arbitration was that 'there is hardly an effective way to appeal awards'";

(b) "in an earlier survey of corporate lawyers from large corporations in America, 54.3% explained that the decision to prefer litigation over arbitration was the difficulty in appealing arbitral awards"; and

(c) a "lack of appeal mechanism on the merits" is increasingly considered one of the "worst characteristics" of international arbitration.[249]

23 Second, introducing an opt-in right of appeal better aligns the flexibility of Singapore's arbitration framework with that of other popular seats. Parties who prefer a right of appeal would naturally consider the availability of this option to be a factor in favour of choosing a particular jurisdiction as a seat.

24 As summarised above, London and Hong Kong (which are among the most preferred arbitration seats globally[250]) provide parties with an optional right of appeal on points of law. This suggests that the availability of a right of appeal may be a contributing factor to a seat's competitiveness, or at least has not detracted from London and Hong Kong's competitiveness.

C. Development of Singapore law

25 An oft-stated benefit introducing a right of appeal on points of law is that this facilitates and promotes the development of mercantile law, by virtue of the precedent value of appellate decisions.[251] For example, Lord Thomas of Cwmgiedd (former Lord Chief Justice of England and Wales) suggested that the effect of a diminishing number of appeals against awards had resulted in an "undermining of the means through which much of the common law's strength … was developed".[252]

26 We agree that the availability of appeals from awards would aid the development of Singapore law and that it is important to give weight to this consideration. That said, we do not wish to overstate this benefit, as the proposed amendments require that a tribunal's decision must be obviously wrong or open to serious doubt before an appeal can be brought.

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[249] See 2020 SAL Report, *supra* n 217, at [2.30] to [2.33].

[250] Queen Mary University of London and White & Case LLP, "2021 International Arbitration Survey: Adapting arbitration to a changing world" <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> (accessed 31 July 2024) at 6.

[251] See e.g. BCLP Annual Arbitration Survey 2020, *supra* n 248, at 2; and 2020 SAL Report, *supra* n 217, at [2.37] to [2.40].

[252] Lord Thomas of Cwmgiedd, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration" (9 March 2016) <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (accessed 31 July 2024) at [22].

D. Time and costs

27 The inherent increase in time and costs incurred by parties who appeal an award may affect the attractiveness of arbitration. On this point, the 2020 BCLP Survey found that 62% and 57% of respondents agreed that a right of appeal makes the arbitration process too long and too expensive respectively.[253] In the 2022 SIDRA Survey, 63% and 79% of respondents indicated that cost and speed respectively were key factors for their choice of dispute resolution mechanism.[254]

28 That said, having an opt-in right of appeal would nevertheless remain favourable given the benefits discussed above. Parties who opt into the appeals regime would be aware of the increased time and costs involved as a tradeoff. Parties who do not wish to incur these downsides need not agree to have a right of appeal. We have considered whether any right of appeal regime in Singapore should be opt-out (as in the UK), rather than opt-in. In our view, since the right of appeal regime will have time and costs implications, it is preferable for parties to opt-in. There may be less sophisticated international users of arbitration who may not otherwise be aware of a need to opt-out of the regime. If our recommendation is accepted, this means that for arbitrations under the AA, parties have to opt out of the right of appeal regime, whereas for arbitrations under the IAA, parties must opt in. This is not novel —New Zealand has adopted such an approach.[255]

29 To minimise any potential attempts by parties to make submissions on matters of fact (which would inflate the costs of the appeal), we recommend specifying that the court must decide the appeal on the basis of the findings of facts in the award, which is a requirement under Hong Kong law.[256]

IV. Recommendation

30 This section considers the potential limitations and issues in the appeals process, and suggests legislative safeguards that may be put in place.

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[253] BCLP Annual Arbitration Survey 2020, *supra* n 248, at 13.

[254] 2022 SIDRA Survey, *supra* n 233, at 6, Exhibit 4.1.

[255] 2020 SAL Report, *supra* n 217, at [3.17].

[256] See HKAO, Schedule 2, section 5(3).

A. Potential for abuse

31 Parties who wish to adopt a "scorched earth" approach to their disputes may seek to use the appeal process to frustrate or delay counterparties' attempts to enforce their rights.

32 The stringent requirements for permission to appeal would, however, mitigate this risk by discouraging unmeritorious applications. Additionally, with the existing body of Singapore, English and Hong Kong case law to aid interpretation of these requirements, the legal position in Singapore can be quickly established, rather than requiring many test cases.

33 Relatedly, we agree with the proposed amendments to the IAA in 2019 (which mirror the relevant provisions under section 50 of the AA) to empower the Singapore courts to order the applicant or appellant to (a) provide security for costs and/or (b) pay any money payable under the award into court or otherwise secure the same. These would act as deterrents against abuse of the appeal process and, conversely, provide counterparties with added certainty that they would be assured of timely payment of their costs and/or the money payable under the tribunal's award, as the case may be, where an application or appeal is unsuccessful.

34 For similar reasons, to minimise wastage of judicial resources, the appellate court's permission should be required before any applicant may bring an appeal from the High Court's first instance decision to grant or refuse permission to appeal, or a further appeal from the High Court's substantive decision on an appeal. We recommend that permission of the appellate court, rather than the High Court (as the Ministry originally proposed), ought to be required, similar to the position for appeals on rulings of jurisdiction under section 10 of the IAA and for appeals on questions of law under section 49 of the AA.

35 Finally, consistent with our recommendations in Chapter 1, we recommend that the court be empowered to make orders relating to (i) costs of the court proceedings as a whole; and (ii) costs of the arbitral proceedings. Exceptionally, if all the parties agree

and the court is satisfied that it is in the interest of justice to do so, the court should be empowered to remit the issue of costs to the tribunal for consideration.[257]

B. Situations where the tribunal's decision is unclear

36 A further issue may arise where the award does not set out the tribunal's reasons for its decision on a point of law, or otherwise lacks sufficient detail for the appeal. In our view, the original proposed amendments in the 2019 Consultation Paper,[258] which empower the court to order the tribunal to give reasons (and which mirror the relevant provisions under the AA[259] and English[260] and Hong Kong[261] laws), are necessary to address this issue. Otherwise, situations may arise where a lack of reasons in an award make it impossible for the court to properly decide on an appeal therefrom. We acknowledge that in such cases, there may be potential concerns that the tribunal is *functus officio* after issuing its award. That said, rather than refusing permission to appeal on the basis that the tribunal cannot revisit its award (or guessing or inferring the tribunal's basis for its decision), we think the preferable and more practical approach would be to seek clarity from the tribunal.

C. Waiver provisions in institutional rules

37 Next, we note that some institutional rules such as the SIAC rules[262] or ICC rules[263] include automatic waiver provisions. This might possibly result in the right of appeal being unintentionally excluded (despite parties expressly opting into the appeal process).

38 Hence, we suggest that clarifying that the right of appeal is not waived merely by operation of the agreed institutional rules; parties' choice of institutional rules alone

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[257] See Chapter 1 of this Report for a more detailed discussion on the issues relating to costs orders and the basis for our recommendations in this regard.

[258] 2019 Consultation Paper, *supra* n 218; Annex B, proposed section XXB(4).

[259] AA, section 50(4).

[260] EAA, section 70(4).

[261] HKAO, Schedule 2, section 7(2).

[262] SIAC Arbitration Rules 2016, Rule 32.11.

[263] ICC 2021 Arbitration Rules, Rule 35(6).

should not circumvent this right. If parties subsequently wish to mutually waive their right of appeal, they can enter into a separate agreement to do so.

D. Disputes involving foreign or international law

39 A further issue for consideration is whether a "question of law" ought to include foreign or international law. Although the AA does not define the term, the 2020 SAL Report recommended that "question of law" should mean Singapore law and international law.

40 The 2020 SAL Report did not otherwise explain why a "question of law" should be restricted to Singapore law, other than observe that the English provisions restrict that term to questions of English law.[264]

41 We agree with the 2020 SAL Report that "question of law" should be defined as including questions of public international law, as the Singapore courts already consider such questions in domestic litigation.[265]

42 However, we are of the view that there is no longer a need to expressly restrict "question of law" to Singapore law to the exclusion of foreign law. With the formation of the SICC featuring international judges and more flexible rules for the proving of foreign law, the fact that a dispute features a foreign governing law should no longer be treated as an automatic bar for the involvement of the Singapore courts. This is all the more so in situations where, in accordance with our recommendation, the parties themselves have opted in to the right to appeal regime before the Singapore courts. What the system of law is can be a factor that the courts can consider when deciding whether to grant permission to appeal. We therefore recommend that the term "question of law" be expressly defined to include foreign and international law.[266]

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[264] See EAA, section 82(1).

[265] 2020 SAL Report, *supra* n 217, at [4.2] to [4.7].

[266] In the draft report, we initially recommended legislatively prescribing that the SICC shall hear appeals on questions of foreign and international law. However, we have since reconsidered this position following the focus group discussion (see below), and no longer recommend including express provisions in this regard.

V. Focus Group

43 In our draft report, we recommended that an opt-in right of appeal on points of law be included under the IAA, along with various safeguards to address the policy considerations highlighted above.

44 Most of the focus group members broadly agreed with this recommendation. There were comments regarding the specific safeguards that ought to be put in place.

45 Members of the focus group who indicated support for the inclusion of a right of appeal on points of law expressed the following views:

(a) An opt-in approach would not change the default scenario for parties who choose to arbitrate in Singapore; it merely enhances party autonomy for parties who prefer more flexibility under Singapore law. There is no obligation on parties to include a right of appeal. Hence, such reform would be beneficial without changing the parameters of the IAA framework too drastically.

(b) From a policy perspective, a right of appeal would enhance the options available on the "menu" for dispute resolution in Singapore. This will enable Singapore to better meet demand from arbitration users who prefer the option of appeal.

(c) A right of appeal creates precedent value for questions of law in arbitration.

(d) An opt-in (as opposed to opt-out) approach for appeals would unlikely result in Singapore being a less competitive jurisdiction for arbitration. On the contrary, corporate users had previously provided feedback to members of the focus group that an opt-in right of appeal would create a more favourable environment for arbitration in Singapore. In particular, there is perceived value in the additional consistency of arbitration dispute outcomes that would be facilitated by a right of appeal. Some corporate users had also expressed dissatisfaction with past awards containing erroneous legal reasoning.

46 On the other hand, the focus group members who disagreed with our recommendation expressed three principal concerns, summarised as follows:

(a) Although the right of appeal would be optional, this may unnecessarily increase the time and costs for negotiation of dispute resolution clauses due to the added

complexity. Finality is a key benefit of arbitration and if parties wish to have a right of appeal, they can opt for litigation instead. There is therefore some difficulty in predicting whether parties would perceive that the option of an appeal adds value.

(b) Having adopted the UNCITRAL Model Law as the legal framework for international arbitrations in Singapore, it is unnecessary to re-design the system by introducing a right of appeal which would blur the line between arbitration and litigation. This is especially considering that parties who choose to resolve disputes in Singapore already have the option of using the SICC.

(c) Introducing another avenue of challenging arbitral awards creates more opportunities for parties to bring unmeritorious applications merely as a strategic maneuver. Hence, not having any right of appeal might be a beneficial distinguishing factor in favour of Singapore.

47 On balance, we maintain our recommendation to introduce an opt-in right of appeal on questions of law. In our view, an opt-in mechanism strikes the right balance between enhancing party autonomy and avoiding unnecessary complexity in cases where parties prefer arbitration primarily for its efficiency (by virtue of the finality of arbitral awards). Based on available empirical evidence,[267] appeals from awards on questions of law tend to be the exception and not the norm. Hence, an optional right of appeal would not unduly dilute the application of the Model Law, or result in arbitration no longer serving a unique and significant function. Finally, the risk of abuse can be meaningfully addressed by way of appropriate control mechanisms and costs consequences.

48 Other comments and queries received from the focus group include:

(a) Whether it was necessary to expressly preclude the operation of automatic waiver provisions under institutional rules. The concern was that our proposed provision in this regard may create uncertainty.

(b) What is the jurisprudence on the status of an award which has been varied by the court. There was a suggestion to consider whether the preferable approach

[267] See paragraph 17 of this chapter.

would generally be to remit the award to the tribunal for reconsideration, where the court determines that the tribunal had made an error of law.

(c) What is the manner in which the tribunal should state the reasons for its award in sufficient detail, if the court orders it to do so.

(d) The feasibility of including a further option to bring an appeal on questions of fact, and not just law. One key situation in which this would be beneficial is where parties are unable to agree on whether to use arbitration or litigation as the forum for dispute resolution. Arbitration with a right of appeal on both questions of fact and law could serve as a compromise in such scenarios.

(e) A suggestion not to prescribe that appeals on points of foreign or international law be allocated to the SICC, and instead to leave this matter to the court's discretion.

(f) A suggestion that it may be unnecessary to expressly provide that appeals must be decided on the basis of the findings of fact in the award.

(g) A suggestion that the requirement for the question of law to be one of general public importance (before permission to appeal is given) might require some reconsideration *vis-à-vis* questions of foreign or international law.

(h) A suggestion that, to avoid delays in the proceedings, any applications for permission to appeal ought to be filed within one month of the date of the award rather than three months, with the three-month timeline applying only to the filing of the appeal (after permission has been granted). There was a similar suggestion that, rather than including a leave requirement, there can be a summary dismissal process to address unmeritorious appeals in a timely manner.

(i) A suggestion to revise one of the requirements for permission to appeal to cohere with the fact that the right of appeal would only be available on an opt-in basis.[268]

[268] The requirement as originally drafted, provided as follows: "despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question". The suggestion was to delete the phrase "despite the agreement of the parties to resolve the matter by arbitration".

(j) An observation that there would sometimes be difficulty in distinguishing between questions of fact and questions of law.

49 We have considered the focus group's input in the round. Our recommendations are as follows:

(a) We maintain our recommendation for an express provision to prevent an automatic waiver of the right of appeal under institutional rules. If parties opt into the appeal regime, their agreement could potentially be rendered otiose by the operation of automatic waiver provisions under institutional rules. The better approach would be to exclude the operation of any such waiver provisions by default to avoid this outcome. We do not think that this would create uncertainty. The anti-waiver provision automatically precludes the operation of waivers under institutional rules where Singapore is selected as the seat of the arbitration.

(b) As regards the court's role in varying awards upon hearing an appeal, we are of the view that the fact that an award has been varied by the court would unlikely constitute grounds for refusing enforcement under Article 36 of the Model Law or Article V of the New York Convention. The EAA has adopted this approach without any notable reports regarding issues with the enforceability of awards varied by English courts. In connection with this, we have recommended maintaining the Ministry of Law's proposed provision in 2019 that a court's variation of an award would have effect as part of the award.

(c) That being said, it is difficult to predict what variations by the court might be appropriate as a consequence of the court's decision that the tribunal had erred on the question of law. The better course would be for the court to exercise its discretion and decide whether the matter is more appropriate for remission, or whether the matter is straightforward enough such that remission would be a waste of time and costs.

(d) As regards the manner in which a tribunal might be required to state further details of the reasons for its award, we think this is a matter best left to the court, having regard to the specific rules of arbitration agreed upon by the parties.

(e) We do not recommend that a right to appeal on questions of fact should be included. This would be less likely to achieve a balance between party autonomy, finality, and time and costs. In particular, this would afford parties significantly greater latitude to attempt to bring unmeritorious appeals in abuse of the appeal process. Excluding appeals on questions of fact better coheres with the general principle that an appellate court should be slow to overturn findings of fact, which we think applies with greater force in the arbitration context.

(f) We agree with the suggestion not to legislatively prescribe the specific court in which appeals on points of foreign or international law are to be heard. The courts are best-placed to determine, in individual cases, whether it is more appropriate for the case to be heard by the SICC. Accordingly, we no longer recommend including provisions that will automatically route cases involving foreign and international law to the SICC.

(g) We maintain our recommendation to expressly provide that appeals must be decided on the basis of the findings of fact in the award, in line with the approach under Hong Kong law. This would help to deter parties from adducing further evidence or making submissions on factual matters, as the court would be required not to consider such evidence or submissions. It will also legislatively confirm, for the purposes of the IAA, the position articulated by the courts in the context of the AA.[269] Upon further consideration following the focus group discussion, we recommend additionally indicating (for the avoidance of doubt) that the court may take into account the clarifications provided by the tribunal after the court orders the tribunal to state the reasons for its award in sufficient detail.

(h) We maintain our recommendation to include the alternative requirement (for permission to appeal to be granted) that "the decision of the arbitral tribunal on the question is obviously wrong" or "the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious

[269] See e.g. *Ng Tze Chew Diana v Aikco Construction Pte Ltd* [2020] 3 SLR 1196 ("***Ng Tze Chew Diana***"), per Ang Cheng Hock J at [113]: "the arbitrator is the master of the facts, and an application for leave to appeal, or an appeal for that matter, is not the appropriate avenue to challenge such findings of fact, which must be accepted in an unqualified manner".

doubt", notwithstanding the inclusion of foreign and international law issues. This is because the requirement of "general public interest" does not necessarily refer to public interest solely as a matter of Singapore law or domestic interests. For example, as regards contractual interpretation, these requirements have been interpreted as drawing a distinction between 'one-off' situations which have no repercussions beyond the rights and liabilities of the parties, and 'standard term' situations where the court's interpretation would be applicable in other similar cases, such that the question would be of some general legal interest.[270] In principle, the question would not be precluded from being of general public importance merely because the question for the court's determination is one of foreign or international law. Instead, this would be a factor considered by the court.

(i) As regards timelines, we agree (upon reconsideration of our initial recommendation) with the suggestion to shorten the timeline for applications for permission to appeal to be brought within 30 days of the date of the award, similar to what the Ministry of Law initially proposed.[271] Parties may seek a discretionary extension of time if necessary.[272] This is to avoid undue delay. Unlike the proposed position for appeals on questions of law, setting aside applications do not have an intermediate leave requirement. Accordingly, on re-consideration, adopting the three-month timeline under Article 34 may not be appropriate in this context as it will further delay the finality of the award.

(j) We further recommend specifying that where a correction or interpretation request had been made under Article 33(1) of the Model Law, or where the tribunal corrects the award of its own initiative under Article 33(2), the timeline would start to run from the date when the applicant was notified of the outcome

[270] See e.g. *Chun Wo Construction & Engineering Co Ltd and others v the Hong Kong Housing Authority* [2019] HKCA 369 at [4.5] to [4.14] and [8.9]. See also *Ng Tze Chew Diana*, *id*, at [68] to [70] and [92].

[271] We had originally recommended that the timeline for any application for an appeal on questions of law should be three months from the date of the award or of the notification of the result of any arbitral process of appeal or review. This was originally intended to be consistent with the three-month timeline for setting aside applications under Article 34(3) of the Model Law.

[272] See e.g. *Ng Tze Chew Diana*, *supra* n 269, at [34], which sets out the factors to be considered in deciding whether an extension of time ought to be granted for applications under section 49(3) of the AA, such as the degree of prejudice that would be suffered by the respondent and the reasons for the delay.

of the request or the tribunal's own correction, as the case may be. This would be similar to the position under Hong Kong law.[273] However, we recommend drafting the applicable provision in a manner that contemplates that a request under Article 33(1) may be considered unjustified by the tribunal (and hence does result in any correction or interpretation). Hong Kong law does not appear to expressly provide for this possibility. Due to the 30-day timeline under Article 33(1), we recommend that the timeline to seek permission to appeal should also be 30 days, to avoid inconsistency.

(k) Further, we recommend removing the reference to additional awards under Article 33(3) of the Model Law as one of the types of recourse that parties are required to seek before making an application or appeal.[274] This is because the function of an additional award is not to resolve errors of law in the original award. If the claims to be addressed in the additional award (if any) would potentially be affected by the outcome of the appeal, parties may request that the tribunal await the court's decision before making the additional award. To avoid doubt, we also recommend specifying that if a question of law arises out of an additional award made under Article 33(3) which did not arise out of the tribunal's prior award, a separate application for permission to appeal may be brought. In other words, even if a request for an additional award is made under Article 33(3), this would not affect the 30-day timeline to appeal on questions of law arising out of the original award. If the same question of law arises out of both the original award and the additional award, the parties will be time-barred from bringing an application to appeal on such questions after the original 30-day time limit, unless the court grants a discretionary extension of time (see paragraph (i) above).

(l) We recommend, upon reconsideration, the following amendment to the following requirement for permission to appeal:

[273] See HKROC, Order 73, rule 5(2).

[274] In Hong Kong, there has been at least one case in which counsel have made the argument (in relation to the requirement to exhaust "any available recourse" under Article 33 of the Model Law) that parties must first exhaust the right to request for an additional award, before they may bring an application to challenge an award on the ground of serious irregularity. This argument was rejected by the Hong Kong court: see *Maeda Corporation v Bauer Hong Kong Limited* [2019] HKCFI 1006 at [59] to [61].

~~despite the agreement of the parties to resolve the matter by arbitration,~~ it is just and proper in all the circumstances for the court to determine the question.

In this regard, we do not recommend following the approach under Hong Kong law, under which courts do not appear to have similar residual discretion to refuse permission to appeal.[275]

(m) Whilst we acknowledge that there are certain situations where mixed questions of fact and law may arise, or where parties may disagree over the proper characterisation of the relevant question, this is a matter in respect of which the court would be best placed articulate relevant principles. Hence, we do not recommend legislatively defining the meaning of "questions of law".

50 Finally, some of the concerns raised by the focus group in relation to Issue 1 (whether to confer on the court the power to make costs orders for the arbitral proceedings following a successful setting aside) would equally apply to certain provisions that we have proposed in relation to Issue 5. Specifically, there was some discussion regarding whether it would be more appropriate to remit issues of costs to the tribunal for reconsideration by default. The focus group raised concerns of potential delays that might be occasioned by remission. Similar concerns would apply to cases where the court orders the tribunal to state the reasons for its award in sufficient detail.

51 We agree that these concerns are significant and have made further recommendations in this regard. Our additional recommendations in respect of issues relating to the costs of the arbitral proceedings mirror those we have made in respect of Chapter 1. As regards situations where the tribunal is ordered to give clarifications, we recommend specifying that these must be provided within such time as the court may direct.

[275] See HKAO, Schedule 2, section 6(4).

VI. Conclusion

52 We recommend that the IAA should be amended to introduce an opt-in right of appeal on points of law. The Ministry of Law's proposals in 2019 should be adopted, with modifications, such as:

(a) expressly requiring appeals to be decided on the basis of the findings of fact in the award;

(b) defining questions of law to expressly include questions of foreign and international law;

(c) preventing an automatic waiver of the right of appeal under institutional rules;

(d) making provision for the costs of the court and arbitral proceedings; and

(e) providing that applications for permission to further appeal from the High Court shall be determined by the appellate court.

53 Our recommended revisions to the relevant provisions proposed by the Ministry of Law in 2019 can be found in Annex B below.

ISSUE 6: HOW TO ASCERTAIN THE GOVERNING LAW OF THE ARBITRATION AGREEMENT

I. Introduction

1 This chapter considers whether Singapore law should reform its choice of law rules for determining the governing law of an arbitration agreement.

A. Background

2 The governing law of an arbitration agreement supplies the relevant rules to determine issues of formation, validity, scope and other contractual aspects of the arbitration agreement.[276]

3 Under Singapore law, the governing law of an arbitration agreement is determined according to the common law's three-stage framework: (a) an express choice of law; (b) an implied choice of law; and otherwise (c) the law with the closest and most real connection with the arbitration agreement.

4 Within this framework, the Singapore courts have developed a number of principles— we refer to this as the "**Singapore Common Law Approach**".[277] The key principle of the Singapore Common Law Approach is that the governing law of the main contract is usually an implied choice of law for the arbitration agreement contained in the main contract, unless there are indications to the contrary.[278]

5 Prior to the upcoming revisions to the EAA recommended by the Law Commission,[279] the English position for determining the governing law of an arbitration agreement (the

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[276] Chan, Tan & Poon, *supra* n 151, at [3.33]-[3.37]; Gary Born, *International Commercial Arbitration* (3rd Ed, Kluwer International, Updated March 2024) ("**Born**") at §4.03.

[277] *BCY v BCZ* [2017] 3 SLR 357 ("***BCY v BCZ***"); *BNA v BNB* [2020] 1 SLR 456 ("***BNA v BNB***"); *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 ("***Anupam v Westbridge***").

[278] *BNA v BNB*, *id*, at [47].

[279] United Kingdom, Law Commission, *Review of the Arbitration Act 1996: Final report and Bill* (Law Com No 413) (Chairman: The Right Honourable Lord Justice Green) ("**UK Final Report and Bill**") at Chapter 12; see also The Honourable Justice of the Court of Appeal Steven Chong, "Change and Continuity in the World of Arbitration", Speech given at the Chartered Institute of Arbitration (CiArb) Young Members Group Conference (21 February 2024) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-steven-chong-speech-given-at-the-chartered-institute-of-arbitration-(ciarb)-young-members-group-conference> (accessed 26 August 2024).

"**English Common Law Approach**") was broadly similar to the Singapore Common Law Approach.[280]

6 The key feature of England's new statutory approach is that, by default, an arbitration agreement is governed by the law of the seat of arbitration unless the parties expressly agree otherwise in the arbitration agreement. A choice of governing law for the main contract will not be regarded as a choice of law for the arbitration agreement contained in the main contract. Put simply, English law would re-align the law of the arbitration agreement with the law of the seat, in contrast to its current alignment (like the Singapore Common Law Approach) with the law of the main contract in which the arbitration agreement is contained.[281]

7 The Law Commission's proposed statutory choice of law rules have been included in the Arbitration Bill introduced by the UK Parliament.[282] Malaysia is in the process of enacting amendments to its MAA that essentially follows the Law Commission's position.[283]

8 Another reform option is to adopt validation-style rules. The Swiss position is one possible model: an arbitration agreement is considered valid as long as it is valid under either the law of the main contract or any other law governing the subject matter of the dispute, or Swiss law.[284] Others have argued that leading arbitral seats should adopt an even broader validation model: that an arbitration agreement should be considered valid if valid under any law that has a connection to the arbitration agreement.[285]

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[280] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("***Enka v OOO Insurance***"). For a comparison between the Singapore and English positions, see generally, Darius Chan and Teo Jim Yang, "Re-Formulating the Test for Ascertaining the Proper Law of an Arbitration Agreement: A Comparative Common Law Analysis" (2021) 17 J Priv Int L 439 ("**Chan & Teo – Comparative Analysis**").

[281] UK Final Report and Bill, *supra* n 279, at Appendix 5, at [5.7]; United Kingdom, Ministry of Justice, Explanatory Notes to the Arbitration Bill [HL] as introduced in the House of Lords on 21 November 2023 ("**HL Bill 7**") at [12]-[16].

[282] Arbitration Bill [HL] (HL Bill 59, as amended in Special Public Bill Committee) (UK) ("**HL Bill 59**"), cl 1.

[283] Arbitration (Amendment) Bill 2024 (D.R.38/2024) (Malaysia), cl 5.

[284] PILA, Article 178(2). See also Dutch Civil Code, Article 10:166.

[285] Gary Born, "The Law Governing International Arbitration Agreements" (2014) 26 SAcLJ 814 ("**Born SAcLJ**").

B. Recommendation: a new statutory choice of law approach

9 In our view, Singapore should enact a new statutory choice of law approach for determining the governing law of an arbitration agreement to replace the existing Singapore Common Law Approach.

10 Although the existing law in Singapore is sound in principle, a simpler choice of law framework clearly set out in statute provides greater certainty and predictability for commercial parties who wish to arbitrate their disputes or enforce their awards in Singapore.

11 Specifically, we recommend that Singapore should amend the IAA to enact the following statutory choice of law rules for determining the governing law of an arbitration agreement:

> **Law applicable to arbitration agreement**
>
> (1) The law to which the parties have subjected their arbitration agreement shall be the law that the parties expressly designate as applicable to the arbitration agreement.
>
> (2) In the absence of an express designation under subsection (1), the law to which the parties have subjected their arbitration agreement shall, subject to contrary agreement,[286] be the law that the parties expressly designate as applicable to any contract which contains that arbitration agreement. If no law has been expressly designated by the parties as applicable to any contract which contains the arbitration agreement, subsection (3) shall apply.
>
> (3) In all other cases, the law applicable to the arbitration agreement shall be the law of the seat of arbitration.[287]

[286] The inclusion of this phrase is intended to address exceptional situations where, for instance, parties stipulate in their contract that the governing law clause shall not apply to the arbitration agreement, or exclude certain laws from being the law governing the arbitration agreement.

[287] We recommend using the term "seat of arbitration" instead of the term "place of arbitration" because it represents modern usage as demonstrated by case law.

(4)	In the absence of (i) any agreement between the parties on a seat; and (ii) any rules of arbitration agreed to or adopted by[288] the parties which provides for a default seat, the General Division of the High Court (or the appellate court) may, for the purposes of subsection (3), determine the seat of arbitration by having regard to the circumstances of the case, including the convenience of the parties.

12 This proposed statutory approach largely reflects the Singapore Common Law Approach. The main difference is that the new approach lays down a bright-line rule that an express choice of law (e.g., via a governing law clause) to govern a contract which contains an arbitration clause will now be conclusively treated as the parties' choice of law for the arbitration agreement. This departs from the Law Commission's preference for the law of the seat.

II. The Singapore Common Law Approach

13 We begin with a brief review of the Singapore Common Law Approach. More detailed elaboration can be found in Annex C below.

14 The Singapore Common Law Approach is generally sound in principle. It strives to give effect to party autonomy by ascertaining whether the parties have agreed on a choice of law. The Singapore Common Law Approach provides a presumption that a choice of governing law in a contract will be treated as a choice of governing law for an arbitration clause contained within that contract.[289]

15 However, there is uncertainty over when the presumption should be displaced in favour of another law, such as the law of the seat of the arbitration.

16 One example is the validation principle as applied by the Singapore courts. The presumption can be displaced where the arbitration agreement would likely be invalid if it were governed by the same law as the main contract, but only if it is proved that the parties were aware of the apparent invalidity under that law.[290] Whether this applies

[288] The inclusion of this phrase is intended for consistency with section 15A of the IAA.

[289] *Anupam v Westbridge*, *supra* n 277, at [67]-[69]; *BNA v BNB*, *supra* n 277, at [47]; *BCY v BCZ*, *supra* n 277, at [61]-[65]; *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 ("***Dyna-Jet v Wilson Taylor***") at [31].

[290] *BNA v BNB, id*, at [90]; applied in *Cosmetic Care Asia Ltd v Sri Linarti Sasmito* [2021] SGHC 157 at [93]-[94] more generally beyond the context of the governing law of an arbitration agreement.

in any given case gives rise to significant uncertainty.[291] There are also other undecided points of law, such as whether a similar validation reasoning can apply to issues of formation, namely if the law of the seat takes a more generous view than the law of the main contract as to whether a particular party is bound by the arbitration agreement.[292]

17 Legislation provides an opportunity to formulate a clear set of choice of law rules that are specifically tailored to arbitration agreements, without being constrained by the common law's choice of law framework for contracts generally.[293] A statutory approach establishes clear expectations for commercial parties about the features and consequences of choosing Singapore as a seat of arbitration.

III. Recommendation

18 Elaborating on our recommendation, Singapore should enact a statutory choice of law approach in the IAA that adopts the following principles:

(a) If a choice of law has been expressly designated to apply to the arbitration agreement (e.g., "This arbitration agreement shall be governed by the laws of …"), this should always be given effect.

(b) Otherwise, in cases where the arbitration agreement forms part of a contract, if a choice of law has been expressly designated to apply that contract (e.g., "This contract shall be governed by the laws of …"), this express choice of law for the main contract should be construed and given effect as a choice of law for the arbitration agreement (unless parties have expressly stipulated otherwise, which is very rare).

(c) In all other cases, no express choice of law has been made for the arbitration agreement. In the absence of an express choice, one would give precedence to the seat of arbitration by applying the law of the seat.

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[291] *Anupam v Westbridge*, *supra* n 277, at [67]-[74]; *Gourmet Gate Korea Co., Ltd v Asiana Airlines, Inc.* [2023] SGHC(I) 23 ("***Gourmet Gate Korea v Asiana Airlines***") at [63]-[64].

[292] English law has decided that the validation reasoning cannot apply in such cases: see *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 ("***Kabab-Ji SAL v Kout Food Group***") at [49]-[52].

[293] Symeon C. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford, 2014) at 217.

(d) There is no room for the operation of the validation principle because the current way it has been applied creates uncertainty for parties.

19 Party autonomy remains a cardinal principle. Contracting parties are free to choose a governing law for their arbitration agreement if they so wish.[294] The importance of giving due effect to party autonomy is underscored by Article V(1)(a) of the New York Convention, which provides that the validity of an arbitration agreement should first be determined "under the law to which the parties have subjected it". Only in the absence of party choice should the issue of validity be determined "under the law of the country where the award was made".[295]

A. A choice of law for an arbitration agreement must be express

20 The first key tenet of our recommendation is that a choice of law for an arbitration agreement must be expressed, either in the arbitration agreement or, if applicable, the contract in which the arbitration agreement is contained. This effectively removes the implied choice analysis for arbitration agreements under the common law. The English reform has done the same.[296]

21 We do not think removing the implied choice analysis for arbitration agreements detracts from party autonomy. On the contrary, our proposal would facilitate the exercise of party autonomy by establishing clear guidance on how contracting parties should go about expressing a choice of law for their arbitration agreement.

22 Party autonomy is only meaningful if the rules giving effect to party autonomy are themselves sufficiently clear and certain in their application.[297] When it comes to arbitration agreements, international case law has shown how difficult it is to discern an implied choice of law, especially where there are competing indications between the

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[294] *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 ("***Amin v Kuwait***") at 60-6; as long as the parties' choice of law is bona fide and legal and the application of the chosen law is not contrary to public policy: *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277 at 290. See Yeo Tiong Min SC, *Commercial Conflict of Laws* (Academy Publishing, 2023) ("**Yeo**") at [12.001]-[12.002]; Lord Collins of Mapesbury and Professor Jonathan Harris (gen eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 16th Ed, 2022) ("***Mapesbury & Harris***") at [32-006].

[295] *BNA v BNB*, *supra* n 277, at [54].

[296] UK Final Report and Bill, *supra* n 279, at [12.45]-[12.53].

[297] Alex Mills, *Party Autonomy in Choice of Law* (Oxford, 2018) at 328.

law chosen to govern the main contract and the law of the seat chosen by the parties.[298] It has been observed that parties generally do not negotiate the law of the arbitration agreement.[299] Divining any implied choice of law to govern the law of the arbitration agreement (or the law of any contract) is often an artificial and time-consuming exercise.[300] This is fortified by the UK Supreme Court's recent observation in *UniCredit Bank GmbH v RusChemAlliance LLC* that whether the parties have made a choice of law to govern their arbitration agreement is a matter of the proper interpretation of the contractual documents. The concept of an implied choice is not legally significant.[301] If a choice of law cannot be reasonably construed from the contractual documents, the courts should not strain artificially to find a putative or implied agreement by attributing to the parties an unrealistic process of reasoning.[302]

23 We are aware there is a view that Article V(1)(a) of the New York Convention allows for an express choice and implied choice of law, due to its generally-phrased language that "the law to which the parties have subjected" their arbitration agreement should be given effect.[303] In our view, Article V(1)(a) merely permits but does not require that Contracting States give effect to both express and implied choices of law. The ultimate objective of Article V(1)(a)'s choice of law rules is to give effect to party autonomy. Our proposal is entirely in that same spirit.

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[298] E.g., *Enka v OOO Insurance*, *supra* n 280, where the main contract did not contain an express choice of law and the UK Supreme Court was split 3-2 on what law should govern the arbitration agreement.

[299] *BCY v BCZ*, *supra* n 277, at [61]; *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [1]. See also Maxi Scherer & J. Ole Jensen, "Towards a Harmonized Theory of the Law Governing the Arbitration Agreement" (2021) IJAL 1 ("**Scherer & Jensen**"); Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at 222; Nigel Blackaby, Constantine Partasides & Alan Redfern, *Redfern and Hunter on International Arbitration* (7th Ed, Oxford University Press, 2023) ("**Blackaby, Partasides & Redfern**") at [2.03]-[2.04].

[300] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [47]; see also *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418 at [70]-[72].

[301] *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 ("***UniCredit v RusChemAlliance***") at [25].

[302] *UniCredit v RusChemAlliance*, *id*, at [25] and [58].

[303] *Enka v OOO Insurance*, *supra* n 280, at [129]; Albert Jan van den Berg, The New York Arbitration Convention Of 1958: Towards a Uniform Judicial Interpretation (Kluwer, 1981) at 293.

24 In sum, a provision stipulating what Singapore law would consider a sufficiently clear choice of governing law for an arbitration agreement provides greater certainty without detracting from party autonomy.[304]

B. An express choice of law for the main contract should be construed as a choice of law for the arbitration agreement

25 When a choice of law has been expressly designated to apply to the arbitration agreement, that should always be given primary effect as a matter of party autonomy. The more common scenario, however, is where there is no choice of law specifically applicable to the arbitration agreement, but the contract in which the arbitration agreement is contained does expressly stipulate a choice of law (e.g., via a governing law clause). The second key tenet of our recommendation is this: Singapore law should take the position that an express choice of governing law for the main contract should be construed as a choice of law for the arbitration agreement (unless parties stipulate otherwise, which is very rare). Our recommendation departs from the Law Commission's preference for the law of the seat.

26 Our recommendation retains the current position under the Singapore Common Law Approach that a choice of governing law for the main contract generally should amount to a choice of law for the arbitration agreement. A governing law in a contract should generally be construed to apply to all provisions, including the arbitration clause (unless parties stipulate otherwise, which is rare). The doctrine of separability does not mean that the arbitration clause is a separate contract for choice of law purposes.[305] This is

[304] There have been similar codifications of contractual choice of law principles to clarify how party autonomy should be exercised. For instance, the Rome Convention takes a more stringent stance than the common law in ascertaining a choice of law made by the parties to govern their contract, by stating clearly that an implied or tacit choice of law can only be found if it has been "*demonstrated with reasonable certainty*": see 1980 Rome Convention on the law applicable to contractual obligations, Art 3(1), [1998] OJ C 27/34; *Lawlor v Sandvik Mining & Construction Mobile Crushers & Screens Ltd* [2013] EWCA Civ 365 at [26]-[29]. See also Darius Chan & Jim Yang Teo, "Ascertaining the Proper Law of an Arbitration Agreement: The artificiality of inferring intention where there is none" (2020) 37 J.Int'l Arb. 635 ("**Chan & Teo – Artificiality of inferring intention**") at 642-643.

[305] *BCY v BCZ*, *supra* n 277, at [60]-[61]; *Anupam v Westbridge*, *supra* n 277, at [67]. Singapore case law has clarified that the doctrine of separability has a specific purpose and would not apply, for instance, where a challenge to the underlying contract is also an attack on the arbitration agreement (*Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [58]), or where it is disputed that the alleged contract containing the arbitration agreement was ever formed (*COT v COU*, *supra* n 135, at [30]).

the prevailing position in several other jurisdictions, including Hong Kong,[306] India,[307] Austria,[308] Germany,[309] and Japan.[310]

27 Our proposed statutory approach modifies the Singapore Common Law Approach slightly. Only an *express* choice of law for the main contract will amount to a choice of law for the arbitration agreement. This takes a narrower approach than the existing Singapore Common Law Approach, which relies on a wider presumption that parties generally intend their arbitration agreement to be governed by the same law as the broader contract in which the arbitration agreement is found.[311]

28 In our view, a statutory bright-line rule that a choice of law for an arbitration agreement should be express and cannot be implied is preferable for reasons of certainty. The law should construe a choice of law clause in a contract as extending to an arbitration agreement therein only when that choice of law clause is express, unless, of course, that clause is expressed in terms that it does not apply to the arbitration agreement (which is rare). If parties have not chosen a law to govern the main contract, there is no reason to presume that they have chosen a law to govern the arbitration clause.

29 If parties (i) have not expressly designated a law to govern the main contract (or the arbitration clause); *but* (ii) they have designated a seat, in those circumstances the law governing the arbitration agreement shall be the law of the seat.[312] This is intended for consistency with Article V(1)(a) of the New York Convention.

30 In contrast, under the Law Commission's proposal, an arbitration agreement will, by default, be governed by the law of the seat unless a different choice of law has been

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[306] *Klöckner Pentaplast GMBH & Co KG v Advance Technology (H.K.) Company Limited* [2011] 4 HKLRD 262 ("***GMBH v Advance Technology***"); *China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co Ltd* [2023] HKCFI 132 ("***China Railway v Chung Kin Holdings***").

[307] *National Thermal Power Corp. v Singer Co.,* (1992) 3 SCC 551 ("***National Thermal Power v Singer***").

[308] *D v C*, Case No. 3Ob153/18y, 19 December 2018, [2020] YBCA 196 [Supreme Court of Austria, Austria] ("***D v C***").

[309] *Subsidiary company of franchiser v. Franchisee*, 1 Sch 01/08, 13 January 2011, [2012] YBCA 220 [Higher Regional Court of Thuringia, Germany] ("***Subsidiary of Franchiser v Franchisee***").

[310] *X v Y* (2010) 2112 Hanrei Jiho 36 [Tokyo High Court, Japan] ("***X v Y***").

[311] *BCY v BCZ*, *supra* n 277 at [31]; *BNA v BNB*, *supra* n 277, at [47].

[312] *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071. See also *BNA v BNB*, *id*, at [48]: that if the parties had addressed their minds to the issue, they would have selected the law with the closest and most real connection to the arbitration agreement to govern that agreement.

expressed specifically for the arbitration agreement. The Law Commission's principal consideration was that the English Common Law Approach had unduly opened the door for a clear choice of English arbitration to be negated or frustrated by an implied choice of foreign law. The application of foreign law to issues relating to the arbitration agreement would potentially circumvent the operation of the generous principles developed in England's arbitration laws to be supportive of arbitration, particularly on issues of arbitrability, scope and separability.[313]

31 We do not consider it desirable for Singapore to adopt the new English statutory approach.[314]

32 First, Singapore's reputation and role as a safe seat for international arbitration does not require it to avoid the application of foreign law. It is accepted that parties who choose to seat their arbitration in Singapore would fairly expect to benefit from Singapore's supportive legal ecosystem towards arbitration. Nevertheless, it is justifiable for foreign law to apply to the parties' arbitration agreement, especially when there are predominantly foreign elements in the case.[315] Instead of shutting out foreign law, it is precisely the task of the conflict of laws to determine when foreign law should be engaged and when it should not, taking due account of Singapore's general public policy in favour of arbitration.

33 Taking subject-matter arbitrability for example, the Singapore Court of Appeal has explained that this depends not only on the public policy at the seat of arbitration (e.g., Singapore), but also foreign public policy where this arises in connection with essential elements of an arbitration agreement.[316] This exemplifies the court's international outlook.

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[313] UK Final Report and Bill, *supra* n 279, at [12.17]-[12.18]; United Kingdom, Law Commission, *Review of the Arbitration Act 1996: Second Consultation Paper* (Law Com No 258) (Chairman: The Right Honourable Lord Justice Green) ("**UK Second Consultation Paper**") at [2.52]-[2.62].

[314] See also The Honourable Justice of the Court of Appeal Steven Chong, "Change and Continuity in the World of Arbitration", Speech given at the Chartered Institute of Arbitration (CiArb) Young Members Group Conference (21 February 2024) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-steven-chong-speech-given-at-the-chartered-institute-of-arbitration-(ciarb)-young-members-group-conference> (accessed 26 August 2024).

[315] Yeo, *supra* n 294, at [11.006].

[316] *Anupam v Westbridge*, *supra* n 277, at [48]. See also, more generally, *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842; *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] SGCA 9, especially at [76]-[77].

34 We do not think that a clear choice of Singapore arbitration would necessarily be frustrated or rendered significantly less effective if the arbitration agreement were to be governed by a law other than Singapore. In any case, parties who wish to avoid foreign law are free to designate Singapore law to govern their arbitration agreement.

35 Second, whilst a choice of seat is a choice of the arbitration law of the seat,[317] it is not necessarily a choice also of the substantive contract law of the seat. The law of the arbitration pertains to procedural aspects and conduct of the arbitration, whereas the governing law of the arbitration agreement pertains to contractual issues such as validity and scope. In our view, it is preferable to favour an express governing law clause, rather than a choice of seat, as a relevant indication of the law chosen to apply to the arbitration agreement. This ensures that contractual issues pertaining to the main contract and contractual issues pertaining to the arbitration agreement are generally determined in a consistent manner under the same law. Otherwise, adopting the English statutory approach may produce odd results.

36 For instance, when ascertaining whether a non-signatory is party to the main contract, one would apply the law governing the contract, but when asking whether that same non-signatory is party to the arbitration agreement within that same contract, one would apply the law of the seat. This asymmetry means a non-signatory may be party to the arbitration agreement, but yet not be party to the main contract, or vice versa.

37 Similarly, in "mixed mode" dispute resolution clauses where there is both a jurisdiction clause and arbitration clause each intended to govern different issues that might arise under a single contract,[318] it is awkward to say that the interpretation of the scope of the jurisdiction clause and the arbitration clause in the same contract would be governed by two potentially different laws (i.e., the jurisdiction clause is governed by the law governing the main contract, whereas the law governing the arbitration agreement is the law of the seat).[319]

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[317] Born, *supra* n 276, at §4.04[A][4].

[318] See *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251.

[319] United Kingdom, Law Commission, *Review of the Arbitration Act 1996: Responses to Second Consultation Paper* ("**UK Responses to Second Consultation Paper**") at 72 (Response by Professor Adrian Briggs).

C. *The law of the arbitration agreement shall be the law of the seat in the absence of an express choice of law governing the main contract*

38 We are aware that, under our recommendation, it is still possible for the odd results described above to happen if our proposed subsection (3), i.e., the law of the seat, were to apply, and such a law is different from the law of the main contract. To avoid such odd results altogether, the law of the arbitration clause should always be the same as the law governing the main contract. We have considered whether to have a more straightforward choice of law rule providing as follows: unless parties stipulate otherwise, the law governing the arbitration agreement shall be the law governing the contract the arbitration clause is in. Such a choice of law rule, which does not involve the law of the seat, has the attractiveness of simplicity.

39 However, after careful consideration, we do not think that the law of the seat should be thus relegated because that creates inconsistency with Article V(1)(a) of the New York Convention. Instead, we think the right balance is to use the law of the seat as a "fall back" as provided for under the New York Convention. If there is no express choice of law governing the main contract, the law of the arbitration agreement shall be the law of the seat (which, it is acknowledged, could be different from the law governing the main contract and therefore potentially give rise to the odd results described above). Be that as it may, since a vast majority of cases typically have an express choice of law governing the main contract, they will avoid the odd results described above since the arbitration agreement will be governed by the same law governing the main contract.

40 Separately, we are aware there is sometimes said to be a distinct predilection for the specific issue of validity of an arbitration agreement—as compared to other issues typically also governed by the law of the arbitration agreement, such as issues of scope, interpretation and discharge of an arbitration agreement [320] —to be determined independently from the equivalent issue affecting the main contract. Commercial parties who have chosen a particular seat of arbitration may often have done so with an expectation or understanding that the laws at that seat are supportive of arbitration and

[320] For one, the UK Supreme Court was not persuaded that a validation reasoning applied with much force to issues of formation and scope of an arbitration agreement *Kabab-Ji SAL v Kout Food Group*, *supra* n 292, at [49]-[52].

would largely uphold the validity of the agreement to arbitrate. This is often the rationale cited in support of adopting validation-style rules.[321]

41 However, we consider that, at present, a validation model should not be adopted in Singapore. It remains a controversial legal concept. The Singapore courts have expressed uncertainty about it on at least one occasion. The High Court in *BNA v BNB* gave several reasons why a validation model does not properly investigate and uphold the intention of the parties, and it is also inconsistent with established authority.[322] On appeal, the Court of Appeal did not resort to applying a broad validation reasoning that an arbitration agreement should be valid if it were valid under any law connected to it.[323] Unlike English authorities which appear to have overwhelmingly held that English law applies as the law governing the arbitration agreement, the Court of Appeal in *BNA v BNB* found that the arbitration clause was not governed by Singapore law, and that the validity of the clause should be decided by the PRC courts.

42 Any validation rule only answers issues concerning validity of an arbitration agreement, but not other issues typically also determined according to the law governing the arbitration agreement. In our view, a splintering of choice of law rules for different issues connected to the arbitration agreement is a radical departure from the long-standing choice of law approach in common law jurisdictions. Consequently, we do not think there are strong enough reasons of principle or policy that would justify Singapore law moving in favour of a validation model.

D. The statutory rules are applicable to all arbitration agreements

43 Our recommended statutory approach should apply regardless of whether the arbitration is seated in Singapore or elsewhere, and whether an arbitration award has been rendered or not.

44 Article V(1)(a) of the New York Convention prescribes specific choice of law rules for the validity of an arbitration agreement. The question of validity must be determined

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[321] E.g., Born SAcLJ, *supra* n 285.

[322] *BNA v BNB* [2019] SGHC 142, at [51]-[66].

[323] Cf. Born SAcLJ, *supra* n 285.

"under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

45 The wording of our proposed approach deliberately adopts the language of Article V(1)(a) of the New York Convention. This ensures that the same choice of law rules apply across the pre-award and post-award stages.[324]

E. Where the seat of arbitration has not been determined, the Court should have the power to determine the seat if necessary

46 Our recommendation applies the law of the seat whenever a choice of law for the arbitration agreement or the main contract containing that arbitration agreement has not been expressed. If the seat itself has not been agreed, the seat will typically either be determined in accordance with the applicable arbitral rules which stipulate a mechanism by which the seat is to be determined, or, if the parties have not agreed to any such arbitral rules, be designated by the tribunal under Article 20(1) of the Model Law.

47 However, there may be situations where it is necessary to determine the governing law of the arbitration agreement even before a tribunal has been constituted. Such scenarios can come before the courts, for instance, in a stay application under section 6 of the IAA whereby the court is asked to determine the validity of the arbitration agreement and must first determine the law governing the arbitration agreement. The Law Commission similarly recognised that such scenarios could arise, though in the Law Commission's view they would be rare because by the time a matter ended up before the court, the seat would have been designated by then or perhaps could be designated by the court itself under section 3 of the EAA. The Law Commission opined that, in those situations where it is necessary to identify the law governing the arbitration agreement prior to the designation of a seat, the court can rely on traditional common law principles.[325] In our view, such an approach, namely switching between a statutory and common law approach, may cause confusion.

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[324] *Anupam v Westbridge*, *supra* n 277, at [43].

[325] UK Final Report and Bill, *supra* n 279, at [12.66].

48 Unlike the EAA, the IAA does not contain a provision that empowers our courts to determine the seat in the absence of party agreement. Article 20(1) of the Model Law allocates that power to the arbitral tribunal. Article 20(1) has generally been understood to be subject to the right of the parties to decide on arbitral rules that govern this issue. Institutional practice varies on this issue. In the absence of party agreement on the seat, some institutions such as the SIAC Rules provides that the tribunal will determine the seat; the ICC Rules and SCC Rules generally provide that the institution will determine the seat; the HKIAC Rules and LCIA Rules generally provide a default seat unless the arbitral tribunal determines otherwise.

49 In the rare scenario where the main contract does not contain an express choice of law clause and the parties have not designated a seat (whether by way of agreement or by way of arbitral rules which provides for a default seat), and the seat has not been determined whether by the mechanism stipulated in any agreed arbitral rules or by the tribunal under Article 20(1) of the Model Law, we think it is necessary to expressly give the courts the power to determine the seat for the purposes of ascertaining the governing law of the arbitration agreement under subsection (3) of our recommended provisions.

50 This is a power that the courts may, but do not have to, exercise. The rationale for allocating the courts power to determine the seat, notwithstanding Article 20(1) of the Model Law, is that the courts may need to resolve certain issues even before the arbitral process gets underway (e.g., whether court proceedings should be stayed on the basis that the dispute is subject to a valid arbitration agreement and should be referred to arbitration). In those situations, it may be inconvenient to require the parties to first initiate the arbitration and/or constitute the tribunal in order to have the seat determined by the tribunal or institution (as the case may be), before going back to the courts to have the substantive application heard.

51 We do not think such a recommendation is inconsistent with the Model Law. Article 20(1) of the Model Law was modelled on Article 16(1) of the UNCITRAL Arbitration Rules 1976,[326] which had allocated residual power to the tribunal to determine the seat

[326] Howard M. Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at 593-594.

in the absence of agreement as a matter of convenience so that "national courts do not have to intervene to establish the seat".[327] Our recommendation is confined to the scenario where the seat has not been agreed, nor are there any agreed arbitral rules which directly provide for a default seat in the absence of an agreed seat, and it is more convenient in the circumstances for the court to determine the seat.

52 Our recommendation does not detract from any arbitral rules that parties may have agreed to. Where the arbitral process is already underway and there is no difficulty in having the tribunal or institution (as the case may be) determine the seat in accordance with the agreed arbitral rules, the rules can be given effect and the Singapore courts do not have to exercise their power to determine the seat. The courts' power is intended to be exercised in limited circumstances where it would be inconvenient to insist that steps be taken in the arbitral process for the sole purpose of having a seat determined before the issue of governing law that is before the court can be heard.

53 As mentioned above, we had considered an alternative recommendation, namely, where there is no choice of law in the main contract and the arbitration agreement (such that our recommended subsection (3) is engaged), and yet the seat has also not been chosen nor determined, the Singapore courts should first ascertain the law governing the main contract using the choice of law rules for contracts generally and then apply that same law to govern the arbitration agreement. This would allow the courts to make a finding on the law governing the arbitration agreement without having to have the seat determined first.

54 However, we ultimately did not prefer that alternative. In cases where a contract has no express or implied choice of law, common law choice of law rules dictate that the contract will be governed by the law with the closest connection to it. However, that is not the choice of law rule in Article V(1)(a) of the New York Convention. If parties have not made a choice of law for the main contract, it follows that they have also not made any choice of law for the arbitration agreement and therefore, applying Article V(1)(a), the law governing the arbitration agreement must be the law of the seat. Our recommended subsections (3) and (4) give better effect to Article V(1)(a), because they

[327] Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International, 2017) at 150.

pave the way for the seat to be determined first (whether by the courts, the tribunal or institution) before the law of the seat is then applied as the law governing the arbitration agreement. After all, the place most suited for the arbitration to be seated may not necessarily be the place with the closest connection to the main contract, and vice versa.[328]

IV. Focus Group

55 We explained to the focus group that our recommendation essentially comprised two simple primary rules. If there is an express choice of law in the main contract or the arbitration agreement, that is given effect as the law chosen to govern the arbitration agreement. In the absence of such an express choice of law, the law of the seat governs the arbitration agreement.

56 There was general agreement with our recommendation that Singapore law would benefit from the increased legal certainty and predictability provided by a more prescriptive and straightforward set of statutory rules on what the governing law of an arbitration agreement is in a given case. Members of the focus group who were in-house counsel and practitioners also affirmed our view that, in the ordinary course, commercial parties would only meaningfully negotiate the law governing their main contract, and the jurisdiction in which any arbitration pursuant to their arbitration clause should be seated. Parties typically do not independently negotiate the law that should govern their arbitration agreement. Any expectation or stipulation otherwise would unnecessarily increase transaction costs.

57 Opinion was more finely balanced on whether the law chosen to govern the main contract or the law of the chosen seat should extend to the arbitration agreement.

58 One group agreed with our recommendation that the law expressly chosen to govern the main contract should extend to the arbitration agreement. They opined that this accords with common sense as what rational businesspeople would intend when

[328] *Enka v OOO Insurance*, *supra* n 280, at [113]–[115].

applying a governing law for their contract. Overall, our recommended approach was described to be refreshingly clear.

59 A second group preferred the English approach that the law governing the arbitration agreement was more closely associated with the law of the seat, rather than the law governing the main contract. They opined that the law of the seat chosen by the parties should be considered as applicable to the arbitration agreement, unless there is a clear contrary agreement that another law should govern the arbitration agreement specifically.

60 A third view was expressed that there was no need to replace the existing common law rules. Although they recognised the benefits of legal certainty and predictability brought about by our recommended approach (and indeed the English statutory approach), they felt there was nevertheless some value in the flexibility under the existing rules to ultimately give effect to parties' intent to arbitrate, which was what the Court of Appeal tried to do in *Anupam v Westbridge*.[329]

61 The variety of views we received is consistent with the Law Commission's experience in its extensive public consultations on whether the English position should be reformed. The Law Commission ultimately concluded in its final report that no singular expectation could be attributed to all arbitrating parties on what they would ordinarily expect the law governing their arbitration agreement to be.[330] It underscores our view that more prescriptive statutory rules are needed to stipulate how parties should go about expressing a choice of law for their arbitration agreement.

62 After considering all views from the focus group, we decided to maintain our recommendation. Similar to the reasoning found in recent decisions by the UK Supreme Court,[331] in our view a generally-worded governing law clause in the main contract

[329] At least one focus group participant suggested that legislation on the issue of governing law should be limited to overruling certain aspects of *Anupam v Westbridge*, *supra* n 277, but this falls outside the scope of this Report.

[330] UK Final Report and Bill, *supra* n 279, at [12.41]-[12.43].

[331] *UniCredit v RusChemAlliance*, *supra* n 301, at [25]; *Kabab-Ji SAL v Kout Food Group*, supra n 292, at [39]. See also, UK Responses to Second Consultation Paper, *supra* n 319, at 72 (at [8]) (Response by Professor Adrian Briggs).

would plainly and naturally be understood as applicable to any arbitration agreement that is part of that contract. The law governing the arbitration agreement is mostly relevant to questions as to formation, validity, effect and discharge of the arbitration agreement,[332] and should not be confused with the law governing the conduct of the arbitration (*lex arbitri*). Even among the focus group respondents who preferred the English statutory approach, it was acknowledged that commercial parties would, for instance, ordinarily expect the question of who the parties to the arbitration agreement to be determined in the same way as the question of who the parties to the main contract are.

63 The other key issue debated during the focus group discussion was our proposed subsection (4) to confer the court a power to determine the seat for the purposes of determining the law governing the arbitration agreement.

64 Some were sceptical about whether it would ever be appropriate or necessary for the court to determine the seat. If there were any uncertainty about where the arbitration should be seated, and there was no agreement on how that should be determine, the issue ought to be decided by the arbitral tribunal. Others supported our recommendation to reserve a power to the courts. They agreed that certain situations may arise where no tribunal has been constituted but the courts need to rule on what law governs the arbitration agreement.

65 We decided to retain our proposed subsection (4). It is not designed to interfere with the powers of the tribunal or institution (as the case may be) to determine the seat in the absence of an agreed seat. To the contrary, it makes available limited curial assistance to support arbitration to the extent necessary. There are times when it is not practicable or realistic to insist that a party initiate the arbitral process for the seat to be determined, especially where, for example, the other party is non-cooperative and is steadfastly obstructing any steps towards calling upon an arbitral institution or having a tribunal constituted to determine the seat.[333]

[332] *BNA v BNB*, supra n 277, at [55].

[333] E.g., *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 225.

66 We considered but decided against further delineating the limited circumstances in which the courts' power should be exercised (for instance, by including express language that the power should be exercised only where "necessary"). First, such language would be superfluous because our proposed subsection (4) confers a discretionary power that the courts "may" but need not exercise. Second, the courts would in any event be guided in the exercise of its discretion by the principle of limited curial intervention pursuant to Article 5 of the Model Law. Third, we consider it undesirable to overly circumscribe the courts' discretion.

67 In our view, it suffices to provide that the curial power in our proposed subsection (4) is reserved for situations where (i) the parties have not agreed on a seat; and (ii) there are also no applicable arbitral rules which provides for a default seat in the absence of an agreed seat. By way of illustration, Article 16.2 of the LCIA Arbitration Rules 2020 provides that in the absence of an agreed seat, London shall be the seat of arbitration unless and until the tribunal decides that another seat is more appropriate.[334] In such a case, in our view the Singapore court can and should proceed to determine the law governing the arbitration agreement on the footing that London is the seat.

68 Finally, we invited views on whether any statutory rules enacted in Singapore should expressly state their applicability to offers to arbitrate in any treaty or foreign legislation (e.g., in the context of investor-state arbitrations). This issue emerged from a House of Lords amendment to the Arbitration Bill in England and Wales in July 2024.[335]

69 Following views given by the focus group, we decided not to make express provision for this. Whilst we broadly shared the House of Lords' view that arbitration agreements formed pursuant to such offers to arbitrate would generally be governed by international law and/or foreign domestic law,[336] our recommended statutory provisions would likely yield that very same outcome in most cases. In any event, the relevance of our statutory

[334] See also HKIAC Administered Arbitration Rules 2024, Article 14.1.

[335] Arbitration Bill [HL] (HL Bill 1, as introduced in the House of Lords on 18 July 2024) (UK); United Kingdom, House of Lords, Parliamentary Debates (Hansard), Official Report (30 July 2024) at col 950 (Lord Ponsonby of Shulbrede, The Parliamentary Under-Secretary of State, Ministry of Justice).

[336] *Id*.

rules to such an arbitration agreement can be determined in the specific context of each case.

V. Conclusion

70 In sum, Singapore should enact a new statutory choice of law approach for determining the governing law of an arbitration agreement to replace the existing Singapore Common Law Approach.[337] However, rather than give primacy to the law of the seat, Singapore should give primacy to the law chosen by the parties to govern any contract in which the arbitration agreement is part of.

[337] See paragraph 11 of this chapter.

ISSUE 7: WHETHER REVIEW OF THE TRIBUNAL'S JURISDICTION SHOULD BE CONDUCTED BY WAY OF AN APPEAL OR A REHEARING

I. Introduction

1 This chapter discusses whether a challenge on the tribunal's jurisdiction before the court should be conducted by way of an appeal or a rehearing. There are actually two distinct questions.[338] First, what is the standard of review. A standard of review determines the extent to which a court must defer to the findings of an arbitral tribunal, e.g., should a challenge before the courts be conducted by way of an appeal or a rehearing. Second, what is the format of review. The format of review relates to the rules that govern how courts should conduct such review, e.g., what arguments and evidence are permissible before the courts.

2 On the standard of review, we recommend that a tribunal's ruling on jurisdiction should continue to be subject to a rehearing before the courts (instead of an appeal), without any deference granted to the tribunal's findings. Insofar as the scope of review is concerned, parties should not have an unfettered right to introduce new evidence. Whilst we do not recommend any changes to the IAA, we recommend the introduction of new Rules of Court and practice directions to confirm that (a) the court has the discretion to decide what evidence to receive and how the evidence is to be received; and (b) requiring parties to identify new arguments and new evidence sought to be introduced before the courts.

[338] Laurent Crépeau, "Making Sense of Standards and Formats of Review Applicable to the Judicial Review of an Arbitral Tribunal's Jurisdictional Decisions" (2023) 4(1) CJCA 1.

A. Current state of Singapore law

(1) Challenging a tribunal's jurisdiction

3 Jurisdiction refers to the power of the tribunal to hear a case.[339] Arguments as to the existence, scope, and validity of the arbitration agreement are regarded as jurisdictional.[340]

4 If a party to arbitral proceedings disputes the jurisdiction of the tribunal, it must raise such plea not later than the submission of the statement of defence.[341] The tribunal may rule on such plea either as a preliminary question or in an award on the merits.[342]

5 If the tribunal rules on the issue of jurisdiction as a preliminary question, a party may subject the tribunal's jurisdiction ruling to curial review under section 10(3) of the IAA read with Article 16(3) of the Model Law.[343]

6 If the tribunal rules on the issue of jurisdiction in an award on the merits, a jurisdictional challenge can be brought under a setting aside application or an application to resist enforcement of the award.

(2) Standard of review

7 Currently, a tribunal's decision on jurisdiction is subject to *de novo r*eview by the Singapore courts.[344] This is so whether in the context of a challenge under section 10(3) of the IAA,[345] or in the context of a setting aside application.[346] This means that there is no basis for deference to be accorded to the tribunal's findings on its jurisdiction.[347] *Black's Law Dictionary* defines term "hearing de novo" as "a reviewing court's decision

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[339] *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 (CA) at [207].

[340] *BBA v BAZ* [2020] 2 SLR 453 at [78].

[341] Model Law, Article 16(2).

[342] Model Law, Article 16(3).

[343] Chan, Tan & Poon, *supra* n 151, at [5.25].

[344] *BTN v BTP*, *supra* n 45, at [66].

[345] *BCY v BCZ*, *supra* n 277, at [36].

[346] *COT v COU*, *supra* n 135, at [29].

[347] *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("***Sanum v Lao***") at [41].

of a matter anew, *giving no deference* to a lower court's findings".[348] Although the court will consider what the tribunal has said because this might well be persuasive, the court is not bound to accept or take into account the tribunal's finding on the matter.[349]

8 The tribunal's own view of its jurisdiction has no legal or evidential value.[350] This statement of legal principle has, however, been qualified. It does not mean that all that transpired before the tribunal should be disregarded, necessitating a full rehearing of all the evidence; instead, it means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities.[351]

II. Comparative review

9 Jurisdictions such as Hong Kong,[352] Australia,[353] Canada,[354] and France[355] subject a tribunal's decision on jurisdiction to a *de novo* review.

10 The position is similar in the United States and Germany. In the United States, courts will conduct a *de novo* review unless there is "clear and unmistakable" evidence that parties intended to submit the issue to arbitrators.[356] In Germany, a positive jurisdictional decision by a tribunal is subject to *de novo* review by the courts; however, a negative jurisdictional decision is not susceptible to review.[357]

11 In England, the Law Commission has recommended that where a participating party has objected to the tribunal's jurisdiction and the tribunal has ruled on its jurisdiction,

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[348] *Black's Law Dictionary* (Bryan A Garner gen ed) (Thomson Reuters, 2014, 10th Ed) at p 837, cited in *Sanum v Lao*, *ibid*.

[349] *Sanum v Lao*, *ibid*.

[350] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 ("***Dallah Real Estate v Pakistan***"), at [30], which was cited with approval by the Singapore Court of Appeal in *PT First Media TBK*, *supra* n 146, at [162].

[351] *AQZ v ARA* [2015] 2 SLR 972 ("***AQZ v ARA***") at [57].

[352] *R v A, B and C* [2023] HKCFI 2034.

[353] *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1; *IMC Aviation v Altain*, *supra* n 90.

[354] *The Russian Federation v Luxtona Ltd* (2021) ONSC 4604, upheld on appeal in *The Russian Federation v Luxtona Ltd* (2023) ONCA 393.

[355] *S. Pac. Props. Ltd v Républiquue Arabe d'Egypte*, (1987) 26 I.L.M. 1004, cited in Born, *supra* n 276, at Chapter 7.03[B][3].

[356] *Schneider v Thailand* 688 F.3d 68, 72 (2d Cir. 2012). See Born, *id*, at Chapter 26.05, footnote 561.

[357] *BGH*, Judgment of 24 July 2014, III ZB 83/13, cited in Born, *id*, at Chapter 7.03[D][4].

two limitations apply. First, the court will not entertain any new grounds of objection or any new evidence, unless even with reasonable diligence it could not have been put before the tribunal. Second, the evidence will not be reheard, save exceptionally in the interests of justice.

12 In Switzerland, instead of a rehearing, the courts tend to conduct a limited review based on the facts as found in the arbitral award.[358]

III. Arguments against *de novo* review

13 There are two principal arguments in favour of departing from a *de novo* review.[359]

14 First, a *de novo* review has the potential to cause delay and increase costs.[360] A rehearing is relatively more expensive and time consuming as compared an appeal.

15 Second, a *de novo* review raises a basic question of fairness.[361] A party that raises a jurisdiction challenge before the tribunal will obtain an award that sets out the deficiencies in the evidence and argument. That losing party may then obtain new evidence and develop their arguments for another hearing before the court.[362] A *de novo* review effectively gives the losing party a second bite of the cherry.

IV. Arguments in favour of *de novo* review

16 There are three principal arguments in favour of retaining a *de novo* review.

17 First, if a challenge to a tribunal's jurisdiction in court is less than a *de novo* review, it may fail to establish an issue estoppel when the award is enforced abroad.

18 Second, it would be unfair to preclude a *de novo* review if the party raising the jurisdiction challenge had not in fact consented to the tribunal's jurisdiction.

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[358] United Kingdom, Law Commission, *Review of the Arbitration Act 1996: A Consultation Paper* (Law Com CP No 257, 2022) ("**UK Consultation Paper**") at [8.28].

[359] UK Consultation Paper, *id*, at [8.30]–[8.31].

[360] UK Final Report and Bill, *supra* n 279, at [9.16].

[361] UK Final Report and Bill, *id*, at [9.17].

[362] UK Consultation Paper, *supra* n 358, at [8.31], citing *Jiangsu Shagang Group Co Ltd v Loki Owning Co Ltd* [2018] EWHC 330.

19 Third, if a tribunal has no jurisdiction, then its ruling should have no weight at all, and there should be no deference afforded by the courts.

V. Recommendation

20 On balance, we do not see a need to depart from the current standard of review. A tribunal's ruling on jurisdiction should be subject to *de novo* review by the courts.

21 As a matter of principle, if a tribunal has no jurisdiction, then its ruling should have no weight at all and no deference should be afforded. A *de novo* review is therefore an essential safeguard to ensure that the parties have in fact consented to arbitration and to prevent the tribunal from ascribing jurisdiction to itself or, as it is often said, "pulling itself up by its own bootstraps".[363] Because the tribunal should not be the final arbiter of its own jurisdiction, there is no principled reason to give deference to the tribunal's findings of fact or law in relation to its own jurisdiction.[364]

22 Up until the Law Commission's recommendation, the English position was in favour of *de novo* review as well. In *Dallah Real Estate v Pakistan*,[365] the UK Supreme Court opined that any challenge before the court under section 67 of the EAA is by way of a full rehearing.[366] However, the Law Commission observed that *Dallah Real Estate v Pakistan* concerned a situation where a party had not participated in the arbitration proceedings. In such a situation, the Law Commission acknowledged that a full rehearing would apply. However, the Law Commission argued that *Dallah Real Estate v Pakistan* and its support for a full rehearing "was not as categorical as had been suggested".[367] The Law Commission's proposal therefore draws a distinction between a participating and a non-participating respondent. For a participating respondent, the Law Commission was in favour of limitations that would apply in any curial review of the tribunal's jurisdiction.

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[363] UK Second Consultation Paper, *supra* n 313, at [3.21]. See also *COT v COU*, *supra* n 135, at [53].

[364] UK Second Consultation Paper, *id*, at [3.21].

[365] *Dallah Real Estate v Pakistan*, *supra* n 350.

[366] *Dallah Real Estate v Pakistan*, *id*, at [26].

[367] UK Final Report and Bill, *supra* n 279, at [9.31].

23 In our view, the Law Commission's recommendation may create a perverse incentive for objecting parties to not participate in the arbitration proceedings. This is because if a party were to participate in the arbitration proceedings, it must put in all grounds of objection and evidence before the arbitral tribunal. Otherwise, it may be precluded from doing so subsequently before the English courts, unless it can show that the new grounds of objection or new evidence could not be introduced even with reasonable diligence.

24 The Law Commission also justified its recommendation by saying that it gives the principle of competence-competence some substance.[368] In our view, competence-competence only gives the tribunal the power to decide on its own jurisdiction first, but does not entail that the tribunal's decision must necessarily have "some weight" [369] when the courts have to decide the same question of jurisdiction.

25 At the same time, the rationale of the Law Commission's recommendation is ultimately aimed at reducing time and costs and conserving judicial resources.[370] In our view, those are worthwhile considerations which can be addressed by adjusting the format of review instead of the standard of review. Indeed, the Law Commission's recommendation ultimately eschewed focusing on labels of appeal or review or rehearing and identified practical constraints instead.

26 On the format of review, there are differing decisions by the Singapore High Court.

27 The first case is *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*.[371] In that case, Leow JC held that a party does not have a full unconditional power to adduce fresh evidence at will in an application under section 10 of the IAA.[372] Leow JC adopted a modified *Ladd v Marshall* test introduced by the Court of Appeal in *Lassiter Ann Masters v To Keng Lam*,[373] and held that fresh evidence may be admitted if: (a) the party seeking to admit the evidence demonstrated

[368] UK Final Report and Bill, *id*, at [9.56].

[369] *Ibid*.

[370] UK Consultation Paper, *supra* n 358, at [8.30].

[371] *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 ("***Lao v Sanum***").

[372] *Lao v Sanum*, *id*, at [44].

[373] *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR(R) 392.

sufficiently strong reasons why the evidence was not adduced at the arbitration hearing; (b) the evidence if admitted would probably have an important influence on the result of the case though it need not be decisive; and (c) the evidence had to be apparently credible though it need not be incontrovertible.[374]

28 The *Ladd v Marshall* test traditionally applies in the context of civil litigation, namely whether the Court of Appeal should, in an appeal, receive further evidence under section 37(4) of the SCJA.

29 The second case is *AQZ v ARA*, decided less than a month after *Lao v Sanum*. Prakash J (as she then was) held that nothing in the ROC 2014 restricts parties from adducing new material that was not before the arbitrator. Parties can adduce new evidence in the affidavits they file in the originating summons and if there is a need, the court may order the deponents to appear and be cross-examined on the new evidence.[375] However, a *de novo* hearing did not mean that oral evidence and cross-examination will be allowed in every application, in effect, turning every challenge into a complete rehearing of all that occurred before the tribunal.[376] Generally, the matter will be resolved by way of affidavit evidence.[377] The court may allow oral evidence and/or cross-examination when it considers (a) that there is or may be a dispute as to fact; and (b) that to do so would secure the just, expeditious and economical disposal of the application.[378]

30 The third case is *CLQ v CLR*.[379] In that case, the defendant relied on *Lao v Sanum* for the argument that "a party does not … have a full unconditional power to adduce fresh evidence at will".[380] In response, the plaintiff cited *AQZ v ARA* for the proposition that there was nothing that restricted parties from adducing new *material* not before an arbitrator.[381] The SICC agreed with the plaintiff. The SICC held that the court reviews

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[374] *Lao v Sanum*, *supra* n 371, at [44].

[375] *AQZ v ARA*, *supra* n 351, at [59].

[376] *AQZ v ARA*, *id*, at [49].

[377] *AQZ v ARA*, *id*, at [52].

[378] *AQZ v ARA*, *id*, at [53].

[379] *CLQ v CLR* [2022] 3 SLR 145 ("***CLQ v CLR***").

[380] *CLQ v CLR*, *id*, at [26].

[381] *CLQ v CLR*, *id*, at [27].

an arbitral tribunal's jurisdictional ruling on a *de novo* basis, which means that the hearing is conducted as if the original had not taken place.[382] There is therefore no general bar against adducing fresh evidence.[383]

31 While *CLQ v CLR* lends support to the position in *AQZ v ARA*, there remains uncertainty. In *COT v COU*,[384] Coomaraswamy J observed that "[t]he *court* determining a jurisdictional challenge *de novo* remains free to exercise its procedural discretion in the usual way. That discretion extends to what evidence it will receive, whether it is content to rely on the evidence presented to the tribunal or wishes to receive evidence anew and whether it receives the evidence on affidavit alone or viva voce, with or without cross-examination" [emphasis added].[385] Citing *AQZ v ARA*, Coomaraswamy J held that the fact that the court adopts a *de novo* review of the jurisdiction of a tribunal does not however "give a party a right to insist on the court undertaking a full rehearing of the evidence led before the tribunal."[386]

32 The principles elucidated in *AQZ v ARA* and *COT v COU* are largely similar. But there is a nuanced point of difference insofar as the format of review is concerned. On the one hand, *COT v COU* held that the court has the discretion to decide "what evidence it will receive".[387] On the other hand, *AQZ v ARA* held that there is no restriction on parties adducing new material that was not before the arbitrator and parties can adduce such new evidence in the affidavits they file alongside their application.

33 In our view, there is a need to lay down clearer Rules of Court on the format of review, specifically on new evidence sought to be adduced before the court.

34 *Lao v Sanum* and *AQZ v ARA* arguably lie on opposite ends of the spectrum. On the one end, *Lao v Sanum* stands for the proposition that the modified *Ladd v Marshall* test must be satisfied before any fresh evidence will be admitted. On the other end, *AQZ v ARA* stands for the proposition that new evidence is admissible as of right, though such

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[382] *CLQ v CLR*, *id*, at [28].

[383] *Ibid*.

[384] *COT v COU*, *supra* n 135.

[385] *COT v COU*, *id*, at [57].

[386] *Ibid*.

[387] *Ibid*.

evidence introduced late in the day "may attract a degree of scepticism" and the court can impose costs consequences.[388] *Sanum* therefore adopts a stricter approach while *AQZ v ARA* adopts a more liberal approach.

35 We think that the approach in *COT v COU* strikes the best balance along the spectrum. Instead of giving parties an unfettered right to introduce new evidence, the court should have the discretion to consider what evidence it will receive, whether it is content to rely on the evidence presented to the tribunal or wishes to receive evidence anew and whether it receives the evidence on affidavit alone or viva voce, with or without cross-examination.

36 In deciding whether new evidence is to be received, the *Ladd v Marshall* test can be considered by the court as factors rather than strict requirements to be fulfilled in the overall justice of the case.[389] Other factors that the court should consider would include the probative value and relevance of the evidence sought to be adduced, procedural oppressiveness, potential for delays, and whether appropriate costs orders can mitigate any prejudice caused to the opposing party.

37 To implement such an approach, parties should be required to identify the new arguments and new evidence sought to be adduced before the court. This is not novel. In the context of civil litigation under O 19 r 31(1)(b) of the ROC 2021, an appellant's case must "[highlight] any new points not raised in the lower Court". The purpose is two-fold.[390] First, it affords the appellate court the opportunity to consider the new points in advance and assess whether permission should be granted to the party to raise those points in the appeal. Second, this also prevents the opposing party from being taken by surprise at the hearing of the appeal.

38 In our view, these principles should also be applicable when a court reviews an arbitral tribunal's jurisdiction. In any application concerning a review of a tribunal's jurisdiction, *COT v COU* should apply. Additionally, new Rules of Court should be introduced such

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[388] *AQZ v ARA*, *supra* n 351 at [59], citing *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190.

[389] Darius Chan, "The Scope of *De novo* Review of an Arbitral Tribunal's Jurisdiction", Singapore Law Gazette (2015), Vol 11.

[390] *BCBC Singapore Pte Ltd and another v PT Bayan Resources and another* [2024] 1 SLR 1 at [34].

that parties are required to identify new arguments and new evidence sought to be adduced before the court. The court would be better able to arrive at an informed decision on whether to admit fresh evidence, and if so, whether the evidence should be received on affidavit alone or *viva voce*.[391] In our view, the use of a multi-factorial approach to tighten the *format* of review is preferable as opposed to departing from the current *standard* of review altogether.

39 Finally, we suggest a minor textual amendment to section 10 of the IAA which is presently titled "Appeal on ruling of jurisdiction". As noted by the Law Commission in its Second Consultation Paper, an appeal "could encompass a rehearing, so the distinction between the two was blurred".[392]

40 There is a distinct set of principles which govern an "appeal". Under Singapore law, the threshold for appellate intervention is high. For instance, an appellate court's power to review findings of fact will be "sparingly exercised"[393] and an appellate court will only overturn a finding of fact where the lower court's assessment is "plainly wrong" or "against the weight of the evidence".[394] To the extent the Singapore courts continue to apply a *de novo* review of an arbitral tribunal's jurisdiction,[395] the term "appeal" may be misleading. For the sake of clarity, section 10 of the IAA should be renamed to "Curial review of tribunal's preliminary ruling on jurisdiction".

VI. Focus Group

41 In our draft report, we recommended that, on the standard of review, a tribunal's ruling on jurisdiction should continue to be subject to a rehearing before the courts, without any deference granted to the tribunal's findings. On the format of review, we recommended that parties should not have an unfettered right to introduce new evidence. Instead, *COT v COU* should apply such that the court should have the discretion to decide what evidence to receive and how the evidence is to be received. Our

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[391] *COT v COU*, *supra* n 135, at [57].

[392] UK Second Consultation Paper, *supra* n 313, at [3.22].

[393] *Yong Kheng Leong v Panweld Trading Pte Ltd* [2023] 1 SLR 173 (CA) at [18].

[394] *Nambu PVD Pte Ltd v UBTS Pte Ltd* [2022] 1 SLR 391 at [8].

[395] *Dallah Real Estate v Pakistan*, *supra* n 350, at [30], which was cited with approval by the Singapore Court of Appeal in *PT First Media TBK*, *supra* n 146, at [162].

recommendation was that there should be no changes to the IAA, but new Rules of Court could be introduced to confirm that (a) the court has the discretion to decide what evidence to receive and how the evidence is to be received; and (b) requiring parties to identify new arguments and new evidence sought to be introduced before the courts.

42 On the standard of review, the focus group generally supported our recommendation. A common view that emerged was that a rehearing, as opposed to an appeal or a limited review, would not necessarily entail lengthier court proceedings.

43 On the format of review, some focus group participants were of the view that there may not be a need to introduce new Rules of Court because the differing case law on this issue could resolve itself in due course. However, some focus group participants suggested that, while case law can sort itself out, it may be preferable to intervene in a bid to achieve greater clarity without delay.

44 Having considered the differing views on the format of review, we are in favour of maintaining our recommendation for the introduction of new Rules of Court. In our view, the extent to which differing case law can be resolved by the Court of Appeal within a reasonable period of time is unclear. The differing decisions in *Lao v Sanum* and *AQZ v ARA* have been in existence since 2015.

VII. Conclusion

45 In sum, on the standard of review, we recommend that a tribunal's ruling on jurisdiction should continue to be subject to a rehearing before the courts (instead of an appeal), without any deference granted to the tribunal's findings. Insofar as the scope of review is concerned, parties should not have an unfettered right to introduce new evidence. Instead, *COT v COU* should apply such that the court should have the discretion to decide what evidence to receive and how the evidence is to be received, whether by way of affidavit or *viva voce*. Whilst we do not recommend any changes to the IAA, we recommend the introduction of new Rules of Court to confirm that (a) the court has the discretion to decide what evidence to receive and how the evidence is to be received; and (b) requiring parties to identify new arguments and new evidence sought to be introduced before the courts. In doing so, the court would be better able to arrive at an

informed decision on whether to admit fresh evidence, and if so, whether the evidence should be received on affidavit alone or *viva voce*.

ISSUE 8: SUMMARY DISPOSAL

I. Summary disposal

1 This chapter discusses the merits of the proposal to insert an explicit provision in the IAA allowing for arbitral tribunals to exercise powers of summary disposal in arbitrations governed by the IAA.

2 We recommend that section 12 of the IAA should be amended to expressly provide, in a new subsection, that the arbitral tribunal has the power to summarily dispose of matters in dispute by way of an award, unless the parties expressly agree that the arbitral tribunal shall not have such a power.

II. The Law Commission's report

3 The Law Commission's final proposal on summary disposal is as follows:[396]

(a) a new provision is to be included into the EAA;

(b) the new provision shall provide that unless the parties otherwise agree, the arbitral tribunal may make an award on a summary basis in relation to a claim, or a particular issue arising in a claim;

(c) this power may be exercised only on an application by a party, and only after the arbitral tribunal has afforded the parties a reasonable opportunity to make representations to the arbitral tribunal; and

(d) the arbitral tribunal shall only make an award on a summary basis if the tribunal considers that a party has no real prospect of succeeding on the claim or issue, or, a party has no real prospect of succeeding in the defence of the claim or in relation to the issue.

4 In its analysis, the Law Commission identified three main considerations:

[396] UK Final Report and Bill, *supra* n 279, at [6.52].

(a) whether the EAA should expressly contain a provision granting arbitral tribunals the power to make an award on a summary basis;

(b) if there is to be such a provision, whether that provision should state the procedure for invoking the power and if so, what that procedure should be;

(c) if there is to be such a provision, whether the provision should state the ground or applicable threshold for an award to be made on a summary basis and if so, what the ground or applicable threshold should be.

5 This chapter considers the same three considerations, together with a fourth, namely, whether only specific matters can be the subject of a summary disposal and if so whether this qualification should be expressly stated in the provision in the IAA.

III. Whether the IAA should contain an express provision granting arbitral tribunals the power to make an award on a summary basis

6 Although summary disposal[397] is a relatively new feature in arbitrations, it is now an entrenched feature of many major institutional arbitration rules governing commercial arbitrations, including the SIAC,[398] LCIA,[399] ICC,[400] HKIAC,[401] SCC,[402] ICDR[403] and JAMS.[404] It is also present in the ICSID Rules[405] and the CIETAC Rules governing international investment arbitrations.[406]

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[397] Summary disposal is also known as early disposition, early dismissal, summary dismissal and the like. It is however not to be confused with other procedures that seek to provide for a quicker, more efficient resolution of the arbitration, such as expedited procedure under the SIAC Rules and the Summary Procedure under the CIETAC Arbitration Rules.

[398] Rule 29.

[399] Article 22.1(viii).

[400] Although not expressly provided for in the ICC Rules, it is widely accepted that the power exists, following the issuance of "The Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", ICC Practice Note (30 October 2017) <https://www.iccwbo.be/wp-content/uploads/2017/10/20171031-ICC-Note-to-Parties-and-Arbitral-Tribunals-on-the-Conduct-of-Arbitration.pdf> (accessed 26 August 2024) at [59]-[64].

[401] Article 43.1.

[402] Article 39.

[403] Article 23.

[404] Article 25.

[405] Rule 41(5).

[406] Article 26.

7 There is therefore no longer any serious debate, or doubt, that the arbitral tribunal having power to summarily dispose of a matter in an arbitration is consistent with the ideals of arbitration. Initial concerns and objections that a summary disposal procedure offends a party's right to be heard and undermines the validity and enforceability of the award made on a summary basis have not taken root.

8 The question which remains to be considered, however, is whether the IAA should expressly refer to the power to make an award on a summary basis. It is difficult to conceive of a compelling argument against the inclusion of such a provision in the IAA.

9 Given that the arbitration rules of the major institutions already provide for summary disposal in one form or another, the inclusion of a provision in the IAA would, at the most, confirm what most parties and arbitral tribunals would already know and expect to be the case. It is equally true that the inclusion of the provision will be somewhat superfluous precisely because most of the arbitrations would be governed by institutional rules which already provide for summary disposal.

10 The main advantage therefore of having the provision in the IAA, therefore, is to provide certainty in arbitrations where parties have not agreed on the application of a set of arbitration rules, or where the applicable rules are silent as to whether the arbitral tribunal has the power to make an award on a summary basis. In these cases, a provision in the IAA will provide parties, and the arbitral tribunal, with certainty as to whether such a power can be exercised. Such a provision may also signal to enforcement courts, especially foreign enforcement courts, that, for awards made under the IAA, there is no doubt or dispute over the arbitral tribunal's power to make an award on a summary basis.[407]

11 It is important however to recognise, as the Law Commission did, that any summary disposal power should be subject to any agreement of the parties to the contrary. This qualification would accord with party autonomy. An agreement to the contrary can be express or can be evidenced by the choice of a set of arbitration rules which expressly

[407] A point which was alluded to by the Honourable Justice Steven Chong J in his speech, "Change and Continuity in the World of Arbitration", Speech given at the Chartered Institute of Arbitration (CiArb) Young Members Group Conference (21 February 2024) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-steven-chong-speech-given-at-the-chartered-institute-of-arbitration-(ciarb)-young-members-group-conference> (accessed 26 August 2024) at [24].

prohibits[408]—as opposed to being silent—the arbitral tribunal to exercise powers of summary disposal.

12 In sum, we recommend that the IAA be amended to include a specific provision stating that unless otherwise agreed between the parties, arbitral tribunals have the power to make an award on a summary basis ("**Provision**"). Our recommended Provision is set out in Annex D.

IV. Whether only specific matters can be the subject of a summary disposal and if so, whether this qualification should be expressly stated in the provision

13 The next question to be considered is whether the Provision should state the matters that can be the subject of a summary award. Bearing in mind that one of the main purposes of expressly providing for the power of summary disposal in the IAA is to provide clear guidance to parties and arbitral tribunals in arbitrations that are not conducted in accordance with arbitration rules that have provisions governing summary disposal, it follows that the Provision must be able to guide the parties and the arbitral tribunal in these arbitrations on what can or cannot be the subject of summary disposal.

14 There are generally three competing options: (a) only claims or counterclaims can be the subject of summary disposal; (b) claims, defences, and counterclaims can be the subject of summary disposal; and (c) any issue of fact or law, in a claim or defence, whether going to jurisdiction or the merits, can be the subject of summary disposal.

15 There is a divergence across institutional arbitration rules:

Institutional Rules	**Matter that can be the subject of summary disposal**
SIAC[409]	Claim or defence

[408] While there are arbitration rules which have not yet expressly adopted summary disposal powers and procedures, such as the CIETAC Arbitration Rules, the DIS Rules, and the KCAB Rules, there does not seem to be any institutional arbitration rules which expressly prohibits an arbitral tribunal from exercising summary disposal powers.

[409] Rule 29.1

LCIA[410]	Claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim
SCC[411]	Issue of fact or law concerning issues of jurisdiction, admissibility or merits
HKIAC[412]	Point of law or fact
ICC Practice Note	Claim or defence
JAMS[413]	Claim or issue
ICDR[414]	Issue in claim or counterclaim

16 In substance, however, summary disposal of claim (and counterclaim) or defence is the same as summary disposal of a claim. This is because the summary disposal of a defence would result in the granting of the claim. Although rules such as the SIAC Rules draws a distinction between claim and defence, it is difficult to conceive of a situation where the arbitral tribunal may dismiss a defence without also summarily disposing of, namely allowing, the claim to which that dismissed defence relates.

17 Accordingly, the real question is whether issues, of fact and/or law, should also be the subject of summary disposal. The underlying premise here is that the summary disposal of the issue or issues will not result in the summary disposal of the claim.

18 In this regard, in addition to the SCC, HKIAC, JAMS and ICDR Rules, the Law Commission also recommended that summary disposal be available for "any issue which

[410] Article 22.1(viii)

[411] Article 39.

[412] Article 43.1.

[413] Article 25.

[414] Article 23.

lacks merit, whether the issue arises in a claim or defence, and whatever the issue raised, including jurisdictional objections".[415]

19 Whether the subject of summary disposal should be limited to disposal of a claim or include issues that will not dispose of a claim is ultimately a decision on whether the summary disposal regime should be over-inclusive or under-inclusive, and the pros and cons of each. There is unlikely to be a one-size-fits-all answer.

20 In some cases, it may be that the summary disposal of an issue may lead to the narrowing of issues and ultimately a more efficient resolution of the underlying dispute. In other cases, that may not be the result and the summary disposal procedure would instead prolong the dispute and generate additional costs for the parties. Whether summary disposal achieves its stated objective of resolving the dispute more efficiently will likely turn on the specific facts and circumstances of each case. This in turn is a judgment call that only the arbitral tribunal will be able to make, and should be given the power to decide. Accordingly, it is desirable that the arbitral tribunal has full optionality.

21 In sum, the Provision should, tracking the existing section 19A of the IAA, provide that unless otherwise agreed between the parties, the arbitral tribunal's summary disposal power can be exercised over any issue, claim or defence (or part thereof).

V. Whether the provision should state the procedure for summary disposal and if so, what that procedure should be

22 The Law Commission recommended that the procedure for summary disposal is a matter to be determined by the arbitral tribunal, having consulted the parties, albeit that the procedure is only triggered on the application by a party.[416] However, the eventual proposed amendment to the EAA[417] only states that the summary disposal power is part of the arbitral tribunal's power under section 34(1) of the EAA,[418] and that the arbitral tribunal must allow the parties a reasonable opportunity to make representations as to the procedure.

[415] UK Final Report and Bill, *supra* n 279, at [6.20].

[416] UK Final Report and Bill, *id*, at [6.34].

[417] UK Final Report and Bill, *id*, at [6.52].

[418] Which provides that the tribunal shall decide all procedural and evidential matters.

23 Here, the question to be considered is whether there is any utility in having a provision in the IAA which clarifies the procedure for a specific power that the arbitral tribunal has and may exercise. On balance, there seems to be no compelling principled and practical justification for doing so.

24 As a matter of principle, the IAA is silent on matters of procedure. It is trite that arbitral tribunals in arbitrations governed by the IAA—and by extension, the Model Law—have wide powers to decide matters of procedure, as well as evidence. This is enshrined in Article 19 of the Model Law,[419] and case law.[420] Specifying the procedure just for summary disposal, even if to state that the arbitral tribunal shall give the parties a reasonable opportunity to make representations, would seem anomalous in the circumstances, and might be viewed as an example of legislative over-prescription.

25 There is also no conceivable practical justification to spell out a procedure. Notably, the 'procedure' in the proposed provision in the EAA is not so much a procedure as it is a reminder to the arbitral tribunal that the parties must be permitted to make representations before the tribunal considers whether to proceed with the application for summary disposal.

26 In sum, the Provision should not prescribe a procedure.

VI. Whether the provision should state the ground or applicable threshold for an award to be made on a summary basis and if so, what the ground or applicable threshold should be

27 The Law Commission recommended that the EAA expressly state the ground and threshold for making an award on a summary basis. The rationale was to ensure that "all arbitrations seated in England and Wales would apply the same test", which would in turn ensure "certainty and consistency … and fairness".[421]

28 It is however unclear why it is important, either for the system of arbitration or the specific parties in any given arbitration, that the arbitral tribunal in that case applies the same ground and threshold as arbitral tribunals in other cases when deciding whether to make an award

[419] Which provides that subject to parties' agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

[420] Chan, Tan & Poon, *supra* n 151, at [4.245]-[4.246], [8.155], [8.157], [8.201]-[8.204].

[421] UK Final Report and Bill, *supra* n 279, at [6.36].

on a summary basis. Indeed, the idea that there should be consistency in the substantive applicable law arguably runs counter to the nature and practice of arbitration which is, notwithstanding the proliferation of arbitral rules, very much still party-driven.

29 That said, the practice appears to be converging, as exemplified in the institutional arbitration rules.

Institutional Rules	**Ground or threshold**
SIAC[422]	Manifestly without legal merit or manifestly outside the jurisdiction of the arbitral tribunal
LCIA[423]	Manifestly outside the jurisdiction of the arbitral tribunal, or is inadmissible, or manifestly without merit
SCC[424]	Not specified (but the phrase "manifestly unsustainable" is used as an example of an assertion that can be made in a request for summary procedure)
HKIAC[425]	Manifestly without merit or manifestly outside the arbitral tribunal's jurisdiction or no award can be rendered in favour of the party making the point of law or fact even if that point is assumed to be correct
ICC Practice Note	Manifestly devoid of merit or manifestly outside the arbitral tribunal's jurisdiction
JAMS[426]	Outside the arbitral tribunal's jurisdiction or manifestly without merit

[422] Rule 29.1

[423] Article 22.1(viii)

[424] Article 39.

[425] Article 43.1.

[426] Article 25.

ICDR[427]	Not specified

30 Except for the ICDR and the SCC, the other institutional rules have adopted the ground or threshold of 'manifest', which is to state simply, another way of saying that the claim, defence, or issue in question, is so obviously wrong. Given the relatively standardised practice across the major institutional arbitration rules, the ground or threshold recommended by the Law Commission, namely, that the matter "has no real prospect of succeeding",[428] appears unnecessary. Referring to a test that is employed under English law will also likely lead to parties and their lawyers having to research and tailor their submissions to the content of English law on this point, an exercise that might incur additional costs and time for parties in a dispute which may otherwise not have any other substantive connection to English law.

31 From the IAA's perspective, given the relatively standardised approach across institutional rules, there is no overarching impetus for the Provision to guide arbitral tribunal and parties in arbitrations which are not governed by arbitration rules that provide for summary disposal on the appropriate ground or threshold to be applied. The parties and the arbitral tribunal are free to develop their arguments, as they would any other argument, with the flexibility and international approach that is synonymous with international arbitration.

32 In sum, the Provision should not prescribe the ground or threshold for summary disposal.

VII. Focus Group

33 In our draft report, we recommended that section 12 of the IAA can be amended to expressly provide that the arbitral tribunal has the power to summarily dispose of matters in dispute by way of an award, unless the parties expressly agree that the arbitral tribunal shall not have such a power.

[427] Article 23.

[428] UK Final Report and Bill, *supra* n 279, at [6.51].

34 Some members of the focus group supported the recommendation, on the basis that it would provide more certainty to arbitral tribunals as to the scope of their powers. There were four main concerns expressed by other members of the focus group.

35 First, the recommendation was superfluous. If the institutional rules already gave the arbitral tribunal the same or similar powers, prescribing the power in the IAA might unintentionally create uncertainty and disputes over whether the rules or the IAA takes precedence, and the implications of that, should the position under the rules and the amended IAA conflict.

36 Second, the opt-out mechanism built into the recommended draft subsection will inadvertently encourage litigation over when parties have agreed to opt-out of the provision.

37 Third, situating the provision in section 12 of the IAA may give the impression that the power is a procedural power, as opposed to a substantive one, in part because of the language of section 12(6) of the IAA, and also because the definition of an "award" in section 2(1) of the IAA expressly excludes any order or direction made under section 12 of the IAA.

38 In the main, we consider that the first two concerns are unlikely to result in a material increase in litigation or uncertainty. Even if there may be disagreements over the interpretation of the amended IAA, any uncertainty as to the interpretation would likely be finally and quickly resolved in a single case. Even if there is some initial uncertainty, we do not think that this should stand in the way of a strong signal from Singapore as to where it stands in terms of creating a more efficient and robust arbitration system.

39 As for the third concern, we agree that there may be some initial confusion over whether the power to order summary disposal under section 12 of the IAA would disqualify the summary decision from having the force of an award. However, we do not think that this is the correct interpretation of the proposed amended section 12 of the IAA. There is a distinction between (a) the power of the arbitral tribunal to give directions to the parties that the claim, defence, or an issue will be determined summarily, and (b) the summary decision itself to be issued by way of an award. The recommendation in our draft report was to legislatively enshrine the tribunal's power to do the former, i.e. give directions to the parties for the purpose of having the claim or issue determined summarily, in section 12.

The decision itself which is reached through the summary disposal process will remain a decision on the merits and the substance of the dispute (or a part of it) and hence will qualify as an "award" under section 2(1) of the IAA.

40 Nevertheless, after re-considering the issue, we now recommend that the Provision can be reflected by amending section 19A of the IAA, instead of section 12. This is intended to avoid any doubt over the enforceability of a summary award.

41 Finally, it was suggested that the originally proposed requirement in the Provision, i.e., "if having regard to all the circumstances of the case the tribunal considers that such determination will promote a more efficient and expeditious resolution of the dispute", might inadvertently create disharmony with institutional rules. After re-considering the issue, we have removed the phrase to remove any potential conflict with arbitral rules. Even without the express inclusion of this phrase, all tribunals will in any event highly likely consider whether invoking the summary disposal mechanism will expedite proceedings in each case. We have also included a sub-provision clarifying what "summary basis" means, with reference to the corresponding amendments to the EAA.

VIII. Conclusion

42 We recommend that section 19A of the IAA should be amended to expressly provide that the arbitral tribunal has the power to summarily dispose of matters in dispute by way of an award, unless the parties expressly agree that the arbitral tribunal shall not have such a power. The suggested amendments to section 19A can be found in Annex D below.

ANNEXURES

I. Annex A – Other consequential amendments to the IAA (Issue 1)

1 The first consequential amendment to be considered is the definition of an "award" under section 2(1) of the IAA:

> a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any order or direction made under section 12

2 This definition of an "award" means it may be inaccurate to describe a tribunal's standalone decision on costs as a "costs award".[429] Compared to the New York Convention, the IAA's definition of an "award" is narrower; on a plain reading, the IAA's definition may exclude the recognition of a tribunal's standalone decision on costs as an "award" for the purposes of enforcement. This is especially so where the decision on costs was issued in the context of an international arbitration seated in Singapore, in which case the avenue for enforcement is under section 19 of the IAA (and not under the New York Convention).[430] This is an issue that currently exists even if our recommendations in chapter 1 are not accepted. Neither the EAA nor the HKAO prescribes a definition of "award". Instead, English case law prescribes various considerations in determining whether a decision of the arbitral tribunal constitutes an award.[431]

3 If our recommendations in Chapter 1 are accepted, the courts will have the power to remit the issue of costs to the tribunal. In such an event, the tribunal may issue a standalone decision on costs. It is suggested here that the definition of an award under the IAA should be extended to a standalone decision on costs as follows:

[429] See *CBX v CBZ*, *supra* n 3, at [3] where the term "Final Award (Costs)" was used by the tribunal.

[430] See *PT First Media TBK*, *supra* n 146, at [53]–[55] and [65]–[71].

[431] *ZCCM Investments Holdings plc v Kansanshi Holdings plc* [2019] EWHC 1285 (Comm) at [40].

a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory, partial, or costs award, but excludes any order or direction made under section 12

4 The second consequential amendment to be considered is the inclusion of a provision to confer on the arbitral tribunal the power to assess costs. While our recommended provisions suggests that the tribunal is empowered via remission to consider the issue of costs following the setting aside of the main award, nothing in the IAA more generally recognises the tribunal's power to decide the issue of costs. In this regard, Singapore law is unique. Other jurisdictions have provisions that empower the tribunal to decide the issue of costs: e.g., section 63 of the EAA, section 74 of the HKAO and paragraph 6(1)(a) of Schedule 2 to the NZAA.

5 Section 63 of the EAA is noteworthy; it sets out the scope of the tribunal's power to deal with the question of costs of the arbitration. The relevant parts of that provision provide as follows:

63 The recoverable costs of the arbitration.

(1) The parties are free to agree what costs of the arbitration are recoverable.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify—

(a) the basis on which it has acted, and

(b) the items of recoverable costs and the amount referable to each.

…

(5) Unless the tribunal … determines otherwise —

(a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and

(b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

6 Section 6(1)(a) of Schedule 2 to the NZAA is also noteworthy. Although forming part of the suite of optional rules prescribed under the NZAA that parties are free to include, it provides for the tribunal's power to decide on costs and to also take into account any offers to settle in arriving at that decision:

6 Costs and expenses of an arbitration

(1) Unless the parties agree otherwise,—

(a) the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of Schedule 1, or any additional award under article 33(3) of Schedule 1; or

…

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,—

(a) if a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and

(b) the fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final

> determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

7 It is suggested here that one possibility is for section 21 of the IAA to be amended with provisions similar to section 63 of the EAA or section 6(1)(a) of Schedule 2 to the NZAA. As it stands, section 21 of the IAA is limited in that it does not provide for a tribunal to have the power to decide on costs. Section 21 also does not expressly provide for settlement offers to be considered by the taxing authority, which may be worth considering in line with Singapore's approach to promote consensual settlement.

II. Annex B – 2019 proposed provisions (with SIDRA's amendments in mark-up) (Issue 5)

Appeal against award on points of law

XXA. —

(1) This section —

(a) has effect despite Article 34(1) of the Model Law; and

(b) applies where all parties to any arbitral proceedings have agreed in writing, whether in the arbitration agreement or in any other document, for this section to apply.

(2) A party to the arbitral proceedings may appeal to the General Division of the High Court on a question of law arising out of an award made in the proceedings —

(a) upon notice to the other parties and to the arbitral tribunal; and

(b) with the permission of the General Division of the High Court.

(3) An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section, but to avoid doubt, the court's jurisdiction under this section is not excluded merely because of any waiver in any provision in the rules of arbitration agreed to or adopted by the parties.

(4) The right to appeal under this section is subject to the restrictions in section XXB.

(5) Permission to appeal against an award under this section may be given only if the General Division of the High Court or the appellate court (as the case may be) is satisfied that —

(a) the determination of the question will substantially affect the rights of one or more of the parties;

(b) the question is one that the arbitral tribunal was asked to determine;

(c) on the basis of the findings of fact in the award —

(i) the decision of the arbitral tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

(d) it is just and proper in all the circumstances for the court to determine the question.

(6) An application for permission to appeal against an award under this section must identify the question of law to be determined and state the grounds on which it is alleged that permission to appeal should be granted.

(7) The General Division of the High Court or the appellate court (as the case may be) must decide the question of law which is the subject of an appeal under this section on the basis of the findings of fact in the award, and for the avoidance of doubt, the court may take into account the clarifications provided by the tribunal pursuant to an order under section XXB(4).

(8) On hearing an appeal against an award under this section, the General Division of the High Court or the appellate court (as the case may be) may by order —

(a) confirm the award;

(b) vary the award;

(c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the court's determination; or

(d) set aside the award, in whole or in part.

(9) The General Division of the High Court or the appellate court (as the case may be) must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(10) In addition to any orders made by the General Division of the High Court or the appellate court (as the case may be) under subsection (8), the court may make an order against any party on:

(a) costs of the proceedings under this section, including in respect of any orders, directions or decisions made by the court under section XXB; and

(b) costs of the arbitral proceedings, which may modify or replace, in whole or in part, any costs orders made by the arbitral tribunal.

(11) Notwithstanding subsection (10)(b), the General Division of the High Court or the appellate court (as the case may be) may remit to the arbitral tribunal the issue of costs of the arbitral proceedings provided:

(a) all parties to the award agree to the remission; and

(b) it is in the interests of justice to do so.

(12) An appeal may be brought against any decision or order of the General Division of the High Court under this section, subject to the following provisions:

(a) an appeal may be brought only with the permission of the appellate court; and

(b) in the case of a further appeal against an order of the General Division of the High Court under subsection (8), the appellate court may grant permission to further appeal only if the question of law is one of general importance, or one that for some other special reason should be considered by the appellate court.

(13) The General Division of the High Court or the appellate court (as the case may be) shall determine an application for the permission of the court under subsections (2)(b) or (12)(a) without a hearing unless it appears to the court that a hearing is required.

Supplementary provisions to appeal under section XXA

XXB.—

(1) This section applies to an application or appeal under section XXA.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted —

(a) any available arbitral process of appeal or review; and

(b) any available recourse under Article 33(1) of the Model Law (request for correction or interpretation.

(3) Unless time is extended by the courts, an application for permission to appeal shall be brought:

(a) if there has been any arbitral process of appeal or review, within 30 days of the date when the applicant was notified of the result of that process;

(b) if a request has been made under Article 33(1) of the Model Law, within 30 days of the date when the parties are notified of the outcome of the request;

(c) if there is any correction of the award under Article 33(2) of the Model Law, within 30 days of the date when the parties are notified of the correction; and

(d) in all other cases, within 30 days of the date of the award.

(4) To avoid doubt, a separate application for permission to appeal under section XXA(2)(b) may be brought on a question of law arising out of an additional award made by the arbitral tribunal under Article 33(3) of the Model Law and not arising out of the tribunal's prior award in the same arbitral proceedings.

(5) If on an application or appeal it appears to the General Division of the High Court or the appellate court (as the case may be) that 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 to enable the General Division of the High Court or the appellate court (as the case may be) to properly consider the application or appeal, the General Division of the High Court or the appellate court (as the case may be) may order the arbitral tribunal to state, within such time as the court may direct, the reasons for its award in sufficient detail for that purpose.

(6) Where the General Division of the High Court or the appellate court (as the case may be) makes an order under subsection (4), it may make such further

order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(7) The General Division of the High Court or the appellate court (as the case may be) may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The power to order security for costs must not be exercised by reason only that the applicant or appellant is —

(a) an individual ordinarily resident outside Singapore; or

(b) a corporation or association incorporated or formed under the law of a country outside Singapore or whose central management and control is exercised outside Singapore.

(9) The General Division of the High Court or the appellate court (as the case may be) may order that any money payable under the award must be paid into the General Division of the High Court or the appellate court (as the case may be) or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(10) The General Division of the High Court or the appellate court (as the case may be) may grant permission to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (8), and this does not affect the general discretion of the General Division of the High Court or the appellate court (as the case may be) to grant permission subject to conditions.

(11) Any order, direction or decision of the General Division of the High Court or the appellate court (as the case may be) under this section is not subject to appeal.

Effect of order of court upon appeal against award

XXC. —

(1) Where the General Division of the High Court or the appellate court (as the case may be) makes an order under section XXA(8) with respect to an award, subsections (2) and (3) apply.

(2)	Where the award is varied by the General Division of the High Court or the appellate court (as the case may be), the variation has effect as part of the arbitral tribunal's award.
(3)	Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal must make a fresh award in respect of the matters remitted within 3 months of the date of the order for remission or such longer or shorter period as the General Division of the High Court or the appellate court (as the case may be) may direct.
(4)	~~Where the award is set aside in whole or in part, the High Court may also order that any provision in the arbitration agreement stating that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies is of no effect as regards the subject matter of the award or the relevant part of the award, as the case may be.~~[432]
Definitions **XXD.**–	
(1)	For the purposes of sections XXA to XXD —
(a)	"appellate court" means the court to which an appeal under section XXA is to be made under section 29C of the Supreme Court of Judicature Act 1969; and
(b)	"question of law" includes a question of foreign or international law.
~~Application for leave of High Court, etc.~~ ~~**24D.**~~	

[432] We propose to exclude section XXC(4) although it formed part of the amendments proposed by the Ministry of Law in 2019. Hong Kong does not have a similar provision. The wording of that provision appears to be traceable to *Scott v Avery* (1856) 5 HL Cas 811 (see also Chan Leng Sun SC, *Singapore Law on Arbitral Awards, 2011*, Chapter 6: Recourse against an Award (Academy Publishing) at 6.57), wherein an arbitral decision on a dispute sum was expressed in the relevant arbitration clause to be a condition precedent to the right of a party to maintain an action or suit on the sum. In our view, the proposed section XXC(4) no longer has practical relevance following modern developments in international arbitration, especially in light of the New York Convention where awards can be directly recognized and enforced in Contracting States without having to bring a separate action on the dispute sum.

(1) An application for the leave of the High Court to appeal under section 24A(2)(b) or (6) must be made in such manner as may be prescribed in the Rules of Court.

(2) The High Court must determine an application mentioned in subsection (1) without a hearing unless it appears to the High Court that a hearing is required.

(3) For the purposes of this section –

(a) an application mentioned in subsection (1) may be heard and determined by a Judge in Chambers; and

(b) the Court of Appeal has the like powers and jurisdiction on the hearing of an application under section 24A(2)(b) as the High Court or any Judge in Chambers has on the hearing of such an application.[433]

[433] Save for the requirement that applications for permission to appeal against an award or permission to appeal from a decision of the court to grant or refuse leave to appeal are to be determined without a hearing unless necessary, we propose not to include section XXD as originally proposed by Ministry of Law. This is because since 3 May 2023, the Guide for the Conduct of Arbitration Originating Applications (Registrar's Circular No. 1 2023) (the "**Arbitration Practice Guide**") has been in force for the conduct of arbitration matters commenced by way of an Originating Application filed under the IAA. Hence, to the extent that any such provisions are necessary, they can be implemented in the Arbitration Practice Guide.

III. Annex C – Singapore Common Law Approach, and England and Wales' statutory choice of law approach (Issue 6)

A. *The Singapore Common Law Approach*

(1) Summary

1 The current Singapore Common Law Approach is set out by the Court of Appeal decisions of *BNA v BNB*[434] and *Anupam v Westbridge*[435]. The governing law of an arbitration agreement is determined under the common law's three-stage framework for determining the governing law of any contract.[436]

(a) The first stage asks whether the parties have expressly chosen a governing law of their arbitration agreement.

(b) If there is no express choice, the second stage asks whether the parties have impliedly chosen a governing law of their arbitration agreement.

(c) If there is no implied choice, the arbitration agreement is governed by the law with the closest and most real connection with that agreement.

2 An express choice of governing law in the arbitration agreement will no doubt be given effect – the general expectation in Singapore is that this means the arbitration agreement itself should express a choice of governing law.[437] However, contracting parties do not commonly do this. Arbitration clauses are often finalised at the last minute and are not usually negotiated independently from the main contract.[438]

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[434] *BNA v BNB*, *supra* n 277, noted in Chan & Teo – Artificiality of inferring intention, *supra* n 304.

[435] *Anupam v Westbridge*, *supra* n 277.

[436] Chan, Tan & Poon, *supra* n 151, at [3.38]-[3.48].

[437] *BNA v BNB*, *supra* n 277, at [46]. A governing law clause in the main contract (e.g., "This Contract shall be governed by …") could also be interpreted as an express choice of governing law also for the arbitration agreement, but ultimately it is of no material consequence whether a choice of governing law for the arbitration agreement is express or implied: *Enka v OOO Insurance*, *supra* n 280, at [35].

[438] *BCY v BCZ*, *supra* n 277, at [61]. See also HL Bill 7, *supra* n 281, at [16]; Born, *supra* n 276, at §4.04[A][2][d].

3 In such cases, the Singapore Common Law Approach would generally align the law of the arbitration agreement with the law of the main contract, unless there are contrary indications otherwise.

(a) Where the arbitration agreement itself does not state a choice of law, the presumption is that the parties impliedly intended their arbitration agreement to be governed by the same law as the law governing the main contract in which it is found.[439]

(b) This presumption can be rebutted by contrary indications that the parties had chosen some other law, such as the law of the seat of the arbitration, to govern the arbitration agreement.[440]

(c) One possible contrary indication is that the parties' intention to arbitrate all their disputes would be frustrated were it concluded that the parties chose the law governing their main contract to also govern the arbitration agreement. This may, depending on the circumstances of each case, constitute sufficient evidence to conclude that the parties could not have made that implied choice of law to govern their arbitration agreement.[441] This is sometimes known as a 'validation principle'.[442]

(d) If there is no express or implied choice of law, the arbitration agreement is governed by the law with the closest connection with that agreement. This is virtually always said to be the law of the seat of the arbitration.

4 Singapore is among several jurisdictions which lean towards finding that parties intended their arbitration agreement to be governed by the same law as their main contract. Other jurisdictions that adopt this "main contract approach" include Hong

[439] *Anupam v Westbridge*, *supra* n 277, at [67]-[69]; *BNA v BNB*, *supra* n 277, at [47]; *BCY v BCZ*, *supra* n 277, at [61]-[65]; *Dyna-Jet v Wilson Taylor*, *supra* n 289, at [31]. In all these Singapore cases, the parties had expressly chosen the governing law for their main contract. More difficult is where the main contract has no express governing law – this caused the 3-2 split of the UK Supreme Court in *Enka v OOO Insurance*, *supra* n 280.

[440] *BNA v BNB*, *supra* n 277, at [47].

[441] *Anupam v Westbridge*, *supra* n 277, at [67]-[74].

[442] Born, *supra* n 276, at §4.04[A][4].

Kong[443] and India,[444] and civil law jurisdictions like Austria,[445] Germany,[446] and Japan[447]. It was also formerly the position under English law, prior to the upcoming revisions to the EAA recommended by the Law Commission.

5 Besides the "main contract approach", there is a range of other competing approaches.[448]

(a) A second approach is the "seat approach", which leans in favour of finding that the arbitration agreement is governed by the same law as the seat of the arbitration, unless there is a clear agreement that another law should apply. Sometimes it is reasoned that a choice of seat amounts to an implied choice of governing law for the arbitration agreement. In other cases, it is reasoned that arbitration agreements are most closely connected to the arbitral seat and therefore it must be the law of the seat that applies.[449] Sweden is among the jurisdictions which adopt this approach. For instance, Swedish law considers an arbitration agreement to be a separate agreement from the main contract and therefore a choice of law in the main contract is not a choice of law for the arbitration agreement.[450]

(b) A third approach focuses on giving effect to whichever law under which the arbitration agreement would be upheld, rather than on ascertaining and giving effect to a choice of law made by the parties. Switzerland and the Netherlands are among the jurisdictions which adopt this approach. For instance, Swiss law would consider a few different laws and the arbitration agreement would be valid as long as it is valid under one of those laws.[451]

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[443] *GMBH v Advance Technology*, *supra* n 306; *China Railway v Chung Kin Holdings*, *supra* n 306.

[444] *National Thermal Power v Singer*, *supra* n 307.

[445] *D v C*, *supra* n 308.

[446] *Subsidiary of Franchiser v Franchisee*, *supra* n 309.

[447] *X v Y, supra* n 310.

[448] See Scherer & Jensen, *supra* n 299; Blackaby, Partasides & Redfern, *supra* n 299, at [3.13]-[3.14].

[449] Born, *supra* n 276, at §4.04[A][2][c], noting that the rationale for apply the law of the seat is "*frequently not well-articulated*".

[450] Case No. T 7929-17, 19 December 2019 [Svea Court of Appeals, Sweden].

[451] PILA, Article 178(2); Dutch Civil Code, Article 10:166.

(c) A fourth approach takes the perspective that international arbitration agreements need not be governed by the national law of any particular State. This is primarily associated with French law, which takes the view that issues of formation and validity of international arbitration agreements are decided by determining the common intention of the parties with reference to substantive rules of law and international public policy.[452]

(2) Assessment

6 The existing law under the Singapore Common Law Approach is generally sound in principle.

7 By applying the generally applicable contractual choice of law rules to the specific context of arbitration agreements, the Singapore Common Law Approach reflects the substantial autonomy given to contracting parties to choose the applicable law under which they enter into a contract to create legal rights and obligations between them.[453]

8 The Singapore Common Law Approach also reflects how the common law will generally be slow to infer that reasonable commercial parties have intended different parts of a single contract to be governed by different laws (also known as *dépeçage*).[454] If they did so intend, clear indications to that effect should be found in the contract or surrounding circumstances.[455] *Dépeçage* is the exception, not the norm.

9 The analysis is not affected by Singapore law's doctrine of separability of the arbitration agreement. Separability simply means that an arbitration agreement which would otherwise be valid will not be rendered invalid only because the substantive contract into which it is integrated is itself invalid. It does not mean that the arbitration

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[452] *Municipalité de Khoms El Mergeb v. Société Dalico*, 20 December 1993, n° 91-16.828 [Court of Cassation, France]; *Kout Food Group v Kabab-Ji SAL*, 28 September 2022, n° 20-20.260 [Court of Cassation, France] ("***Kout Food Group v Kabab-Ji SAL***").

[453] *Amin v Kuwait*, *supra* n 294, at 60-6; as long as the parties' choice of law is bona fide and legal and the application of the chosen law is not contrary to public policy: *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277 at 290. See Yeo, *supra* n 294, at [12.001]-[12.002]; Mapesbury & Harris, *supra* n 294, at [32-006].

[454] *Enka v OOO Insurance*, *supra* n 280 at [39].

[455] *Kahler v Midland Bank Ltd* [1950] AC 24 at 42; Yeo, *supra* n 294, at [32-044].

agreement is a separate agreement for the purposes of determining whether the parties had chosen a law to govern their contractual relationship.[456]

10 The Singapore Common Law Approach applies these choice of law principles with the commercial realities in mind. When drafting and negotiating an arbitration clause for their contract, parties generally do not go to the extent of expressly stating a governing law within the arbitration clause itself. The "main contract approach" recognises that when parties have negotiated a choice of law to govern their contractual relationship *vis-à-vis* the main contract, that is also a choice of law for their arbitration agreement.

11 The Singapore Common Law Approach has the advantage of leaving the Singapore courts with flexibility to decide how to best give effect to party autonomy on the specific facts of each case. The Court can consider all relevant circumstances to ascertain whether the parties had intended to choose the law of the main contract or some other system of law to govern their arbitration agreement. For instance, the arbitration agreement may make reference to certain statutory provisions that are specific to a particular governing law.[457]

12 On the other hand, flexibility also entails some degree of uncertainty.

13 First, the application of the 'validation principle' can be a matter of significant uncertainty. The validation principle under Singapore law requires proof that the parties were at least aware that a choice of a particular governing law to govern their arbitration agreement could result in an invalid arbitration agreement. The application of this test can be a complex question, as seen in the two Court of Appeal decisions of *BNA v BNB* and *Anupam v Westbridge*.[458]

(a) In *BNA v BNB*, PRC law was the governing law of the main contract and therefore the starting point was that the parties impliedly chose PRC law to also govern their arbitration agreement. Although there was some indication that the

[456] *BCY v BCZ*, *supra* n 277, *at* [60]-[61]; *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2013] 1 WLR 102 ("***Sulamérica v Enesa***") at [26].

[457] *Arsanovia Limited v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

[458] *Gourmet Gate Korea v Asiana Airlines*, *supra* n 291, at [63]-[64]. See also Chan & Teo – Comparative Analysis, *supra* n 280, at 461-467.

arbitration agreement might be invalid under PRC law, the Court of Appeal held that any potential invalidating effects of a governing law on the arbitration agreement is only relevant where the parties were at least *aware* of such consequence. On the facts, the Court found no evidence that the apparent invalidity of their arbitration agreement under PRC law was known to the parties, and therefore it could not displace the implied choice of PRC law.[459]

(b) In *Anupam v Westbridge*, the main contract was a shareholders' agreement governed by Indian law and was made between the shareholders of an Indian company. The shareholders' agreement contained an arbitration clause. It was undisputed that the arbitration agreement would be ineffective if it were governed by Indian law. The Court of Appeal found that, unlike the situation in *BNA v BNB*, the parties in this case could not have intended Indian law to govern the arbitration agreement because it was "impossible to contend that as shareholders [of an Indian company] they were not aware that disputes [within the scope of their arbitration agreement] would give rise to questions of Indian company law that would generally fall to be determined by the Indian courts (at the time of the agreement)."[460] It appears that whereas *BNA v BNB* required proof of actual knowledge of the apparent invalidity of the arbitration agreement under a particular governing law, *Anupam v Westbridge* suggests that our courts are prepared to draw an inference from the surrounding facts and circumstances that the parties must have been aware about the apparent invalidity.[461]

14 In comparison, English law does not have a 'knowledge' requirement. English law is prepared to infer an implied choice in favour of the law of the seat as long as there exists a serious risk that, if governed by the same law as the matrix contract, the arbitration agreement would be ineffective.[462]

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[459] *BNA v BNB*, *supra* n 277, at [90]; applied in *Cosmetic Care Asia Ltd v Sri Linarti Sasmito* [2021] SGHC 157 at [93]-[94] more generally beyond the context of the governing law of an arbitration agreement.

[460] *Anupam v Westbridge*, *supra* n 277, at [72].

[461] Chan & Teo – Comparative Analysis, *supra* 280, at 467.

[462] *Enka v OOO Insurance*, *supra* n 280, at [170(vi)]. See also *Sulamérica v Enesa*, *supra* n 456, at [31].

15 The Singapore courts have not clarified whether Singapore's validation principle can be applied beyond issues of validity. Under English law, the UK Supreme Court has confirmed that the validation principle only applies where the application of a particular governing law puts the arbitration agreement at risk of being invalid or legally ineffective. The validation principle cannot apply, in contrast, to help decide whether an agreement to arbitrate has been formed as between certain parties. For instance, if the main contract is governed by English law and contains an agreement to arbitrate in Paris, it does not matter that French law would take a more generous view than English law as to whether a particular party (e.g., a non-signatory to the contract) is bound by the arbitration agreement. This cannot negate the ordinary inference that the arbitration agreement is governed by English law because the issue of whether the non-signatory is bound does not put the arbitration agreement at risk of being invalid.[463]

16 Second, it is unclear under Singapore law whether there is anything else, besides the validation principle, that may displace the presumption in favour of the law governing the main contract. In comparison, English law had initially begun in *Enka* to explore has identified a second exception: where the law of the seat contains a provision stipulating that, where an arbitration is subject to that law, the arbitration agreement will be governed by that country's law by default where the parties have not agreed on an applicable law.[464] For instance, *Carpatsky Petroleum Corporation v PKSC Ukrnafta* involved an agreement to arbitration seated in Sweden and administered by the Arbitration Institute of the Swedish Chamber of Commerce (SCC).[465] Although the main contract provided for the "law of substance of Ukraine" to apply "on examination of disputes",[466] Butcher J held that this could only be construed as a choice of the law applicable to the substantive issues which formed part of a dispute between the parties, but not a choice of law to govern the arbitration agreement itself. Section 48 of the SAA provides that where an arbitration agreement has an international connection, the agreement shall be governed by the law of the seat by default where the parties have not agreed on an applicable law. Butcher J held that since the parties chosen Sweden as

[463] *Kabab-Ji SAL v Kout Food Group*, *supra* n 292, at [49]-[52].

[464] *Enka v OOO Insurance*, *supra* n 280, at [70]-[72] and [170(vi)].

[465] [2020] EWHC 769 (Comm) ("***Carpatsky***").

[466] *Carpatsky*, *id*, at [67].

the seat of arbitration, they should be taken to have known about section 48. Therefore, the choice of Swedish law as the law of the seat meant that the parties impliedly agreed for Swedish law to govern the arbitration agreement pursuant to section 48 of the SAA. However, the UK Supreme Court in *UniCredit Bank GmbH v RusChemAlliance LLC* has since retreated from that position. Once the court in *Carpatsky* concluded that the parties have not agreed on an applicable law, thereby ostensibly engaging the default rule in section 48 of the SAA, that conclusion immediately requires the judge to apply the default rule under English law that in the absence of party choice, the validity of the arbitration agreement is governed by the law of the country where the award was made.[467]

17 Third, the Singapore Common Law Approach rests on a narrow understanding of the principle of separability of the arbitration agreement, which is not shared by all jurisdictions and may also be displaceable by a contrary intention of the parties.[468]

18 The Singapore courts have taken a narrow view of separability. Separability under Singapore law, as expressed in Article 16 of the Model Law, does not mean that the arbitration agreement is not a *separate* agreement from the main contract for all intents and purposes. It is merely *separable* for the narrow and specific purpose of preserving the arbitration agreement where the main contract is found to be non-existent or invalid.[469] For all other purposes Singapore law does not consider the arbitration agreement to stand as a separate contractual agreement from the main contract in which it is contained. This is said to accord with the commercial reality that the arbitration clause is one of many provisions in the main contract and is typically negotiated as part of the main contract.[470] This is also the understanding of separability under English law.[471]

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[467] *UniCredit Bank GmbH v RusChemAlliance LLC*, *supra* n 301 at [37]-[60]. See also Chan & Teo – Comparative Analysis, *supra* n 280, at 469-470.

[468] Blackaby, Partasides & Redfern, *supra* n 299**,** at [3.12]-[3.17].

[469] See also *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [27], describing the doctrine as one of "severability".

[470] *BCY v BCZ*, *supra* n 277, at [61]. .

[471] *Enka v OOO Insurance*, *supra* n 280, at [61].

19 In contrast, other jurisdictions take a broader view of separability, which understands the arbitration agreement as a truly autonomous agreement that stands wholly apart from the substantive contract for all intents and purposes. For instance, Swedish law and French law take the view that an arbitration agreement is legally independent of the main contract in which it is contained. This reduces the significance of a choice of law clause in the main contract, since the arbitration agreement is a separate agreement.[472] The conclusion is usually that (as in the case of Swedish law) the law of the seat chosen by the parties will govern the arbitration agreement, or (as in the case of French law) that there is simply no need to refer to the law of the main contract to decide issues pertaining to the arbitration agreement.

20 The lack of uniformity over separability gives rise to the possibility of disputes over the impact of the principle on the governing law of the arbitration agreement.

(a) Disputes could arise over whether it is the Singapore principle of separability or some other law's principle of separability that should apply in a given case, particularly when one party is seeking to prevent arbitration from being commenced.

(b) Even if Singapore's principle of separability applies, disputes could arise over whether the parties had in fact understood the arbitration agreement in a truly autonomous sense.

(c) Even if a Singapore court applies a narrow reading of separability, there is a risk of inconsistent outcomes because the issue may resurface before another court (e.g., after arbitration has taken place and an award has been made). This happened in *Kabab-Ji v Kout Food Group*: the UK Supreme Court found that the Paris-seated arbitration agreement was governed by English law (which was the law of the main contract), and that the holding company of one of the signatories to the arbitration agreement was not bound under English principles

[472] *Municipalité de Khoms El Mergeb c/Sté Dalico*, Cass. Civ. 1ere, 20 December 1993; Svea Court of Appeals, 19 December 2019, Case No. T 7929-17. Even other Model Law jurisdictions may not necessarily follow Singapore's narrow understanding of separability under Article 16(1) of the Model Law, as it could be argued that the phrase "For that purpose" does not necessarily exclude the possibility of separability having application for certain other purposes, such as determining the governing law of the arbitration agreement: see *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) at 76.

of contract law (including on transfer of contractual rights and obligations). But the French Court of Cassation found that, on the French approach of applying substantive rules to determine the parties' common intention, the holding company was bound by the arbitration agreement.[473]

B. *England and Wales's statutory choice of law approach*

21 The Law Commission recommended the enactment of a new statutory rule for the law of England and Wales that, unless the parties specify a governing law within the arbitration agreement itself, the arbitration agreement will be governed by the law of the seat. This departs from the existing English Common Law Approach set out by the UK Supreme Court in *Enka v OOO Insurance*[474] in two ways:

(a) **Different starting point:**[475] The starting point is now that the governing law of the arbitration agreement will be aligned with the law of the seat (as opposed to the law governing the main contract under *Enka*). This replaces the "main contract approach" under the English Common Law Approach with a statutory "seat approach".

(b) **Starting point only displaced by express choice in the arbitration agreement:**[476] The starting point in favour of the law of the seat can only be displaced if the arbitration agreement itself contains a choice of governing law. There is no room for an implied choice of law for the arbitration agreement in the analysis. A choice of governing law in the main contract will not be sufficient evidence that the parties intended that same law to govern the arbitration agreement. A choice of law for the arbitration agreement must be expressed within the arbitration agreement itself.

22 The Law Commission's recommendation was put into the draft Arbitration Bill that was introduced into the House of Lords on 21 November 2023.[477] In the latest draft of

[473] *Kabab-Ji SAL v Kout Food Group*, *supra* n 292; cf. *Kout Food Group v Kabab-Ji SAL*, *supra* n 452.

[474] *Enka v OOO Insurance*, *supra* n 280.

[475] This is the proposed section 6A(1) to be incorporated into the amended EAA.

[476] This is the proposed section 6A(2) to be incorporated into the amended EAA.

[477] Arbitration Bill [HL] (HL Bill 7, as introduced in the House of Lords on 21 November 2023) (UK), cl 1.

the Arbitration Bill (as amended on 27 March 2024), a new section 6A would be inserted into the EAA:[478]

6A Law applicable to arbitration agreement

(1) The law applicable to an arbitration agreement is—

(a) the law that the parties expressly agree applies to the arbitration agreement, or

(b) where no such agreement is made, the law of the seat of the arbitration in question.

(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that that law also applies to the arbitration agreement.

23 In the Law Commission's view, England's competitiveness as a safe seat for international arbitrations would be furthered by its proposed statutory choice of law rules which, principally, would (a) avoid the application of foreign law which may not be as generous towards arbitration as English law; and (b) is simpler and gives less room for disputes to arise.

24 A brief background to the Law Commission's proposed reform provides helpful context.

(a) An *Enka* reform was not in the Law Commission's initial shortlisted areas for statutory reform. In its First Consultation Paper released in September 2022,[479] the Law Commission noted the suggestion from some stakeholders but indicated that it had not come around to any need for statutory intervention.

(b) After the First Consultation Paper was released, a substantial number of responses came forward in favour of an *Enka* reform, including many

[478] HL Bill 59, *supra* n 282, cl 1(2). The draft Bill will be further examined by the House of Lords in the Report Stage, which is scheduled to begin on 12 June 2024.

[479] UK Consultation Paper, *supra* n 358, at [11.8]-[11.12].

practitioners active in international arbitration in England.[480] Notably even Lord Hamblen and Lord Leggatt, who gave the majority judgment of the UK Supreme Court in *Enka v OOO Insurance*, suggested legislation to ensure that English law will govern all agreements to arbitrate in England.[481]

(c) When the Law Commission issued its Second Consultation Paper in March 2023, the Law Commission proposed a new statutory rule which would effectively overrule the existing "main contract approach" under *Enka* with a new "seat approach".[482] This again prompted many public responses, many favourably, though not also without some scepticism.[483] The proposed new statutory rule came to be finalised in the Law Commission's Final Report.

25 The Law Commission broadly referred to three key justifications for its proposed reform.

26 **First**, the *Enka* approach unduly opened the door for a clear choice of English arbitration to be negated or frustrated by an implied choice of foreign law. This was arguably the Law Commission's principal consideration in favour of reform.

27 The Law Commission reasoned that, under *Enka*, an English arbitration clause in a foreign law contract would, more likely than not, be governed by that same foreign law rather than English law. This opens the door for a party to prevent an arbitration from being conducted by invoking foreign law rules which may be less supportive towards

[480] E.g., United Kingdom, Law Commission, *Review of the Arbitration Act 1996: Responses to First Consultation Paper* ("**UK Responses to First Consultation Paper**"); UK Responses to First Consultation Paper at 24-26 (Response by Allen & Overy LLP); UK Responses to First Consultation Paper at 109-116 (Response by Members of Brick Court Chambers together with Lord Mance, Sir Bernard Rix & Ricky Diwan KC); UK Responses to First Consultation Paper at 229-230 (Response by Chartered Institute of Arbitrators); UK Responses to First Consultation Paper at 409-413 (Response by judges of the Business & Property Courts). Cf. UK Responses to First Consultation Paper at 636-640 (Response by Linklaters LLP).

[481] UK Responses to First Consultation Paper, *id*, at 486-487 (Response by Lord Hamblen and Lord Leggatt).

[482] UK Second Consultation Paper, *supra* n 313, at Chapter 2.

[483] E.g., UK Responses to Second Consultation Paper, *supra* n 319, at 71-73 (Response by Professor Adrian Briggs); UK Responses to Second Consultation Paper, *supra* n 319, at 103-105 (Response by Clifford Chance LLP); UK Responses to Second Consultation Paper, *supra* n 319, at 141-148 (Response by Professor Andrew Dickinson); UK Responses to Second Consultation Paper, *supra* n 319, at 243-248 (Response by Professor Alex Mills); UK Responses to Second Consultation Paper, *supra* n 319, at 262-264 (Pinsent Masons LLP).

arbitration than English law, particularly on the issues of arbitrability, scope and separability.[484]

(a) **Arbitrability** (whether a particular dispute can be resolved by arbitration): The Law Commission opined that English law tends to accept more types of disputes that can be arbitrated than other foreign laws might. Parties to a foreign law contract may select arbitration in England as their preferred forum for resolving their disputes, but yet are prevented by foreign law from resolving their dispute in that agreed forum of arbitration.[485]

(b) **Scope** (whether a particular dispute falls within the arbitration agreement): The Law Commission opined that English law is generous when it comes to the scope of an arbitration agreement and tends to presume that the parties wanted all aspects of their dispute to be settled through one arbitration, rather than having different aspects resolved through different processes.[486] It would be undesirable if foreign law were to deprive the parties their ability to arbitrate all aspects of their dispute and to do so in England.[487]

(c) **Separability** (whether the arbitration clause survives any invalidity of the main contract, enabling arbitration to resolve disputes about such invalidity): The Law Commission opined that separability was an importance principle of English law which ensures that the arbitration clause survives any alleged invalidity of the main contract. This enables arbitration to resolve disputes about such invalidity, rather than allowing a party to scuttle an arbitration by raising allegation of invalidity.[488]

28 Therefore, the Law Commission recommended a default statutory rule in favour of the law of the seat, which would see more English-seated arbitration agreements governed

[484] UK Final Report and Bill, *supra* n 279, at [12.17]-[12.18]; UK Second Consultation Paper, *supra* n 313 at [2.52]-[2.62].

[485] UK Second Consultation Paper, *id*, at [2.57]-[2.58].

[486] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

[487] UK Second Consultation Paper, *supra* n 313, at [2.59].

[488] UK Second Consultation Paper, *id*, at [2.54]-[2.56].

by English law. This would also mean that the English courts would no longer need to rely on a validation principle to uphold English-seated arbitrations.[489]

29 **Second**, the *Enka* approach is too legally complex and unpredictable in its application to the facts, which would only encourage more skirmishes on a threshold issue of governing law and divert energy from the real dispute.[490] The Law Commission observed that complexity and unpredictability was the principal reason given by consultees in favour of reform.

30 For one, the exercise of ascertaining whether an implied choice of law had been made can be complex.

31 A more specific, and apparently significant, source of complexity was identified by the Law Commission in section 4(5) of the EAA.[491]

(a) Section 4(5) acknowledges that some provisions of the EAA are non-mandatory and hence provides that parties can choose some other law (namely other than the law of England and Wales) in respect of a matter that would otherwise be governed by a non-mandatory provision of the EAA.

(b) Since *Enka* meant that English-seated arbitration clauses in foreign law contracts would likely be governed by foreign law, disputes may arise between the parties over whether the implied choice of foreign law for the arbitration agreement has displaced a particular provision of the EAA. This raises complex questions of whether the relevant provision of the Act is procedural (therefore mandatory) or substantive (therefore non-mandatory). This may engender unnecessary complex disputes.

(c) Separability was cited as a specific example. The English doctrine of separability is enshrined in section 7 of the EAA. It normally applies to all English-seated arbitration agreements, as part of the *lex arbitri* (the law of the arbitration) in England. However, the UK Supreme Court in *Enka* commented

[489] UK Final Report and Bill, *supra* n 279, at [12.54]-[12.59].

[490] UK Final Report and Bill, *id*, at [12.19]-[12.20] and [12.22] and [12.74].

[491] UK Final Report and Bill, *id*, at [12.19]; UK Second Consultation Paper, *supra* n 313 at [2.32]-[2.36].

that section 7 is a non-mandatory provision and can be displaced if the parties choose foreign law to govern their arbitration agreement.[492] This result is undesirable because the English doctrine of separability was developed to uphold agreements to arbitrate in England even in where the main contract is invalid, yet it can be ousted by foreign law even though the parties have agreed to arbitrate in England.

32 Given the complexities of the English Common Law Approach, the Law Commission reasoned that its default statutory rule in favour of the law of the seat had the advantage of simplicity and certainty and would reduce the risk of satellite argument over the threshold issue of governing law. Further, any doubt over which law governs the main contract would not infect the question of which law governs the arbitration agreement.[493]

33 **Third**, a default rule that aligns the governing law of the arbitration agreement with the law of the seat would be in line with the ordinary expectations of commercial parties. The Law Commission noted varying opinions on what contracting parties would ordinarily expect in relation to the governing law of their arbitration agreement and acknowledged that no singular expectation could be attributed to all arbitrating parties.[494] Nevertheless, the Law Commission concluded that a clear statutory rule would at least help to set the parties' expectations when negotiating commercial contracts.[495]

34 The Law Commission also addressed three key points made by some consultees in critique of the proposed reform.

35 **First**, some criticised that the Law Commission's proposal would not allow for an implied choice of governing law for the arbitration agreement. It also consciously ousts

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[492] *Enka v OOO Insurance*, *supra* n 280, at [73]-[93]; overruling the earlier position expressed in *C v D* [2007] EWCA Civ 1282 and *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm) that section 4(5) only applies where parties have specifically excluded a particular non-mandatory provision of the EAA.

[493] UK Final Report and Bill, *supra* n 279, at [12.74]-[12.75].

[494] UK Final Report and Bill, *id*, at [12.41]-[12.43].

[495] UK Final Report and Bill, *id*, at [12.44].

any possible argument that a choice of governing law for the main contract could be construed as a choice of governing law for the arbitration agreement. The new English statutory rule would only recognise a choice of governing law that is expressed within the arbitration agreement itself.

36 The Law Commission maintained that the elimination of implied choice was not inconsistent with party autonomy since contracting parties can still make a choice of governing law in express terms in the arbitration agreement if they so wished. In addition, a statutory default rule in favour of the law of the seat also gives effect to party autonomy by ensuring that their express intention to arbitrate is not undermined by an implied choice of foreign law which may result in a less generous approach to the arbitration agreement.[496]

37 **Second**, some questioned how the Law Commission's proposal would deal with arbitration agreements without a clear choice of seat, since the arbitration agreement must have a governing law from the outset even if the seat of arbitration has not been designated.

38 The Law Commission suggested in cases where the seat has not been designated, the governing law of the arbitration agreement can be initially determined according to the English Common Law Approach viz. *Enka*. But when the seat of arbitration is designated (whether by the parties, the arbitral tribunal, or other person or authority), this could trigger a retrospective change to the governing law of the arbitration agreement, such that the arbitration agreement is now governed by the law of the seat under the statutory default rule. Nevertheless, the Law Commission opined that such cases would be rare because if there was a dispute over the governing law of the arbitration agreement, the seat would have been designated by the time the governing law dispute came before the court (or tribunal) for determination.[497]

39 **Third**, some questioned whether the default statutory rule in favour of the law of the seat should apply to all arbitrations with any seat of arbitration, or only to arbitrations seated in England and Wales. The Law Commission's proposed reform takes the former

[496] UK Final Report and Bill, *id*, at [12.45]-[12.53].

[497] UK Final Report and Bill, *id*, at [12.65]-[12.66].

approach. The Law Commission explained that this potentially captures and resolves a wider range of circumstances.[498]

[498] UK Final Report and Bill, *id*, at [12.67]-[12.71].

IV. Annex D – Recommended amendments to IAA (Issue 8)

Awards made on different issues and summary determination

19A.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may:

(a) make more than one award at different points in time during the arbitral proceedings on different aspects of the matters to be determined; or

(b) make one or more awards on a summary basis.

(2) The arbitral tribunal may, in particular, make an award relating to —

(a) an issue affecting a claim or defence; or

(b) a part only or the whole of a claim, counterclaim, cross-claim or defence, which is submitted to it for decision.

(3) If the arbitral tribunal makes an award under this section, it must specify in its award, the issue, claim or defence, which is the subject matter of the award.

(4) For the purposes of sub-section (1), an arbitral tribunal makes an award on a summary basis in relation to an issue, claim or defence if the tribunal has exercised its powers under Article 19 of the Model Law with a view to expediting the proceedings on that issue, claim or defence. [underline added]

V. Annex E – Focus Group Participants

SIDRA is deeply grateful to the following focus group participants, comprising arbitrators, institutions, practitioners and in-house counsel, who provided feedback on a draft of this Report (in alphabetical order of their last names):

i. Amira Budiyano

ii. Chong Yee Leong

iii. Timothy Cooke

iv. Delphine Ho

v. Koh Swee Yen SC

vi. Jayne Kuriakose

vii. Eugene Leong

viii. Colin Liew

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END

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