Singapore Academy of Law
Law Reform Committee

Report on the Right of Appeal against International Arbitration Awards on Questions of Law

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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EXECUTIVE SUMMARY

OVERVIEW

1 Singapore law does not avail parties to an international arbitration a right to appeal an award on questions of law unless parties have opted for the arbitration proceedings to be governed by the Arbitration Act (Cap 10, Rev Ed 2002) ('**AA**') instead of the International Arbitration Act (Cap 143A, Rev Ed 2002) ('**IAA**'). If parties take this option, section 49 of the AA applies to allow appeals on questions of law where certain requirements are met. The drawback of this option is that parties would also have to accept the application of all the other provisions in the AA which in the ordinary course apply only to domestic arbitrations.

2 At a meeting on 24 January 2019, the Law Reform Committee ('**LRC**') of the Singapore Academy of Law approved a project to consider whether Singapore should provide a limited right of appeal against international arbitration awards on questions of law without the need for parties to opt for the AA to apply (**Chapter 2**). Subsequently, on 26 June 2019, the Ministry of Law announced a public consultation on proposed amendments to the IAA, including the possibility of allowing parties to agree that there shall be a right of appeal to the High Court on questions of law. In view of this development, an advance copy of the report was submitted to the Ministry on 30 August 2019.

3 This report considers and makes recommendations as to how such a right should be structured, both in terms of (1) how to make available the right in the IAA (**Chapter 3**) and (2) the relevant procedural and substantive rules governing the exercise of such a right (**Chapter 4**). This report goes on to consider whether awards which have been successfully appealed and thus varied by the court would face any problems with enforceability outside Singapore bearing in mind the regime under the UNCITRAL Model Law on International Commercial Arbitration (1985) ('**Model Law**') the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ('**NY Convention**') (**Chapter 5**).

4 Finally, this report raises the question of, and invites feedback on, whether the reform should go further to also permit a right of appeal where parties have not agreed to such a right but where the party desiring to appeal has obtained leave of court to do so (**Chapter 6**).

WHETHER A RIGHT TO APPEAL ON QUESTIONS OF LAW SHOULD BE MADE AVAILABLE

5 Chapter 2 of this report sets out and evaluates the reasons in support of law reform to allow a limited right to appeal an international arbitration award on questions of law and recommends such reform.

6 First, the original justifications for minimising curial intervention and thereby making unavailable appeals under the IAA have no application where parties have agreed to such appeals.

7 Second, empirical evidence that has emerged since the early 1990s suggests that choice of seat is not in fact closely tied to the availability of such appeals. In other words, Singapore does not greatly risk making itself less attractive as a seat if it offers parties this option to appeal.

8 Third, giving parties an option to appeal is attractive in that it provides, self-evidently, an opportunity for parties to correct errors in questions of law in the award and opens up more opportunities for mercantile law to be developed.

9 Weighing these matters in the round, the authors propose making available the option to appeal where parties have agreed to such appeals.

HOW SHOULD THE RIGHT TO APPEAL BE MADE AVAILABLE

10 Chapter 3 sets out a recommendation on how to make the right to appeal available. Presently, parties to international arbitration may, pursuant to section 15 of the IAA, opt out of the IAA and for the AA to apply. This makes available the right of appeal under section 49 of the AA.

11 This approach, however, is not entirely desirable to users of international arbitration. A party cannot opt to apply only section 49 of the AA – that party must take all of the other provisions of the AA and along with it the implications of having all such other provisions apply.

12 This report thus recommends making available the right of appeal within the IAA itself provided parties have chosen such an option. Parties can choose such an option by agreeing to it in the arbitration agreement or anytime thereafter.

13 For completeness, this Chapter also considers the 'opt-out' approach adopted by the Singapore International Commercial Court ('**SICC**') and concludes that such a model is unsuitable for international arbitration.

HOW THE IAA SHOULD BE AMENDED

14 Chapter 4 recommends amending the IAA to make available the right of appeal by adopting and incorporating (with modifications) sections 49–52 of the AA.

15 First, these specific AA provisions contain sufficient procedural and substantive safeguards to make the right a useful one whilst guarding against abuse. Given that these provisions are modelled after those in the UK Arbitration Act 1996 (c 23; '**UK AA**') (in particular, section 49 of the AA is modelled after section 69 of the UK Act), it also brings comfort to know that empirical evidence points to the workability of these formulations in appropriately restricting the extent of curial intervention without making useless this right.

16 Second, it is, however, proposed that a "question of law" be clarified to refer to a question of Singapore law or international law.

ENFORCEMENT IMPLICATIONS

17 Chapter 5 considers whether there are going to be problems with enforceability if an award is appealed successfully and varied by the Court, bearing in mind the regime under the Model Law and the NY Convention. It concludes that there is minimal risk of enforceability problems.

CONSULTATION ON WHETHER REFORM SHOULD GO FURTHER

18 Chapter 6 of this report raises the question of, and invites feedback on, whether the reform should go further to also permit a right of appeal where parties have not agreed to such a right but where the party desiring to appeal has obtained leave of court to do so. It is envisaged that parties would be permitted to contract out of this position (that is, this would be an *opt-out* regime).

CHAPTER 1

INTRODUCTION

A. THE PROBLEM

1.1 Parties are unable to appeal an international arbitration award on questions of law unless they elect for the Arbitration Act ('**AA**')[1] to apply thereby permitting appeals pursuant to section 49 of the AA. Parties can elect to do so pursuant to section 15 of the International Arbitration Act ('**IAA**').[2]

1.2 As observed by the Singapore High Court in one case:[3]

> The principle of party autonomy is also reflected in the fact that *parties are free to choose the arbitral regime to govern their arbitration*. More commonly, parties to a domestic arbitration, who, for example, wish their arbitral award to carry a higher degree of finality may agree in writing for the IAA to apply: […]
>
> Likewise, *parties in an international arbitration, who perhaps favour more judicial intervention, may opt for the AA to govern their arbitration*. […] [Emphasis added.]

1.3 Parliament intended this where section 15 of the IAA is concerned. As the then Minister of State for Law Assoc Prof Ho Peng Kee observed:[4]

> Section 15 was intended to allow parties who desire a greater degree of judicial intervention to opt out of the Model Law regime into the domestic Arbitration Act as the applicable law of arbitration. […] For the avoidance of doubt, section 15 is amended to state that Singapore's domestic arbitration law under the Arbitration Act would apply to the arbitration if parties expressly choose to opt out of the International Arbitration Act or the Model Law.

1.4 In sum, parties to an international arbitration are given the flexibility to avail themselves of the right to appeal in two ways, namely, by:

(1) **Opting out of the IAA** – expressly agreeing that their arbitration shall not be governed by the Model Law or Part II of the IAA (section 15(1)(b) of the IAA); *or*

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1 Cap 10, 2002 Rev Ed.

2 Cap 143A, 2002 Rev Ed.

3 *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR(R) 333 at [29] and [30], HC.

4 Ho Peng Kee (Minister of State for Law), speech during the Second Reading of the International Arbitration (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (5 October 2001), vol 73 at cols 2222 and 2223.

(2) **Opting into the AA –** expressly agreeing for their arbitration to be governed by the provisions of the AA (section 15(1)(b) of the IAA).

1.5 In contrast, an appeal on a question of law is available *by default* to the parties to a domestic arbitration in Singapore although parties may nonetheless exclude this right pursuant to section 49(2) of the AA.

1.6 This report considers whether a right of appeal against an international arbitration award on questions of law should be available without resort to the application of the AA (which would have to apply wholesale).

B. SUMMARY OF ISSUES AND FINDINGS

1.7 This report considers the following specific issues:

(1) Whether the IAA should provide for an optional and limited right of appeal against international arbitration awards on questions of law (**Chapter 2**).

(2) How the right should be made available (**Chapter 3**).

(3) How the IAA should be amended to provide for such a right (**Chapter 4**).

(4) Whether there are going to be problems with enforceability when an award has been appealed successfully and varied by the Court (**Chapter 5**).

(5) Whether the reform should be extended further to also permit a right of appeal where parties have not agreed, but where one party obtains leave of court to appeal (**Chapter 6**).

1.8 The corresponding findings and recommendations are as follows:

(1) A limited right of appeal against international arbitration awards on questions of law should be allowed where parties agree to such an appeal (**Chapter 2**).

(2) The right of appeal should be made available by way of amendment to the IAA and should be on an 'opt-in' basis (**Chapter 3**).

(3) The current AA provisions may be adopted in the IAA with two modifications: (a) that in addition to consent of the parties, leave of court is also required for the appeal to be made; and (b) that "questions of law" exclude questions of foreign law such that only questions of Singapore law and international law may be appealed (**Chapter 4**).

(4) There is limited risk of enforceability problems where an award has been successfully appealed and varied by the court (**Chapter 5**).

(5) There are arguments both for and against the reform going further to allow an appeal without consent of parties but where a party desiring to appeal has obtained leave of court. Feedback on this point is sought from the arbitration community (**Chapter 6**).

CHAPTER 2

THE AVAILABILITY OF REVIEW

A. THE ISSUE

2.1 As discussed above, unlike the AA, the IAA does not grant any right to appeal against international arbitration awards on questions of law. As the IAA governs international arbitrations in Singapore,[5] this means that, generally speaking, no appeal can lie against an international arbitration award on a question of law save where parties agree to the application of the AA.

2.2 Short of agreeing the application of the AA wholesale, parties cannot appeal an international arbitration award on questions of law even if they have agreed. In other words, the infrastructure of the IAA does not accommodate parties who want to appeal but do not want the AA (with its suite of other provisions) to apply. This Chapter considers whether this is justified or whether reform is required to change this.

B. THE PROPOSED REFORM

1. Summary

2.3 This report recommends granting parties an optional and limited right of appeal against international arbitration awards on questions of law if they agree to such appeals. This is so for a number of reasons:

(1) First, granting such a right will allow parties the *option* to correct errors in questions of law in awards. To the extent it is desirable that errors in questions of law be corrected, this is a point in favour of allowing appeals.

(2) Second, opening up appeals against international arbitration awards on questions of law will permit better development of Singapore mercantile law jurisprudence.

(3) Third, party autonomy is not undermined given that the right of appeal is available only where parties agree.

(4) Finally, it is no obstacle to allow such a right of appeal by pointing to the risk of Singapore becoming less attractive as a seat. Empirical evidence does not suggest that there is a strong correlation between choice of seat by users of

5 Section 5 of the IAA provides that Part II of the IAA and the Model Law, by default, do not apply to an arbitration that is not international.

international arbitration and the availability of a right to appeal questions of law.

2. Position in the United Kingdom vs the position in Singapore

2.4 Under English arbitration legislation, appeals against arbitral awards on questions of law are available to parties in both domestic and international arbitration. Section 69 of the Arbitration Act (United Kingdom) ('**UK AA**'),[6] which section 49 of the AA is closely modelled after,[7] applies equally to both international and domestic arbitrations.

2.5 This is in contrast to the Singapore position outlined above.

2.6 While the UK's recognition of the right of appeal against international arbitration awards on questions of law is an outlier amongst popular seats of arbitration, this does not appear to have diminished the attractiveness of the UK as a seat of arbitration. It is noteworthy that the decision to recognise this right of appeal was a considered one despite acknowledgment that this approach differs from that of other jurisdictions where such rights of appeal are unavailable.[8]

2.7 While the right to appeal on questions of law is available by default under section 69 of the UK AA, parties may choose to exclude the court's jurisdiction under section 69(1). If they do so, then section 69 will not apply to the arbitration. The UK thus takes an 'opt-out' approach to such a right.

2.8 In view of the aforesaid, the analysis which follows revisits the Singapore position.

3. Diminishing importance of original reasons behind the exclusion

2.9 The historical reasons for not granting a right of appeal on questions of law for international arbitrations may not have as much force today and indeed, one may go so far as to say, have no force whatsoever where parties have agreed to such appeals.

2.10 The legislative history of the IAA demonstrates that the key reason for exclusion of a right of appeal was to ensure adherence to the Model Law.[9] The right to appeal on questions of law under section 49 of the AA

6 1996 c 23 (UK).

7 Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (2nd ed) (Abingdon, Oxon; New York, N.Y.: Informa Law from Routledge, 2016) at 236.

8 Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (chair: The Rt Hon Lord Justice Saville) (1997) 13(3) Arb Int'l 275 at [284]–[285] ('**1996 Report UK**').

9 Sub-committee on Review of Arbitration Laws, *Report on Review of Arbitration Laws* (Singapore: Law Reform Committee, Singapore Academy of Law, 1993) ('**1993 Report**') at [22].

was deliberately omitted from the IAA to adhere to the policy of minimal curial intervention that goes hand-in-hand with the Model Law, which "provides for a defined and limited court supervisory role".[10] Accordingly, it was decided that too much curial intervention in international disputes "is out of line with international developments, especially with the Model Law".[11] In contrast, the right of appeal was retained for domestic arbitration. The Singapore Academy of Law's Law Reform Committee report in 1993 (the '**1993 Report**') observed that, unlike international arbitration, "a greater degree of curial supervision and intervention is […] generally considered to be more appropriate in cases of domestic arbitration".[12]

2.11 At the time, adherence to the Model Law was deemed highly necessary to ensure Singapore's viability and attractiveness as an international arbitration centre. Specifically, the 1993 Report observed that "in many jurisdictions it is recognised that a greater degree of freedom should be allowed in international arbitration than in the case of domestic arbitration" and that "the current trend in international arbitration is to lessen the degree of curial intervention".[13] Strict adherence to this widely accepted standard was hence intended to ensure that foreign parties will not be "uncomfortable with unfamiliar arbitration laws and excessive intervention from local courts if they select Singapore as a venue for arbitration".[14]

2.12 The three reasons cited by Assoc Prof Ho Peng Kee, then Parliamentary Secretary to the Minister for Law, for adopting the Model Law and limiting the scope of appeals from international arbitration awards clearly demonstrate this key consideration:[15]

> Firstly, the Model law provides a sound and *internationally accepted framework* for international commercial arbitrations.
>
> Secondly, the general approach of the Model Law will *appeal to international businessmen and lawyers*, especially those from Continental Europe, China, Indonesia, Japan and Vietnam who may be unfamiliar with English concepts of arbitration. This will work to Singapore's advantage as our businessmen expand overseas.
>
> Thirdly, it will promote Singapore's role as a *growing centre for international legal services and international arbitrations*. [Emphasis added.]

10 "The Role of the Court" in *UNCITRAL Model Law on International Commercial Arbitration: Explanatory Documentation Prepared for Commonwealth Jurisdictions* (London: Commonwealth Secretariat, 1991) at [7.04] ('**Explanatory Documentation**').

11 1993 Report, above, n 9 at [22].

12 *Id* at [10].

13 *Ibid*.

14 Ho Peng Kee (Parliamentary Secretary to the Minister for Law), speech during the Second Reading of International Arbitration Bill, *Singapore Parliamentary Debates, Official Report* (31 October 1994), vol 63 at col 625.

15 *Id* at col 627.

2.13 The following paragraphs suggest that such concerns about excluding this right of appeal have much less strength today given the following key developments.

(a) Key development 1 – the meteoric rise of Singapore's arbitration scene

2.14 Notably, in deciding to exclude this right under the IAA, the 1993 Report had considered and rejected the UK approach (outlined earlier) that allowed appeals on questions of law in *both* domestic and international arbitration proceedings. After considering the reasons underlying the UK approach discussed in the Mustill Report,[16] the 1993 Report decided that "Singapore can ill-afford to adopt a similar stance".[17]

2.15 This was due in part to the fact that Singapore had yet to become a popular choice of arbitral seat. The 1993 Report had acknowledged the Mustill Report's reasons for rejecting adoption of the Model Law, including the observation that the Model Law is probably more suitable for adoption by states with an undeveloped arbitration regime and set-up, such as "(i) states with no developed law; (ii) states with a reasonably up-to-date body of arbitration law which has not been greatly used in practice; and (iii) states with an outdated or inaccessible body of arbitration law".[18] Subsequently, the 1993 Report concluded as follows:[19]

> The Committee considered the grounds on which England rejected the Model Law and are unanimously of the view that Singapore can ill-afford to adopt a similar stance. If Singapore aims to be an international arbitration centre it must adopt a world view of international arbitration. *The Committee therefore recommends the adoption of the Model Law.* [Original emphasis.]

2.16 In a similar vein, then Minister of State for Law Ho Peng Kee suggested that Singapore had to limit curial intervention in accordance with the Model Law if it was "to ensure adequate legal support for Singapore's regionalisation drive" in becoming a hub for arbitration[20] and ensure Singapore's attractiveness as an arbitration venue.[21]

2.17 These were pertinent considerations at a time when Singapore was still seeking to establish itself as a popular arbitral seat. However, things

16 Department of Trade and Industry (UK), *A New Arbitration Act? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law on International Commercial Arbitration* (Chair: the Rt Hon Lord Justice Mustill) (London: HMSO, 1989) ('**Mustill Report**'), also published in [1989] 4 Arb Materials 5.

17 1993 Report, above, n 9 at [8].

18 *Id* at [6(e)].

19 *Id* at [8].

20 Ho Peng Kee, speech during the Second Reading of International Arbitration Bill, above, n 20 at col 624.

21 *Id* at col 626.

have changed. Over the last two decades, Singapore has experienced a "meteoric"[22] rise and is now "widely recognised as the leading arbitration hub in Asia".[23] Singapore and the Singapore International Arbitration Centre (SIAC) are the top seat in Asia and the top institution in Asia respectively.[24] As observed by Minister for Law K Shanmugam as early as 2011 in proposing judicial review of negative jurisdictional rulings, Singapore's "position as the leading centre for arbitration in Asia is now cemented".[25]

2.18 Crucially, such developments also mean that Singapore has some room for justifiable divergence from the 'international' standard. It is noteworthy that Singapore's popularity as an arbitral seat comes notwithstanding bold changes modifying the approach in the Model Law. For example, the 2012 Amendments to the IAA allowed judicial review of negative jurisdictional rulings "despite there being no clear international consensus on the merits of such recourse".[26] As observed by Judge of Appeal Steven Chong:[27]

> The 2012 amendments to the IAA are also significant for allowing judicial review of negative jurisdictional rulings despite there being no clear international consensus on the merits of such recourse. […] Therefore, once again, Parliament had no hesitation in taking the lead by amending s 10 of the IAA.

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22 K Shanmugam (Minister for Law), speech during the Second Reading of the International Arbitration (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (9 April 2012), vol 89 at 65.

23 *Report of the Singapore International Commercial Court Committee*, Singapore International Commercial Court website (November 2013) at [6] <*https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20191118084255/https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf*>) ('***SICC Report***').

24 White & Case LLP & the School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, website of the School of International Arbitration, Queen Mary University of London (2018) at 9 <*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20180712204150/http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF*>) ('**IAS 2018**').

25 Shanmugam, speech during the Second Reading of the International Arbitration (Amendment) Bill, above, n 22 at 65.

26 Justice Steven Chong, *Making Waves in Arbitration – the Singapore Experience* [speech delivered at the Singapore Chamber of Maritime Arbitration Distinguished Speaker Series 2014], Supreme Court of Singapore website (10 November 2014) at [16] <*https://www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/SCMA%20Distinguished%20Speaker%20Series%202014%20(10%2011%2014).pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190830040400/https://www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/SCMA%20Distinguished%20Speaker%20Series%202014%20(10%2011%2014).pdf*>).

27 *Ibid*.

2.19 Validating Minister Shanmugam's comments that Singapore's "position as the leading centre for arbitration in Asia is now cemented" when proposing the 2012 amendments, Singapore has not been affected adversely by such bold legislative reform and steps. In fact, Singapore has continued to grow in popularity, from the fourth most preferred seat globally in the *2015 International Arbitration Survey* to the third most preferred seat globally in 2018.[28]

2.20 As Singapore's position as an international arbitration centre grows, Singapore's approach towards how to develop its arbitration regime has changed significantly. From an initial cautious approach of adhering to international norms, it now demonstrates a willingness to be "sensitive to the needs of the commercial users of arbitration and […] unafraid to make bold, even pioneering, changes to accommodate such needs".[29]

(b) Key development 2 – does the availability of *appeals* actually affect *appeal* (of the seat)?

2.21 Since the early 1990s, widely available empirical evidence now shows that the availability of appeals against international arbitration awards on questions of law has little, if any, impact on the choice of arbitration seat. As discussed, a key reason behind Singapore's decision to exclude the right of appeal from the IAA was the fear that allowing such appeals may affect Singapore's popularity as a seat. However, such concerns may be overstated given the empirical evidence that has emerged since.

2.22 One clear example is the UK experience. Despite the UK approach to allowing appeals on questions of law for both domestic and international arbitration under section 69 of the UK AA, London has consistently retained its position as the top seat of choice for arbitration. London is consistently and clearly the most preferred seat for arbitration, maintaining the top spot, and leading with considerable margin in fact, under the 2010, 2015 and 2018 editions of the *International Arbitration Surveys* ('**IAS**').[30] Such is its

28 IAS 2018, above, n 24 at 9.

29 Chong, above, n 26 at [14].

30 See White & Case LLP & the School of International Arbitration, Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, website of the School of International Arbitration, Queen Mary University of London (2010) at 19 <*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190425210848/http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf*>) ('**IAS 2010**'); White & Case LLP & the School of International Arbitration, Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, website of the School of International Arbitration, Queen Mary University of London (2015) at 12 <*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190425210259/http://www.arbitration.*

(*cont'd on the next page*)

faithful following that under the IAS 2018 results, 64% of respondents believe that London's popularity will not be adversely affected at all by Brexit.[31]

2.23 The explanation behind this trend is probably that the availability of such appeals has little, if any, correlation with the popularity of a seat. The IAS 2018 results indicate that the main considerations in preferring seats have little to do with the availability of appeals on the merits. Rather, the main reasons are generally tied to the parties' confidence in the legal system, with general reputation and recognition of the seat and the neutrality and impartiality of the local legal system being the top two factors.[32] Similarly, the IAS 2010 results suggest that the availability of appeals against awards is relatively insignificant compared to other factors such as neutrality, impartiality and the record of the Courts in enforcing agreements to arbitrate and arbitral awards.[33] Accordingly, one commentator has suggested that fears about whether the appealability of an award on its merits will affect a seat's attractiveness may be a lot less significant than originally thought:[34]

> Given section 69 [of the UK AA] is approaching its twentieth birthday and England continues to thrive as a hub of international arbitration, perhaps such concern is purely theoretical.

2.24 It is apposite to note that in the UK, as discussed above at paragraph 2.7, parties ultimately have a choice as to whether such a right of appeal should apply to their particular arbitration. The right of appeal on a question of law is *never* compulsory. If parties want to conduct arbitration in the UK but fear judicial intervention, they can simply exclude the applicability of section 69. If they do so, no appeal will lie on any question of law. This should logically not affect the popularity of the seat. After all, if parties want to conduct arbitration in London but do not want the award to be appealable on questions of law, they can simply agree that section 69 will not apply.

(c) Original concerns are outdated and no longer apply

2.25 Taking into account these two key developments outlined above, it is questionable whether Singapore's original reasons for adhering strictly to the Model Law's exclusion of *any* availability of appeal on questions of law

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qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf>); IAS 2018, above, n 24 at 9.

31 IAS 2018, *id* at 12.

32 *Ibid* at 11.

33 IAS 2010, above, n 30 at 18.

34 Matt Marshall, *Section 69 almost 20 Years On*…, Kluwer Arbitration Blog (24 June 2015) <*http://arbitrationblog.kluwerarbitration.com/2015/06/24/section-69-almost-20-years-on/*>. (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190427104831/http://arbitrationblog.kluwerarbitration.com/2015/06/24/section-69-almost-20-years-on/*>).

should still apply with similar force today. Given that these reasons largely informed the choice to exclude appeals against international arbitration awards on questions of law, the decision to exclude any such appeals, regardless of the parties' intentions, may hence no longer be justified.

2.26 This is particularly so since, as the next section discusses, there are compelling reasons against the complete exclusion of any right of appeal on questions of law, even if parties want to include it.

4. Rightness over finality

2.27 A limited right of appeal against international arbitration awards on questions of law is desirable as it allows parties a choice as to whether to keep open an avenue to correct errors in questions of law in arbitration awards.

2.28 Although "one of the much-cited benefits" of arbitration is finality,[35] there is much to be said for allowing an appeal where parties have contracted the availability of such an appeal – in such a case, the parties have clearly chosen retaining the option to correct errors in questions of law over finality to the extent that allow such appeals does impact finality. Indeed, parties may have good reason to make such a choice – for example, where the quantum involved is sizeable and the stakes are high, which is often the case in high-value international arbitration matters which Singapore seeks to attract. It has been observed that:[36]

> [The] appeal of finality can sometimes depend on the size and complexity of the case, such that where the stakes are particularly high the need to protect against the risk of an aberrant award, by permitting court review, outweighs the desire for speed and finality.

2.29 Providing a limited right of appeal also "protect[s] fairness and the legitimate expectation of [arbitration's] commercial users".[37] As expressed by Nyandoro:[38]

> The more complex a dispute, the more it is open to human error either substantively or procedurally. Likewise, the more high-value an arbitration, the more costly an error may end up being and the more likely it is that an

35 Nish Shetty, "The Arbitration Agreement" in Sundaresh Menon (ed-in-chief), *Arbitration in Singapore: A Practical Guide* (Singapore: Sweet & Maxwell, 2014) at [6.103].

36 Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30(5) J Int'l Arb 531 at 534.

37 Tonderai Nyandoro, *Why the English Right to Appeal an Arbitral Award on a Point of Law is not Anachronistic?*, Kluwer Arbitration Blog (30 May 2016) <*http://arbitrationblog.kluwerarbitration.com/2016/05/30/english-right-appeal-arbitral-award-point-law-not-anachronistic/*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190830042629/http://arbitrationblog.kluwerarbitration.com/2016/05/30/english-right-appeal-arbitral-award-point-law-not-anachronistic/*>).

38 *Ibid*.

> aggrieved party may wish to preserve a right of appeal. In addition, if disputes are higher value today than ever, the additional procedural layer of s. 69 (with the additional costs and delay it entails) becomes more justified. The appeal mechanism should therefore be viewed as one which benefits, rather than hinders, the arbitration process.

5. Autonomy over finality

2.30 Furthermore, providing an optional right of appeal, rather than no right at all, also respects party autonomy since the appeal is available by the choice of the parties. There is also an increasing demand for such a right of appeal.

2.31 In a survey conducted by the Cornell-Pepperdine/Straus Institute of in-house counsel in Fortune 1000 companies, one of the most frequently cited reasons for not utilising arbitration was that "there is hardly an effective way to appeal awards".[39] Similarly, in an earlier survey of corporate lawyers from large corporations in America, 54.3% explained that the decision to prefer litigation over arbitration was the difficulty in appealing arbitral awards.[40]

2.32 Such sentiments evidencing a desire for appealability against arbitration awards are not limited to the USA. Similarly, although the *2018 International Arbitration Survey* recognised that many parties to arbitration view "national court intervention" as one of the three worst characteristics of international arbitration (23%), a very sizeable *14%* also selected "lack of appeal mechanism on the merits" as one of the three worst characteristics.[41] The authors would also commend the following analysis:[42]

> It is also useful to compare the results of the 2015 survey with those of a similar survey conducted by the Queen Mary School of International Arbitration in 2006. As a rough gauge, and keeping in mind that the respondents to the surveys were not the same, the percentage of respondents who favoured an appeal mechanism increased from 9% (in 2006) to 23% (in 2015) – an increase of about 150%. On deeper analysis of the surveys, the actual increase in support may be even greater than the 150% figure suggests. The respondents to the 2006 survey were drawn entirely from in-house counsel, of which an overwhelming 91% rejected the idea of an appeal mechanism. In contrast, nine years later, amongst the in-house counsel subgroup of the 2015 survey, the lack of an appeal mechanism had become the third most frequently selected "worst characteristic" of international arbitration.

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39 Thomas J Stipanowich & J Ryan Lamare, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations" (2014) 19 Harv Negotiation L Rev 1 at 53.

40 William H Knull III & Noah D Rubins, "Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?" (2000) 11(4) Am Rev Int'l Arb 531 at 532.

41 IAS 2018, above, n 24 at 8.

42 Justin Yeo, "On Appeal from Singapore International Commercial Court" (2017) 29 Sing Acad LJ 574 at [25] (footnotes omitted).

2.33 The increasing demand for a right of appeal on questions of law supports the proposition that "there is a case in favour of retaining *at least* an *optional* mechanism for error correction" which allows parties to "retain for themselves the ability to exercise such a right" if they choose to do so.[43] Furthermore, it has been observed that "given the increasing magnitude and frequency of cross-border investment and trade transactions," the desires for appeal mechanisms is likely to apply "in particular to international arbitration."[44] As highlighted by a commentator:[45]

> [P]arties should be given options either to contract out of all review or to contract into review on the merits of the dispute. While in domestic transactions good arguments can be made for uniform arbitration régimes, the special needs of international business call for greater freedom of contract.

2.34 Where the parties have in their arbitration agreement expressly stipulated for the right of appeal against the arbitral tribunal's decision on questions of law, refusing judicial intervention in the way agreed in fact undermines party autonomy. In arbitration, "it is important to remember that the finality of an award is ultimately a direct consequence of the choice of the parties" and hence "party autonomy will always trump finality".[46] In some cases, parties may not necessarily prioritize finality. Given the nature of arbitration, which is "after all, a creature of contract",[47] autonomy should be given primacy. Once party autonomy is accepted as the source of the arbitrator's power, the parties' agreement to allow judicial review on the substantive merits of the case takes precedence. Hence the Court of Appeal has made the following observation:[48]

> Given the inherently private and consensual nature of arbitration, our courts will ordinarily respect the principle of party autonomy and give effect to (workable) agreed arbitration arrangements in international arbitration, subject only to any public policy considerations to the contrary.

2.35 Finally, insofar as Singapore's policy in promoting international arbitration is concerned, not offering even a limited right of appeal may in fact adversely affect Singapore's popularity as an arbitration venue. In this

43 Nyandoro, above, n 37 (emphasis added).

44 Knull & Rubins, above, n 40 at 532.

45 William W Park, "Why Courts Review Arbitral Awards" in Robert Briner [*et al*] (eds), *Law of International Business and Dispute Settlement in the 21st Century = Recht der internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: liber amicorum Karl-Heinz Böckstiegel, anlässlich seines Ausscheidens als Direktor des Instituts für Luft- und Weltraumrecht und des von ihm gegründeten Lehrstuhls für internationales Wirtschaftsrecht* (Cologne: Carl Heymanns Verlag, 2001), 595 at 605.

46 Platt, above, n 36 at 534.

47 Knull & Rubins, above, n 40, at 534.

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

regard, the observations of a dissenting judge, Nott J, in a California Court of Appeal case illustrate this point:[49]

> [T]he majority decision [holding that parties to an arbitration agreement cannot validly agree that an arbitration award is subject to judicial review] will discourage people from agreeing to arbitrate, which is the exact opposite of California's public policy. Most arbitration proceedings are conducted fairly, economically and expeditiously by arbitrators who are experts in their field. However, one of the worst positions an attorney can be in is to recommend binding arbitration, and then have to explain to a bewildered (and angry) client an unexplainable adverse result that cannot be remedied. Anecdotal stories abound where an arbitrator has made an award contrary to the facts or the law. Although I have no statistical facts to back it up, I am willing to bet that there are literally hundreds of cases annually that do not go into arbitration because attorneys or parties are fearful of receiving an arbitrary result that is totally final, without the safety net of judicial review.

2.36 In summary, this Chapter proposes an optional and limited right of appeal that is available, as this will allow parties autonomy to choose whether or not they want to exclude curial intervention. (Chapter 3 will further elaborate how this optional right should be made 'opt-in' rather than 'opt-out'.)

6. Appeals allow mercantile law jurisprudence to be developed

2.37 Finally, allowing appeals against arbitral decisions on questions of law with respect to international arbitration will also aid the development of mercantile law. Providing a right of appeal under the IAA will allow for more opportunities for the Court to publish reasoned judgments in relation to points of law being appealed. Consequently, "if there is a challenge to an arbitral award, the court's judgment may well go into the public domain".[50]

2.38 Lord Thomas of Cwmgiedd, famously advocating for the increased use of section 69 of the UK AA, stated that "the bringing of claims in arbitration has played a central role in this development [of the common law] because it provided a ready source of appellate decisions, which have

49 *Crowell v Downey Community Hospital Foundation* 95 Cal App 4th 732 (2002) at 741–742, CA (Cal, USA).

50 Rupert Jackson, *Arbitration: Is It still Fit for Purpose? Keynote Speech at the 11th International Conference on Construction Law and Alternative Dispute Resolution in Mauritius on 23rd May 2018*, 4 New Square website (23 May 2018) at [5.5] <*http://www.4newsquare.com/wp-content/uploads/2018/05/Arbitration-Is-it-still-fit-for-purpose-by-Sir-Rupert-Jackson-of-4-New-Square.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190830064741/http://www.4newsquare.com/wp-content/uploads/2018/05/Arbitration-Is-it-still-fit-for-purpose-by-Sir-Rupert-Jackson-of-4-New-Square.pdf*>).

helped shape commercial law".[51] In particular, he highlighted how appeals "play a vitally important role in commercial law" in three ways:[52]

> a. It enables the law to develop in the light of reasoned argument, […]
>
> b. It enables public scrutiny of the law as it develops. This may mean the wider public and it may equally mean those parts of society that have a direct interest in the decision and the principle it articulates. Scrutiny can lead to public debate, or debate in the commercial market place. It can bring the issue back to the courts or to parliaments if necessary.
>
> c. It ensures, as a necessary underpinning to public scrutiny, that the law's development is not hidden from view. Where markets are concerned publicity in this sense is of fundamental importance: publicly articulated laws, and precedents, are the basis from which markets and market actors can organise their affairs and business arrangements.

2.39 While it may be argued that arbitral tribunals are not strictly bound by precedent, it is generally acknowledged that past decisions are a valuable source of principles and rules that can guide future decisions. For example, while Sundaresh Menon CJ notes that "arbitration is designed to be ad hoc and confidential, and is predominantly concerned with resolving the specific disputes between the parties",[53] his Honour has also acknowledged the value of precedent and past decisions in international arbitration, namely the presence of "a growing body of substantive rules and principles that arbitrators can draw upon in deciding disputes".[54] Even though arbitrators are not bound by precedent and deal with the matters directly before them, "the decisions of these tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international

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51 Lord Thomas of Cwngiedd (Lord Chief Justice of England & Wales), *Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration: The BAILII Lecture 2016*, British and Irish Legal Information Institute website (9 March 2016) at [12] <*https://www.bailii.org/bailii/lecture/04.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20171115054137/http://www.bailii.org/bailii/lecture/04.pdf*>).

52 *Id* at [11].

53 Sundaresh Menon, *The Rule of Law and the SICC: Singapore International Chamber of Commerce Distinguished Speaker Series*, Singapore International Commercial Court website (10 January 2018) at [28(c)] <*https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190830065513/https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf*>).

54 Sundaresh Menon, *International Commercial Courts: Towards a Transnational System of Dispute Resolution: Opening Lecture for the DIFC Courts Lecture Series 2015*, Supreme Court of Singapore website (2015) at [54] <*https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture—difc-lecture-series-2015.pdf*> (accessed 18 November 2019; archived at <*https://web.archive.org/web/20190424002036/https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture—difc-lecture-series-2015.pdf*>).

commerce."[55] This is demonstrated by the observations of an *ad hoc* UNCITRAL tribunal in *Austrian Airlines v Slovak Republic*:[56]

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. […] It also believes that, subject to the specifics of a given treaty and the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

2.40 As the increased availability of appeals may contribute to the development of an important body of mercantile law jurisprudence, it is a benefit that should not be understated. Gabrielle Kaufman-Kohler, after conducting a thorough review of the use of precedent in arbitration, stated that the use of precedent ensures consistency, which is essential for arbitration to possess legitimacy.[57] International arbitration matters involve increasingly complex issues of transnational commerce. Most sophisticated commercial disputes, which are the most likely to throw up complex points of law, are today resolved by arbitration, thereby depriving the courts of the opportunity to resolve these points. The move towards arbitration therefore potentially saps Singapore's commercial law of its vitality, which optional appeals might help to overcome or ameliorate. Hence, allowing appeals enables the courts to allow rules and norms to develop around complex, commercial matters of public importance[58] and error-correction "preserve[s] the jurisprudential value in the development of commercial law, subject as it should be to rigorous but transparent judicial scrutiny".[59]

55 *Dow Chemical France v ISOVER Saint Gobain* (ICC Award No 4131) (1984) 9 YB Com Arb 131 at 136–137.

56 *Austrian Airlines v Slovak Republic*, UNCITRAL *ad hoc* arbitration final award (9 October 2009) at [84].

57 Gabrielle Kaufman-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture" (2007) 23(3) Arb Int'l 357 at 378.

58 Taner Dedezade, "Are You In? Or are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law" [2006] Int'l Arb L Rev 56 at 59.

59 Nyandoro, above, n 37.

CHAPTER 3

THE RIGHT OF APPEAL SHOULD BE MADE AVAILABLE THROUGH MODIFICATION OF THE IAA

A. INTRODUCTION

3.1 Having recommended making available a right to appeal an international arbitration award on questions of law above, this Chapter considers how such a right may be statutorily provided for.

B. THE PROPOSED REFORM

1. Summary

3.2 This report proposes that a standalone 'opt-in' right of appeal be provided for under the IAA. Such an approach will incorporate the desirable 'opt-in' nature of the current regime, while avoiding its shortcomings.

2. Evaluation of the current regime

3.3 As discussed briefly in the introduction, parties to international arbitration in Singapore may currently only bring appeals on questions of law by opting to be governed by the AA rather than the IAA.

(a) Limitation – Differences between AA and IAA provisions

3.4 A notable limitation of this approach is that parties that want to incorporate *only* section 49 of the AA into their agreement are unable to do. Instead, they will have to submit to the other provisions of the AA as well. Under this current regime, parties will accordingly be governed by *all* AA provisions, even those they deem undesirable.

3.5 The differences between the IAA and AA extend beyond just section 49 of the AA and include differences in their respective approaches towards stay of proceedings, powers of the arbitrator and power of the courts.[60] Such differences can have important practical implications for parties in deciding whether they want to be governed under AA or IAA. For example, there are significant differences in the approaches taken under the AA and under the IAA regarding whether court proceedings must be

60 See Merkin & Hjalmarsson, above, n 7 at 3–5 for an overview of the main differences between the AA and IAA.

stayed when initiated in breach of an arbitration agreement. Where court proceedings are commenced in breach of an arbitration agreement under the IAA, section 6 of the IAA prescribes a mandatory stay of proceedings. In contrast, under section 6 of the AA, such stays are discretionary.[61] The issue of whether a case is governed by the AA or the IAA and hence whether or not it is subject to a mandatory stay of proceedings has been of material significance in a number of cases.[62]

(b) Benefits of an 'opt-in' basis

3.6 On the other hand, one notable benefit of the current regime is its 'opt-in' nature, which clearly places the focus on party autonomy and choice. Parties to an international arbitration must *expressly elect* for this right of appeal, which clearly signals that the basis of the right to appeal is party autonomy and choice. Section 49 of the AA is worded as a right that applies *by default* unless parties "agree to exclude the jurisdiction of the Court" or there is an "agreement to dispense with reasons for the arbitral tribunal's award."[63] However, unlike domestic arbitration, parties to international arbitrations are governed by the IAA by default. Hence, unlike domestic arbitration, the right to appeal on questions of law does not apply by default. Parties in international arbitration must have *expressly agreed* that the Model Law or Part II of the IAA shall not apply to the arbitration or *expressly agree* that the AA shall apply.[64] In the UK, similar reform has been touted with respect to section 69 of the UK AA to amend section 69's opt-out nature to an opt-in provision. It has been argued that doing so reinforces the perception that retaining the right of appeal is premised on party autonomy.[65]

3.7 The authors propose as a first step of reform for the regime to be 'opt-in'. Certainly, bolder moves may be made in the future if this should prove to be a popular option to change the regime into an 'opt-out' one.

3. Comparison with the Singapore International Commercial Court

3.8 For completeness, we briefly compare the *opt-in* model recommended above to the *opt-out* appeal mechanism adopted by the SICC and explain why we have not recommended a similar mechanism.

61 Mohan R Pillay, "The Main Features of Arbitration" in Menon, above, n 35, 71 at [3.044].

62 See, for example, *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25, CA; *Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625, HC.

63 AA, above, n 1, s 49(2).

64 IAA, above, n 2, s 15(1).

65 See, for example, Marshall, above, n 34.

3.9 Under paragraph 139 of the *Singapore International Commercial Court Practice Directions*,[66] appeals against the SICC's decisions may be brought unless the parties "agree in writing to waive, limit or vary the right to appeal," in which case the appeal "may be brought only to the extent as agreed between the parties."[67] Accordingly, where the parties "agree in writing that there shall be no appeal against any judgment or order of the Court, such judgment or order shall be binding on the parties and no appeal shall lie against it".[68] It is notable that the right of appeal applies by default, and is simply "subject to any prior agreement between the parties to limit or vary the scope of appeal".[69]

3.10 While this opt-out model similarly provides parties "broad autonomy in determining the extent and scope of appeal",[70] it should not apply to arbitration as there are some fundamental differences between SICC and arbitration proceedings that justify this distinction.

3.11 Crucially, although the SICC has "tailored rules to be more flexible and expedient than the traditional forms of court litigation",[71] the SICC is still fundamentally a "Court[ ] of law"[72] that "cater[s] to users who prefer the features of litigation and a court-based process".[73] As section 18A of the Supreme Court of Judicature Act ('**SCJA**')[74] makes clear, the SICC is a division of the High Court, subject to similar rules that apply to the High Court. Sections 18A–M of the SCJA bring the SICC's functions, powers and jurisdiction largely in line with those of the High Court. Accordingly, SICC processes and judgments are still different from arbitration and still retain much of the formality and structure of a court of law.

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66 *Singapore International Commercial Court Practice Directions (Effective 22 July 2019)*, Supreme Court of Singapore website (22 July 2019) <*https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions—amended-version-(15-july-2019).pdf*> (accessed 20 November 2019; archived at <*https://web.archive.org/web/20191120104146/https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions—amended-version-(15-july-2019).pdf*>).

67 *Id* at [139].

68 *Ibid*.

69 SICC Report, above, n 23 at [35].

70 Yeo, above, n 42 at [43].

71 Bernard Eder & Shaun Leong, "The Evolving Role of the Singapore International Commercial Court: Jurisdictional Issues and Enforcement Perspectives" in David Joseph & David Foxton (gen eds), *Singapore International Arbitration: Law and Practice* (2nd ed) (Singapore: LexisNexis, 2018), 621 at [1.5].

72 *Id* at [1.7].

73 Indranee Rajah (Minister, Prime Minister's Office; Second Minister for Finance; Second Minister for Education; and Second Minister for Law), *The Future of Dispute Resolution in Singapore*, Ministry of Law website (19 June 2018) at 3 <*https://app.mlaw.gov.sg/files/NoteonFutureofDisputeResolution.pdf/*> (accessed 20 November 2019; archived at <*https://web.archive.org/web/20191120110245/https://app.mlaw.gov.sg/files/NoteonFutureofDisputeResolution.pdf/*>).

74 Cap 322, 2007 Rev Ed.

3.12 Next, the availability of appellate recourse is in fact one of the key features of the SICC that distinguishes it from arbitration. As the Chief Justice discussed at length, the SICC is not intended to be identical to international commercial arbitration, and it is precisely the *wide scope* of appeals under SICC that *differentiates* it from arbitration, that is, the "availability of a single tier of appeal" in international commercial courts in contrast to the general "one shot" nature of arbitration.[75] The "international character" of the SICC, for example, with international jurists sitting on its panel, further justifies a wider scope of appellate recourse than national courts reviewing international arbitration decisions.

3.13 Accordingly, the authors are of the view that the opt-out nature of the right of appeal under the SICC should not be imported into the IAA. While the default position for arbitration is *non-availability* of curial intervention on questions of law, the default position under the SICC is *availability* of such appeals, a distinction that is justified in both principle and policy.

4. Proposed formulation

3.14 Accordingly, this report proposes that a standalone *opt-in* provision allowing a right of appeal on points of law should be made available to parties under the IAA. Doing so would:

(1) require parties to expressly opt into a right to appeal; and

(2) unlike the current AA regime, require them to opt specifically into a right of appeal on questions of law, rather than to be governed under the AA generally.

3.15 To do so, section 49 of the AA may be adapted with some inspiration from the New Zealand Arbitration Act 1996 ('**NZ AA**')[76] and the Hong Kong Arbitration Ordinance ('**HK AO**'),[77] both of which provide for *opt-in* rights of appeal against arbitral awards on questions of law. (We note that the HK AO only provides this right for domestic arbitration and that international arbitration awards are not appealable on questions of law. However, since we are concerned primarily with the formulation, reference can still be made to the HK AO.)

(a) New Zealand Arbitration Act 1996

3.16 Under the NZ AO, whether the right to appeal against arbitration awards on questions of law is on an 'opt-in' or 'opt-out' basis depends on whether it is a domestic or international arbitration. As this is the intended

75 Menon, above, n 54 at [49].
76 1996 No 99 (NZ).
77 Cap 609 (HK).

outcome of this reform, it is apposite to consider how the New Zealand legislation achieves this 'opt-in' effect.

3.17 The right to appeal against arbitral awards on questions of law is contained in clause 5 of Schedule 2. Section 6(2) of the NZ AA then provides that the provisions of Schedule 2 apply to every domestic arbitration "unless the parties agree otherwise" but applies to international arbitrations "only if the parties so agree".

3.18 For the sake of completeness, section 6 is reproduced here:

> (2) A provision of Schedule 2 applies—
>
> (a) to an arbitration referred to in subsection (1) which—
>
> (i) is an international arbitration as defined in article 1(3) of Schedule 1; or
>
> (ii) is covered by the provisions of the Protocol on Arbitration Clauses (1923); or the Convention on the Execution of Foreign Arbitral Awards (1927), or both,—
>
> only if the parties so agree; and
>
> (b) to every other arbitration referred to in subsection (1), unless the parties agree otherwise.

(b) Hong Kong Arbitration Ordinance

3.19 Under the HK AO, the right to opt into appeal arbitral awards on questions of law is *only available* for parties to domestic arbitration. However, insofar as the relevant provision is designed as an *opt-in* right to appeal, its formulation is worth consideration in deciding how such an opt-in right to appeal may be formulated under the IAA.

3.20 Clause 5, 6 and 7 of Schedule 2 to the HK AO contains the right to appeal against arbitral awards on questions of law. Insofar as material, section 99 of the Act further provides as follows:

> **Arbitration agreements may provide expressly for opt-in provisions**
>
> **99**. An *arbitration agreement may provide expressly* that any or all of the following provisions are to apply— […]
>
> (e) sections 5, 6 and 7 of Schedule 2. [Emphasis added.]

(c) Proposed formulation

3.21 While the NZ AA and HK AO create an 'opt-in' mechanism for the right of appeal in a separate schedule containing optional provisions, Singapore's arbitration legislation fundamentally differs in its general structure. Nevertheless, the terminology used to effect such an 'opt-in' basis is helpful.

3.22 Accordingly, this report proposes the following formulation to be considered for the right of appeal under the IAA:

> **Appeal against award**
>
> *Notwithstanding Articles 5 and 34 of the Model Law*, a party to arbitral proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the High Court on a question of law arising out of an award made in the proceedings, *where all parties to the proceedings have agreed that they may exercise such a right of appeal*. [Emphasis added.]

3.23 The subsequent Chapter sets out the other safeguards which would follow from this primary provision.

CHAPTER 4

HOW THE RIGHT SHOULD BE EXERCISED – ADOPTING THE ARBITRATION ACT'S PROVISIONS WITH MODIFICATIONS

A. THE ISSUE

4.1 This Chapter considers whether it is appropriate to adopt the procedural and substantive safeguards currently provided under the AA for the IAA. In particular, this report considers whether (1) the procedural safeguards under sections 49–52 of the AA are sufficient, and (2) whether the substantive standard of review under section 49(5) is sufficiently exacting and should similarly apply to appeals against international arbitration awards.

B. THE PROPOSED REFORM

4.2 This report recommends that the current formulation and standard of review under sections 49–52 of the AA should be mirrored with modifications as set out in the Schedule, most of which are self-explanatory.

4.3 We would only highlight that a key modification we propose is to define "question of law" to mean both Singapore law and international law.

4.4 Although section 49 of the AA is modelled after section 69 of the UK AA, a notable difference is that the AA does not expressly define a "question of law". In contrast, section 82 of the UK AA defines a "question of law" as "a question of the law of England and Wales" or "a question of the law of Northern Ireland" for a court in England and Wales or a court in Northern Ireland respectively.[78] There is no equivalent provision in Singapore to that effect. It is proposed that this be specifically provided for.

4.5 Separately, on defining questions of law to include international law, this is being proposed because complex international arbitrations do raise questions of international law and not merely questions of Singapore law and, for this reform to be useful, the Singapore court should be empowered to also consider such questions. It is noteworthy that the Singapore courts in the context of domestic litigation already consider questions of international law.[79]

78 UK AA, s 82(1).

79 See, for example, *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536, CA.

4.6 It bears noting the phrase "question of law" does not require further clarification as its meaning is clearly established in jurisprudence. In *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd*,[80] the Court of Appeal affirmed[81] the earlier definition of a question of law laid down in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd*:[82]

> A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court.

4.7 As observed by the subsequent High Court decision of *Lim Chin San Contractors Pte Ltd v L W Infrastructure Pte Ltd*,[83] this definition has also been cited with approval in the UK.[84]

4.8 With that in mind, the Schedule sets out the proposed provisions to be included in the IAA adopted from sections 49–52 of the AA with modifications.

80 [2004] 2 SLR(R) 494, CA.
81 *Id* at [19].
82 [1993] 2 SLR(R) 208 at [7], HC.
83 [2011] 4 SLR 455 at [42], HC.
84 *Ibid*, referring to the cases of *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* [2005] EWHC 1370 (TCC), 102 Construction L Rep 1 at [107], HC (Eng & Wales); and *The Coal Authority v Davidson* [2008] EWHC 2180 (TCC), [2008] Construction Industry L Letter 2621 at [6], HC (Eng & Wales).

CHAPTER 5

INTERNATIONAL IMPLICATIONS

A. THE ISSUES

5.1 This Chapter considers two issues:

(1) whether Singapore's adoption of the Model Law poses any impediment to the proposed reforms; and

(2) whether an award that is varied pursuant to an appeal on a question of law is enforceable under the NY Convention.

B. ANALYSIS

1. Summary

5.2 The authors are of the view that:

(1) Singapore's adoption of the Model Law is not an impediment to the provision of a right of appeal on points of law under the IAA. Such a right is not inconsistent with the Model Law and, in any case, should not be resisted merely on the basis of such non-adherence.

(2) There is limited risk to an award having been successfully appealed and varied by the court to be refused enforcement overseas in an NY Convention jurisdiction.

2. Adherence to the Model Law

5.3 If a right of appeal against arbitral awards on questions of law is proposed, a question arises as to whether Singapore's adoption of the Model Law under the IAA poses any impediment.

(a) The potential inconsistency addressed

5.4 Article 5 of the Model Law provides that "no court shall intervene except where provided in this law". With respect to the appellate recourse to set aside awards, Article 34(2) of the Model Law provides that "an arbitral award may be set aside by the court […] *only if* […]" one of several exhaustive grounds are met. The wording of these articles suggests that, short of falling within one of the exhaustive grounds specified in Article 34(2) of the Model Law, appeals may not be brought against arbitral awards. As an appeal against an arbitration award on a question of law does not fall within Article 34(2) of the Model Law, such a right in the IAA may arguably be inconsistent with the Model Law.

5.5 Nevertheless, moving past this strict interpretation of the Model Law, an expanded scope of judicial review on questions of law does not actually offend the Model Law's approach. Even though the right to appeal under the Model Law is narrower than that being proposed in this report, the Explanatory Note to the Model Law makes clear that modifying the standard and scope of judicial review is permitted under the Model Law. It states that:[85]

> The Model Law […] permits foreign parties readily to ascertain the possible occasions for court intervention. Moreover, although it is to be hoped that adopting States will take the Law largely as defined, any State could extend the scope of judicial review without breaching any international obligation.

5.6 Accordingly, Singapore's approach to the Model Law has never been one of absolute adherence. As stated by Menon CJ, "the Model Law is not adopted *in toto*."[86] Furthermore, it is apposite to note that section 24 of the IAA already arguably departs from the Model Law by adding two additional grounds that may allow a court to set aside the award of an arbitral tribunal.[87]

5.7 Furthermore, it may be argued that the proposed reforms are ultimately consistent with the spirit of the Model Law, which accords a central role to party autonomy. It is important to highlight that the proposed reform does not create a compulsory judicial review mechanism, nor even a default right of appeal, but merely offers as choice for parties to opt into a right of appeal. This is consistent with the spirit of the Model Law. The Singapore High Court has recognised the central role that party autonomy possesses in the Model Law: "the principle of party autonomy is one that is central to the Model Law".[88] Similarly, as stated in the Explanatory Note on the Model Law:[89]

> as evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

85 Explanatory Documentation, above, n 10 at [7.03].

86 Pillay, "The Main Features of Arbitration" in Menon, above, n 35 at [3.075].

87 The IAA, s 24, states that "notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if (a) the making of the award was induced or affected by fraud or corruption; or (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."

88 *ABC v XYZ* [2003] 3 SLR(R) 546, at [2], HC.

89 Explanatory Documentation, above, n 10 at [14].

Accordingly, insofar as party autonomy is central to the proposed reform, which is structured as an opt-in mechanism, it is unlikely that this is a reform that is hugely inconsistent with the spirit of the Model Law.

(b) Inconsistency is not a bar

5.8 Even if there is possibility of inconsistency with the Model Law, it is clear that non-adherence to the Model Law is not a sufficient ground for refusing to enact necessary and justified reforms. As discussed earlier, Parliament amended the IAA to allow for a right to judicial review of negative jurisdictional rulings, even though "the position under the Model Law does not allow for curial intervention in respect of negative jurisdictional rulings".[90] Indeed, the Law Reform Committee, in considering whether their proposal of judicial review for negative jurisdictional rulings was consistent with the Model Law ultimately concluded:[91]

> We recognise that the proposals will mark a departure from the Model Law. However, that by itself cannot, in our view, be a reason not to adopt what is reasonable.

3. Enforceability under the NY Convention

5.9 A second question may arise as to whether awards that have been varied under an appeal brought under the IAA will still be enforceable under the NY Convention.

(a) Potential unenforceability

5.10 Under the NY Convention, which has been incorporated into the IAA, contracting states are bound to "recognize arbitral awards as binding and enforce them" under Article III of the Convention. Nevertheless, under Article V of the NY Convention, recognition and enforcement of the award "may be refused" in certain limited circumstances.

5.11 As this report proposes that the IAA provision adopts the general formulation of section 49 of the AA, one of the possible outcomes of an appeal against an arbitral award is the variation of an award under the equivalent of section 49(8)(c) of the AA. A question hence arises as to whether such "varied awards" constitute "arbitral awards" that are covered under the NY Convention.

90 Chong, above, n 26 at [16].

91 *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (Singapore: Law Reform Committee, 2011) at [17].

(b) Singapore law – varied award is still an arbitral award

5.12 The first issue is whether an award that has been varied is still an "arbitral award" even though the variation is carried out by the court. The definition of an "award" under section 2 of the AA (mirrored by section 2 of the IAA)[92] defines an arbitral "award" as follows:

> "award" means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 28; […]

5.13 Importantly, where the court varies an award under section 49(8) of the AA, section 51(2) of the AA renders the variation as part of the original award, stating as follows:

> Where the award is varied by the Court, the variation shall have effect as *part of the arbitral tribunal's award*. [Emphasis added.]

5.14 The combined effect of these provisions under the AA is that insofar as the status of such varied awards in Singapore is concerned, awards that have been varied pursuant to section 49(8) of the AA are regarded as arbitral awards of the original arbitration tribunal. Accordingly, if the IAA incorporates an equivalent provision to mirror section 51(2) of the AA, an award of the arbitral tribunal that has been varied by the reviewing court will be a valid arbitral award under Singapore law.

5.15 Accordingly, conceptually, there ought to be no difficulty in enforcing such varied awards. Empirically, there is a relative dearth of case law regarding the enforceability of awards that have been *varied* by a curial court at the seat of arbitration. This is unsurprising given the lack of such a provision in most jurisdictions. It is noteworthy, however, that the UK does not appear to face any such problem having had a regime which allows appeals against international arbitration awards for decades.

5.16 Accordingly, it is suggested that any such risk of lack of enforceability in a foreign NY Convention jurisdiction is going to be low and should not be a bar to the reforms recommended in this report.

92 The IAA, s 2, similarly describes an award as "decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12". The AA, s 28, mirrors the IAA, s 12, insofar as it provides for the powers of the arbitral tribunal.

CHAPTER 6

APPEAL WITHOUT CONSENT OF PARTIES BUT WITH LEAVE OF COURT

A. INTRODUCTION

6.1 This report has recommended that a right to appeal an award on questions of law should be made available where parties have agreed to such an avenue of appeal (that is, an *opt-in* regime).

6.2 Nevertheless, the authors consider it appropriate to consult the arbitration community on whether the reform should go even further to also permit a right of appeal where the parties have not expressly agreed to such a right of appeal, provided the party who desires to appeal obtains leave of court to appeal. This would be the default position under this regime unless parties expressly contract out of this (that is, an *opt-out* regime). It is envisaged that an *opt-out* regime would give rise to more appeals than a purely *opt-in* regime.

B. ANALYSIS

1. Summary

6.3 There are arguments both for and against an opt-out regime.

6.4 The arguments for an opt-out regime are as follows:

(1) First, as explained above, there is empirical evidence that there is a weak link between choice of seat and availability of appeal on questions of law with leave of court. As observed earlier, London is consistently the most popular seat for arbitration, even though section 69 of the UK AA provides for the right of appeal *either* with parties' consent *or* with leave of court. (See paragraph 2.22 above). Accordingly, an opt-out regime may not adversely impact Singapore's popularity as a seat.

(2) Second, if the availability of the right of appeal is expanded, there would be more appeals and therefore more opportunities for the Courts to develop mercantile law. (See Part II.B.6 above) The opt-in regime may not yield a meaningful number of appeals. For example, in New Zealand under the NZ AO, it has been observed that, in the period 2000 to 2011, out of 68 appeals brought against arbitral awards, *55* applications were made with leave of the court in contrast to *13* applications being made in circumstances where parties

had, prior to the issuance of the award, agreed to make available such an avenue of appeal.[93]

6.5 The arguments against an opt-out regime are as follows:

(1) First, it may be observed that there could already be ample opportunity for the Singapore courts to develop mercantile law – for example, the caseload for the Court of Appeal has increased steadily and it may be surmised that there is proportionately an increase in commercial matters considered by the Court of Appeal. Indeed, there are new plans to introduce a new appellate court in light of the Court of Appeal's increased caseload.[94] Nonetheless, it could equally be said that as arbitration becomes even more popular (and likely so given the current trajectory), exponentially more complicated disputes would be resolved in arbitration instead of litigation.

(2) Second, there is potentially conflicting empirical evidence which could suggest that creating an opt-out regime would negatively impact Singapore's popularity as a seat and detract from its general approach minimising curial intervention. In the IAS 2018, a sizeable 60% of respondents cited "avoiding specific legal systems/national courts" as one of the most valuable characteristics of international arbitration,[95] suggesting that such curial intervention without parties' agreement may not be well-received. Accordingly, there is value in consulting the arbitration community to obtain Singapore-specific feedback on whether Singapore's popularity as a seat may suffer if an opt-out regime is adopted.

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93 See *John G Walton, Appeals on Questions of Law – A New Zealand Perspective*, website of John G Walton, Bankside Chambers (20 April 2018) <*https://johnwalton.co.nz/musings/appeals-on-questions-of-law---a-new-zealand-perspective*> (accessed 25 November 2019; archived at <*https://web.archive.org/web/20190120220341/https://johnwalton.co.nz/musings/appeals-on-questions-of-law--a-new-zealand-perspective*>).

94 See Edwin Tong, *Keynote Address by Mr Edwin Tong, Senior Minister of State for Law & Health, at the Litigation Conference 2019*, Ministry of Law website (22 April 2019), at [91]–[99] <*https://app.mlaw.gov.sg/news/speeches/keynote-address-by-mr-edwin-tong-senior-minister-of-state-for-law-health-litigation-conference-2019*> (accessed 25 November 2019; archived at <*https://web.archive.org/web/20191125105449/https://app.mlaw.gov.sg/news/speeches/keynote-address-by-mr-edwin-tong-senior-minister-of-state-for-law-health-litigation-conference-2019*>). The change has been effected by the Constitution of the Republic of Singapore (Amendment) Act 2019 and the Supreme Court of Judicature (Amendment) Act 2019 which were passed by Parliament on 5 November 2019 (see the speeches during the Second and Third Readings of the Supreme Court of Judicature (Amendment) Bill and the Constitution of the Republic of Singapore (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (5 November 2019), volume 94), but at the time of writing had not yet come into force.

95 IAS 2018, above, n 24 at 7.

2. Conclusion

6.6 The authors therefore welcome feedback from arbitration practitioners and stakeholders on whether the reform should go further and make the appeal regime an opt-out regime.

CHAPTER 7

CONCLUSION

7.1 In conclusion, this report recommends the following:

(1) That the IAA be amended to include an optional right of appeal against international arbitration awards on questions of law;

(2) subject to the feedback on Chapter 6 in terms of how this right should arise, the authors at present propose that the right should be structured as an 'opt-in' provision that requires parties to expressly agree the right of appeal on questions of law; and

(3) in terms of the rules governing the exercise of the right, this report proposes that the proposed IAA formulation should mirror the formulation and standard of review under sections 49–52 of the AA with the aforesaid modifications.

7.2 Additionally, this report also wishes to consult on whether the reform should go further to permit a right of appeal where parties have not agreed but where one party obtains leave of court to appeal.

SCHEDULE

PROPOSED PROVISIONS

APPEAL AGAINST AWARD

XX.—(1) Notwithstanding Articles 5 and 34 of the Model Law, a party to arbitral proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the High Court on a question of law arising out of an award made in the proceedings, where all parties to the proceedings have agreed that they may exercise such a right of appeal.

(2) The right to appeal under this section shall be subject to the restrictions in section YY.

(3) On an appeal under this section, the Court may by order —

(*a*) confirm the award;

(*b*) vary the award;

(*c*) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's determination; or

(*d*) set aside the award in whole or in part.

(4) The Court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(5) The decision of the Court on an appeal under this section shall be treated as a judgment of the Court for the purposes of an appeal to the Court of Appeal.

(6) In this section, "question of law" means a question of Singapore law and includes a question of public international law.

SUPPLEMENTARY PROVISIONS TO APPEAL UNDER SECTION XX

XY.—(1) This section shall apply to an appeal under section XX.

(2) An appeal may not be brought if the appellant has not first exhausted —

(*a*) any available arbitral process of appeal or review; and

(*b*) any available recourse under Article 33 of the Model Law (correction or interpretation of award and additional award).

(3) Any appeal shall be brought within 30 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the appellant was notified of the result of that process.

(4) If on an appeal it appears to the Court that the award —

(*a*) does not contain the arbitral tribunal's reasons; or

(*b*) does not set out the arbitral tribunal's reasons in sufficient detail to enable the Court to properly consider the appeal,

the Court may order the arbitral tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the Court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The Court may order the appellant to provide security for the costs of the appeal, and may direct that the appeal be dismissed if the order is not complied with.

(7) The power to order security for costs shall not be exercised by reason only that the appellant is —

(*a*) an individual ordinarily resident outside Singapore; or

(*b*) a corporation or association incorporated or formed under the law of a country outside Singapore or whose central management and control is exercised outside Singapore.

(8) The Court may order that any money payable under the award shall be brought into Court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

EFFECT OF ORDER OF COURT UPON APPEAL AGAINST AWARD

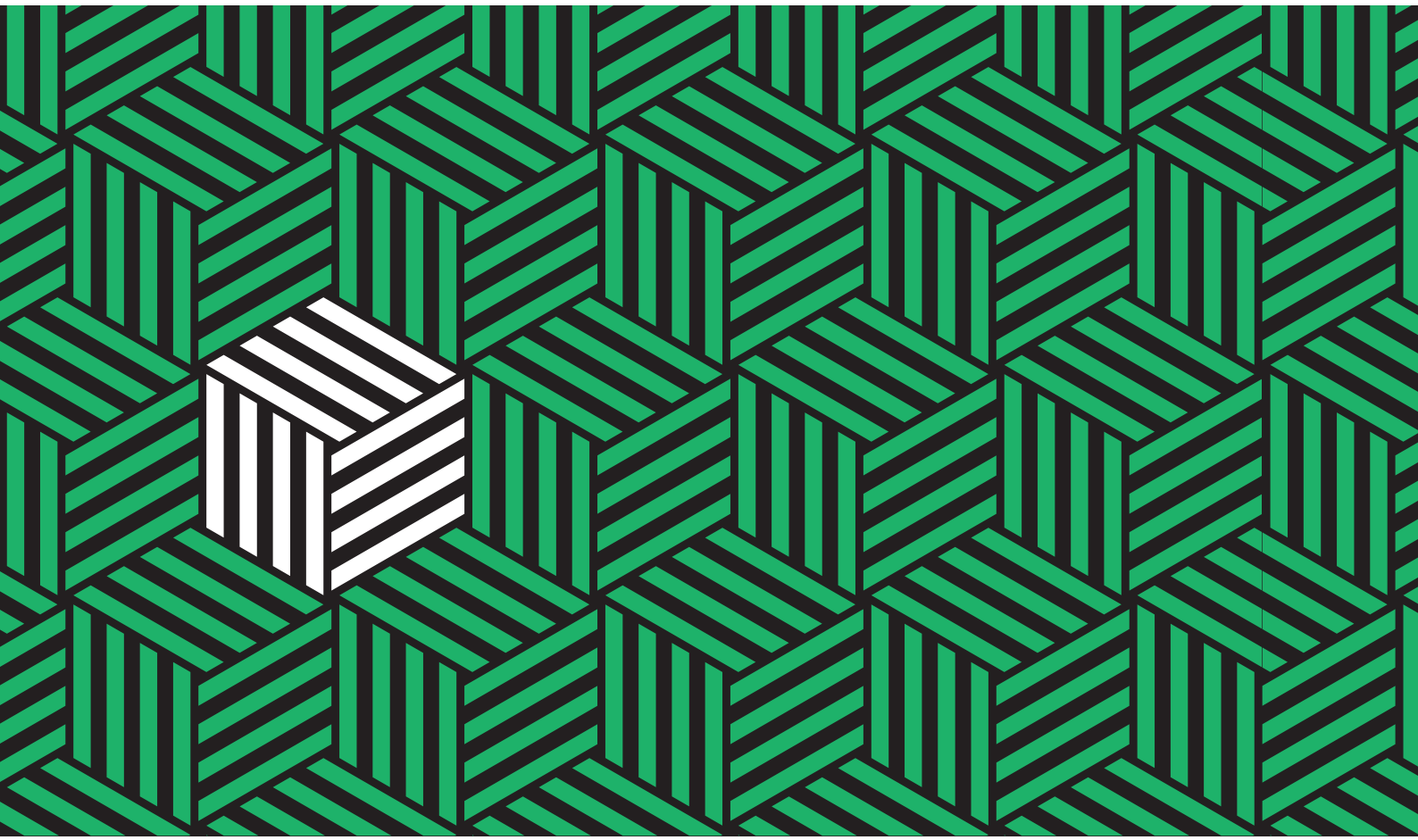
YY.—(1) Where the Court makes an order under section XX with respect to an award, subsections (2), (3) and (4) shall apply.

(2) Where the award is varied by the Court, the variation shall have effect as part of the arbitral tribunal's award.

(3) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within 3 months of the date of the order for remission or such longer or shorter period as the Court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the Court may also order that any provision

that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, shall be of no effect as regards the subject-matter of the award or, as the case may be, the relevant part of the award.



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