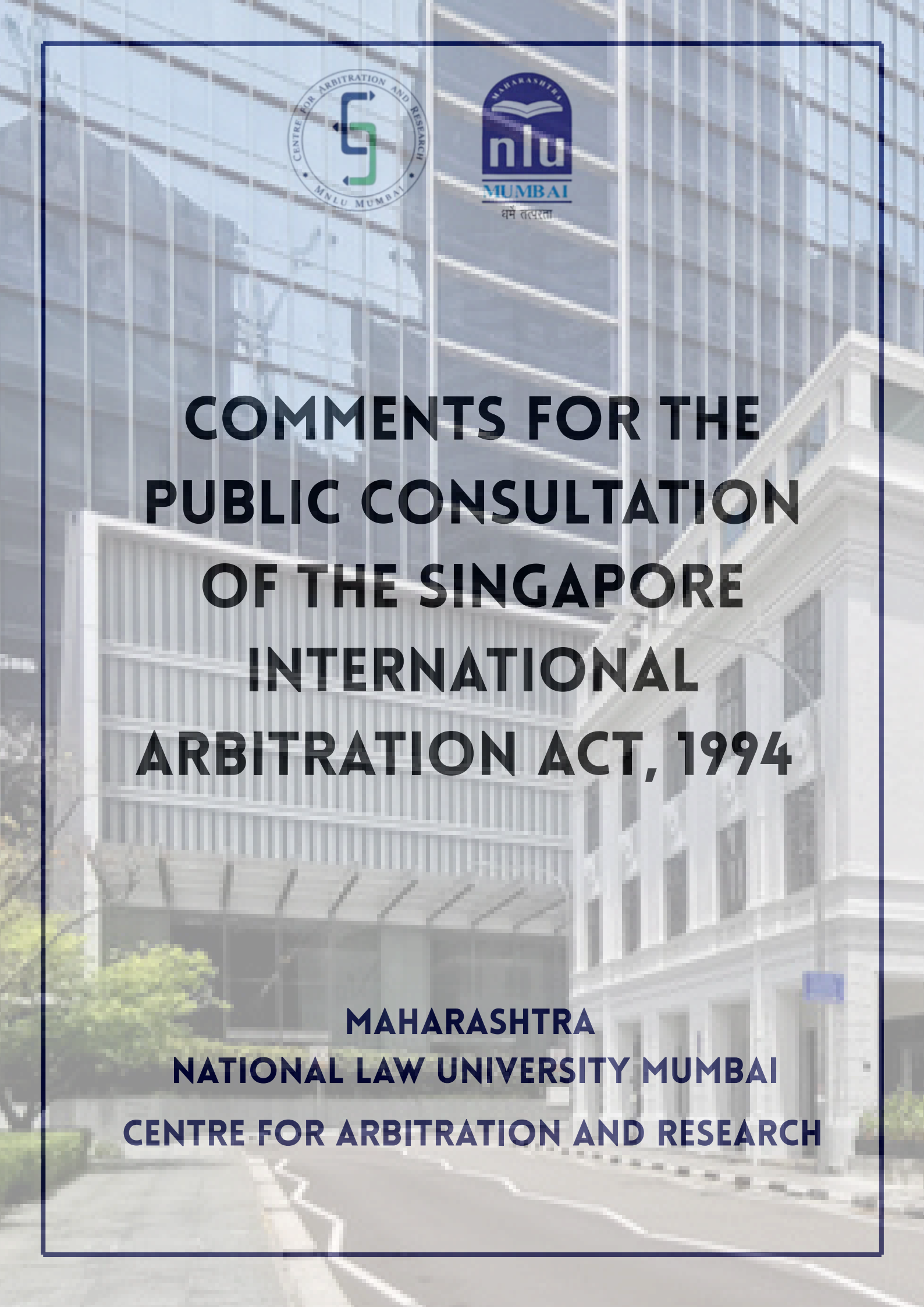

COMMENTS FOR THE PUBLIC CONSULTATION OF THE SINGAPORE INTERNATIONAL ARBITRATION ACT, 1994

MAHARASHTRA
NATIONAL LAW UNIVERSITY MUMBAI
CENTRE FOR ARBITRATION AND RESEARCH

MAHARASHTRA NATIONAL LAW UNIVERSITY

Maharashtra National Law University Mumbai ("**MNLU Mumbai**") is a premier law university situated in Mumbai, India. MNLU Mumbai is a university set up by the Government of Maharashtra with a vision to become a world-class law university committed to foster an environment of excellence in research, scholarship, education, and justice.' The motto of MNLU Mumbai is *Dharme Tatparta* i.e. 'Preparedness to Uphold Dharma'.

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With its vision and mission to impart justice education, several research centers have been established by MNLU Mumbai. Under the able guidance of the Chancellor, Justice B.R. Gavai, Judge of the Supreme Court of India, Vice-Chancellor Prof. (Dr.) Dilip Ukey and Registrar Dr. Pratapsinh Salunke, the University continues to set benchmarks for legal education across the country.

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CENTRE FOR ARBITRATION AND RESEARCH

MNLU Mumbai's Centre for Arbitration and Research ("**CAR**") seeks to carry out research in arbitration law and practice, contribute to policy discussion, and provide a platform for the training of arbitration professionals. CAR wishes to emphasise research and training in contemporary and emerging issues of arbitration law, specifically in niche practice areas, often unexplored by academia, but highly relevant for practitioners, such as construction arbitration, maritime arbitration, investment arbitration, sports arbitration, etc. CAR was founded under the patronage of Vice-Chancellor Prof. (Dr.) Dilip Ukey. CAR's Faculty Coordinator is Chirag Balyan, Assistant Professor of Law at MNLU Mumbai.

See more at http://mnlumumbai.edu.in/car.php

INTRODUCTION AND ACKNOWLEDGEMENT

The Centre for Arbitration and Research (CAR) at Maharashtra National Law University Mumbai (MNLU Mumbai) is honoured to provide its detailed comments on the Public Consultation of the Singapore International Arbitration Act, 1994. We are grateful to the Ministry of Law of Singapore for opening this consultation process and for encouraging stakeholder participation on matters of vital importance to the international arbitration community.

The present consultation is timely and significant, as it addresses several key areas within the Singapore International Arbitration Act that have far-reaching implications for the credibility, finality, and integrity of arbitration proceedings. Our responses draw upon comparative jurisprudence, doctrinal analysis, and emerging international best practices. While we broadly agree with many of the proposals advanced by the Ministry and the SIDRA Report, we have identified certain areas where we believe reform must be approached with caution or additional nuance.

This document represents the collective efforts of our faculty and student research team and reflects MNLU Mumbai's continuing engagement with contemporary issues in international arbitration law and reform.

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The CAR agrees with the recommendation suggested by SIDRA. There must be a statutory leave requirement for appeals to the Court of Appeal arising from a High Court decision in a setting aside application.

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The CAR does not recommend shortening of the three-month time limit for setting aside of applications but we agree with giving the courts discretion to extend time limit to file an application under section 24(a) of the International Arbitration Act ("**IAA**").

V. Issue 5: Whether a right of appeal on questions of law is desirable?

The CAR agrees with the inclusion of all the provisions as provided in the consultation paper and the recommendations of the SIDRA Report except for the inclusion of questions of foreign law as questions of law. We have also additionally raised a concern related to the applicability of confidentiality measures to the appeals related to questions of law.

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

The CAR recommends the inclusion of a statutory law in the IAA to decide the governing law in absence of an explicit governing law clause. This law would be the law of the seat decided in the agreement. If there is no explicit clause determine the law of the seat, the law would be the seat as determined by the arbitral institution under the institutional rules so designated or the arbitral tribunal so constituted. Further, in absence of an explicit law of the seat clause and prior to the determination of the law of the seat by the institutional rules or arbitral tribunal, the court must retain the power to determine the seat if necessary.

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

The CAR recommends that in cases of a challenge on procedural irregularities, a limited review must be conducted by the court and in cases of a challenge on substantive irregularities, a de novo hearing may be conducted by the court. Further, with regards to the introduction of new arguments/evidence, we recommend that courts should be given discretion and apply rules of evidence as per the existing case laws. A specific statutory provision is not recommended.

VIII. Issue 8: Whether the summary disposal powers of arbitral tribunals should be set out in the IAA?

The CAR recommends that a provision is expressly recognising the arbitral tribunal's power to summarily dispose any issue is desirable. However, we argue that the provision must include a threshold for the use of summary powers by the arbitral tribunal.

ISSUE 1 – WHETHER TO CONFER THE POWER TO MAKE COST ORDERS FOR ARBITRAL PROCEEDINGS FOLLOWING A SUCCESSFUL SETTING ASIDE OF AN AWARD ON THE COURT?

1. Whether legislative amendments should be introduced to give Singapore courts the discretion to:

    a. make an order in respect of costs of the arbitration proceedings following a successful set-aside application; and / or

    b. remit the issue of costs to the arbitral tribunal as an exceptional remedy when:

    i. all of the parties to the award agree to the remission; and

    ii. it is in the interest of justice to do so.

RECOMMENDATION

2. We agree with the recommendation provided by SIDRA. There should be a statutory power for courts to make cost orders for arbitral proceedings following a successful setting aside of an award.

ANALYSIS

3. There are numerous jurisdictions that have explicit written provisions in their statutory law that empower arbitral tribunals to assess the issue of costs. This includes Section 74 of the Hong Kong Arbitration Ordinance, paragraph 6(1)(a) of Schedule 2 to the New Zealand Arbitration Act and Section 31A of the Indian Arbitration and Conciliation Act 1996.[1]

4. Under current Singapore law, courts do not have statutory authority to make orders on costs for arbitral proceedings following a successful setting aside of an award. While Section 10(7) of the IAA allows the court to award costs in jurisdictional challenges,[2] neither Section 24 of the IAA nor Article 34 of the UNCITRAL Model Law - applicable to setting aside applications - contain any similar provision.[3] This gap was noted by the Court of Appeal in *CBX v CBZ*, where the court observed that the absence of curial power to deal with costs, especially when part of the arbitral award and its costs determination are set aside, may lead to injustice.[4]

[1] Arbitration Ordinance, (Cap. 609) § 57 (H.K.); Arbitration Act 1996, sch. 2 para. 6(1) (N.Z.); Section §31, Arbitration and Conciliation Act, No. 26, Acts of Parliament, 1996 (India).
[2] International Arbitration Act, (Sing.), § 10(7).
[3] UNCITRAL Model Law on International Commercial Arbitration, art. 34.
[4] CBX v CBZ [2022] 1 SLR 47.

5. In both the SIDRA and SAL reports, a strong case is made for reforming Singapore's arbitration framework to permit courts to make costs orders relating to the arbitral proceedings after an award is successfully set aside. The SIDRA report thus recommends amending the IAA to provide courts with discretion to either apportion costs or remit the matter to the tribunal under exceptional conditions.[5] The SAL 2019 report reinforces this with a detailed legislative proposal for inserting a new provision in Section 24 of the IAA, modelled on Section 10(7), to allow cost orders against any party, including modifying or replacing the tribunal's earlier costs decision.[6]

6. While in English law, there is no statutory power provided to courts on the matter, English courts have creatively used remittal powers under sections 68(3) and 69(7) to refer the issue of costs back to the tribunal where partial setting aside has occurred.[7] However, Singapore courts lack equivalent remittal powers post-setting aside under Article 34 of the Model Law.[8] Hence, the statutory power for courts to make orders on costs after an award is set aside, is necessary.

7. We agree with the proposed reforms for the following reasons. **First**, it is only fair to the parties who successfully challenge an invalid award that they should be able to recover their arbitration costs. In *CBX v CBZ*, the court noted that the tribunal's costs order was influenced by aspects of the award that were later set aside. Denying courts the ability to remedy that discrepancy created injustice for both parties.[9]

8. **Second**, enabling courts to intervene doesn't undermine party autonomy, as the power would only apply in exceptional scenarios where the tribunal is jurisdictionally incompetent. This narrow discretionary power respects arbitral independence while protecting litigants.

9. **Third**, the proposed reform would bring clarity and consistency to Singapore's legal regime, especially in light of Section 10(7), which allows courts to allocate costs in

[5] Singapore International Dispute Resolution Academy (SIDRA), *Issue I Report on Whether to Confer on the Court the Power to Make Costs Orders Following a Successful Setting Aside*, at ¶ 4 (2024).
[6] Law Reform Comm., Singapore Acad. of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings*, (2019).
[7] Arbitration Act 1996, §§ 68, 69 (UK).
[8] *Supra* note 3.
[9] *Supra* note 4.

jurisdictional challenges.[10] Extending this principle to Section 24 proceeding is both logical and necessary. As the SAL report notes, arbitrating parties should not bear the brunt of defective proceedings without a safety valve.[11]

10. Thus, we recommend amendment of Section 24 of the IAA to confer discretionary power upon courts to make or vary costs orders following the successful setting aside of an arbitral award. The court's discretion should be limited to prevent abuse and should be informed by guiding principles, such as whether the setting aside arose due to fraud, lack of jurisdiction, or breach of natural justice. This balances fairness, party autonomy, and judicial restraint - aligning Singapore with evolving best practices in international arbitration law.

[10] *Supra* note 2.
[11] Law Reform Comm., Singapore Acad. of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings*, (2019).

ISSUE 2 - WHETHER SEPARATE COST PRINCIPLES SHOULD BE APPLIED IN RESPECT OF UNSUCCESSFUL SETTING ASIDE APPLICATIONS?

11. Whether there is anecdotal or empirical evidence of applicants using setting aside applications to drag out the resolution of a matter and / or the enforcement of an arbitral award?

12. Whether there is a need to adopt separate cost principles for unsuccessful setting aside applications to disincentivise frivolous and unmeritorious setting aside applications, and if so, whether this should be on an indemnity basis or a different framework?

RECOMMENDATIONS

13. A balanced, tiered cost framework should be adopted for setting aside applications, whereby standard costs are awarded by default and indemnity costs are imposed only in cases involving frivolous, abusive, or clearly unmeritorious challenges. Such an approach would effectively deter tactical misuse while safeguarding access to justice for parties with legitimate grounds to challenge arbitral awards.

ANALYSIS

14. The Singapore court in the of *BTN v BTP*[12] concluded that the court will award the costs according to the standard basis and indemnity cost allocation will only be done where there are exceptional circumstances which will encourage the indemnity cost allocation. The standard cost allocation refers to when the court allots the costs to the parties on a reasonable basis and often this does not include the whole cost incurred by the successful party.[13] The court also said that in exceptional circumstances the indemnity basis of allocation can be used. This method of allocation involves the losing party to bear the cost of the successful party. This is only used in exceptional circumstances as mentioned below.
"In the course of its decision, the Court also restated the following categories of conduct that may provide good reason to order indemnity costs:

[12] BTN v BTP [2021] SGHC 38.
[13] Standard v. Indemnity Costs in an Unsuccessful Application to Set Aside an Arbitral Award: A Singapore Perspective-Kluwer Arbitration Blog, Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2021/05/02/standard-v-indemnity-costs-in-an-unsuccessful-application-to-set-aside-an-arbitral-award-a-singapore-perspective/ (last visited Apr. 13, 2025).

- *where the action is brought in bad faith, as a means of oppression or for other improper purposes;*
- *where the action is speculative, hypothetical or clearly without basis;*
- *where a party's conduct in course of proceedings is dishonest, abusive or improper; or*
- *where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process."*[14]

15. However, the Hong Kong Court of Appeals in the case of *A v R*[15] have held that the indemnity principle should be upheld regardless of other circumstances. Though this approach is in line with the pro-enforcement bias in international commercial arbitration, it risks putting fear in the minds of the individuals for not bringing up meritorious settling aside application before the courts.

16. The divergence between Singapore and Hong Kong's default cost rules in relation to unsuccessful set-aside applications or resistance to enforcement of arbitral awards is both doctrinally significant and practically impactful. Singapore adopts a measured and discretionary approach, reserving indemnity costs for exceptional circumstances. Conversely, Hong Kong presumes that indemnity costs should follow any unsuccessful attempt to set aside or resist enforcement of an award, shifting the burden onto the unsuccessful party to prove "special circumstances" to escape a full cost burden.

17. In Singapore, where standard costs are the default, the burden of persuasion rests on the prevailing party, who must demonstrate that the losing party's conduct justifies a deviation from the norm.[16] This preserves the principle that access to the courts should not be unduly penalised, particularly in a system where challenges may raise genuine but difficult questions of law or procedural fairness.[17] It also allows the judiciary to differentiate between abusive, tactical challenges and good faith applications, avoiding over-deterrence

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[14] *What are the cost implications of challenging an arbitral award through the courts? - NZIAC Website*, NZIAC Website, https://nziac.com/what-are-the-cost-implications-of-challenging-an-arbitral-award-through-the-courts/ (last visited Apr. 13, 2025).
[15] A v R [2010] 3 HKC 67.
[16] Standard v. Indemnity Costs in an Unsuccessful Application to Set Aside an Arbitral Award: A Singapore Perspective-Kluwer Arbitration Blog, Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2021/05/02/standard-v-indemnity-costs-in-an-unsuccessful-application-to-set-aside-an-arbitral-award-a-singapore-perspective/ (last visited Apr. 13, 2025).
[17] LEONARDO DE OLIVEIRA, ACCESS TO JUSTICE AND THE RIGHT TO A HEARING IN ARBITRATION, THE ICCA REPORTS NO. 10, (2022).

that could undermine procedural justice. As reaffirmed in *BTN v BTP*, a mere lack of success does not equate to misconduct; and the discretion to award indemnity costs must be exercised judiciously, with regard to the entire procedural conduct of the parties involved.[18]

18. On the other hand, Hong Kong's default rule in favour of indemnity costs operates as a strong policy signal of the jurisdiction's pro-enforcement stance towards arbitral awards. This approach aligns with the objectives of the Civil Justice Reform (2009), which emphasises procedural efficiency and discourages abuse of process.[19] The logic here is twofold: first, parties who agree to arbitration should honour the resulting award unless there are compelling legal grounds to challenge it; and second, imposing indemnity costs by default on failed challenges creates a financial disincentive against bringing unmeritorious claims, potentially deterring frivolous delay tactics and promoting finality.[20]

19. However, this approach, though commendable in its efficiency goals, may overcorrect and risk penalising legitimate legal challenges. By reversing the presumption, it potentially suppresses nuanced or good faith legal arguments, especially in complex or novel issues where the line between a weak case and an abusive one is not always clear. While the threat of indemnity costs in Hong Kong can successfully discourage baseless or frivolous challenges, it may also have the unintended consequence of deterring well-founded yet complex applications. This is particularly true for smaller or financially constrained parties who may lack the resources for the heightened financial risk. As a result, Hong Kong's cost regime tends to favour enforcement efficiency at the expense of procedural justice. By placing greater emphasis on deterring challenges rather than facilitating a balanced post-award review, the system may risk alienating stakeholders who expect the arbitral process to include a fair and accessible mechanism for contesting awards when justified.

20. Critically, the default rule also determines the burden of proof in cost determinations, with broader implications for judicial reasoning. In jurisdictions like Singapore and New

[18] *Supra* note 12.
[19] Weixia Gu, Civil Justice Reform in Hong Kong: Challenges and Opportunities for Development of Alternative Dispute Resolution (2010). Hong Kong Law Journal, Vol. 40, Part 1, pp. 43-64, 2010, University of Hong Kong Faculty of Law Research Paper No. 2013/008, Available at SSRN: https://ssrn.com/abstract=2196706.
[20] Aloke Ray, *A v R: Enforcement at any Cost(s)? - Kluwer Arbitration Blog*, KLUWER ARBITRATION BLOG (2009), https://arbitrationblog.kluwerarbitration.com/2009/11/11/a-v-r-enforcement-at-any-costs/.

Zealand, where standard costs are presumed, the successful party bears the onus of proving exceptional circumstances, such as bad faith, improper motives, or vexatious conduct, to secure indemnity costs.[21] This ensures that indemnity awards remain a targeted remedy, deployed only in response to clearly abusive or unjustified litigation conduct. By contrast, Hong Kong's approach places the burden on the losing party, compelling them to prove why indemnity costs should *not* be awarded. This reversal of presumption significantly alters the risk landscape for any party contemplating a set-aside application and reflects preference for upholding awards rather than scrutinising their legal validity.

21. Importantly, this dichotomy also reflects broader differences in legal culture and policy orientation. Singapore's courts, like those in the UK and New Zealand, appear to value judicial restraint, access to justice, and procedural integrity as core elements of their arbitration policy. This is consistent with the UNCITRAL Model Law framework, which encourages deference to arbitral finality while leaving enforcement and cost questions to national procedural rules. Singapore's approach, in turn, preserves the Model Law's balance between respect for arbitral autonomy and minimal judicial intervention.

22. Moreover, while deterrence of frivolous litigation is often cited as a justification for Hong Kong's model, there is little empirical evidence to suggest that indemnity costs alone have a uniquely effective deterrent impact. Courts in Singapore and New Zealand, which do not apply such a blanket presumption, have shown no systemic issues of delay or abuse in set-aside proceedings. Instead, their ability to penalise truly egregious conduct on a discretionary basis illustrates that targeted cost sanctions remain available and effective, without the downsides of an overly rigid presumption.[22]

23. From a jurisprudential perspective, Singapore's approach fosters greater predictability and fairness in cost allocation. The nuanced framework enables the judiciary to tailor cost orders in a way that reflects the overall integrity of the litigation process, not merely the result. This upholds the integrity of arbitration by ensuring that parties are not penalised solely for seeking legal redress, especially where the law is unsettled or interpretation-

[21] DECISIONS ON COSTS IN INTERNATIONAL ARBITRATION, ICC DISPUTE RESOLUTION BULLETIN 2015,(2015), https://iccwbo.org/wp-content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf.
[22] Napier City Council v H2O Management (Napier) Ltd [2020] NZHC 2481.

dependent. It strikes a delicate balance between deterring abuse and protecting the right to challenge awards, aligns with broader international arbitration norms under the Model Law, and ensures that cost consequences are grounded in conduct rather than outcome alone.

ISSUE 3: WHETHER TO INTRODUCE A LEAVE REQUIREMENT FOR APPEALS TO THE COURT OF APPEAL ARISING FROM A HIGH COURT DECISION IN A SETTING ASIDE APPLICATION

24. Whether the IAA should be amended:

    a. To require parties to obtain permission to appeal against a decision of the High Court on both setting aside and resisting enforcement applications (whether successful or otherwise) to prevent frivolous, unmeritorious, or vexatious appeals;

    b. That the application for permission should be heard by the High Court or the Court of Appeal; and

    c. For any such application to be decided without hearing as a default, unless the Court determines otherwise.

RECOMMENDATION

25. We agree with the recommendation suggested by SIDRA. There must be a statutory leave requirement for appeals to the Court of Appeal arising from a High Court decision in a setting aside application.

ANALYSIS

26. An aggrieved party may wish to appeal a high courts' decision to set aside an arbitral award. Such appeals may turn out to be vexatious and lacking sufficient merit, merely placed by the party to attempt a favourable decision. To ensure that only meritorious appeals are permitted, a leave requirement may be put in place. This system has been followed in both Hong Kong and Singapore. The previous Review of the Singapore International Arbitration Act in 2024 believed that introducing a leave requirement would be useful. We hold the same stance as well.

27. In Hong Kong, section 81(4) and section 83(3) of the Hong Kong Arbitration Ordinance both mention that the leave to appeal from the first instance court is a requisite condition.[23] The same view has also been held by the Hong Kong General Chamber of Commerce.[24]

[23] HKAO, §§ 81(4), 84(3).
[24] 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) [70]–[75].

Hong Kong grants leave applications for certain factors. In the case of *Maeda Kensetsu Kogyo Kabushiki Kaisha v Bauer Hong Kong Ltd*[25] The court granted Maeda leave to appeal on two of the questions of law, as it considered these questions to be of general importance to the construction industry and that the arbitrator's decision was open to serious doubt, these being the conditions as set out under section 6(4)(c)(ii)[26]

28. In *CIC v Wu and Others,*[27] the Court of First Instance declined to grant leave to appeal against its earlier decision refusing enforcement of an arbitral award as the appeal lacked a reasonable prospect of success. The Honourable Justice Mimmie Chan, in delivering the judgment, put forth the applicable legal framework governing the Court's discretion in determining applications for leave to appeal. Four key principles were emphasised:

    (i) Discretionary Nature of the Decision: The refusal to enforce the arbitral award constituted an exercise of judicial discretion. This process necessarily involved a balancing of competing considerations and an evaluative assessment of the relevant facts and legal issues.

    (ii) Limited Grounds for Appellate Intervention: Leave to appeal would not be granted unless the applicant could demonstrate either an error of law or fact, or that the judge's exercise of discretion was plainly wrong. Mere disagreement with the outcome would not suffice.

    (iii) Proper Context of Judicial Commentary: The Court underscored the necessity of construing in context the oft-cited dictum from *China International Fund Ltd v Dennis Lau & Another,*[28] where the Court of Appeal noted that the threshold of a "reasonable prospect of success" is "not a very high threshold." This observation must be read alongside the Court of Appeal's broader reasoning, which emphasised the finality of arbitral awards and the advantage enjoyed by the trial judge in having greater familiarity with the factual matrix and submissions of the parties.

[25] [2019] HKCFI 1006.
[26] Jennifer Wu and Cynthia Chan, *'Appealing or challenging an arbitral award in Hong Kong on questions of law or serious irregularity'* (Out-Law, 4 January 2023) https://www.pinsentmasons.com/out-law/analysis/appealing-or-challenging-an-arbitral-award-in-hong-kong-on-questions-of-law-or-serious-irregularity
[27] [2023] HKCFI 1055
[28] [2015] 4 HKLRD 609.

(iv) Deference to the First Instance Judge's Discretion: The appellate court would not interfere with the first instance judge's exercise of discretion so long as the decision fell within the range of permissible judicial outcomes. That is, interference is unwarranted if the judgment lies within the bounds upon which reasonable judges might legitimately differ, even if the appellate court has a differing opinion.

29. Applying these principles, the Court found that the proposed grounds of appeal failed to surmount the requisite threshold. The Court was not satisfied that there existed any reasonable prospect that the appeal would succeed. Accordingly, leave to appeal was refused.[29]

30. Another principle has also been upheld in *Chun Wo Construction & Engineering Co Ltd v Hong Kong Housing Authority,*[30] where the Court of Appeal upheld the principle that granting leave to appeal requires showing that the intended appeal is reasonably arguable and has merit. It reaffirmed that questions must be of great general or public importance for further appeals, such as to the Court of Final Appeal.

31. Hong Kong's approach reflects the *pro-arbitration* ethos, which is embedded in the UNCITRAL Model Law, which limits court intervention to exceptional circumstances. This restraint aligns with global trends favouring finality, as excessive appeals undermine arbitration's core advantage: resolution speed. Leave applications ensure that excessive appeals are prevented.

32. The United Kingdom adopts a similarly cautious approach in granting leave to appeal arbitral awards, with a well-defined mechanism to challenge such awards. UK courts apply a stringent standard when granting leave to appeal an arbitral award. Under Section 69(3)(c) of the Arbitration Act 1996, leave will only be granted if the court is satisfied that the tribunal's decision on a question of law is "obviously wrong" or, alternatively, that the question is of "general public importance" and the tribunal's decision is at least "open to serious doubt."[31]

[29]HERBERT SMITH FREEHILLS,https://www.herbertsmithfreehills.com/notes/arbitration/2023-05/hong-kong-court-refuses-leave-to-appeal-rare-successful-challenge-to-award (last visited Apr.12,2025).
[30] [2019] HKCA 369.
[31] Arbitration Act 1996, c. 23, § 69(3)(c) (UK).

33. The case of ViaSat Inc v Hansen Yuncken Pty Ltd,[32] though not an English case, provides insights into the leave application for an appeal in similar contexts like the UK. This case highlights how arbitral awards are binding, with the exception of egregious errors. The NSW Supreme Court stated that the bar for granting leave for appeal of an arbitral award was a high one, and had to take into consideration the rights substantially affected, question that the arbitrator was to determine, and publicly important or if the doubt was serious enough, and if it was just and proper for the court to determine the question. Several decisions from the High Court of England and Wales were referred to for the same by Justice Rees. Thus, the concept of limiting appeals and maintaining arbitral finality is maintained in this case as well.

[32] [2024] NSWSC 1581 (*ViaSat*).

ISSUE 4 – WHETHER THE TIME LIMIT TO FILE A SETTING ASIDE APPLICATION SHOULD BE REDUCED?

34. Whether the IAA should be amended to:
    a. Shorten the three-month time limit for the filing of setting aside applications; and/or
    b. give the courts the discretion to extend the time limit to file an application under section 24(a) of the IAA, where the award may be tainted by fraud or corruption.

RECOMMENDATION

35. We do not recommend shortening of the three-month time limit for setting aside of applications, but we agree with giving the courts discretion to extend the time limit to file an application under Section 24(a) of the IAA.

ANALYSIS

36. We present the above recommendation on similar considerations of the SIDRA Report. However, we reproduce the critical principles below which support the above conclusion.

37. We fully support the idea that shorter timelines may rush parties into filing a setting aside application and may be against the interests of fairness and justice. Although a shorter timeline may result in speedy justice, three months' time is more suitable to properly examine the grounds of setting aside.[33] Thus, a shorter timeline may risk undermining due process by encouraging ill-prepared or premature applications, especially in international disputes where award debtors need time to consult local counsel, gather documents, and assess legal merits.

38. Fraudulent conduct and corruption, unlike other grounds such as procedural unfairness, are often discovered after the award is rendered, sometimes much later. Cross-border fraud is especially becoming increasingly complex and sophisticated, involving hidden or delayed evidence, which may be difficult to uncover within a rigid three-month limit. Considering parallel developments in various other jurisdictions such as New Zealand,[34] United Kingdom,[35] and France,[36] which have recognised the distinctive characteristic of

[33] 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) at ¶22.
[34] Arbitration Act 1996, sch. 1, ch. 7, art. 34(3) (N.Z.).
[35] Federal Republic of Nigeria v Process & Industrial Developments Ltd [2020] EWHC 2379 (Comm).
[36] French Civil Code of Procedure, Articles 1502 and 1506(5).

fraud, as opposed to other grounds of setting side, it is desirable to allow for extension of time limit for awards affected by fraud or corruption.

39. While we support the proposed legislative reform to allow for an extension of the time limit in cases involving fraud or corruption under section 24(a) of the IAA, we also recommend recognising the potential for other legitimate grounds that may warrant similar judicial discretion in future. However, given the current lack of a clear consensus on what these additional grounds should be, we suggest that it would be prudent for such principles to be developed incrementally through case law. This approach allows courts to respond flexibly to evolving factual scenarios while maintaining legal certainty and coherence within Singapore's arbitration framework.

ISSUE 5 : WHETHER A RIGHT OF APPEAL ON QUESTIONS OF LAW IS DESIRABLE?

40. Whether the IAA should be amended to introduce a right of appeal on points of law, on an opt-in basis?

41. If so, whether:
    a. appeal on "points of law" should be restricted to Singapore law, or whether it should include foreign or international law;
    b. to clarify that the right of appeal is not waived merely by operation of institutional rules (such as the SIAC or ICC rules), which may include automatic waiver provisions;
    c. to expressly require appeals to be decided on the basis of the findings of fact in the award;
    d. to make provisions for the costs of the court and arbitral proceedings; and
    e. to provide that applications for permission to further appeal from the High Court shall be determined by the appellate court.

RECOMMENDATION –

42. Our recommendation regarding whether a right of appeal on questions of law is desirable is as follows:
    i. Yes, the IAA must be amended to introduce a right of appeal on points of law, on an opt-in basis.
    ii. The following is our recommendation of the sub-issues -
        a. Appeal on points of law should be restricted to Singapore Law and international law. It should exclude foreign law.
        b. Right of appeal should not be waived by automatic waiver provisions of the institutional rules.
        c. To expressly require that appeals must be decided on the basis of findings of fact.
        d. To make provisions for costs of the court and arbitral proceedings; and
        e. Applications for permission to further appeal from the High Court shall be determined by the appellate court.
        f. Incorporate explanation to clarify the applicability of confidentiality.

ANALYSIS

We agree the inclusion of all the provisions as provided in the consultation paper and the recommendations of the SIDRA Report except for the inclusion of questions of foreign law as questions of law. We have also additionally raised a concern related to the applicability of confidentiality measures to the appeals related to questions of law.

A. EXCLUSION OF QUESTIONS OF FOREIGN LAW FROM QUESTIONS OF LAW

43. The SIDRA Report suggests the inclusion of both questions of foreign law and international law.[37] However, it does not provide sufficient grounds for inclusion of foreign law except that there are international judges and more flexible rules in place.

44. We recommend that any introduction or expansion of an appeal mechanism on "points of law" in Singapore be strictly limited to **Singapore law and international law**, explicitly excluding foreign law. This is premised on the following grounds –

    i. Questions of foreign law are questions of fact

    ii. Determining questions of foreign law does not create precedential value

45. This recommendation is predicated on the significant difference between international law and foreign law and the inherent difficulty in distinguishing questions of law and fact in arbitration appeals.[38] The Black's Law Dictionary defines foreign law as "*The laws of a foreign country, or of a sister state"*[39] whereas "international law" is defined as "*the law which regulates the intercourse of nations; the law of nations.*"[40]

46. Marcus Teo in his scholarly paper '*Foreign Law as Fact*'[41] has argued that foreign laws should be classified as a question of fact pursuant to the "fact doctrine". The Singaporean judiciary has also been considering questions of foreign law as issues of fact.[42] The Singapore Court of Appeal has held that "*foreign law is an issue of fact, which must be*

[37] *Supra* note 5, p. 89, ¶42.
[38] Fence Gate Ltd. v. NEL Constr. Ltd., [2001] EWHC TCC 137, ¶ 38 (Eng.).
[39] Black's Law Dictionary, p. 776.
[40] Black's Law Dictionary, p. 14.
[41] Marcus Teo, *Foreign Law as Fact* [2024] LMCLQ 635, https://dx.doi.org/10.2139/ssrn.5096387 (accessed 14 April 2025).
[42] *Re Harish Salve and another appeal*, [2018] SGCA 6 [45]; Commodities Intelligence Centre Pte Ltd v Hoi Suen Logistics (HK) Ltd [2021] SGCA 114.

provided, either by adducing raw sources of foreign law or by adducing the opinion of a foreign law expert."[43]

47. The Singapore Academy of Law's 2020 Report on the Right of Appeal against International Arbitration Awards on Questions of Law (**2020 SAL Report**) also supports this restricted scope of question of law to specifically include domestic law and international law only.[44] Including international law is logical due to its frequent relevance in international arbitration and the existing familiarity of Singaporean courts with such matters.[45]

48. Conversely, including foreign law presents significant challenges. While the UK's experience with a right to appeal might be cited as a precedent, a closer analysis reveals critical distinctions that render its model less suitable for Singapore in this specific context. The UK Court of Appeal has grappled with the complexities of reviewing foreign law, ultimately leading to a legislative restriction in Section 82(1) of their law, which defines "question of law" strictly as pertaining to the law of England and Wales.[46] Consequently, the appeal option in the UK concerning international commercial arbitration remains deliberately limited.[47]

49. While the SICC possesses expertise in foreign law,[48] the fundamental treatment of foreign law as fact in Singaporean jurisprudence renders it unsuitable for a legal appeal mechanism. Even though O.16 R.8 of the SICC Rules, 2021 provide for counsel submissions along with the traditional method of adducing expert evidence,[49] it is merely an additional method of proving the foreign law and does not fundamentally change the nature of a question of foreign law.

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[43] Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal [2008] 2 SLR(R) 491.
[44] Singapore Academy of Law, *2020 Report on the Right of Appeal against International Arbitration Awards on Questions of Law*, https://sal.org.sg/wp-content/uploads/2025/02/2020-Report-on-the-Right-of-Appeal-against-International-Arbitration-Awards-on-Questions-of-Law.pdf#page=33.11 (date accessed Apr. 14, 2025). Also see Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal [2008] 2 SLR(R) 491.
[45] Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] 5 SLR 536, CA.
[46] Michael O'Reilly, *Appeals From Arbitral Awards: The Section 69 Debate*, British Institute of International and Comparative Law, https://www.biicl.org/files/2493_michael_o_reilly_-_appeals_from_arbitral_awards_the_section_69_debate_.pdf (accessed 14 April, 2025).
[47] Sharp Corp. Ltd. v. Viterra BV [2024] UKSC 14.
[48] R. Thirgood, *Appeals in Arbitration Paper*, https://arbitrationlaw.com/sites/default/files/r._thirgood_-_appeals_in_arbitration_paper.pdf#page=13.67 (accessed 14 April, 2025).
[49] Order 16 Rule 8, Singapore International Commercial Court, Rules, 2021.

50. One of the most prominent arguments to include an appeal on questions of law is to develop mercantile law in Singapore by creating precedential value.[50] However, the determinations on foreign law as a finding of fact would not amount to a binding precedent. Even in English law, the questions of foreign law are not binding and at most, only create a rebuttable presumption.[51] Therefore, given the complexities involved, there is not enough incentive to include questions of foreign law within the appeal on questions of law.

51. Thus, restricting appealable "points of law" to Singapore law and international law is a more pragmatic and legally coherent approach as it would avoid opening the door to protracted disputes over the interpretation of foreign legal systems, thereby preserving Singapore's standing as a leading international arbitration hub.

B. CONFIDENTIALITY

52. One of the fundamental benefits of opting for arbitration as a preferred mode of dispute resolution is confidentiality and privacy of the parties. As per the 2018 QMUL Survey, it is amongst the top five most valuable characteristics of arbitration.[52] Over 87% respondents believed that confidentiality in international commercial arbitration was of importance.[53] Hence, it is established that confidentiality is an important consideration while designing a favourable arbitration framework.

53. As the object of the appeals on questions of law is to develop *lex mercatoria* and the appeals are to be handled by the General Division High Court, the principle of open justice would be applicable.[54] Although the High Court may grant a sealing order under its inherent powers to achieve ends of justice,[55] the request for confidentiality and privacy may be rejected in some cases.[56]

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[50] SIDRA Report, *supra* n at 85, [24-25]; 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 14 April 2025), at 2; 2020 SAL Report, *supra* n at [2.37] to [2.40].
[51] Trevor Hartley, Pleading and Proof of Foreign Law: The Major European Systems Compared, 45 INT'L & COMP. L.Q. 271, 283 n.59 (1996).
[52] White & Case LLP & the School of International Arbitration, Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, website of the School of International Arbitration, Queen Mary University of London (2018), p.7.
[53] *Id.* at p.3.
[54] Tan Chi Min v The Royal Bank of Scotland plc [2013] 4 SLR 529 at [8]-[14].
[55] BBW v BBX and others [2016] 5 SLR 755 at [25]–[30].
[56] The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 4.

54. Considering the standard for publication of judgements of major lega; interest under Section 23(4), coupled with the objective of development of *lex mercatoria,* it is obvious that the intention is to publish the judgements rendered under the proposed provision. However, this may go against a parties' reasonable wish to conceal any matter as provided under Section 23(4). An explanation as to the applicability of exception under Section 23(4) may be help in balancing the opposing interests.

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

55. Whether Singapore should:

    a. retain the Singapore Common Law Approach;

    b. enact a statutory choice of law approach in the IAA; or

    c. adopt the English position under the UK Arbitration Act 2025,

    in ascertaining the governing law of the arbitration agreement.

56. If you are of the view that (b) should be done, whether Singapore should enact a statutory choice of law approach in the IAA based on the following principles, to provide greater certainty and predictability for commercial parties who wish to arbitrate their disputes or enforce their awards in Singapore:

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

    b. In the absence of an express designation, the law which the parties have subjected their arbitration agreement to, shall be the law that the parties expressly designate as applicable to any contract which contains that arbitration agreement; and

    c. If no law has been expressly designated by the parties as applicable to any contract which contains that arbitration agreement, the law applicable to the arbitration agreement shall be the law of the seat of arbitration.

RECOMMENDATION

57. Our recommendation in determining the governing law of the arbitration agreement is for Singapore to:

    i. Enact a statutory choice of law approach in the International Arbitration Act, 1994 ('**IAA**').

    ii. The statutory choice of law approach will be as follows:

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

        b. In the absence of an express designation, the law which govern the arbitration agreement shall be the law that the parties expressly designate as the law of the seat of arbitration; and

c. If the seat of arbitration has not been expressly designated by the parties in the contract, the law applicable to the arbitration agreement shall be the law of the seat as determined by the arbitral institution under the institutional rules so designated or the arbitral tribunal so constituted.

Provided, that the General Division of the High Court (or the appellate court) may determine the seat of arbitration if necessary, in absence of an express designation of the seat of arbitration in the arbitration agreement and prior to the determination of the seat of arbitration by the institutional rules so designated or the arbitral tribunal so constituted.

ANALYSIS

A. Statutory Choice of Law Approach

58. The current Singapore Common Law Approach is in line with the approach followed in England, prior to the Arbitration Act, 2025 ('**English 2025 Act**').[57] While the substance of the approach will be analysed further, the lack of a statutory framework has led to numerous disputes on the matter, both in England and Singapore, not to mention other jurisdictions. Providing a clear statutory framework would ensure stability, consistency and predictability to commercial parties who wish to arbitrate their disputes or enforce their awards in Singapore.[58] It would also enhance the efficiency of the process. These are essential in ensuring that Singapore maintains a pro-arbitration regime.

59. Further, it must be noted that we are recommending adopting a statutory choice of law approach as opposed to the position adopted by the English 2025 Act. This is due to the reason that the English 2025 Act fails to account for a situation wherein there is no explicit choice of seat mentioned in the contract.[59]

B. Express Designation of the Law Governing the Arbitration Agreement

60. Currently, it is not common for parties to include a separate clause specifically stating the law governing the arbitration agreement. However, if the statute expressly states that such

[57] Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38; UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30.
[58] Giuditta Cordero-Moss, *Why Arbitration Needs Conflict of Laws Rules*, Kluwer Arb. Blog (Oct. 17, 2018), https://arbitrationblog.kluwerarbitration.com/2018/10/17/why-arbitration-needs-conflict-of-laws-rules/.
[59] Arbitration Act 2025, c. 3, §6 (UK).

a choice would be upheld, it encourages parties to include such clauses in their arbitration agreements, or main contracts, as the case may be.

61. An express designation of the law governing the arbitration agreement must be clear, specific and unambiguous. The law governing the main contract, even if expressed in wide terms, such as 'this law will govern the whole of the contract in all respects' will not be sufficient. This is due to the fact that parties rarely consider the validity of the arbitration agreement when deciding the law of the main contract.[60] The main contract and the arbitration agreement have fundamentally different legal purposes; the main contract establishes substantive rights and obligations concerning a transaction, while the arbitration agreement determines the mode and manner of resolving disputes arising from that transaction.[61] An argument made in favour of the law of the contract is that parties intend the entire contract to be governed by a single legal system.[62] However, the main contract governs the relationship between the parties and the arbitration agreement governs the breakdown of that relationship.[63] It is therefore not commercially sensible to presume that parties naturally intend for the same law to govern both these distinct relationships.[64] Further, multiple laws governing separate parts of a contract is not uncommon (this is known as *dépeçage*).[65]

62. This is further supported by the Doctrine of Separability, a foundational aspect of international arbitration law. The United Nations Commission on International Trade Law Model Law ('Model Law') states "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*".[66] This

[60] Jean-François Poudret & Sébastien Besson, Comparative Law of International Arbitration ¶297 (Stephen Berti & Annette Ponti trans., 2d ed. 2007); Philippe Fouchard, Emmanuel Gaillard & Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration ¶425 (Emmanuel Gaillard & John Savage eds., 1999); Klaus Peter Berger, *Re-Examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 320 (Albert Jan van den Berg ed., 13 ICCA Congress Series, KLUWER LAW INT'L 2007).
[61] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 590 (2nd ed. 2014).; Maxi Scherer & J. Ole Jensen, *Towards a Harmonized Theory of the Law Governing the Arbitration Agreement*, 10 INDIAN J. ARB. L. 1 (2021) (hereinafter 'Scherer & Jenson'); Katharina Plavec, *The Law Applicable to the Interpretation of Arbitration Agreements Revisited*, 4 U. VIENNA L. REV. 82 (2020), https://doi.org/10.25365/vlr-2020-4-2-82.
[62] Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors [2012] EWCA Civ 638, ¶11.
[63] FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12, ¶12.
[64] *Ibid*.
[65] *Supra* note 61, Scherer & Jenson, at p. 8.
[66] United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 16(1), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) (Hereinafter 'Model Law').

validates the stance that an arbitration agreement is typically considered different from the rest of the contract even though it may be a clause within the contract. While this Doctrine is used to shield the validity of the arbitration agreement from the invalidity of the contract, there is no reason to think that it does not also apply to concluding which law will determine that validity.[67]

63. It is, thus, a far-fetched presumption that the governing law clause of the main contract is an express choice of the governing law of the arbitration agreement. Therefore, only an express mention of the governing law of the arbitration agreement will suffice.

C. Implied Choice of the Law Governing the Arbitration Agreement

64. In the absence of an explicit clause stating the governing law of the arbitration agreement, the law of the seat would be considered the implied choice. The choice of a seat is the selection of a formal legal infrastructure within which the arbitration will take place. The choice of a seat is a decision by the parties to apply the procedural laws of a nation to the arbitration. It has been argued that the seat is selected merely for neutrality or geographical reasons, however in surveys conducted, it has been stated that the national arbitration laws are a factor in choosing the seat.[68] Further, parties spend extensive time and effort in deciding upon the seat.[69] Thus, it is reasonable to presume that the choice of that law for one aspect of the arbitration will extend to another aspect of the arbitration.[70] Further, commercial parties are far more likely to have presumed that their choice of the seat law governs all aspects of the arbitration.[71]

65. Additionally, this inference is in line with the default rule in the Model Law. Article V(1)(a) states that in the absence of a choice of law, the validity of an arbitration agreement must

[67] *Supra* note 61, Scherer & Jenson, at p. 8.
[68] Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration p. 13; Queen Mary University of London, 2018 International Arbitration Survey p. 10.
[69] Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause,* in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 197, 197 (Albert Jan van den Berg ed., 9 ICCA Congress Series, Kluwer Law Int'l 1999).
[70] Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, [2020] EWCA Civ. 574, ¶¶ 90–91, 109; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 293 (Kluwer 1981).
[71] *Ibid*.

be governed by the law of the country where the award was made, i.e., the seat.[72] Applying the law of the main contract as the law governing the arbitration agreement, could lead to the award not being recognised as valid in the seat courts. Parties expect the pro-arbitration legal principles of the seat to apply, as opposed to the potentially restrictive law of the main contract.[73] This would lead to a failure of the arbitral process and cause unnecessary and avoidable hardship for the parties.

66. Further, the importance of the law of the seat is widely recognised. Numerous jurisdictions, approximately 51%, tend to apply the law of the seat in absence of an explicit choice of law governing the arbitration agreement (as opposed to 34% applying the law of the main contract).[74] Even the jurisdictions that apply the three-step test with a presumption that the implied choice is the law of the main contract (including Singapore), acknowledge that the law of the seat has the closest and most real connection to the arbitration. Even France which applies a delocalised approach to determine the law governing the arbitration agreement has preferred the seat law to the law of the main contract.[75]

67. To uphold party autonomy, it is essential to interpret the intention of commercial parties with consideration to their likely knowledge and the factors that they would have considered. It is clear that parties choose the seat specifically for arbitration, considering various factors relevant to the arbitration, while the law of the main contract is chosen without a similar consideration to the arbitration.

D. Lack of Express Designation of the Seat

[72] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(a), June 10, 1958, 330 U.N.T.S. 3.
[73] Aaron McDonald, *Governing Law of Arbitration Agreements Arising From Standing Offers to Arbitrate in Treaties and Foreign Legislation: The Exception to the Default Rule Under the English Arbitration Bill*, Kluwer Arbitration Blog (Oct. 11, 2024), https://arbitrationblog.kluwerarbitration.com/2024/10/11/governing-law-of-arbitration-agreements-arising-from-standing-offers-to-arbitrate-in-treaties-and-foreign-legislation-the-exception-to-the-default-rule-under-the-english-arbitration-bill/.
[74] *Supra* note 61, Scherer & Jenson, at p. 4; *Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc., Case No. T1881–99, Swedish Supreme Court, 27 October 2000, (2001) XXVI YBCA 291 (Sweden); Matermaco SA v PPM Cranes Inc., Brussels Tribunal de Commerce, 20 September 1999, (2000) XXV YBCA 673* (Belgium); Law No. 4686, Int'l Arbitration Law, art. 4, 5 July 2001, Resmî Gazete [Official Gazette], No. 24453 (Turkey).
[75] Kabab-Ji S.A.L. v. Kout Food Group, French Court of Cassation (First Civil Chamber), 28 September 2022, N° 20-20.260, FS-B.

68. In the instance that the parties do not expressly designate the seat of arbitration in the contract, the seat will be determined as per the institutional rules decided by the parties or the arbitral tribunal.[76] This seat will then also be applicable as the law governing the arbitration agreement. This may seem to be overextending the presumption that parties intended for that law to apply to the arbitration agreement. However, since the institutional rules themselves were chosen by the parties, it is a natural inference that they were aware of the default seat of those institutional rules. Parties also consent to the constitution of the arbitral tribunal, who decide the seat of arbitration in absence of institutional rules. After which, the same justification for applying the choice of seat to the arbitration agreement would follow.

E. POWER OF THE COURT TO DETERMINE THE LAW OF THE SEAT

69. It becomes necessary to provide the court with the power to determine the law of the seat in case the seat of arbitration has not been designated by the parties. This is to ensure that the court is able to make decisions prior to the constitution of the arbitral tribunal (which would likely decide the seat), such as to provide interim relief. For this, it is necessary for the court to determine the validity of the arbitration agreement.[77]

70. It is important to note, however, that this power is only to be used when necessary. That necessity would only arise in the rare situation wherein the contract does not expressly designate the law of the seat, a default seat has not yet been designated by an arbitral institution, nor has an arbitral tribunal decided a seat of arbitration. This is to ensure minimal court intervention, however, still allow the court to be able to provide interim relief to parties prior to arbitration.

71. This proviso is also not in violation of Article 20 of the Model Law which states that the seat of arbitration is to be determined by the arbitral tribunal, if not agreed upon by the parties.[78] This is because the determination by the court may only be exercised in rare circumstances to ensure parties' access to interim relief. The alternative is to require the tribunal to first begin arbitral proceedings and determine the seat and only then allow

[76] UNCITRAL Model Law on International Commercial Arbitration,1985, Art, 20 (1).
[77] International Arbitration Act 1994, §6 (Sing.).
[78] *Supra* Note 76.

parties to seek interim relief. This undermines the purpose of seeking interim relief, which is for it to be immediate. It would further make it exceedingly difficult for a party to seek interim relief, if the other party is obstructing or refusing to participate in the arbitration.

72. In addition, this power is discretionary evidenced by use of the word ’may’ in the recommended provision. Thus, this gives courts the power to use their discretion to determine whether the determination of the seat is truly ’necessary’ in the relevant context. This would prevent abuse of this provision by parties who do may be attempting to stall the arbitration process or avoid it altogether.

ISSUE 7: WHETHER REVIEW OF THE TRIBUNAL'S JURISDICTION SHOULD BE CONDUCTED BY WAY OF AN APPEAL OR A REHEARING?

1. Whether the court's review of a tribunal's jurisdiction should continue to be conducted by way of a de novo review?

RECOMMENDATION

73. Our recommendation is to apply a nuanced approach including both forms of review for different situations.
    a. When the jurisdiction of the tribunal is challenged on account of procedural irregularities, the decision of the tribunal must be given deference and the review conducted be in the form of an appeal (limited review).
    b. When the jurisdiction of the tribunal is challenged on account of substantive irregularity, the decision of the tribunal must not be given deference and the review conducted be in the form of a hearing (de novo).

74. With regards to the introduction of new arguments/evidence, we believe courts should be given discretion on this and apply rules of evidence as per the existing case laws. A separate statutory provision is not necessary.

ANALYSIS

75. The concept of court review in this context involves two main aspects.[79] Firstly, the standard of review and secondly, the format of review. The standard of review of an arbitral tribunal refers to the level of deference courts should give to an arbitral tribunal's ruling on its own jurisdiction. The format of review, on the other hand, refers to the procedural framework of the review, in which it is decided whether parties can introduce new arguments and evidence at this stage.

A. Standard of Review

[79] 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.

76. The courts may conduct a limited hearing when the jurisdiction of the tribunal is challenged merely on account of procedural irregularities. This may include the fact that parties have not followed pre-arbitral mediation/conciliation, not provided notice within the sufficient period, etc. This is due to the fact that the parties are challenging the manner in which arbitration was initiated, not the very duty to arbitrate. In this context, when parties have given their consent to arbitrate, and admit to the duty to arbitrate, the decision of the tribunal must be given deference.[80] This is currently the practice followed in the United States.[81] When there is clear and unmistakable evidence that parties agreed to delegate authority to the arbitrator tribunal, the decision of the tribunal on jurisdiction regarding procedural irregularities must be given deference.

77. This practice will ensure minimal court intervention, efficient dispute resolution and enhance the pro-arbitration atmosphere in Singapore. It also upholds the kompetenz-kompetenz principle, by allowing the tribunal to rule on its own jurisdiction and giving deference to that decision.

78. The questions on substantive jurisdiction of the tribunal are, (i) whether there is a valid arbitration agreement, (ii) whether the tribunal is properly constituted, and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.[82] Questioning the substantive jurisdiction of the arbitral tribunal goes to the very root of the matter of party consent. Party autonomy is a cornerstone of arbitration. Unlike courts that get their power through the constitution, or other tribunals that get their power through statute, the genesis of the power of an arbitral tribunal is through the arbitration agreement. Thus, any matter dealing with the substantive jurisdiction of the tribunal, on the basis of that agreement, must be reviewed de novo by the courts. This is necessary so that parties that do not consent to arbitration are not forced to comply with the jurisdiction of the tribunal with minimal recourse.

[80] Redfern, Alan & Hunter, Martin, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 6th ed. § 5.126 (2015).
[81] Howsam v. Dean Witter Reynolds, Inc. 537 US 79, 84 (2002); BG Group PLC v. Republic of Argentina, No. 12-138, 572 US (5 March 2014).
[82] Arbitration Act 2025, c. 3, §30 (UK).

79. This practice is followed widely in jurisdictions across the world, including Canada,[83] Germany,[84] France,[85] United States,[86] among others. The Canadian Court of Appeal provided two main justifications that we are in agreement with. Firstly, the courts have a statutory responsibility to ensure tribunals do not exceed authority granted to the parties.[87] Arbitral tribunals must contain their decision-making to the issues submitted to them. The tribunal must be prevented from exceeding their mandate as per the agreement. Secondly, it opined that minimal interference does not display passive oversight when jurisdiction is in question.[88] The seat of arbitration is selected by the parties to maintain supervisory jurisdiction. While, in most contexts such supervisory jurisdiction entails minimal judicial interference, when the question goes to the root of the consent of parties to arbitrate, the court must intervene.

80. Further, it cannot be said that a de novo review violates the principle of *Kompetenz-Kompetenz*. The *Kompetenz-Kompetenz* Principle allows arbitral tribunals to rule on their own jurisdiction, granting tribunals chronological priority, not exclusive authority.[89] Thus, it does not preclude courts from conducting fresh reviews of legal and factual aspects of jurisdictional questions.

81. Conducting a de novo review is also in line with the UNCITRAL Model Law. Article 16 of the UNCITRAL Model Law states that while arbitral tribunals may rule on their own jurisdiction, embodying the competence–competence principle, courts are also explicitly allowed to determine jurisdiction when a party challenges the tribunal's preliminary ruling.[90] Article 34, enables courts to annul awards if the tribunal lacks jurisdiction or if procedural irregularities occurred.[91] Interpreting both articles together, it can be stated that a full jurisdictional inquiry is permitted.'

B. Format of Review

[83] Lululemon Athletica Canada Inc. v. Industrial Color Productions Inc., (2021) BCCA 428.
[84] German Code of Civil Procedure, (1985) §1059.
[85] LEGIFRANCE ,https://www.legifrance.gouv.fr/juri/id/JURITEXT000042664738 (last visited Apr. 13, 2025).
[86] First Options of Chicago, Inc. v. Kaplan, (1995) 514 U.S. 938.
[87] Arbitration (International Commercial) Act, 1993, § 34, cl.2(a)(iv).
[88] United Mexican States v. Cargill, Inc., (2011) ONCA 622.
[89] Russian Federation v. Luxtona Limited**, (**2023) ONCA 393.
[90] UNCITRAL Model Law on International Commercial Arbitration,1985, § 16, cl.3.
[91] UNCITRAL Model Law on International Commercial Arbitration,1985, § 34, cl.2.

82. The format of the review entails the procedural rules guiding the review, i.e., whether new arguments and evidence can be introduced before the court. We do not believe that a statutory provision must be present to determine whether the courts can introduce new arguments/evidence. Giving discretion to the court would ensure a more equitable result as courts would be allowed to determine when the introduction of new evidence and/or arguments are relevant and admissible.[92]

83. The Singapore Court of Appeal in Lassiter Ann Masters v To Keng Lam[93] applied the below threefold test to allow new evidence:

    a. the party seeking to admit the evidence demonstrates 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 must be apparently credible though it need not be incontrovertible.

84. This test ensures that parties are not intentionally excluding evidence when the tribunal is determining jurisdiction. This would have adverse ramification as parties who object to the tribunal's jurisdiction may completely refuse to participate in the arbitral proceedings. However, there is an aspect of good faith wherein parties, despite objecting to the jurisdiction of the tribunal, must participate fully in the arbitration.[94] It also ensures that the evidence is relevant and reliable, and not being used by parties to arbitrarily submit voluminous evidence in the hope that some will be deemed persuasive.

85. However, the Singapore High Court has said that there is no bar in the Rules of Court which restricts parties from introducing new material that was not before the arbitrator.[95] It did clarify that such new material would be regarded with a degree of scepticism.[96]

86. A comprehensive understanding of these positions would imply that parties are free to introduce new evidence before the courts, subject to the rules of procedure of the court.

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[92] Central Trading & Exports Ltd v Fioralba Shipping Co [2014] EWHC 2397.
[93] [2004] 2 SLR(R) 392; upheld in Tan Boon Heng v Lau Pang Cheng David [2013] SGCA 48.
[94] Astro Nusantara International BV and ors v PT Ayunda Prima Mitra and ors HCCT 45/2010 (17 February 2015).
[95] AQZ v ARA [2015] SGHC 49.
[96] *Ibid.*

Further, the court would not have an unfettered right to refuse evidence, however it can refuse evidence on the ground that it would cause prejudice to the other party and if it does not comply with the rules of the court to ensure that evidence is presented in a fair manner.[97]

87. Thus, while parties may introduce new evidence, the court retains discretion over its admissibility and weight. In doing so, it would consider the full factual and procedural context, including how the new evidence is presented, to assess whether its admission would result in undue prejudice to the opposing party. This would prevent abuse of process, while ensuring fair adjudication.

[97] Darius Chan, *The Scope of "De Novo" Review of an Arbitral Tribunal's Jurisdiction*, Sing. L. Gaz., Nov. 2015.

ISSUE 8: WHETHER THE SUMMARY DISPOSAL POWERS OF ARBITRAL TRIBUNALS SHOULD BE SET OUT IN THE IAA

88. Whether the IAA should be amended to expressly provide that unless otherwise agreed by parties, the arbitral tribunal has the power to summarily dispose of any issue, claim or defence (or part thereof) in dispute by way of an award.

RECOMMENDATION

89. It is recommended that a provision expressly recognising the arbitral tribunal's power to summarily dispose any issue is desirable. However, we argue that the provision must include a threshold for the use of summary powers by the arbitral tribunal.

ANALYSIS:

90. In the SIDRA report, it is recommended that the inclusion of any threshold is unnecessary as there is a converging practice under various institutional rules and the lack of a threshold would provide arbitrators with greater procedural flexibility. However, it is argued that that excluding a threshold may affect Ad-hoc arbitration due to lack of guidance and may lead to inconsistency and lack of certainty around the exercise of the provision.

A. EXCLUDING A THRESHOLD COULD AFFECT AD HOC ARBITRATION IN SINGAPORE

91. Ad-hoc arbitration involves dispute resolution where the parties agree to arbitrate without any institutional framework.[98] In comparison to institutional arbitration, who are governed by collectively agreed institutional rules, the tribunal in this arbitration is not governed by any rules. The parties are free to decide the procedure to be adopted.

92. In these cases, if the parties vest the power of summary disposition, it is important to note that the tribunal will be free to determine the threshold to proceed too. As a result, the tribunal will be provided with arbitrary powers to decide the case. High chances of a biased tribunal could result, by compromising the due process and the fairness of the proceedings.

[98] Carlsons Solicitors, *What Is Ad Hoc Arbitration and Why Is It Used?*, Carlsons Solicitors (Sept. 2, 2021), https://www.carlsonssolicitors.com/news/2021/9/1/what-is-ad-hoc-arbitration-and-why-is-it-used.

93. In these cases, if the parties vest the power of summary disposition, it is important to note that the tribunal will be free to determine the threshold to proceed too. As a result, the tribunal will be provided with arbitrary powers to decide the case. There are chances of element of bias in the tribunal, which could compromise due process and fairness of the proceedings. Since the concept of "due process" lacks a clear definition or consensus,[99] any procedure the tribunal will adapt will be considered compliant with "due process." Consequently, even after establishing procedural standards for the tribunal, parties may still be compelled to challenge and set aside the award, resulting in unnecessary expenditure of time and costs.

94. In Singapore, there have been substantial presence of AD HOC proceedings. As per the SIAC Annual report, 15% (40 out of 625 cases) administered in 2024 were AD HOC proceedings.[100] Therefore, it is important to chalk out a solution to this problem.

95. To tackle the issue, it is important that the jurisdiction where the award is to be enforced, decides on the threshold for the tribunal to adopt. This may act as an overarching provision for the tribunal to consider and rule accordingly. By clarifying the threshold in the act, it would guide the tribunal on the type of "due process" to follow, rather than find its own procedure and take the benefit of the great autonomy it used to get. In sum, an express provision of threshold would control, and rather streamline ad-hoc proceedings, where the tribunal has a lot of freedom to act.

B. A THRESHOLD COULD UPHOLD DUE PROCESS AND BRING CERTAINTY

96. The debates on summary disposition, primarily, has been on the existence of such power vested with the tribunal. Vested with this power highlights the autonomy the tribunal is ensured to conduct the proceedings. Various countries have upheld this power, as a part of international arbitration practice.

97. However, the procedural flexibility and autonomy provided to the tribunal, also comes with the need to uphold the due process. This due process, hinges between the balance of fairness

[99] Simon Sloane & Emily Wyse Jackson, *Arbitration Awards – Due Process and Procedural Irregularities: Challenges*, Fieldfisher (June 30, 2021), https://www.fieldfisher.com/en/insights/arbitration-awards---due-process-and-procedural-ir.

[100] Singapore International Arbitration Centre, Annual Report 2024, https://siac.org.sg/wp-content/uploads/2024/08/SIAC_Annual-Report-2024.pdf.

and efficiency in the proceedings, which depends on the particular circumstances of the case.[101] Therefore, it is important that the procedural freedom which the tribunal is vested with, is limited. This is to avoid any excessive jurisdiction in the matter by the tribunal.

98. The above problem, has already been identified as the "due process limits", prompting a need to ensure a limit on the procedural freedom of the tribunal. The agreement to arbitrate itself puts an obligation on the tribunal to ensure fairness and efficiency.[102] Consequently, a threshold for the tribunal to consider while deciding summary disposition could ensure fairness and efficiency, ensuring due process. This need was also considered by the UK law commission when deciding whether a threshold should be expressly provided in their newly amended arbitration law. In the report, they concluded the need for a threshold to uphold fairness of the proceedings.[103]

99. Moreover, an analogy can be drawn out with the evidentiary powers of the tribunal to take evidence. As Aleksander Godhe puts in his article, this power of the tribunal is supplied with higher degree of autonomy granted to the tribunal. In addition, the lack of guidance in these procedures acts a constant base for due process claims by the parties.[104] Similarly, as the article points on the higher freedom of the tribunal, the same problem is with the power of summary disposition.

100. The premise of the express recognition of powers of the tribunal to make an award on a summary basis is to provide added certainty in arbitrations where parties have not adopted any arbitration rules or where the rules are silent to whether the arbitral tribunal has the power to make an award on a summary basis. The addition of a threshold would further benefit the parties to predict the standard adopted by the arbitral tribunal and would also increase consistency and uniformity in the exercise of powers to make a summary disposal.

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[101] Alexander Godhe, *Tribunal duties and the exclusion of evidence in international arbitration: the tug-of-war of fairness and efficiency*, 41 Arbitration International 1, 103-117, (Oct. 28, 2024), https://academic.oup.com/arbitration/article/41/1/103/7848500.
[102] Fabricio Fortese & Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration,* 3 Groningen Journal of International Law 1 (May 29, 2015), https://ssrn.com/abstract=2611337.
[103] 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).
[104] *Supra* note 102.

101. As the SIDRA Report recognizes that majority of the institutional rules have adopted the "manifest" standard and there is little to no inconsistency within the frameworks, it could be understood that addition of a threshold in the statutory provision would not lead to larger confusion in any inconsistencies between the statute and the institutional rules. The threshold of "no real prospect of succeeding" under the English law[105] or the "manifest" threshold under various institutional rules should be adopted after further consideration.

[105] *Supra* note 103.