STUDY NOTES FOR SILE PART B COURSE
LAW AND PRACTICE OF INTERNATIONAL ARBITRATION IN SINGAPORE

Table of Contents

1. Applicable laws

1 By way of background, a brief overview of the arbitral process can be found here.

2 In an arbitration, the applicable laws include:

- Arbitration rules
- Law of the seat of the arbitration (*lex arbitri*)
- Law governing the substance of the dispute
- Law governing the arbitration agreement
- Law applicable to non-contractual claims
- Law governing a party's legal capacity to contract

1.1 Legislative framework in Singapore

3 In Singapore, arbitrations conducted pursuant to arbitration agreements which are considered domestic are governed by the Arbitration Act. Where the arbitration agreement is international, the International Arbitration Act applies.

4 The International Arbitration Act applies to an international arbitration or in any other case, if the parties agree that it applies (s 5(1) IAA). An arbitration is international if:

- At least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any state other than Singapore (s 5(2)(a) IAA); or
- The place of arbitration, determined pursuant to the arbitration agreement, is outside the state in which the parties have their business (s 5(2)(b)(i) IAA); or
- The place where a substantial part of the obligations of the commercial relationship is to be performed is situated outside the state in which the parties have their places of business (s 5(2)(b)(ii) IAA); or
- The place where the subject-matter of the dispute is most closely connected is situated outside the state in which the parties have their places of business (s 5(2)(b)(ii) IAA); or

- The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country (s 5(2)(c) IAA).

5 The UNCITRAL MAL on International Commercial Arbitration (1985) (**MAL** "**MAL**"), with the exception of Chapter VIII, has the force of law in Singapore (s 3(1) IAA).

6 By way of background, UNCITRAL is an UN body whose mandate is to harmonise and modernise the law of international trade. The MAL was designed by drafters at UNCITRAL so that States can reform and modernise their laws on arbitration. States can enact the MAL wholesale into its own laws, or they can enact selected portions. In Singapore the IAA enacts the MAL (with the exception of Chapter VIII), but contains additions and modifications.

7 Some other jurisdictions which have legislation based on or influenced by the MAL (commonly known as "MAL jurisdictions") include Germany, Hong Kong, New Zealand, Australia, Canada.[1] When one has to interpret certain MAL provisions, it is not uncommon to look to the (i) *travaux préparatories* of the MAL[2]; and (ii) jurisprudence emanating from other MAL jurisdictions.[3] Be mindful that UNCITRAL updated the MAL with certain amendments in 2006, but Singapore has not yet enacted the 2006 amendments.

8 The MAL applies to international commercial arbitration (Art 1(1) MAL). The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. This includes supply of goods or services, construction, banking, financing, carriage of goods, joint venture, etc. (See footnote to Art 1(1) MAL).

1.2 Relationship between applicable laws

[1] See specific States here: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status
[2] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux
[3] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf

9 All arbitrations require a valid arbitration agreement between the parties for the arbitral tribunal to enjoy jurisdiction. In drafting the arbitration agreement, parties can generally choose between ad hoc or institutional arbitration.[4]

10 In institutional arbitration, parties designate the use of an arbitral institution to administer the arbitration, typically (but not always) in accordance with the arbitral rules of that institution. Such commonly used institutions in this region include Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), Hong Kong International Arbitration Centre (HKIAC), London Court of International Arbitration (LCIA), etc.

11 Institutions publish model arbitration agreements (commonly known as "model clauses") that parties can insert into their contracts. Rather than drafting one from scratch, parties can agree on an arbitral institution, and insert the appropriate model clause from that institution into their contracts. Many jurisdictional issues arise when parties alter the model clauses (which we will examine below).

12 In contrast, ad hoc arbitration means there is no involvement of an arbitral institution to help administer the arbitration. In ad hoc arbitrations, it is not uncommon for parties to agree to adopt the UNCITRAL Arbitration Rules, which were designed to be used by parties without the involvement of an arbitral institution. The UNCITRAL Arbitration Rules is not to be confused with the UNCITRAL MAL. The latter is a model set of provisions to be enacted as law by a legislative body, whereas the former is a set of procedural rules which parties can agree by contract to adopt.

13 Additionally, regardless of whether parties opt for institutional or ad hoc arbitration, an arbitration agreement will typically designate the seat of the arbitration, such as Singapore. The seat of the arbitration provides the procedural law governing the conduct of the arbitration, also known as the *lex arbitri*. It is important to note that the choice of a particular institution does not dictate the choice of the seat. For instance, parties can opt for SIAC arbitration, and designate the seat of arbitration as Kuala

[4] In some jurisdictions ad hoc arbitration is not recognized: see Articles 16 and 18 of the Arbitration Law of the PRC (which is undergoing revision at the moment).

Lumpur or Jakarta (instead of Singapore). Most institutions can administer arbitrations seated anywhere in the world.

14 The choice of the seat has important consequences, the key of which is that it dictates the procedural law governing the conduct of the arbitration (*lex arbitri*). By way of illustration:

a. if an arbitration agreement provides that an arbitration is seated in Singapore, the procedural law governing the conduct of the arbitration is the AA or the IAA for a domestic and international arbitration respectively.

b. If the arbitration agreement provides that the arbitration is seated in London, the procedural law governing the conduct of the arbitration is the English Arbitration Act.

c. If the arbitration agreement provides that the arbitration is seated in Hong Kong, the procedural law governing the conduct of the arbitration is the Hong Kong Arbitration Ordinance.

15 Here is a complication: if parties in their arbitration agreement opt for institutional arbitration with the result that the arbitral rules of that institution apply to that arbitration, to what extent do those institutional rules override provisions of the *lex arbitri*?

1.2.1 Relationship between *lex arbitri* and international rules

16 Under Singapore law, a provision in an arbitration agreement referring or adopting any rules of an arbitral institution is by itself insufficient to exclude the application of the MAL (s 15(2) IAA; overruling *John Holland v Toyo*). Provisions of rules of arbitration selected by parties will apply to the extent that such provision is not inconsistent with a provision of the MAL or the IAA from which the parties cannot derogate (s 15A(1) IAA; overruling *Dermajaya Properties*).

17 A provision of rules of arbitration is not inconsistent with the MAL of the IAA merely

because: it provides for a matter on which the MAL and the IAA is silent (s 15A(3) IAA), or merely because the rules are silent on a matter covered by any provision of the MAL or the IAA (s 15(4) IAA), or merely because it provides for a matter which is covered by a provision of the MAL or IAA which allows the parties to make their own arrangements by agreement but which applies in absence of such agreement (s 15A(5) IAA).

18 *Insigma Technology v Alstom Technology* [2009] SGCA 24 affirmed (at [41]) that parties to an arbitration in Singapore are free to adopt the arbitration rules of their choice to govern their arbitration, and their choice of arbitration rule would be respected by Singapore law and be given the fullest effect possible. Put simply, to the extent there is any conflict between the arbitration rules and the MAL as incorporated by the IAA, the rules chosen by parties will prevail unless the conflict was with a mandatory provision of the MAL.

19 However, this does not totally resolve the issue because the MAL does not expressly prescribe which provisions are mandatory in nature. Be that as it may, it is clear that some provisions in the MAL only provide for a *default* position and allow parties to derogate from that default provision. Such non-mandatory provisions can be identified from their use of the phrase "*unless otherwise agreed by the parties, …*".

20 In other jurisdictions such as England, the English Arbitration Act sets out a list of mandatory provisions that have effect notwithstanding any agreement to the contrary. This means that any arbitral rules chosen by the parties will prevail to the extent they do not conflict with those mandatory provisions.

1.3 Parties can choose applicable laws

1.3.1 Arbitration rules

21 Parties may agree on a set of institutional (such as the ICC or SIAC Rules) or ad hoc arbitration rules (such as the UNCITRAL Rules) to apply to their arbitration. Alternatively, they may formulate their own rules by agreement. If the parties do not

agree on any rules, the law of the seat of arbitration will govern the arbitral procedure (e.g. see Art 21-27 MAL).

22 A question as to the applicable version of any arbitration rules can arise when the rules are revised between the time the arbitration agreement is concluded and the time arbitration is commenced. In this situation, generally there appears to be a presumption in favour of rules that are applicable as at the date of commencement of arbitration and not at the date of contract (*Black and Veatch Singapore v Jurong Engineering* [2004] SGCA 30).

1.3.2 Seat of arbitration

23 Parties are free to agree on the seat (or place) of arbitration (Art 20(1) MAL). If parties fail to specify a seat, the arbitral rules may regulate how the seat is to be decided, for instance, by specifying a default seat in the absence of parties' choice, or by giving the power to the arbitral tribunal to make that decision.

24 Once the seat of arbitration has been agreed upon, it can only be changed by agreement of all the parties. The seat of arbitration—which is a juridical concept—is not necessarily the same as the venue of any arbitral hearing which is a logistical concept. The seat does not change merely because the tribunal holds its hearing at a different place (*PT Garuda v Birgen Air* [2002] SGCA 12 at [24]). The tribunal may hold hearings and meetings by any means and at any location it considers convenient or appropriate, independent of the seat. Of course, the tribunal can also choose to hold hearings at the seat, but it is not required to do so.

25 Factors to consider when choosing a seat of arbitration:

- Seat should be a party to the New York Convention ("**NYC**"). This is important for enforcement of any resulting award in other NYC countries because many jurisdictions have adopted the NYC with reciprocity reservations.
- Seat's arbitration should provide the desired level of judicial interference and control.

- The quality of the judiciary and court system should be considered in case it is necessary to approach a court for assistance.
- Seat should be neutral.

26 The New York Convention is presently the most successful treaty in the world with more than 160 signatory states. It covers the recognition and enforcement of foreign arbitration awards. The NYC is part of Singapore law (enacted under the IAA). Singapore has a made a reservation under the NYC whereby it will apply the NYC only to awards made in another signatory state of the NYC (commonly known as the reciprocity reservation).[5]

1.3.3 Law governing the substance of the dispute

27 Parties are free to choose the rules of law applicable to the substance of the dispute (Art 28(1) MAL). The parties are generally not restricted in their choice of applicable law. There is no requirement that the chosen law has some connection to the parties or to the dispute (*Quarella SpA v Scelta Marble* [2012] SGHC 166 at [34], citing Yves Derains and Eric Schwartz (2005) in *A Guide to ICC Rules of* Arbitration). A tribunal's interpretation of a choice of law clause cannot normally be reviewed unless the tribunal deliberately disregarded the parties' choice of law clause (*Quarella SpA v Scelta Marble*).

28 In the absence of any choice:

a. The arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers appropriate (Art 28(2) MAL).

b. The MAL does not prescribe which set of conflict of laws rules to apply. Some commonly used conflict of laws rules include the conflict of laws rules of (i) the seat of arbitration; (ii) the place where the award is likely to be enforced; (iii) the jurisdiction that would have been competent but for the arbitration place; (iv) the place of contractual performance; (v) the jurisdiction with some element

[5] *"The Republic of Singapore will on the basis of reciprocity apply the said Convention to the recognition and enforcement of only those awards which are made in the territory of another Contracting State."*: https://www.newyorkconvention.org/countries

common to the parties; (vi) general principles of private international law; or (v) the law with the closest connection to the dispute, etc.

29 Although the MAL requires tribunal to first apply conflict of law rules in order to ascertain the appropriate governing law, arbitral rules may not necessarily require the same approach. For instance, SIAC Rule 31 empowers the tribunal to apply the law or rules of law which the tribunal determines to be appropriate, without mandating a conflict of laws methodology.

30 A complication arises: are SIAC Rule 31 and Art 28(3) MAL inconsistent? If so, which prevails? A practical solution favoured by some tribunals is to apply a conflict of laws methodology anyway to ascertain the appropriate governing law, which is not prohibited under SIAC Rule 31.

1.3.4 Law governing the arbitration agreement

31 The law applicable to the arbitration agreement determines the formal validity of the arbitration agreement, from which the authority of the arbitrator flows (*Dallal v Bank Mellat* [1986] QB 441). It is also applicable to questions as to whether the dispute lies within the scope of the agreement and the agreed qualifications or constitution of the tribunal. It has been observed that the proper law of the arbitration agreement will be most relevant to questions as to formation, validity, effect and discharge of the arbitration agreement (*BNA v BNB* [2019] SGCA 84 at [55]). Such issues arise before the commencement of arbitral proceedings, such as during an application for stay of court proceedings. Such issues could also be raised at setting aside or refusal of enforcement proceedings. Once the law governing the arbitration agreement has been identified, the arbitration agreement must be interpreted according to that law.

32 It is implicitly recognised that parties are free to choose the law that governs their arbitration agreement. Art 34(2)(a)(i) MAL and Art V(1)(a) NYC both refer to the validity of an arbitration agreement 'under the law to which the parties have subjected it'. In practice, however, parties traditionally have not expressed a choice as to the law governing the arbitration agreement. However, more and more model clauses are now expressly including a choice of law clause to govern the arbitration agreement. As a

matter of good practice, it is suggested that one should expressly stipulate a choice of law to govern the arbitration agreement.

33 Separately, there have been English case law where the Courts have interpreted an express choice of law clause governing the "Agreement" (which was a defined term in that case) to include the arbitration clause as well. But what happens if the Courts find that the parties have not expressly stipulated a choice of law to govern the arbitration agreement? In England and Singapore, there have been a series of conflicting case law whereby some Courts held that the law governing the arbitration agreement is the law governing the main contract, whereas other Courts held that the law governing the arbitration agreement is the law of the seat.

34 In the absence of an express choice of law governing the arbitration agreement, the position in Singapore now is that there is a rebuttable presumption that parties have impliedly chosen the law governing the main contract to also govern the arbitration agreement. This presumption can be displaced if choosing the law governing the main contract as the governing law of the arbitration agreement would negate the arbitration agreement when the parties have evinced a clear intention to be bound to arbitrate their disputes. For instance, it was argued in *BNA v BNB* [2019] SGCA 84 that applying PRC law (the law governing the main contract) as the governing law of the arbitration agreement would negate the parties' clear intent to arbitrate because PRC law (as it was argued) did not allow a foreign arbitral institution (SIAC in that case) to administer arbitral proceedings seated in China.

35 If there is no express or implied choice of law, the system of law with the closest and most real connection with the arbitration agreement will be applied. The system of law with the closest and most real connection with the arbitration agreement is generally taken to be the law of the seat.

36 Because of the complexities in this area, England (and other jurisdictions such as Malaysia) are now amending their relevant statutes to provide for greater certainty. These amendments generally provide that, in the absence of an express choice by the parties, the law of the seat will be the law governing the arbitration agreement. Whether such legislative amendments will be adopted in Singapore remain to be seen.

1.3.5 Law governing a party's capacity to contract

37 A party must have the capacity to enter into an arbitration agreement.

38 Issues of incapacity may be raised before or during arbitration and may be submitted as a ground to set aside the award (Art 34(2)(a)(i) MAL), or to resist enforcement of an award (Art V(1)(a) NYC; Art 36(1)(a)(i) MAL; S 31(2)(a) IAA).

39 A party's legal capacity to contract is generally governed by the law of the party's nationality (i.e. *lex personam*), even if a different law applies to the merits of the parties' dispute. For a company, that will be the law of the place of incorporation or business. Alternatively, whether a party has validly entered into a contract may be determined by the law governing the contract.

2. Arbitration agreement

2.1 Existence of an arbitration agreement

2.1.1 Definition

40 An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement (Art 7(1) MAL; s 2A(2) IAA).

2.1.2 Writing requirement

41 An arbitration agreement must be in writing (Art 7(2) MAL 1985; s 2A(3) IAA).

42 An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means (s 2A(4) IAA). The requirement that an arbitration agreement shall be in writing is satisfied by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference (s 2A(5) IAA). There is deemed to be an effective arbitration agreement where in any arbitral proceedings, a party asserts the existence of an arbitration agreement in a pleading, and the assertion calls for a reply but is not denied (s 2A(6) IAA). [Note 1: Article 7 MAL does not apply in SG (s 2A(9) IAA). Singapore's version is similar to Option 1 of Art 7 of MAL 2006, except it has its own vocabulary.]

2.1.3 Incorporation by reference

43 Incorporation by reference refers to a situation where parties have not included an arbitration agreement in their own contract, but merely include a reference to another document which contains the arbitration agreement.

44 A reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement provided the reference is such as to make that clause part of the contract (s 2A(7) IAA; Art 7(2) MAL).

45 In Singapore, the test is whether the parties had intended to incorporate the arbitration agreement (*International Research v Lufthansa Systems* [2013] SGCA 55 at [34]). This is a question of construction. Specific words of incorporation may express such an intention (*Concordia v Cornelder* [1999] SGHC 269). Explicit reference to the arbitration clause is not necessary in order for it to be incorporated by reference. To do so would be far too restrictive (*Gay Construction* per Kaplan J; approved in *International Research* at [33]). Where the reference to another document is clearly to adopt all the terms of the document referred to, then incorporation includes the arbitration clause (*Mancon v Heng Holdings* [1999] SGHC 324).

2.2 Parties to an arbitration agreement

2.2.1 Non-signatories

46 As arbitration is based on consent, an arbitration agreement can bind only those who have consented to it. However, there are various legal doctrines that may bind non-signatories to an arbitration agreement. The applicable law on issues concerning the arbitration agreement is generally the law governing the arbitration agreement. To the extent Singapore law is the law governing the arbitration agreement, be mindful that the use of some of the concepts below, such as group of companies' doctrine and estoppel, to make a non-signatory party to an arbitration agreement remain highly controversial.

- Implied consent: Arbitral tribunals have held that negotiation or performance of obligations of a contract by a non-signatory can bind it to the agreement, including its arbitration clause. The fundamental question in the context of implied consent is whether the parties' objective intention was for the non-signatory to be a party to the agreement and its arbitration clause.

- Agency: A non-signatory can be bound to an arbitration agreement by agency principles, i.e. an agent who signs an agreement acting on behalf of a principal binds the principal to the agreement. In this connection, relevant concepts under the law of agency include actual authority (express or implied); apparent authority; and ratification.

- Assignment: An assignment refers to the transfer of property or rights to another party. Where a contract containing an arbitration agreement is assigned, the third party will ordinarily not have signed the contract or arbitration agreement, but is nevertheless bound.

- Group of companies' doctrine: The doctrine allows, under certain limited conditions, the extension of an arbitration agreement signed only by one or some of the companies of a group also to the non-signatory companies of the same group. The oft-cited case on this doctrine is *Dow Chemical v ISOVER Saint Gobain*, which is an ICC arbitral decision, but it is often overlooked that, in this case, the non-signatory itself invoked the arbitration clause. In *Manuchar Steel Hong Kong v Star Pacific Line* [2014] SGHC 181, the Singapore High Court expressed doubts about the applicability of this doctrine under Singapore law.

- Estoppel: Under the doctrine of estoppel, a party is "barred by considerations of good faith and equity from acting inconsistently with its own statements or conduct". A party is prevented from denying representations arising out of words or deeds on which another party has relied to its detriment. However, such a doctrine appears to be very narrow under Singapore law as it presently stands:

    - The doctrine applies to estop one party (A) from arguing that another party (B) to the arbitration agreement needs to commence a separate arbitration for B's claims against A, in circumstances where (i) there is an ongoing arbitration commenced by party C against party A on the same facts as party B's claim; *and* (ii) on a proper interpretation of the relevant contract party B is a party to the arbitration agreement: see *Jiang Haiying v Tan Lim Hui* [2009] SGHC 42.

    - The Singapore courts have considered, but not yet approved, of the wider approach to applying equitable estoppel to non-signatories endorsed in certain US cases: see *Parmod Kumar Verma v Unique Food Partners Pte Ltd* [2020] SGDC 254

2.2.2 Joinder

47 Joinder and intervention are opposite sides of the same coin and fundamentally relate to consent. Joinder refers to the situation where an existing party seeks to add a new party to an arbitration proceeding and to have the third party bound by its outcome. Although the MAL, the NYC and most arbitration agreements are silent on the question of joinder, it is addressed in most institutional rules, which give arbitral tribunals the power to consider whether there is at least *prima facie* consent by the third party to be bound by the arbitration agreement.

2.2.3 Consolidation

48 Consolidation involves the fusion of two or more separate and independently existing arbitrations into one arbitration. The MAL, the NYC and most arbitration agreements are silent on the issue of consolidation, but like the issue of joinder, the consolidation is typically addressed in most institutional rules.

2.3 Subject matter arbitrability

49 The question of subject matter arbitrability concerns whether the subject matter of a dispute is capable of determination by arbitration.

50 For arbitrations seated in Singapore, any disputes which the parties have agreed to submit to arbitration under an arbitration agreement is arbitrable (subjective arbitrability) unless it is contrary to public policy to do so (objective arbitrability) (s 11(1) IAA).

2.3.1 Subjective arbitrability

51 Subjective arbitrability concerns whether the parties have agreed to arbitrate certain claims or issues. This involves interpreting the arbitration agreement, including phrases such as "in connection with" or "arising out of" the contract. [Note: must be "commercial" for the MAL and IAA to apply; see footnote to Art 1 MAL]. In Singapore, the SGCA has held that arbitration clauses should be construed widely such that all manner of claims relating to the contract (whether based on tort or contract; whether common law or statutory), should be regarded as falling within their scope unless there

was a good reason to conclude otherwise (*Larsen Oil v Petroprod* [2011] SGCA 21 at [19]). The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out the relationship into which they have entered to be decided by the same tribunal (*Premium Nafta v Fili Shipping applied in Larsen v Petroprod* at [13]).

52 In *Larsen*, despite the SGCA's broad approach towards the construction of arbitration clauses, it found that the company's pre-insolvency management was unlikely to have contemplated including avoidance claims within the scope of an arbitration agreement (at [20]). Even if so contemplated, those claims were non-arbitrable as they were in essence insolvency claims (at [59]).].

2.3.2 Objective arbitrability

53 Objective arbitrability concerns matters the law permits parties to resolve by arbitration. A dispute is not arbitrable if it is contrary to public policy (s 11(1) IAA). In Singapore, no specific subjects have been identified by statute as being or as not being arbitrable. However, it is generally accepted that issues which may have public interest elements may not be arbitrable, e.g. citizenship, legitimacy of marriage, grants of statutory licences, validity of registration of trademarks or patents, copyrights, winding-up of companies (*Aloe Vera of America v Asianic Food* [2006] SGHC 78 at [72]).

54 In *Anupam Mittal v Westbridge Ventures* [2023] SGCA 1, the Singapore Court of Appeal held that "public policy" for the purposes of s 11 of the IAA includes foreign public policy. The SGCA thus adopted a novel "composite" approach in determining the arbitrability of a dispute at the pre-award stage. In the first instance, the arbitrability of a dispute is determined by the law that governs the arbitration agreement. If it is a foreign governing law and that law provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed pursuant to s 11. Second, where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed.

2.3.3 Consequences of non-arbitrable disputes

55 If a dispute is not arbitrable, an award on the dispute can be set aside (Art 34(2)(b)(i) MAL) or the courts may refuse to enforce it (Art V(2)(a) NYC; s 31(4)(a) IAA).

2.4 Pathological arbitration clauses

2.4.1 General approach

56 The term "pathological clause" is used to describe ambiguous or unclear arbitration agreements which contain defects liable to disrupt the smooth progress of the arbitration.

57 In Singapore, the SGCA has held that the concept of a "pathological clause" fulfilled a descriptive function rather than a prescriptive function, and labelling a clause as "pathological" did not automatically invalidate it as an agreement. Rather, "it depends on the nature or substance of the defect, or whether the defect was curable" (*Insigma Technology v Alstom Technology* [2009] SGCA 24 at [38]). In general, tribunals or courts will rely on the principle of effective interpretation to salvage the arbitration clause by restoring the true intention of the parties. However, the defect may not be curable if it is "impossible to infer an intention which is sufficiently coherent and effective to enable the arbitration to function" (*Insigma* at [39]).

58 Examples of defects:

- Naming the arbitral institution incorrectly or identifying a non-existent institution.
- Empowering one institution to administer another institution's rules.
- Referring to an arbitral institution by its location rather than by its name.
- Failing to indicate clearly that the award is final and binding.
- Identifying a specific arbitrator who has died or become unable to act thereafter.
- Drafting terms that are inherently contradictory to other terms in the arbitration agreement.

2.4.2 Naming the arbitral institutions incorrectly or identifying a non-existent situation

59 An arbitration agreement is not nullified simply because the parties chose the rules of a non-existent organisation. In such a case, the court may consider whether the dominant purpose of the agreement was to settle the disputes by arbitration. If it was, the court may direct arbitration before such tribunal as it determines to be the most appropriate in the circumstances (*Lucky-Goldstar v Ng Moo Kee* [1993] 2 HKLR 73 per Kaplan J). The court may determine through interpretation of the parties' intentions a particular arbitration institution to apply. In *Lucky-Goldstar*, the arbitration clause selected the rules of procedure of the 'International Commercial Arbitration Association', which was a non-existent organisation. The Defendant sought a stay of proceedings and the Plaintiff argued that there was no binding arbitration agreement on ground of a common mistake that such an institution did not exist or was 'inoperative or incapable of being performed'. Kaplan J granted the stay of proceedings, holding that the arbitration agreement was not nullified just because parties chose the rules of a non-existent organisation.

60 Another example is *Re Shanghai Xinan Screenwall Building & Decoration Co Ltd* [2022] SGHC 58 where the Singapore High Court interpreted a potentially defective arbitration clause, which selected the "*China International Arbitration Center*" (a non-existent institution), as an agreement to CIETAC arbitration and therefore upheld an award issued by a CIETAC Tribunal. The Court held that, provided the parties objectively intended to refer to the same arbitral institution (rather than intended different arbitral institutions, or it being impossible to tell either way), the validity of the arbitration agreement would not be affected.

61 A high watermark can be seen in the case of *KVC Rice Intertrade Co Ltd v Asian Mineral Resources* [2017] SGHC 32, where the relevant arbitration clauses in two contracts provided by "… *arbitration as per Singapore Contract Rules*" and "… *arbitration as per Indian Contract Rules*". The Singapore High Court characterised the arbitration clauses as "bare" arbitration clauses which do not specify either the place of arbitration or the means of appointing arbitrators. The Court observed that the enforcement of "bare" arbitration clauses would give rise to practical difficulties over how the arbitral tribunal would be appointed. Be that as it may, the Court upheld the arbitration clauses by finding that the statutory appointing authority in the IAA, namely

the President of the SIAC, has the power under Art 11(3) MAL to appoint the tribunal even in cases where the place of arbitration is unclear or not yet determined.

2.4.3 Empowering one's institution to administer another institution's rules

62 The Singapore Court of Appeal has held that, in general, there is no objection in principle to providing for a hybrid arbitration, namely one administered by one arbitration institution but governed by the rules (adapted as necessary) of another arbitration institution if the administering institution could arrange for organs to carry out functions similar to those performed by the other arbitration institution (*Insigma Technology v Alstom Technology* [2009] SGCA 24 at [35]).

63 In *Insigma*, the arbitration clause provided that *"… such disputes shall be resolved… before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce… the proceedings shall take place in Singapore*". The arbitral tribunal found that it was workable because the SIAC (in a letter to the tribunal) had indicated which bodies and individual officers within the SIAC would perform the roles of the functionaries described under ICC rules. The Singapore High Court upheld the tribunal's award. The Singapore Court of Appeal affirmed the decision below.

64 In *HKL Group v Rizq* [2013] SGHCR 5, the Court had to deal with an arbitration agreement which provided as follows. "*Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed*".

65 However, no entity called the "Arbitration Committee" exists in Singapore. The Singapore High Court upheld the arbitration agreement, but on the condition that "*parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules, with liberty to apply should they fail to secure any such agreement. [The Court] will hear parties on the issue of the*

imposition of any other conditions". The Court reached this decision even though after the *Insigma* case the ICC amended its institutional rules to clarify that the ICC is the only body authorised to administer arbitrations under the ICC Rules.

66 Notwithstanding these cases, it is good practice to avoid using hybrid arbitration clauses, namely, clauses that provide for arbitral institution to administer the arbitration using the rules of another institution. Even if the clause maybe upheld in Singapore, any consequent award may not be enforceable in another jurisdiction.

2.5 Drafting arbitration clauses

67 Try as much as possible to stick to the model clauses promulgated by the different arbitral institutions (these clauses are usually accessible on their websites). If you are free drafting, essential elements to include:

- Certainty regarding the identity of the parties.
- Certainty that the parties have agreed to submit their disputes exclusively to arbitration.
- Certainty as to the subject matter or scope of arbitrable disputes.
- Certainty of the seat of arbitration.
- Certainty as to the arbitral institution administering the arbitration, if any.
- Certainty as to number of arbitrators—avoid having a panel of two arbitrators.
- Stipulate the language of proceedings.
- Stipulate the governing law of the arbitration agreement.
- Stipulate to what extent parties agree to go for expedited arbitration (which is a feature available under certain institutional rules).

2.5.1 Clear obligation to arbitrate required

68 The drafting of optional arbitration clauses should be avoided. Arbitration agreements should provide that the dispute shall or will be referred to arbitration.

69 If an arbitration agreement provides that a dispute may be referred to arbitration, whether there is a clear obligation to arbitrate is arguable. Some jurisdictions have

equated the term "may" to "shall'' such that arbitration clauses which state that parties "may refer to arbitration" have been interpreted to mean that parties are obliged to do so (*China State Construction v Madiford* [1992] 1 HKC 320)].

70 What if the clause states that the parties "can" refer the dispute to arbitration? In *Guangdong Agriculture v Conagra International* [1993] 1 HKLR 113, the Hong Kong High Court (per Barnett J) upheld such a clause. The clause stated that "*All disputes… SHALL be settled by amicable negotiations. In case no settlement can be reached, the case under the dispute CAN then be submitted to… arbitration*". Construing the entire clause as a whole, the court found that the parties plainly agreed to settle any dispute by arbitration.

2.6 Stay of court proceedings (enforcement of arbitration agreement)

2.6.1 Staying of court proceedings in favour of arbitration

71 Where any party to an arbitration agreement institutes any proceedings in any court in breach of the arbitration agreement, the other party may apply to the court to stay the proceedings and refer the parties to arbitration (Art II(3) NYC; Art 8(1) MAL; s 6(1) IAA).

72 The application to stay the court proceedings must be done not later than the submission of the first statement on the substance of the dispute (Art 8(1) MAL). This may be done at any time after appearance and before delivering any pleading or taking any other step in the proceedings (s 6(1) IAA).

73 Under the IAA, the court shall stay the proceedings unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (Art II(3) NYC; Art 8(1) MAL; S 6(2) IAA).

74 But in the case of domestic arbitration, the court retains some discretion to refuse to stay court proceedings in favour of a domestic arbitration under s 6(2) of the AA. Specifically, it may do so when it is satisfied that there is *sufficient reason* why the matter should not be referred to arbitration in accordance with the arbitration agreement

or if the applicant seeking a stay was not ready and willing to do all things necessary for the proper conduct of the arbitration (s 6(2) AA; *CSY v CSZ* [2022] SGCA 43).

75 According to the Singapore Court of Appeal in *CSY*, in each case, the court must scrutinise the myriad factual circumstances to determine how best to manage its processes and ensure the efficient and fair resolution of the entire dispute. The term "sufficient reason" captures a broad range of factors (*Fasi Paul Frank v Speciality Laboratories Asia Pte Ltd* [1999] 1 SLR(R) 1138 at [18]). Ultimately, the factors invoked will be weighed against and will have to be found to outweigh the significant consideration that the parties had voluntarily bound themselves to arbitrate and ought therefore to be held to their agreement (*Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871 at [8]–[10]). Amongst others, the following factors are also instructive in the inquiry:

(a) the existence of related actions and disputes, some of which are governed by an arbitration agreement and others which are not;

(b) the overlap between the issues in dispute such that there is a real prospect of inconsistent findings;

(c) the likely shape of the process for the resolution of the entire dispute;

(d) the likelihood of injustice in having the same witnesses deal with the same factual issues before two different fora;

(e) the likelihood of disrepute to the administration of justice ensuing from the fact that overlapping issues may be differently determined in different actions;

(f) the relative prejudice to the parties; and

(g) the possibility of an abuse of process.

76 Some courts may refuse to grant a stay if it finds that there is, on the balance of probabilities, no dispute between the parties or that there is no valid and binding arbitration agreement between the parties. In Singapore, the courts will only conduct a *prima facie* examination of whether a dispute which is subject to the arbitration agreement exists and whether there is a valid and binding arbitration agreement between the parties. A mere denial of liability or of the quantum claimed, even in circumstances where no defence exists, will be sufficient to find a dispute for the purpose of s 6 IAA (or Art 8 MAL) (*Dalian Hualiang Enterprise v Louis Dreyfus Asia*

[2005] SGHC 161 at [43]; *Tjong Very Sumito v Antig* [2009] SGCA 41). However, no dispute will exist if there has been a clear and unequivocal admission of liability and quantum.

77 When an application to stay court proceedings is made, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court (s 8(2) MAL).

2.6.2 Attaching conditions

78 In Singapore, the court can order a stay of proceedings under such terms of conditions as it thinks fit (s 6(2) IAA), or impose any interim or supplementary orders as it thinks fit (s 6(3) IAA). The court has an unfettered discretion to impose terms and conditions upon a stay of court proceedings in favour of arbitration. However, the courts will generally be slow to interfere in the arbitration process (*The "Duden"* [2008] SGHC 149 at [12], [15]).

2.6.3 *Prima facie* finding

79 In an application to stay court proceedings in favour of arbitration, to what extent does the court consider the existence, scope and validity of the arbitration agreement? Should the court engage in a *prime facie* review, or make a definitive ruling based on a balance of probabilities?

80 In *Malini v Ventura* [2015] SGHC 225, it was argued that in cases where one party seeking the stay is contesting the very existence of an arbitration agreement, the court should make a definitive ruling on the existence of the arbitration agreement based on a balance of probabilities (which is applied under English law). The Singapore High Court disagreed and preferred the *prima facie* approach.

81 The Singapore Court of Appeal has since held, after a comprehensive review, that the court's examination of whether the arbitral tribunal has jurisdiction is *prima facie* only because this is properly a matter within the jurisdiction of the arbitral tribunal (*Tomolugen v Silica Investors* [2015] 1 SLR 373). For instance, this means that, as long

as it is *arguable* that the dispute falls within the terms of the arbitration agreement or that a party to the legal proceedings is a party to the arbitration agreement, a stay of proceedings should be granted so that the matters can be determined by the arbitral tribunal (*Dalian Hualiang v Louis Dreyfus* [2005] SGHC 161 at [21]).

82 In *Tomolugen*, the Singapore Court of Appeal laid down the following test under the IAA. A court hearing a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:

> (a) there is a valid arbitration agreement between the parties to the court proceedings;
> (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
> (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

83 Once this burden has been discharged by the party applying for a stay, the court should grant a stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself. The court will only refuse to grant a stay when it is clear on the evidence placed before it that one or more of the above three requirements have not been satisfied. The arbitral tribunal's determination of its jurisdiction will nonetheless remain subject to overriding court supervision in the form of an appeal under s 10(3) of the IAA against the arbitral tribunal's jurisdictional ruling, or in proceedings for setting aside or refusing enforcement of the award rendered by the arbitral tribunal (see, respectively, s 24 of the IAA and Art 34 of the MAL, and s 31 of the IAA).

84 For completeness, the SGCA in *Tomolugen* also decided the minority oppression claims are arbitrable as a matter of Singapore law.

3. Jurisdiction of arbitral tribunal

85 An arbitral tribunal's jurisdiction derives from the agreement to arbitrate. The consensual basis of arbitration means that a party can attempt to contest arbitral jurisdiction by denying the agreement to arbitrate.

86 Jurisdictional objections can be absolute (e.g. no capacity, illegal, incapable of being performed) or partial (e.g. particular issue falls outside scope of arbitration clause).

3.1 Options to challenge

87 A party who wishes to contest jurisdiction of the arbitral tribunal has the following options.

88 Participate fully in the arbitration and raise objections directly with the arbitral tribunal. Tribunals are empowered to decide on their own jurisdiction under the competence-competence rule, either as a stand-alone preliminary issue, or together with the merits of the case. Under the MAL, a tribunal's decision that it possesses jurisdiction is always subject to review by the courts, at two stages. The first stage is after the tribunal decides the jurisdiction as a preliminary issue. The second stage is after the tribunal releases its final award.

89 By way of illustration, assuming the seat is Singapore:

a. If the tribunal decides that it has jurisdiction as a preliminary decision, the objecting party can make an application under s 10(3) of the IAA for the Singapore courts to review the tribunal's decision on jurisdiction.

    i. It has been held in *obiter* that if the objecting party does not make an application under s 10(3) of the IAA, that party loses the right to make a setting aside challenge on any eventual award subsequently on the same jurisdictional objection: *PT First Media v Astro Nusantara* [2013] SGCA 57.

ii. Nevertheless, subject to any waiver an award debtor always retains its rights to resist enforcement of the award wherever the award creditor may try to enforcement the award: *PT First Media v Astro Nusantara* [2013] SGCA 57.

b. If the tribunal does not decide the issue of jurisdiction as a stand-alone preliminary issue and decides that it has jurisdiction in an award that also deals with the merits of the case, s 10(3) is not triggered. The objecting party can apply to set aside the award under Art 34 MAL, or resist enforcement the award wherever the award creditor may try to enforcement the award.

90 Refuse to participate in the arbitration. The party can wait for the arbitral tribunal's final award then (i) seek to have that award set aside at the seat on the basis that the tribunal did not have jurisdiction to make the award; or (ii) wait for the claimant to commence proceedings to enforce the award then resist enforcement for the same reason: *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services* [2019] SGCA 33 (overruling the SGHC). Although a respondent who protests a tribunal's jurisdiction has the right not to participate in the arbitration, practically speaking, this is risky. If its jurisdictional plea fails, the non-participating party will be bound by an award made in circumstances where its position was never argued before the arbitral tribunal.

91 Participate in the arbitration and ask the tribunal to determine the jurisdictional objections as a preliminary issue. Boycott the arbitration if the tribunal decides, as a preliminary issue, that the tribunal has jurisdiction. For the same reasons above, this tactic is risky. Indeed, case law is presently unclear what if any recourse a boycotting party has against the tribunal's eventual award.

92 Commence litigation. In such a case, it is expected that the opposing party will typically contest the court's jurisdiction by applying for a stay of court proceedings in favour of arbitration. Nevertheless, the opposing party could decide to accept the domestic court's competence (e.g. if it argues its defence before the court without objecting to the court's jurisdiction), and waive its right to invoke the arbitration agreement in connection with the dispute.

3.2 Doctrine of competence-competence

93 Under the doctrine of competence-competence, an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (Art 16(1) MAL).

3.3 Validity of arbitration agreement (doctrine of separability)

94 The jurisdiction of the arbitrator is put in question if a party contends that the arbitration agreement is invalid.

95 Separate from the doctrine of competence-competence which deals with the power of the tribunal, under the doctrine of separability, an arbitration clause in a contract is treated as an agreement independent of the other terms of the contract (Art 16(1) MAL).

96 The validity of the arbitration clause does not depend upon the validity of the other parts of the contract in which it is contained. This allows a tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute as to the consequences of such invalidity (*Ferris v Plaister* [1994] 34 NSWLR 474 per Kirby J). The arbitration agreement is treated as a distinct agreement that can be void or voidable only on grounds which relate directly to the arbitration agreement (*Premium Nafta Products v Fili Shipping* [2007] UKHL 40 at [17], per Lord Hofmann). This doctrine of separability has been applied by the courts in Singapore (*Govt. of Philippines v Philippine International Air Terminals* [2006] SGHC 206).

97 Practically speaking, this means that if one wants to challenge the validity of the arbitration clause, one cannot simply allege the invalidity of the entire contract—the challenge needs to be targeted at the arbitration clause.

98 There was previously debate on the extent to which the doctrine of separability should apply when the allegation of the complainant goes towards contract formation, as opposed to contract validity. The English courts appear to take the position that the doctrine does not apply when the complaint goes towards whether the contract is even formed in the first place[6]. The Singapore Court of Appeal recently endorsed the same

[6] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWCA 1555.

proposition in *COT v COU* [2023] SGCA 31 at [30], namely, that the separability principle only applies to questions of contractual validity and not to contractual formation.

3.4 Process of objecting to tribunal's jurisdiction

3.4.1 Timing of objection

99 If a party wishes to object to the tribunal's jurisdiction, he must do so not later than the submission of the statement of defence (Art 16(2) MAL). A plea that the tribunal is exceeded its jurisdiction must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. However, the arbitral tribunal may admit a late plea if it considers the delay justified (Art 16(2) MAL).

100 A party is not precluded from raising a plea that the arbitral tribunal does not have jurisdiction by the fact that he appointed, or participated in the appointment of an arbitrator (Art 16(2) MAL).

3.4.2 Failure to object

101 If the party has knowledge of the circumstances and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or within the time limit provided, he shall be deemed to have waived his right to object (Art 4 MAL).

102 Alternatively, if a non-signatory participates in the arbitration and fails to object to a tribunal's jurisdiction within the time limit specified, its silence may amount to entering into an arbitration agreement (s 2A(6) IAA: there shall be deemed to be an effective arbitration agreement where a party asserts the existence of an arbitration agreement in a pleading and the assertion is not denied).

103 However, commencing an action in court specifically in relation to proceedings for temporary injunctive relief or interim measures does not amount to a waiver of the arbitration agreement (Art 9 MAL: it is not incompatible with an arbitration agreement for a party to request from a court an interim measure of protection).

3.4.3 Preliminary question or award on the merits?

104 The arbitral tribunal may rule on a jurisdictional objection either as a preliminary question thus bifurcating the proceedings, or in an award on the merits (Art 16(3) MAL; s 10(3) IAA).

105 The advantage of deciding jurisdiction separately from the merits is that it potentially avoids long and costly proceeding on the merits when it is uncertain whether the arbitral tribunal possesses jurisdiction. It may make sense to bifurcate proceedings especially if the jurisdictional issues involved can be segregated from the merits of the case. On the other hand, if the jurisdictional objections are frivolous (which is not uncommon in attempted dilatory tactics), this militates against bifurcation which would only delay progression to the merits of the case.

3.4.4 Appeal to tribunal's jurisdictional ruling

106 MAL:

- Mechanism to seek immediate review under Art 16(3): If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the court at the seat of the arbitration within 30 days to decide the matter, which decision is subject to no appeal (Art 16(3) MAL). While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award (Art 16(3) MAL).

- Setting aside / enforcement proceedings: A tribunal's preliminary decision on jurisdiction is not liable to be set aside under Art 34 MALbecause it is not an award. However, an award on the merits may be set aside (or resisted when enforced) on the ground that the tribunal lacked jurisdiction (Art 34(2) MAL; Art V NYC).

- Negative jurisdictional decisions: (1) The MAL does not provide for recourse against an arbitral tribunal's decision that it lacks jurisdiction. In other words, if the tribunal decides that it has no jurisdiction, the court shall not second guess that decision. (2) Further, a negative determination on jurisdictional is similarly not an

award as it is not a decision on the substance of the dispute. If jurisdictional decisions are not "awards", they cannot be set aside under Art 34 MAL (*PT Asurani v Dexia Bank* [2006] SGCA 41 at [66]).

107 Singapore's IAA:

- IAA slightly modifies the MAL's mechanism of curial review under Art 16(3). In Singapore, if the tribunal makes a ruling on jurisdiction as a preliminary issue, then regardless of whether the arbitral tribunal makes a positive or negative jurisdictional ruling, any party may, within 30 days after receiving notice of that ruling, apply to the Singapore High Court to decide the matter (s 10(3) IAA). An appeal from the decision of the High Court can be made to the appellate court only with the leave of the appellate court (s 10(4) IAA). There is no appeal if the appellate court refuses to grant leave to appeal (s 10(5) IAA).

3.4.5 Scope of court review of tribunal's jurisdictional decisions

108 Whenever a court at the seat of arbitration (typically called the curial court) reviews an arbitral tribunal's decision on jurisdiction (whether under s 10(3) IAA or at the setting aside stage), the court decides the issue *de novo* and it is not bound by the tribunal's decision. The court's jurisdiction to decide the jurisdiction of an arbitral tribunal is an original jurisdiction and not an appellate one. This is implied from the wording of Art 16(3) MAL which provides for the court to "decide the matter" (*Insigma Technology v Alstom Technology* [2008] SGHC 134 at [21]; *PT First Media v Astro Nusantara* [2013] SGCA 57). The court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities (*AQZ v ARA* [2015] 2 SLR 972 at [57]).

109 To what extent can parties adduce further evidence before the Courts when seeking curial review of a tribunal's decision on jurisdiction? There is no definitive guidance from the Singapore courts yet, with *AQZ v ARA* suggesting a less restrictive approach, compared to *Laos v Sanum* [2015] SGHC 15 applying a stricter approach mirroring the *Ladd v Marshall* test in civil litigation. Most recently, in *COT v COU* [2023] SGHC 69 at [75], it was suggested that the Court has discretion to decide what evidence it will receive, but a party does not have the right to insist on a full rehearing of the evidence

adduced before the tribunal. The discretion extends to what evidence the Court will receive, whether the Court is content to rely on the evidence presented to the tribunal or wishes to receive evidence anew and whether the Court receives the evidence on affidavit alone or *viva voce*, with or without cross-examination.

4. Constitution and challenge of arbitral tribunal

4.1 Constitution of tribunal

4.1.1 Number of arbitrators

110 Parties are free to determine the number of arbitrators (Art 10(1) MAL). If the number of arbitrators is not determined by the parties:

- The default number of arbitrators is three (Art 10(2) MAL).
- Notwithstanding Art 10(2) MAL, there shall be a single arbitrator (s 9 IAA).

4.1.2 Procedure of appointment

111 Parties are free to agree on a procedure of appointing the arbitrator(s) (Art 11(2) MAL). This is a matter usually addressed by institutional rules.

112 Failing such agreement:

- In an arbitration with 3 arbitrators:
  - Each party shall appoint one arbitrator, and the parties shall by agreement appoint the third arbitrator (s 9A(1) IAA). If the parties fail to agree on the appointment of the third arbitrator within 30 days of the receipt of the request to do so, the appointment shall be made by the appointing authority (s 9A(2) IAA).
- In an arbitration with a sole arbitrator:
  - If the parties are unable to agree on the arbitrator, he shall be appointed by the relevant authority specified in Art 6 (Art 11(3)(b) MAL)
- Appointing authority:
  - In Singapore, the High Court is the competent court to perform the functions referred to in Art 6 of the MAL, while the President of the SIAC Court has been designated as the authority competent to perform the functions under Art 11(3) and (4) of the MAL (s 8(1), (2) IAA).

4.2 Challenging arbitrators

113 Steps:

- Step 1: What is the ground for challenge? ➔ Test of 'reasonable suspicion ➔ Look at the IBA Guidelines on Conflicts of Interest in International Arbitration
- Step 2: What is the challenge procedure under the institutional rules or *lex arbitri*?

4.2.1 Grounds for challenge

114 An arbitrator has an ongoing duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence (Art 12(1) MAL). An arbitrator may be challenged if circumstance exist that give rise to "justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties" (Art 12(2) MAL). However, a party may challenge an arbitrator nominated by him only for reasons of which he becomes aware after the appointment was made (Art 12(2) MAL).

115 An objection must be made as soon as the grounds are known to the party seeking the challenge. Failure to do so may constitute a waiver (Art 4 MAL).

4.2.2 Test for impartiality and independence

116 In Singapore, the applicable test is one of "reasonable suspicion". The concern is not whether there is a real likelihood or possibility of bias, but simply whether a reasonable man without any inside knowledge might conclude that there was an appearance of it (*Re Shankar Alan* [2006] SGHC 194 at [76], [78]).

117 A ground which may give rise to impartiality are instances where an arbitrator has private contact with one party or appears to have some personal correspondence from that party. While that there is no absolute rule against an arbitrator corresponding directly with the parties, this should only be done in very exceptional circumstances (*Turner (East Asia) v Builders Federal (Hong Kong)* [1988] SGHC 47 at [93]).

118 Parties can rely on Art 12(2) of the MAL to challenge the appointment of an arbitrator if "*circumstances exist that give rise to justifiable doubts as to his impartiality or independence, … . A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons which he becomes aware after the appointment has been made*.".

119 The Singapore High Court affirmed (in *PT Central Investindo v Francisus Wongso and ors and anor matter* [2014] SGHC 190 ("*PT Central Investindo*")) that the test under this particular provision is an objective one, and the court is to find circumstances that exist which give rise to justifiable doubts. Once such doubts have been found, the applicant need not prove the existence of actual bias.

120 Actual bias is one of the three forms of bias considered by the Singapore courts – (i) actual bias, (ii) imputed bias, or (iii) apparent bias. Findings of an actual bias will obviously disqualify a person from sitting in judgment.

121 The second form of bias is imputed bias which arises where a judge or arbitrator may be said to be acting in his own cause (*nemo judex in sua causa*) and this happens if he has, for instance, a pecuniary or proprietary interest in the case. In such a case, disqualification is certain without the need to investigate whether there is a likelihood or even suspicion of bias.

122 The third form of bias is apparent bias, with the test to be applied being the "reasonable suspicion test", i.e. whether a reasonable and fair-minded person with knowledge of all relevant facts would entertain a reasonable suspicion that the circumstances leading to the arbitral award might result in the arbitral proceedings being affected by apparent bias if the arbitrator was not removed (*PT Central Investindo,* at [18]).

123 In *BYL and ors v BYN* [2020] SGHC(I) 6 ("*BYL v BYN*"), the Singapore Court analogised the test to be applied in order to determine apparent bias in arbitrators to that applied in court proceedings, namely a test of reasonable suspicion. This involves an assessment of whether there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the

relevant facts that the tribunal may be biased and that a fair hearing may not be possible as a result. The test applies to applications to remove an arbitrator for bias under Art 13(3) of the MAL and applications to set aside an arbitral award for apparent bias under section 24(b) of the IAA and Art 34(2) of the MAL (*BYL v BYN*, at [50]).

124 The reasonable suspicion test is applied objectively. The hypothetical reasonable observer is presumed to be a lay-person who is (1) informed of the relevant facts and able to consider them in their proper context, (2) not wholly uninformed and uninstructed about the law in general or the issues to be determined in the proceedings, (3) aware of the traditions of integrity and impartiality that persons who exercise adjudicative functions generally have to uphold, and (4) fair-minded in the sense of being neither complacent nor unduly sensitive or suspicious.

125 A reasonable suspicion or apprehension arises when the hypothetical reasonable observer would think, from the relevant circumstances, that bias is possible. The belief should not be fanciful and must be capable of articulation by reference to the available evidence. A standard of possibility (as opposed to probability) is adopted to ensure that from the public perspective the administration of justice is beyond reproach (*BYL v BYN*, at [51]).

4.2.3 IBA Guidelines on Conflicts of Interest in 2014

126 While they are (typically) not binding and do not have the force of law, the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) are widely referred to by parties, arbitrators, and courts. The IBA Guidelines contain certain "coloured lists" as follows.

127 Non-waivable red list includes situations deriving from the overriding principle that no person can be his or her own judge. Acceptance of such a situation cannot cure the conflict.

- 1.1 The arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

- 1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration
- 1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.
- 1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

128 Waivable red list covers situations that are serious but not as severe. These situations are considered waivable, but only if and when the parties, being aware of the conflict-of-interest situation, expressly state their willingness to have such a person act as arbitrator.

- Relationship of arbitrator to the dispute.
  - 2.1.1. Where the arbitrator has given legal advice or provided an expert opinion, on the dispute to a party or an affiliate.
  - 2.1.2. Arbitrator had a prior involvement in the dispute.
- Arbitrator's direct or indirect interest in the dispute
  - 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.
  - 2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.
- Arbitrator's relationship with the parties or counsel.
  - 2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.
  - 2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.
  - 2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.
  - 2.3.9. A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

129 Orange list: The arbitrator has a duty to disclose in such situations. The parties are deemed to have accepted the arbitrator, if, after disclosure, no timely objection is made.

- Previous services for one of the parties or other involvement in the case
    - 3.1.1 The arbitrator, has, within the past 3 years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party… but the arbitrator and the party… have no ongoing relationship.
    - 3.1.2 The arbitrator has, within the past 3 years, served as a counsel against one of the parties…
- Current services for one of the parties
    - 3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.
- Relationship between an arbitrator and another arbitrator or counsel
    - 3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.
    - 3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.
    - 3.3.3 The arbitrator was, within the past 3 years, a partner of, or otherwise affiliated with another arbitrator or any counsel in the arbitration.
    - 3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
    - 3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.
    - 3.37 Enmity exists between an arbitrator and counsel appearing in the arbitration.
- Other circumstances
    - 3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties.
    - 3.5.2 the arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

130 Green list: a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. The arbitrator has no duty to disclose situations falling within the green list.

- Previously expressed legal opinions.
    - 4.1.1 The arbitrator has previously expressed a legal opinion concerning an issue that also arises in the arbitration (but the opinion is not focused on the case).
- Current services for one of the parties.
    - 4.2.1 A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties.
- Contacts with another arbitrator, or with counsel for one of the parties.
    - 4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.
    - 4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.
    - 4.3.3 Arbitrator teaches in the same faculty or school as another arbitrator, etc.
    - 4.3.4 arbitrator participated in seminars or working parties of a professional organisation with another arbitrator or counsel to the parties.
- Contacts between the arbitrator and one of the parties.
    - 4.4.1 The arbitrator has had an initial contact with a party, or their counsel prior to appointment, if the contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.
    - 4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.
    - 4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

4.2.4 Challenge procedure

131 3 possible scenarios once a challenge is filed:

- Arbitrator does not resign and opposing party contests the challenge. In this case, a decision on the merits of the challenge will have to be taken.
- Opposing party agrees to the challenge. The arbitrator's mandate ordinarily terminates, although an arbitrator may purport to remain on the panel despite all parties agreeing to remove him.
- Arbitrator resigns. However, tendering a resignation after being challenged should not be seen as an admission that the challenge was justified.

132 This is an area that is addressed in most institutional rules. The MAL which applies where parties have not agreed to any relevant rules provides as follows: Parties are free to agree on a procedure for challenging an arbitrator (Art 13(1) MAL). If there is no agreement, a party who intends to challenge an arbitrator shall submit a written statement of reasons for challenge to the arbitral tribunal within 15 days after becoming aware of the circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge (Art 13(2) MAL). If the challenge is unsuccessful, the challenging party may, within 30 days, request the court to decide on the challenge, which decision shall be subject to no appeal. While such a request is pending, the tribunal may continue proceedings and make an award (Art 13(3) MAL).

4.2.5 Failure or impossibility to act

133 If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from office or if parties agree on the termination. Otherwise, any party can request the court to decide on the termination of the mandate, which decision shall be subject to no appeal (Art 14(1) MAL). Withdrawal by the arbitrator or agreement by the parties to terminate the arbitration does not imply acceptance of the validity of any ground for removal (Art

14(2) MAL). The mechanism in Art 14 MAL is different from Art 13 MAL (which deals with challenges as to independence and impartiality) because it provides a direct recourse to the court and is not time limited.

134 Where the mandate of an arbitrator terminates or because of his withdrawal from office, a substitute arbitrator is appointed according to the rules that were applicable to the appointment of the arbitrator being replaced (Art 15 MAL).

4.2.6 Setting aside or resisting enforcement of award on ground that arbitrator was partial

135 A party may attempt to set aside an award on the grounds that the arbitrator was not independent under Art 34(2)(a)(iv) MAL [composition of arbitral tribunal or arbitral procedure not in accordance with agreement of parties] or under s 24(b) IAA [breach of rules of natural justice where rights of party prejudiced]. An application for setting aside may not be made after 3 months of receiving the award (Art 34(3) MAL). However, if the party fails to challenge the arbitrator's lack of impartiality or independence without undue delay after becoming aware of the circumstances, he may be deemed to have waived his right to challenge the arbitrator (Art 4 MAL).

136 Enforcement of the award in Singapore may be resisted on the similar grounds, i.e. that composition of the arbitral tribunal or arbitral procedure was not in accordance with agreement of parties (Art V(1)(d) NYC; s 31(2)(e) IAA).

4.2.7 Immunity of arbitrators and institutions

137 Immunity of arbitrators: An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitration, and or any mistake in law, fact, or procedure made in the course of arbitral proceedings or in the making of an arbitral award (s 25 IAA).

138 Immunity of institutions: Most international arbitration rules also contain an exclusion of liability provision to protect arbitrators and arbitral institutions from civil liability.

Section 25A IAA also provides immunity to an appointing authority for performing its appointment function unless it can be shown that the authority acted in bad faith.

4.3 Arb-med

139 Arb-med is a dispute resolution process which combines arbitration and mediation. The mediation, if it occurs, takes place with the parties' consent at an appropriate stage during the arbitration proceedings.

140 In Singapore, where all parties to an arbitral proceeding consent in writing, an arbitrator may act as a conciliator (s 17(1) IAA). In this case, the parties will be taken to have waived their right to challenge the arbitrator solely on the ground that he had acted previously as a conciliator (s 17(4) IAA).

141 Whilst an arbitrator double-hatting as a mediator is common in certain jurisdictions such as China, issues of impartiality may arise if the arbitrator is also asked to be a mediator. For this reason, the SIAC-SIMC Arb-Med-Arb protocol uses a separate arbitrator and mediator.

142 Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in over 170 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.[7]

143 Parties keen to use the SIAC-SIMC Arb-Med-Arb protocol can insert the appropriate model clause into their contracts.

144 What happens if a party does not adhere to the med-arb clause and refuses to engage in any pre-arbitration mediation? Does that entitle the innocent party to commence a court action instead?

[7] https://siac.org.sg/the-singapore-arb-med-arb-clause

145 In *Heartronics Corporation v EPI Life Pte Ltd* [2017] SGHCR 17, the Singapore High Court refused to grant a stay of court proceedings in favour of arbitration because, in its view, the first defendant had committed a repudiatory breach of the arbitration agreement by conveying that it had no interest in performing its obligation under the relevant med-arb clause to participate in mediation. The first defendant delayed matters, failed to pay the relevant fees for mediation, and alleged that it had cashflow issues which were not substantiated. Under those circumstances, the court held that the first defendant's repudiatory breach was accepted by the plaintiff, thereby rendering the med-arb clause inoperative.

146 This can be contrasted with *Maxx Engineering v PQ Builders Pte Ltd* [2023] SGHC 71, where clause 54 provided that, in the event of a dispute, the parties "*shall endeavour to resolve the dispute through negotiations*" and *"[i]f negotiations fail, the parties shall refer the dispute for mediation at the [SMC] in accordance with the Mediation Rules for the time being in force*". Clause 55 of the contract provided that if the dispute was not resolved by the parties in accordance with clause 54, the parties shall refer the dispute for arbitration.

147 When a dispute arose between the parties, the respondent referred the dispute to arbitration pursuant to Clause 55, without referring the dispute to mediation. The respondent argued that it was not under a contractual obligation to refer the dispute to mediation before resorting to arbitration, because clause 54 had stated that "*[f]or the avoidance of doubt, prior reference of the dispute to mediation under this clause shall not be a condition precedent for its reference to arbitration…*".

148 The Singapore High Court held that, by its plain wording, clause 54 imposed a legal obligation on the parties to refer their dispute to mediation, if negotiations failed. The High Court also found that it was just and equitable to grant an order specific performance sought by the applicant compelling the parties to refer the dispute to mediation, because (a) damages were not an adequate remedy if specific performance was not ordered, (b) the respondent would not suffer substantial hardship from the order, (c) an order for specific performance would not be futile as there was no evidence that mediation would be futile and (d) the order for specific performance would not be impractical as there was no serious difficulty in determining whether the respondent had taken specific and concrete steps to refer the dispute to mediation.

5. Conduct of proceedings

5.1 Freedom to agree on the procedure

149 Parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings (Art 19(1) MAL), for instance by agreeing to certain institutional rules. Failing such agreement, the arbitral tribunal has the power to conduct the arbitration in such manner as it considers appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence (Art 19(2) MAL).

150 It is important to note that domestic evidence statutes and laws are not binding on the tribunal, unless parties agree. e.g. Evidence Act of Singapore only applies if parties agree

5.2 Core procedural rights and duties

151 A fundamental right is that all parties shall be treated with equality and be given a full opportunity of presenting his case (Art 18 MAL).

152 Parties can request for an oral hearing to take place (Art 24(1) MAL). Parties are to be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal (Art 24(2) MAL). All statements, documents or information supplied to the arbitral tribunal by one party shall be communicated to the other party (Art 24(3) MAL).

5.3 Default of a party (or non-participation)

5.3.1 Claimant fails to communicate statement of claim

153 If, without showing sufficient cause, the claimant fails to communicate his statement of claim, the arbitral tribunal shall terminate the proceedings (Art 25(a) MAL).

5.3.2 Respondent fails to communicate statement of defence

154 If, without showing sufficient cause, the respondent fails to communicate his statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations (Art 25(b) MAL).

5.3.3 Any party fails to appear at a hearing or to produce documentary evidence

155 If any party, without showing sufficient cause, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it (Art 25(c) MAL).

5.4 Obtaining evidence

5.4.1 Documentary evidence

156 An arbitral tribunal seated in Singapore has the power to make orders or give directions to any party for the discovery of documents (s 12(1)(b) IAA).

157 Court assistance may be sought in document production (Art 27 MAL). In Singapore, any party to an arbitration may take out a subpoena to produce documents, which may be issued by the SGHC (s 13(1), (2) IAA).

5.4.2 Witness evidence

158 A witness who refuses to give evidence may be compelled to do by the courts in Singapore if said witness is in Singapore (s 13(2) IAA). In *ALC v ALF* [2010] SGHC 231, the Singapore High Court confirmed that under s 30 of the AA, subpoenas may be issued to compel the attendance of a witness before an arbitral tribunal. However, in that case, the Singapore High Court set aside the subpoena on the basis that the party seeking the subpoena ought to have sought directions from the tribunal on the calling of the relevant witness prior to making any court application. This was because the terms of Procedural Order No. 1 in the arbitration reserved the decision as to what *legal* steps a party should take in the event it wishes to adduce evidence from a person who will not appear voluntarily at its request to the arbitrator; and second, that

party should write first to the arbitrator, enclosing the grounds on which they seek such a witness's testimony and explain its relevance to the substantive case.

5.5 Confidentiality

159 This is an issue that is typically covered in institutional rules. In *India v Deutsche Telekom* [2023] SGCA(I) 4, the SGCA described the "*conventionally private nature of arbitration proceedings*".

160 In Singapore, ss 22 and 23 of the IAA provide, among other things, that court proceedings relating to arbitration are to be heard in private by default. In *India v Deutsche Telekom* [2023] SGCA(I) 4, it was recognised that the purpose of ss 22 and 23 is to protect the confidentiality of the arbitration itself and the interest in keeping any enforcement proceedings confidential under the IAA is essentially a derivative interest designed ultimately to protect the confidentiality of the underlying arbitration. However, when the confidentiality of the arbitration has been lost, the principle of open justice would weigh strongly in favour of lifting the cloak of privacy that has been provided for in the IAA.

161 Earlier, in *AAY v AAZ* [2011] 1 SLR 1093, the Singapore High Court opined (at [55]) that "*as a principle of arbitration law at least in Singapore and England, the obligation of confidentiality in arbitration will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration*". In that case, the High Court held (at [72]) that "*confidentiality is a lesser interest than the public interest of having criminal wrongdoing revealed to the relevant authorities for their investigation*" and accordingly "*disclosure to the appropriate authorities where there is reasonable suspicion of criminal conduct is thus an exception to the obligation of confidentiality*".

5.6 Parties' representation

162 In Singapore, there are no restrictions on the ability of foreign lawyers to act for clients in arbitrations seated in Singapore (s 32 read subject to s 35 Legal Profession Act). This extends to: any arbitrator acting in arbitration proceedings, (b) a person representing

any party in arbitration proceedings, or (c) the giving of advice, preparation of documents in relation to arbitration proceedings (s 35(1) LPA).

5.7 Termination of proceedings

163 Arbitral proceedings are terminated by the final award (Art 32(1) MAL). The arbitral tribunal shall issue an order for termination of the arbitral proceedings when: (a) the claimant withdraws his claim, unless the respondents object and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute; (b) the parties agree on the termination of the proceedings; (c) the arbitral tribunal finds that continuation of the proceedings has for any other reason become unnecessary or impossible (Art 32(2) MAL).

164 However, after termination, the mandate of the tribunal may revive if there is a request by a party to correct or interpret the award under Art 33 MAL or if a court hearing a setting aside application determines that the arbitral tribunal shall resume arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside under Art 34(4) MAL (Art 32(3) MAL).

MAL

6. Interim measures

165 Interim measures are court or arbitral tribunal orders designed to protect assets or maintain the status quo pending the outcome of legal proceedings. Most courts and tribunals have concurrent jurisdiction to grant interim relief.

6.1 Tribunal ordered interim measures

166 SG IAA: The tribunal has the power to issue an order or direction to any party granting an interim injunction or any other interim measure (s 12(1) IAA). All orders and directions made or given by an arbitral tribunal is, by leave of the SGHC, enforceable in the same manner as if they were orders made by a court (s 12(6) IAA).

167 Under s 12(1) IAA, an arbitral tribunal seated in Singapore has the powers to make orders or give directions to any party for:

(a) Security for costs;
(b) Discovery of documents and interrogatories;
(c) Giving of evidence by affidavit;
(d) The preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute;
(e) Samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject matter of the dispute;
(f) The preservation and interim custody of any evidence for the purposes of the proceedings;
(g) Securing the amount in dispute;
(h) Ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;
(i) An interim injunction or any other interim measure; and
(j) Enforcing any obligation of confidentiality –
(i)that the parties to an arbitration agreement have agreed to in writing, whether in the arbitration agreement or in any other document;
(ii) under any written law or rule of law; or

(iii) under the rules of arbitration (including the rules of arbitration of an institution or organisation) agreed to or adopted by the parties.

168 An order made under s 12 IAA cannot be set aside because s 34 MAL (and s 24 IAA) only extends to an "award" (*PT Pukuafu v Newmont Indonesia* [2012] SGHC 187 at [19]). To this end, the definition of an "award" under s 2 IAA specifically excludes orders and directions made under s 12 IAA. Nonetheless, the enforcement mechanism under s 12(6) IAA requires the leave of the SGHC, which provides some residual protection for the rights of both parties (*PT Pukuafu* at [27]). In *PT Pukuafu*, the plaintiffs applied to the SGHC to set aside the interim order restraining the plaintiffs from continuing with proceedings before Indonesian courts or instituting new proceedings. The court held that it did not have jurisdiction to set aside the interim order.

169 MAL 1985: Unless agreed otherwise by the parties, the tribunal has the power, at the request of a party, to order any party to take such interim measure of protection as the tribunal considers necessary in respect of the subject matter of the dispute. The tribunal may require any party to provide appropriate security in connection with such measure (Art 17 MAL). The parties may agree that the tribunal should not have such a power.

6.1.1 Interim measures by the Court

170 Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures (Art 17 MAL).

171 The 2006 amendments to the MAL introduced further provisions concerning interim measures, which have not been enacted in Singapore. For instance, the tribunal can order a party, inter alia, to maintain the status quo pending determination of the dispute, refrain from taking action that will prejudice the arbitral process, to preserve evidence relevant to the dispute (Art 17(2) MAL 2006). The party requesting an interim measure must satisfy the tribunal that harm not adequately reparable by damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm likely to result to the party against whom the measure is directed (Art 17A(1)(a) MAL 2006). Moreover, the party must show that there is a reasonable possibility that he will succeed on the merits of the claim (Art 17A(1)(b) MAL 2006).

6.1.2 Ex parte preliminary orders

172 A preliminary order is essentially the same as an interim measure, except it is obtained ex parte, i.e. the tribunal has heard from only one of the parties. The 1985 MAL is silent on ex parte orders.

173 The 2006 amendments to the MAL which have not been enacted in Singapore have certain provisions concerning preliminary orders. Unless agreed otherwise, a party may, without notice to any other party, make a request for an interim measure together with a preliminary order (Art 17B(1) MAL 2006). The arbitral tribunal may grant a preliminary order if it considers that prior disclosure of the request risks frustrating the purpose of the measure (Art 17B(2) MAL 2006). Notice of the order must be provided immediately after the order is made (Art 17C(1) MAL 2006). Further, the tribunal must give the party against whom a preliminary order is directed to present its case (Art 17C(2) MAL 2006). The order has a life span of 20 days but this may be varied after hearing the party subject to the order (Art 17C(4) MAL 2006). Such a preliminary order is binding on the parties but is neither an award nor is subject to enforcement by a court (Art 17C(5) MAL 2006).

174 The 2006 MAL contains safeguards to prevent abuse of the interim measures regime:

- Arbitral tribunal may modify, suspend or terminate interim measure at any time (Art 17D MAL 2006).
- It may require appropriate security to be provided (Art 17E MAL 2006).
- It may require the requesting party to make prompt disclosure of any material change in the basis on which the measure was requested or granted (Art 17F MAL 2006).
- The party requesting the measure is liable for any costs or damages caused by the interim measure if the arbitral tribunal determines that the measure should not have been granted (Art 17G MAL 2006)

6.2 Court ordered interim measures

175 When to go to court to obtain interim relief?

- Where tribunal has not yet been constituted, parties may seek (urgent) provisional measures from a court to protect against immediate harm.
- An interim measure may not be enforceable internationally under the NYC and may need to be requested directly from a court at the place of execution.
- If the interim relief sought would ultimately require court assistance, such as the attachment of a bank account, going to court immediately would save time.
- Tribunal may not have the powers to order interim measures.

However, a downside to going to court is that confidentiality may be lost.

176 SG IAA: The legislature enacted s 12A of the IAA instead of the 2006 amendments to the MAL. The parties may to go the SGHC to seek interim relief under s 12A IAA. The court has the power to make an order of any of the matters set out in s 12(1)(c) to (j) IAA (S 12A(2) IAA). If it is urgent, the SGHC may make such orders as it thinks necessary for the purpose of preserving evidence or assets (s 12A(4) IAA). If it is not urgent, the SGHC will only grant interim relief if the application is made the permission of the arbitral tribunal or the agreement in writing of the other parties (s 12A(5) IAA). In every case, the SGHC will make an order only to the extent that the arbitral tribunal or institution has no power, or is unable for the time being to act effectively (s 12A(6) IAA) – this is critical to note because many institutional rules provide for emergency arbitrations. This means that if parties have agreed to institutional arbitration, such as SIAC arbitration, one can argue that parties ought to invoke SIAC's emergency arbitration procedures instead of the Court's processes for interim relief.

177 The court can order interim measures whether or not the seat of arbitration is Singapore (s 12A(1)(b) IAA; overruling *Swift-Fortune v Magnifica* [2006] SGCA 42). But the SGHC may refuse to make an interim order if the fact that the seat is outside Singapore or likely to be outside Singapore makes it appropriate to make such an order (s 12A(3) IAA).

178 In determining whether the injunction should be granted or upheld, the test is whether the balance of convenience lies in favour of granting or upholding the injunction

(*Maldives Airports v GMR Male* [2013] SGCA 16 at [53]). In *Maldives Airports*, the SGCA found that the balance of convenience was not in favour of granting or upholding the injunction. First, damages would be an adequate remedy. Second, there were practical problems with the enforcement of the injunction. The broad scope of the injunction meant that the Maldives government would not have any certainty of what was required of them to comply with the injunction. Moreover, the injunction required an unaccepted degree of supervision in a foreign land given that its terms were vague and broad. Accordingly, the injunction was set aside.

6.3 Enforcement of interim measures

179 Where the interim measures are granted by tribunal seated in SG: All orders and directions made or given by an arbitral tribunal is, by leave of the SGHC, enforceable in the same manner as if they were orders made by a court (s 12(6) IAA).

180 Where the interim measures are granted by foreign tribunal:

- Enforcement in Singapore: Interim orders or directions made by foreign tribunals are enforceable in Singapore as Part III of the IAA (regarding the enforcement of foreign awards) defines an "arbitral award" to include an order or direction given by an arbitral tribunal (s 27(1) IAA). However, it should also be noted that the court in Singapore can refuse to enforce the interim order or direction under any of the grounds set out in s 31 IAA (same grounds for refusing enforcement of an award).

- Enforcement in general: It may be problematic to enforce interim orders in another jurisdiction that does not have the equivalent of s 27(1) of the IAA. This is because the New York Convention itself does not deal with the enforcement of orders or directions, but only awards (see Art I NYC).

- Enforcement in country which has adopted MAL 2006: However, if the jurisdiction where enforcement is sought has adopted the MAL 2006, enforcement of the interim measure may be sought under Art 17H MAL 2006, which states that an interim measure issued by an arbitral tribunal shall be recognised as binding and is enforceable irrespective of the country it was issued. However, this is subject to

Art 17I MAL 2006, which provides for grounds for refusing recognition or enforcement of an interim measure. The grounds for refusal in Art 36 are applicable. Accordingly, any interim measure issued by an arbitral tribunal would be enforceable in a MAL country that has adopted Art 17I MAL 2006 without needing to consider the applicability of the New York Convention.

6.4 Anti-suit injunctions

181 An anti-suit injunction has been described as an order by a court that has personal jurisdiction over a party to require the party either not to file a claim in a foreign jurisdiction or not to proceed with a claim that has already been filed. The concern is that the same issues between the parties that are currently litigated or arbitrated within the jurisdiction of the court issuing the order, and that foreign action would frustrate efficient results in the forum court, or that the party carrying on litigation in the foreign jurisdiction is doing so in bad faith in order to harass the other party.

182 Anti-suit injunctions are controversial. When any court enjoins a party from bringing a suit in a foreign jurisdiction, questions of international comity come into play as there is an interference on the jurisdiction of the foreign court. International comity involves respect and deference towards another country's laws and court decisions. Nonetheless, because a court's actions may simply be ignored by a foreign court, the success of the anti-suit injunction depends on the amount of coercive power a court can bring to bear over the party subject to its jurisdiction.

183 The general approach taken by the Singapore Courts is that an anti-suit injunction should be granted in aid of arbitration proceedings as long as it can be established that there is a valid and binding arbitration agreement pursuant to s 2A of the IAA, and that there is evidence that a contracting party has acted in breach of the arbitration agreement by commencing proceedings elsewhere.

184 The SGCA made this attitude evident in its decision of *Maldives Airports Co Ltd and anor v GMR Male International Airport Pte Ltd* [2013] 2 SLR 449 ("*Maldives Airports*"), in which it accepted the English Court of Appeal's holding in *Aggeliki Charis Compania Maritama SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's

Rep 87 at 96 that there should be "*no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them*."

185 Indeed, the Singapore Courts' judicial attitude is best summed up by the Singapore High Court when it held that once the Court is satisfied that there is an arbitration agreement, "it has a duty to uphold that agreement and prevent any breach of it": *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [91].

186 This ultimately stems from, and complements the purpose of the IAA, which is to promote Singapore as an international centre for arbitration by facilitating arbitrations seated in Singapore: *WSG Nimbus* at [90]. In *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166, the Singapore High Court held that the Court's power to grant a permanent injunction is derived from s 4(10) of the CLA. The High Court's decision was reversed on appeal but not on this point.

187 Whilst the Singapore courts will grant an ASI to restrain proceedings commenced in breach of an arbitration clause relatively readily, one cannot assume that such an ASI would be enforceable in other jurisdictions. Whether an ASI (or any other order) granted by the Singapore courts can be enforced in another jurisdiction is subject to the laws of that other jurisdiction.

7. Award

188 The arbitrator's duty to make decision in an arbitration is not delegable (*Neale v Richardson*). The test is whether there is excessive delegation of function is whether the arbitrator had exercised his own judgment in accepting or rejecting the opinions or advice given (*Anderson v Wallace*). Improper or excessive delegation of a tribunal's functions may render the award challengeable as being not made in accordance with the agreed procedure or on the ground that the tribunal was improperly constituted.

7.1 Remedies that the tribunal can award

7.1.1 Power to award remedies

189 Typical remedies include: (i) damages and interest; (ii) specific performance; (iii) declaratory orders, (iv) rectification, (v) indemnity against liability from third party claims; (vi) costs.

190 The arbitral tribunal, in deciding the dispute that is the subject to the proceedings may award any remedy or relief that could have been made by the SGHC if the dispute had been the subject of civil proceedings in that court (s 12(5)(a) IAA). Further, the tribunal may award simple or compound interest on the whole or any part of the sum (s 12(5)(b) IAA).

7.1.2 Costs

191 The final award will usually include an order on costs. There are three primary options:

- Reasonable costs to be borne by the overall losing party.
- Reasonable costs to be allocated on a proportional basis.
- Each party is to bear its own costs.

192 Can a party attempt to set aside the costs award because it is so disproportional that it is against public policy? In *VV v VW* [2008] SGHC 11, VV applied to set aside the costs award on the basis that it was so disproportionate it was against public policy. The Singapore High Court rejected this argument. It was not part of the public policy of Singapore to ensure that the arbitration costs were to be assessed on proportionality principles (at [31]).

7.2 Definition of award

7.2.1 What is an award?

193 Whether or not a decision is characterised as an "award" gives rise to significant legal consequences. Only decisions that are "awards" can be the subject of setting aside proceedings and can be enforced under the New York Convention.

194 A key characteristic of an award under the IAA is finality, in the sense that, subject to narrow exceptions, the arbitral tribunal may not thereafter revisit or revise an award that it has made: s 19B of the IAA.

195 An "award" is not defined in the New York Convention. However, it is defined in s 2(1) IAA as a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial awards but excludes any orders or direction. The mere titling of a document as an award does not make it an award. It is the substance and not the form that determines the true nature of the ruling of the tribunal (*PT Asuransi v Dexia Bank* [2006] SGCA 41 at [70]).

196 What are not "awards" as defined under the IAA?

- Orders and directions; but note that they are considered awards under s 27(1) IAA so that orders or directions made by foreign tribunals are enforceable in Singapore.

- A decision on jurisdiction alone is not an award as it is not a decision on the substance of the dispute (*PT Asuransi v Dexia Bank* [2006] SGCA 41 at [66]).

197 "*[O]nce a tribunal has issued an award (be it an interim, interlocutory, partial or final award), the tribunal is functus officio in relation to the specific issues dealt with by the award*": *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 2 SLR 1279.

198 The arbitral tribunal may revisit an award only in the limited circumstances provided in Articles 33 and 34(4) of the MAL, namely: (a) to correct in the award any errors in computation, clerical or typographical errors, or errors of similar nature; (b) to give an interpretation of a specific point or part of the award; or (c) where a court that has been

asked to set aside the award suspends the setting-aside proceedings in order to give the tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

7.2.2 Types of awards

199 A tribunal may make more than one award at different points in time during the arbitral proceedings on different aspects of matters to be determined (s 19A(1) IAA). In particular, the tribunal may make an award relating to an issue affecting the whole claim, or a part of the claim (s 19A(2) IAA).

200 Types of awards include:

- Final award: arbitral proceedings are terminated by the final award (Art 32(1) MAL)

- Interim/partial awards: These are "*awards made in the course of the arbitral proceedings that dispose of certain preliminary issues or* certain *claims for relief prior to the disposition of all the issues in the arbitration*": *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364. Specifically:

    - Interim awards typically refer to awards that are dispositive of discrete *issues* relevant the claims between the parties, but not a particular claim.

    - Partial awards typically refer to awards that are finally dispositive of certain *claims*.

- Provisional rulings: a determination which is not final. An example would be interim measures of protection. They are "*intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the tribunal having jurisdiction as to the substance of the case*", "*do not definitively or finally dispose of either a preliminary issue or a claim in an arbitration*", and are "*inherently capable of being varied in due course*": *Persero* at [49]-[50]. The

definition of an award under the IAA does not include awards that are provisional. "Provisional awards" are proscribed by s 19B of the IAA.

- Consent awards: award on agreed terms or settlement award. When parties settle their dispute during the arbitration, they may request the tribunal to record their settlement in the form of a consent award (see Art 30 MAL).

- Default awards: If the party refuses to participate in the arbitration, the arbitral tribunal may proceed in the absence of the party and render an award (see Art 25(c) MAL).

- Additional awards: Where the tribunal addresses issues which it failed to determine during arbitration proceedings (see Art 33(3) MAL).

7.3 Content and form of awards

7.3.1 Content

201 The award shall be made in writing and be signed by the arbitrator. In proceedings with more than one arbitrator, the signatures of the majority will suffice, provided that the reason for any omitted signature is stated (Art 31(1) MAL). The award shall state the reasons upon which it is based, unless the parties have agreed otherwise (Art 31(2) MAL). The award shall state its date and place of arbitration, and shall be deemed to have made at that place (Art 31(3) MAL).

202 In the context of Singapore, a foreign arbitral award for the purposes of the NYC means an award that was made at a seat outside of Singapore.

7.3.2 Scrutiny and time limits for rendering awards

203 Arbitration laws usually do not prescribe time limits for rendering an award. In contrast, institutional rules may specify a timeframe within which the arbitral award should be issued by the tribunal.

204 What if the timing requirements not complied with? There are two competing views:

- Once the time limit expires without extension, the tribunal's mandate ends regardless of whether certain issues remain undecided.

- Violations of time limit to render an award will not be a ground for its annulment if no prejudice was caused or if such a penalty is unjustified in the circumstances (*Hasbro Inc v Catalyst USA Inc*).

205 In *Alphamix Ltd v District Council of Riviere Du Rampart (Mauritius)* [2023] UKPC 20, an appeal from the Supreme Court of Mauritius, the UK Privy Council upheld the tribunal's award even though the award had been annulled by the Mauritian court for being given three days after the date specified for providing an award. The Court agreed that the communications and conduct of the parties demonstrated an unequivocal common intention formed and manifested that the delay in providing the final, signed version of the award would not result in the award being invalid. That amounted to a tacit agreement to extend the time limit for rendering the award.

7.3.3 Dissenting judgments

206 Where there is more than one arbitrator, the tribunal shall decide by a majority (Art 29 MAL).

7.4 Correction and interpretation of awards

7.4.1 Correction of award

207 Within 30 days of receipt of an award (unless another time period has been agreed upon), a party may, with notice to the other party, request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical errors or errors of a similar nature. If the tribunal considers the request to be justified, it shall make the correction within 30 days of receipt of the request (Art 33(1)(a) MAL).

208 Alternatively, the tribunal may correct any errors in computation, any clerical or typographical errors or errors of a similar nature on its own initiative within 30 days of the date of award (Art 33(2) MAL).

7.4.2 Interpretation of award

209 Within 30 days of receipt of an award (unless another time period has been agreed upon), if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the tribunal considers the request to be justified, it shall make the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award (Art 33(1)(b) MAL).

7.4.3 Additional award

210 A party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted in the award. If the tribunal considers the request to be justified, it shall make the additional award within 60 days (Art 33(3) MAL).

7.4.4 Extension of time

211 The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award (Art 33(4) MAL).

8. Setting aside of award

8.1 Finality of awards

212 A valid award made by the tribunal is final and binding on the parties (s 19B(1) IAA; Rule 28.9 SIAC). Except as provided in Art 33 or 34(4) MAL, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award (s 19B(2) IAA). Once delivered, all awards are final and are *res judicata*. A partial award cannot be revised by the arbitral tribunal in a later award.

213 Errors of law or fact made in an arbitral decision are final and binding on the parties and may not be appealed against or set aside by a court (*PT Asuransi v Dexia Bank* [2006] SGCA 41 at [57]).

214 Save for any corrections to an award (mentioned above), there are two main exceptions to finality:

- Proactively apply to the courts at the seat to set aside/annul the award within the stipulated timeframe under the *lex arbitri*.

- Wait until a court enforcement action is commenced by the award creditor in whichever jurisdiction, and then resist enforcement in accordance with the laws of that jurisdiction. It is likely the laws will mirror the NYC as most States are signatory to the NYC.

Put another way, an award debtor can choose to set aside the award proactively at the seat court, and/or resist enforcement of the award as and when the award creditor brings the award to a particular jurisdiction for enforcement (the precise relationship between these two remedies are explored below). The challenge and enforcement of awards highlights the delicate balance between the autonomy of the arbitral process and the control of national courts. Too much national judicial review will transfer real decision power from the arbitral tribunal to a national court whose neutrality may prove to be less than that of an international arbitral tribunal. On the other hand, too much autonomy for arbitrators creates a situation of moral hazard.

8.2 Setting aside and resisting enforcement are cumulative options

215 Under Singapore law, setting aside/annulling an award (which can only take place at the seat) and objecting to enforcement of the award (wherever the award creditor seeks enforcement) are cumulative remedies. According to the SGCA, the MAL contains at its heart a system of "choice of remedies" which entitle parties to choose whether to actively seek to set aside the award at the seat of arbitration or passively resist enforcement at the place of enforcement or do both (*First Media v Astro* [2013] SGCA 57 at [71]).

216 Put another way, the fact that the award debtor chooses *not* to set aside the award does not preclude the award debtor from resisting enforcement of the award. Conversely, the fact that the award debtor has chosen to apply to set aside the award does not preclude the award debtor from resisting enforcement of the award. By way of dicta, the Singapore Court of Appeal in *First Media v Astro* indicated that it will not be possible to enforce in Singapore an award that has been set aside/annulled because that award would have become a nullity. Other jurisdictions however take differing approaches.

217 On court procedure, note the latest Court Registrar's Circular No. 1 of 2023 on the Guide for the Conduct of Arbitration Originating Applications accessible here, which is equally applicable for both setting aside and resisting of enforcement challenges.

8.3 Setting aside award at seat of arbitration

8.3.1 Exclusive grounds for setting aside

218 The only recourse against an award is to apply to have it set aside at the seat of arbitration (Art 34(1) MAL; Art 1(2) MAL). The grounds for setting aside are exhaustive and found in Art 34(2) MAL (read with s 24 IAA, if the arbitration is seated in Singapore). Apart from these grounds, a court has no power to investigate the merits of the dispute. Errors of law or fact per se are final and binding on the parties and may

not be appealed against or set aside (*PT Asuransi v Dexia Bank* [2006] SGCA 41 at [57]).

219 Setting aside refers to vacating or nullifying the award. Assuming the seat of arbitration is Singapore, Art 1(2) MAL prescribes that an Art 34 MAL setting aside application must take place in Singapore, and it must be made before the Singapore High Court, the court specified in the IAA for the purposes of Art 6 MAL.

8.3.2 Step 1: What is the ground for setting aside?

220 Art 34(2) MAL: An arbitral award may be set aside by the SGHC only if:

- (a) the party making the application furnishes proof that:
  - (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Singapore ; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law; or
- (b) the COURT finds that: [court may raise these grounds on its own initiative]
  - (i) the subject matter of this dispute is not capable of settlement by arbitration under the law of Singapore; or
  - (ii) the award is in conflict with the public policy of Singaporee.

221 s 24 IAA: Notwithstanding Art 34(1) MAL, the SGHC may, in addition to the grounds set out in Art 34(2) MAL, set aside the award of the arbitral tribunal if:

- (a) the making of the award was induced or affected by fraud or corruption;
- (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

222 In practice, when the award debtor to a Singapore seated award is alleging a breach of natural justice, it is common to invoke both s 24(b) IAA as well as Art 34(2).

8.3.3 Step 2: Is the setting aside application made in time?

223 An application for setting aside must be made within 3 months from the date on which the party making that application received the award (Art 34(3) MAL). Art 34 does not provide for any extension of the time period. In Singapore, the courts have no discretion to extend the time period. After the expiry of 3 months, the court will not entertain any application lodged (*Bloomberry Resorts v Global Gaming* [2021] SGCA 9).

8.3.4 Step 3: Should the court exercise its discretion NOT to set aside an award?

224 Art 34(2) MAL states that the court "may" set aside the award if any of the grounds is satisfied. As such, the court retains a discretion NOT to set aside the award even if one of the grounds has been established.

8.3.5 Step 4: What is the consequence of a challenge?

225 A court hearing a challenge to an award may:

- Set aside the award in whole or in part.
- Vary parts of the award.
- Remit the award to the arbitral tribunal for reconsideration.

- Under Art 34(4) MAL, the court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time in order to give the arbitral tribunal an opportunity to resume arbitral proceedings or to take such other action as in the arbitral tribunals opinion will eliminate the grounds for setting aside.

- Note that in *CBS v CBP* [2021] SGCA 4, the SGCA held that it did not have the power to remit award back to the tribunal because, among other reasons, the issue of remittal was not raised before the SGHC in the first instance.

- Refuse to set aside the award (even despite the applicant having established one or more grounds).

8.4 Setting aside of foreign awards

226 Setting aside applications can only be made at a court at the seat of arbitration. A court may not set aside a foreign award (i.e. award made outside the jurisdiction).

9. Enforcement of awards

9.1 Enforcement at the seat of arbitration

227 In Singapore, international arbitration awards made pursuant to an arbitration agreement seated in Singapore may be enforced as judgments or orders of the court (s 19 IAA). There are no statutory provisions setting out when leave for enforcement would be refused under IAA.

228 However, in *First Media v Astro* [2013] SGCA 57, the SGCA held that the same grounds for resisting enforcement under Art 36(1) MAL (which is excluded under the IAA) are equally available to a party resisting enforcement of a domestic international award under s 19 IAA (at [84]). Even though Art 35 and 36 is expressly excluded by s 3(1) IAA, it was done so to maintain Singapore's reciprocity reservation under the NYC (at [86]). Parliament did not intend to exclude the "choice of remedies" policy of the MAL and must have intended for courts to retain the power to refuse enforcement of international arbitration awards made in Singapore (at [87]).

9.2 Enforcing foreign awards in NYC countries

9.2.1 Applicability of the NYC

229 The NYC applies to the recognition and enforcement of foreign awards or awards not considered as domestic awards in the state where their recognition and enforcement is sought (Art I(1) NYC).

9.2.2 Reservations

230 Reciprocity reservation: A contracting state may limit the NYC's scope of application by declaring that it will apply the convention to the recognition and enforcement of awards made only in the territory of another contracting state (Art I(3) NYC). Numerous countries in the region have made a reciprocity reservation, including India,

Indonesia, Japan, Korea, China, Malaysia, New Zealand, Pakistan, The Philippines, Singapore, Vietnam.

231 Commercial reservation: A contracting state may limit the NYC's scope of application to differences arising out of legal relationships which are considered as commercial under the national law of the state making such declaration (Art I(3) NYC).

9.2.3 Obligation to recognise and enforce arbitral awards

232 A state that is party to the New York Convention is obliged to recognise arbitral awards as binding and enforce them (Art III NYC).

233 In *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10, the SGCA held that the doctrine of transnational issue estoppel applied in the context of enforcement proceedings, such that preclusive effect should be accorded to a seat court's prior decision on the validity of an arbitral award. In effect, the SGCA confirmed that parties are precluded from relitigating, before an enforcement court, issues that have been previously decided on by the seat court.

234 By way of *obiter*, the majority opined that, even if transnational issue estoppel did not apply, an enforcement court should nonetheless grant primacy to the prior decision(s) of the seat court pursuant to the "Primacy Principle". Under the Primacy Principle, a seat court's decision on the validity of an arbitral award should be presumed to be final and determinative, short of other considerations such as applicable public policy or evidentiary concerns. In contrast, the Concurring Judge found that there was no need to recognise the Primacy Principle as a further legal principle in enforcement proceedings. He indicated that the two doctrines of issue estoppel and abuse of process (pursuant to the *Henderson v Henderson* principle) were sufficient to give rise to the preclusive effect of a seat court's decision.

9.2.4 Procedure for enforcement

235 Foreign awards refer to awards made pursuant to an arbitration agreement seated outside Singapore (s 27(1) IAA). In Singapore, foreign awards are enforceable and recognised as binding (s 29(1), (2) IAA; Art III NYC).

236 A party seeking to enforce an award has to produce to the court (a) the duly authenticated original award or a certified copy; (b) the original arbitration agreement under which the award is made or a duly certified copy; and (c) a translation in English if the award or agreement is in a foreign language (s 30(1) IAA; Art IV NYC).

237 The general procedure involved in the enforcement of arbitral awards are set out here. Essentially, enforcement under both Parts II and III of the IAA is a two-stage process. First, an *ex parte* application is filed by the award creditor for leave to enforce the award. This is to be supported by an affidavit satisfying the relevant Rule of Court, eg it must exhibit the arbitration agreement and the award, state the name and the usual or last known place of business of the award creditor and debtor, and state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

238 Where the formal requirements are met, the court will make an order granting leave to enforce, typically in a matter of days without the need for an oral hearing, which the award creditor must then serve on the award debtor.

239 Upon effective service, if the award debtor wishes to challenge enforcement, the award debtor must take steps to challenge enforcement within 14 days after service, or if the order is served out of jurisdiction, within such other period as the court may fix.

240 If the award debtor does not challenge the enforcement order within the stipulated timeframe, the award creditor may proceed to enter judgment-in-terms of the award, which can then be executed against assets of the award debtor in Singapore.

241 If the award debtor does challenge the enforcement order based on or more of the exhaustive grounds listed in ss 31(2) and 31(4) of the IAA (for foreign awards) or Art 36 MAL read with s 19 of the IAA (for local awards), the proceedings move to a second inter partes phase, where the SGHC will have to decide on the challenge.

9.2.5 Bilateral and multilateral enforcement agreements

242 The provisions of the NYC shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by contracting states nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon (Art VII(1) NYC). The second part of Art VII(1) NYC is referred to as the 'more favourable right' provision. This means that if a conflict arises between NYC and the domestic law of the enforcing state, the more favourable right to enforce an award will prevail.

9.4 Grounds for refusal of enforcement

243 The grounds for resisting enforcement of an award in Singapore mirror the grounds for setting aside an award made in Singapore. This is because the drafters of the MAL deliberately took reference from the NYC.

244 A court hearing the application for enforcement of a foreign award cannot review the case on the merits. Errors of law or fact per se are final and binding on the parties (*PT Asuransi v Dexia Bank* [2016] SGCA 41 at [57]).

245 A court may refuse enforcement only if certain grounds are met (Art V NYC; s 31 IAA; Art 36 MAL). In determining whether the ground for refusing establishment was established, the enforcement court is entitled to undertake a fresh examination of the issues alleged to establish the ground of challenge (*First Media v Astro* [2013] SGCA 57 at [164]) [i.e. standard of review is *de novo*].

246 Steps:

- Step 1: What are the ground(s) for resisting enforcement?
- Step 2: Even if a refusal ground is established, the court still has a residual discretion to order enforcement. This is because Art V(1) states that enforcement "may be refused", making refusal discretionary.

247 Recognition and enforcement of the award may be refused only if the party against whom it is invoked proves that:

- A party to the arbitration agreement was, under the law applicable to him, under some incapacity at the time the agreement was made (s 31(2)(a) IAA; Art V(1)(a) NYC; Art 36(1)(a)(i) MAL);
- The arbitration agreement is invalid under the law to which the parties have subjected it, or in the absence of any choice, under the law of the country where the award was made (s 31(2)(b) IAA; Art V(1)(a) NYC; Art 36(1)(a)(i) MAL); [Note: this is the provision relied upon when an award debtor alleges that the tribunal does not have jurisdiction for reasons such as an invalid or non-existent arbitration agreement.]
- He was not given proper notice of the appointment of the arbitrator OR of the arbitration proceedings OR was otherwise unable to present his case in the arbitration proceedings (s 31(2)(c) IAA; Art V(1)(b) NYC; Art 36(1)(a)(ii) MAL);
- The award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or contains a decision on the matter beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced (s 31(2)(d) IAA, s 31(3) IAA; Art V(1)(c) NYC; Art 36(1)(a)(iii) MAL);
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place [i.e. *lex arbitri*] (s 31(2)(e) IAA; Art V(1)(d) NYC; Art 36(1)(a)(iv) MAL); or
- The award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority under the law the award was made (s 31(2)(f) IAA; Art V(1)(e) NYC; Art 36(1)(a)(v) MAL).

248 Recognition and enforcement of an arbitral award MAY also be refused if the court where enforcement is sought finds that: [court may raise these grounds on its own initiative]

- The subject matter of the difference between the parties is not arbitrable under the law of the law of the country where enforcement is sought (s 31(4)(a) IAA; Art V(2)(a) NYC; Art 36(1)(b)(i) MAL); or
- Enforcement of the award would be contrary to the public policy of the country where enforcement is sought (s 31(4)(b) IAA; Art V(2)(b) NYC; Art 36(1)(b)(ii) MAL).

9.4.1 Art V(1)(b): Violation of due process / breach of natural justice

249 An award may be refused enforcement on the grounds that the challenging party was not given proper notice of the appoint of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings (s 31(2)(c) IAA; Art V(1)(b) NYC; Art 36(1)(a)(ii) MAL). [Setting aside provision: Art 34(2)(a)(ii) MAL]

250 A restraint on the ability to present one's case is often described as constituting a breach of natural justice rules or a denial of due process.

251 Natural justice is an administrative law concept that encapsulates two famous maxims:

- No one shall be a judge in his own cause (*nemo iudex in causa sua*).
- Each party is to be given the opportunity to be heard (*audi alteram partem*).

252 In Singapore, the courts have indicated that there is a high threshold for proving a denial of due process. In *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443, the SGHC set out the elements that need to be established to set aside an arbitral award for breach of natural justice:

a. which rule of natural justice was breached
b. how that particular rule of natural justice was breached
c. in what way the breach of natural justice connected with the making of the award
d. how the breach prejudiced the rights of the party concerned.

253 In *Soh Beng Tee v Fairmount* [2007] SGCA 28, the SGCA held (at [64]) that it was not the function of the court to scrutinise an arbitral award microscopically in an attempt to determine if there was any blame or fault in the arbitral process. Rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied. [Policy: The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice were complied with in the arbitral process was preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that had been expressly acknowledged under the Act.]

254 Importantly, in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC & Another* [2020] 1 SLR 695, the SGCA held that if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there must be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. The complaining party, at the very least, should seek to suspend the proceedings until the breach has been satisfactorily remedied. The complaining party cannot simply "reserve" its position until after the award to see how the result turns out before deciding whether or not to take the point. The SGCA noted that it is a contradiction in terms for a party to claim that proceedings had been irretrievably tainted by a breach of natural justice, when at the material time it presented itself as a party ready, able and willing to carry on to the award.

255 The following are past examples which have succeeded in supporting a challenge of an arbitral award for breach of natural justice:

- The arbitral tribunal failed to consider an important issue that had been pleaded in an arbitration (*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80).
- The arbitral tribunal failed to give an opportunity to the aggrieved party to address the tribunal on a claim raised at the eleventh hour before rendering the award and was aware that the aggrieved party had not addressed the claim (*AKN v ALC*).
- The arbitral tribunal failed to give an opportunity to the aggrieved party to address the tribunal on issues to be decided in an additional award to be rendered under Article 33 of the MAL (*L W Infrastructure*).

256 Common arguments which failed in support of breach of natural justice challenges include the following:

- The arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party.
- The arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider that party's actual case.
- The arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the party's case.

Some of these are technical challenges and usually disguise the true nature of the complaint – that the arbitral tribunal made errors of law and/or fact in the arbitral award.

9.4.2 Art V(1)(d): Irregularity in procedure or composition of arbitral tribunal

257 An award may be refused enforcement on the grounds that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the *lex arbitri* (s 31(2)(e) IAA; Art V(1)(d) NYC; Art 36(1)(a)(iv) MAL) [Setting aside provision: Art 34(2)(a)(iv) MAL]

258 However, if a party fails to make a timely objection to a procedural irregularity (i.e. proceeds with arbitration without stating objection despite having knowledge of it), the party may be deemed to have waived his right to object (Art 4 MAL; Rule 37.1 SIAC).

259 In addition, even if significant irregularity is proved and the refusal ground is satisfied, an enforcing court may well use its residual discretion to allow enforcement if it considers that the irregularity is unlikely to have affected the outcome of the case, or that no prejudice has been caused to the party resisting enforcement. [For instance, in *Werner A Bock v N's Co*, the Hong Kong CA held that he irregularity in the composition of the arbitral tribunal was of such a nature that it would be unjust to refuse enforcement and allow the defendant to benefit from the irregularity because it had not been prejudiced.]

9.4.3 Art V(1)(e): Award has been set aside

260 An award may be refused enforcement on the ground that it has been set aside or suspended by a competent court at the seat of arbitration (s 31(2)(f) IAA; Art V(1)(e) NYC; Art 36(1)(a)(v) MAL).

261 In some cases, awards that have been set aside at the seat aside at the seat of arbitration have nevertheless been enforced in a different country, particularly in France and in the US (see *Hilmarton* where the French court enforced an award that had been set aside in Switzerland; *Chromalloy* where the US court enforced an award that had been set aside in Egypt).

262 In Singapore, the SGCA has opined in dicta that the Singapore courts will not enforce a foreign award which had been set aside by the court in the seat of arbitration. This is because the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there was simply no award left to enforce (*PT First Media v Astro* [2013] SGCA 57 at [76], [77]).

9.4.4 Art V(2)(b): Public policy

263 A court, of its own initiative, can consider that an award may be refused enforcement on the ground that it is against the public policy in the state it is located (s 31(4)(b) IAA; Art V(2)(b) NYC; Art 36(1)(b)(ii) MAL).

264 In Singapore, the scope of public policy is narrow. It only operates in instances where upholding the arbitral award would "shock the conscience" or is "clearly injurious to the public good" or "wholly offensive to the ordinary, reasonable and fully informed member of the public" or "where it violates the forum's most basic notion of morality and justice" (*PT Asurani v Dexia Bank* [2006] SGCA 41 at [59]). n *VV v VW* [2008] SGHC 11, the SGHC held that a disproportionate costs award did not constitute a violation of public policy.

265 There are at least three different ways public policy challenges can be raised: (1) the *remedies* ordered by the award are contrary to public policy; (2) the award gives effect

to an *underlying contract* that is illegal or tainted with illegality; and (3) *how* the award was procured is contrary to public policy.

266 Public policy has been invoked most commonly in cases involving the second category. In such cases, the question that arises is to what extent the court should re-open the tribunal's findings. This is because the legality of the underlying contract would often have been an issue that the tribunal has dealt with. Therefore, to deal with a public policy challenge in this category, reviewing courts would generally have to first decide if it should re-open the issue of illegality.

267 In Singapore, the SGCA in *AJU v AJT* [2011] SGCA 41 appears to have held that only errors of law made by the tribunal as to the content of the forum's public policy is subject to re-opening by that forum, but not otherwise. *CBX v CBZ* [2020] SGHC(I) 17 interpreted *AJU* as giving rise to the following four scenarios (at [67]):

Scenario	**Law governing the underlying contract**	**Tribunal's finding on the legality of the underlying contract**	**Whether re-opening by reviewing court is permissible**
#1	Singapore law	Not illegal	Able to intervene
#2	Singapore law	Illegal	Unable to intervene
#3	Foreign law	Illegal	Unable to intervene
#4	Foreign law	Not illegal	Unable to intervene unless there is "palpable and indisputable illegality"

268 This matrix has not been considered by the SGCA.

269 In several cases, the SGHC has held that, on the facts, even if there was illegality, it would not rise to the level necessary to justify setting aside the award based on the

public policy ground: see *Gokul Patnaik v Nine Rivers Capital Limited* [2020] SGHC(I) 23.

270 Contrast with other jurisdictions where the courts have adopted a broad notion of public policy:

- In India, the Supreme Court in *ONCG v Sawpipes* appeared to broaden the scope of the term "public policy" by including an all-encompassing ground of "patent illegality".
- In the Philippines, the CA in *Luzon Hydro Corp* held that an award issued by an arbitral tribunal seated in Singapore, which found that costs followed the event, was not consistent with Philippines law. The court found that Philippines public policy prevents a litigant from bearing the other side's costs if its position was bona fide.

9.5 Adjournment of enforcement proceedings

271 Where simultaneous applications are made (i) by the losing party to set aside the award at the seat of arbitration, and (ii) by the winning party to enforce the award in another country, Art VI NYC gives a domestic court hearing the enforcement application discretion 'if it considers it proper' to adjourn the enforcement proceedings. [This applies also where an application to set aside is made but not yet determined.]

272 The trend under Art VI NYC is to adjourn enforcement proceedings if the court hearing the enforcement application considers that there is a probability of success in the proceedings to set aside. However, adjournment should not be automatic on showing a likelihood of success in the setting aside proceedings. There may be factors, viewed in their totality, that are more compelling than a 'probable success' approach. Art VI is enacted as s 31(5) in the IAA.

273 In *Man Diesel & Turbo SE v IM Skaugen Marine Services Pte Ltd* [2018] SGHC 132, the SGHC considered whether it should adjourn proceedings to enforce an arbitral award under s 31(5) of the IAA, pending the determination of proceedings challenging

the award at the seat in Denmark. The SGHC rejected the adjournment application, and upheld the order granting leave for the immediate enforcement of the arbitral award.

274 On the test for granting adjournments under s 31(5) of the IAA, the SGHC observed that the statutory wording was permissive in nature and conferred a wide discretion on the enforcing court. The enforcing court's task was to weigh in the balance all the factors in favour of and against adjournment, so as to reach an outcome that would be most just or least unjust. Taking guidance from English case law, the SGHC distilled the following factors:

- The merits of the setting aside application (to be assessed on a sliding scale basis).
- The likely consequences occasioned by an adjournment and in particular the length of the adjournment.
- All other circumstances of the case.

