Singapore Academy of Law
Law Reform Committee

Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings

February 2019

SAL SINGAPORE ACADEMY OF LAW

Singapore Academy of Law
Law Reform Committee

Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings

February 2019

SAL SINGAPORE ACADEMY OF LAW

Members of the Costs in Arbitration-Related Court Proceedings Subcommittee

1. Jordan Tan
2. Colin Liew

The report was edited by Dr Jack Tsen-Ta Lee, Deputy Research Director, Singapore Academy of Law.

An electronic copy of this report may be accessed from the Singapore Academy of Law website at *https://www.sal.org.sg/Resources-Tools/Law-Reform/Law-Reform-e-Archive*.

ISBN 978-981-14-0682-9

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.

Comments and feedback on this report should be addressed to:

Law Reform Committee
Attn: Law Reform Co-ordinator
Singapore Academy of Law
1 Coleman Street
#08-06 The Adelphi
Singapore 179803
Tel: +65 6332 4070
Fax: +65 6333 9747
Email: lawreform@sal.org.sg

TABLE OF CONTENTS

EXECUTIVE SUMMARY

THE FIRST QUESTION

1 In Singapore, a party to international arbitration who challenges the tribunal's jurisdiction and fails in a preliminary determination can appeal the tribunal's decision to the court under section 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**"). Where the appeal succeeds, the Singapore court can make an order in respect of the costs of the arbitral proceedings. This is useful, because in such cases the tribunal will lack jurisdiction, and so will be unable to make a costs award of its own. There is, however, almost no guidance on how the court should approach the question of costs. General guidance is unlikely to be helpful because of the great variety of ways in which international arbitration is conducted.

2 The subcommittee therefore recommends the introduction of certain measures to address this issue.

(a) First, the subcommittee proposes that the *Guide for the Conduct of Arbitration Originating Summons* (the "***Guide***") issued by the Registrar of the Supreme Court be amended to require the filing of costs schedules in appeals filed under section 10 of the IAA. This will allow the court to benchmark one party's costs against the other's, and so will give it a useful reference point for the assessment.

(b) Second, the subcommittee proposes that the court encourage parties to apply for the appointment of costs-assessors in high-value cases. Well-chosen assessors will be able to assist the court in what would otherwise be a summary determination of costs.

(c) Third, the subcommittee proposes that arbitral institutions, such as the Singapore International Arbitration Centre ("**SIAC**") and the International Chamber of Commerce ("**ICC**"), consider instituting a practice of having the tribunal, in making a decision on a jurisdictional challenge, make a pronouncement on costs of the arbitration incurred up to that stage, which would serve, subsequently, as a useful reference point to the court.

THE SECOND QUESTION

3 Where a party's application to set aside a tribunal's award (whether on the grounds of jurisdiction or otherwise) succeeds at the final stage, the Singapore court currently has no power to make an order in respect of the

costs of the arbitral proceedings. This is problematic, because the tribunal in such cases will be *functus officio* or (if the challenge was based on jurisdiction) will lack jurisdiction. Either way, the tribunal will be unable to make a costs award (or vary any costs award previously made). This leaves parties that correctly apply to set aside the award without a way to recover their costs. This is contrary to the spirit of Singapore's costs regime, and is inconsistent with the position at the interim stage (discussed above). This report does not deal with a situation where the Singapore court is not the supervisory court and has refused enforcement of a tribunal's award given that, in such circumstances, the court has merely refused enforcement in Singapore and does not purport to affect the validity of the award for other purposes in other jurisdictions.

4 The subcommittee therefore recommends a legislative amendment that would allow the court to make an order in respect of the costs of the arbitral proceedings following a successful application to set aside (whether on the grounds of jurisdiction or otherwise) at the final stage. The subcommittee further recommends that the procedures described above to assist the court in assessing costs be used in respect of a determination of costs which follows from a successful application to set aside an award.

5 To the extent that the same issues arise in the context of the Arbitration Act (Cap 10, 2002 Rev Ed) ("**AA**"), the recommendations apply *mutatis mutandis*.

6 In summary, the proposed reforms are as follows:

(a) that the *Guide* be amended to require the filing of costs schedules prior to the determination of (i) appeals against jurisdiction pursuant to section 10 of the IAA and section 21A of the AA; and (ii) applications to set aside an award pursuant to section 24 of the IAA (or article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "**Model Law**")) and section 48 of the AA (see chapter 2, part B.2);

(b) that the *Guide* be amended to state that the court will, in appropriate cases of complexity, encourage parties to agree to or apply to appoint an assessor to assist the court in making a summary assessment as to costs (see chapter 2, part B.3); and

(c) that section 24 of the IAA and section 48 of the AA be amended to expressly empower the court to make an order providing for costs of the arbitration consequent on an order to set aside an award wholly or in part (see chapter 3).

INDUSTRY FEEDBACK

7 Comments on the proposed reforms were sought from key stakeholders in the industry including the SIAC, the ICC, the Singapore

Branch of the Chartered Institute of Arbitrators ("**CiArb**") and the Singapore Institute of Arbitrators ("**SiArb**").

8 The ICC declined to comment on the proposed reforms and clarified that it generally refrained from giving such feedback to maintain neutrality. Feedback was, however, received from the SIAC, CiArb and SiArb, which were in general supportive of the proposed reforms (see chapter 4).

9 The subcommittee's conclusions based on the industry feedback are set out at the end of this paper (see chapter 5).

CHAPTER 1

INTRODUCTION

1.1 This report refers to the following legislative provisions:

(a) section 10 of the International Arbitration Act ("**IAA**");[1]

(b) section 24 of the IAA;

(c) section 21A of the AA;

(d) section 48 of the Arbitration Act ("**AA**");[2] and

(e) article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985).

1.2 Insofar as material, section 10 of the IAA provides as follows:

> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) If the arbitral tribunal rules —
>
> (a) on a plea as a preliminary question that it has jurisdiction; or
>
> (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.
>
> […]
>
> (7) In making a ruling or decision under this section that the arbitral tribunal has no jurisdiction, the arbitral tribunal, the High Court or the Court of Appeal (as the case may be) may make an award or order of costs of the proceedings, including the arbitral proceedings (as the case may be), against any party.

1.3 Insofar as material, section 24 of the IAA provides as follows:

> [T]he 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.

1 Cap 143A, 2002 Rev Ed.
2 Cap 10, 2002 Rev Ed.

1.4 Article 34(2) of the Model Law provides as follows:

> An arbitral award may be set aside by the court […] 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 this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings 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; or
>
> (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:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State.

1.5 Sections 21A and 48 of the AA largely mirror the position in the IAA. The proposed reforms in relation to the IAA apply *mutatis mutandis* to the AA (elaborated on below).

1.6 The following features of the above legislative provisions are notable:

(a) It is clear from section 10(7) of the IAA that, following a successful application under section 10, the court may make an order as to the costs of not only the application, but also the arbitral proceedings as a whole. There is, however, no guidance on how the court should determine the quantum of such a costs order. In addition, there is little guidance in the case law.

(b) There is no corresponding power to award costs following a successful application under section 24 of the IAA or article 34(2) of the Model Law.

1.7 This report considers two issues:

(a) What reforms would better enable a court to determine the quantum of a costs order following a successful challenge under section 10 of the IAA?

(b) Should a corresponding power to award costs following a successful challenge under section 24 of the IAA or Article 34(2) of the Model Law be introduced?

CHAPTER 2

THE FIRST QUESTION

A. THE PROBLEM

2.1 There are only two reported cases in which there have been successful challenges under section 10 of the IAA.[3] Neither gives any substantive guidance on the question of costs. In the first case, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd*,[4] the Court of Appeal simply said as follows:[5]

> We ordered that the Appellant should have the costs of the application below and of the appeal, and that these were to be taxed if not agreed. The disbursements and fees paid in the arbitration were to be indemnified by the Respondent. The costs of the arbitration were to be paid to the Appellant, and, with the consent of the parties, we ordered that these were to be taxed by the Registrar of the Supreme Court if not agreed.

2.2 In the second case, *BCY v BCZ*,[6] the High Court said as follows:[7]

> In addition, the defendant is to pay the plaintiff reasonable costs and expenses incurred in the ICC arbitration, including the Arbitrator's fees and expenses as well the ICC administrative expenses, to be taxed by the Registrar of the Supreme Court if not agreed.

2.3 Thus, upon a successful challenge to the jurisdiction of an arbitral tribunal under section 10 of the IAA, the costs of the arbitration proceedings may be summarily assessed and fixed by the Court or be ordered to be taxed by the Registrar of the Supreme Court. However, neither of these pronouncements provides the Court or Registrar any specific guidance as to how such costs should be taxed.

2.4 The power of the Registrar to tax the costs of proceedings is governed by Order 59 of the Rules of Court ("**ROC**").[8] In theory, therefore, the Registrar may tax the costs of arbitration proceedings in the same manner as High Court proceedings, that is, subject to the provisions of Order 59 of the ROC, the amount of costs to be allowed is in the discretion

3 Colin Liew, "Taxing the Costs of International Arbitration Proceedings", *Singapore Law Gazette* (September 2017) at 25.
4 [2014] 1 SLR 130, Court of Appeal.
5 *Id* at [72].
6 [2017] 3 SLR 357, High Court.
7 *Id* at 385, [98]. The High Court's costs order in this case was adopted from the costs order granted in *Lufthansa*, above, n 4.
8 Cap 322, R 5, 2014 Rev Ed ("ROC").

of the Registrar,[9] which is to be exercised having regard to the principle of proportionality as well as all the relevant circumstances.[10]

2.5 However, there are several practical difficulties faced by the Court in making a summary assessment or the Registrar when taxing the costs of arbitration proceedings:[11]

(a) International arbitration practitioners and arbitrators come from myriad legal traditions and may have differing practices (all of which may be reasonable) which impact legal costs incurred in an arbitration differently. For example, many European legal systems eschew disclosure and cross-examination, and in some major litigation destinations, costs are routinely awarded using fixed tariffs (as in the Netherlands)[12] or not at all (as in the United States). Hence, even if an arbitration is Singapore-seated, the diverse practices of international arbitration practitioners and arbitrators may present the Registrar with costs which differ significantly in nature and/or quantum from what Singapore practitioners and courts are used to.

(b) Whereas the parties may refer the Registrar to precedent bills of costs from other similar cases when the costs of High Court proceedings are taxed, it is not possible to refer to costs awards from other arbitrations for the purposes of taxing the costs of arbitration proceedings, since such awards are unreported and confidential.

(c) In some cases, the tribunal may already have assessed some of the costs. The court then faces a difficult choice: conduct a fresh assessment, and thereby disregard the view of the expert tribunal; or rely on the assessment of a tribunal that has been found to lack competence. In *VV v VW*,[13] the claimant in an arbitration was unsuccessful before the tribunal, and was required to pay the defendant's costs. It then appealed to the High Court on the basis that the costs award was so exorbitant as to be contrary to public policy. The High Court dismissed the appeal, saying "it is not part of the public policy of Singapore to ensure that the costs incurred by parties to private litigation outside the court system […] are assessed

9 *Id*, O 59, r 31(1), read with para 1(1) of Appendix 1 to O 59.

10 *Id*, O 59, r 31(1), read with para 1(2) of Appendix 1 to O 59.

11 Liew, above, n 3.

12 *ICC Commission Report: Decisions on Costs in International Arbitration: Offprint from ICC Dispute Resolution Bulletin 2015, Issue 2* (Paris: International Chamber of Commerce, 2015) at 48 <*https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf*> (accessed 30 January 2019; archived at <*https://web.archive.org/web/20190129034433/https://cdn.iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf*>).

13 [2008] 2 SLR(R) 929, HC.

on the basis of any particular principle including the proportionality principle".[14] Arguably, the High Court would have been less deferential to the tribunal's assessment if it had found the tribunal to lack competence, but *VV* suggests that the tribunal's view will not easily be overridden.

2.6 Appendix 1 to Order 59 of the ROC exhorts decision-makers on costs to have regard to "all the relevant circumstances" and several specific considerations such as the complexity of the case and the value of the claim, but such guidance is so general as to be of little practical use, and does not adequately address the problems identified above. The subcommittee has therefore considered some more specific proposals with a view to providing *practical* suggestions.

B. THE PROPOSED REFORM

1. Summary

2.7 The subcommittee proposes that the *Guide for the Conduct of Arbitration Originating Summons*[15] issued by the Registrar of the Supreme Court be amended to include the following:

(a) provisions requiring that parties to applications under section 10 of the IAA (and the corresponding section 21A of the AA) file schedules setting out the costs of the arbitration before the result of the application is known; and

(b) guidance which forewarns parties that in complex cases the court may appoint a costs assessor on its own motion or encourage the parties to apply for the appointment of a costs assessor.

2.8 The subcommittee also proposes that arbitral institutions such as the Singapore International Arbitration Centre ("**SIAC**") and the International Chamber of Commerce ("**ICC**") consider instituting a practice of having the tribunal, in making a decision on a jurisdictional challenge, make a pronouncement on costs of the arbitration incurred up to that stage, which would serve as a useful reference point to the court subsequently.

14 *Id* at 942–943, [31].

15 The present version of this Guide is contained in Registrar's Circular No 2 of 2018 <*https://www.supremecourt.gov.sg/docs/default-source/module-document/registrarcircular/rc-2-2018—issuance-of-the-guide-for-the-conduct-of-arbitration-originating-summons.pdf*> (accessed 30 January 2019; archived at <*https://web.archive.org/web/20190129035055/https://www.supremecourt.gov.sg/docs/default-source/module-document/registrarcircular/rc-2-2018—issuance-of-the-guide-for-the-conduct-of-arbitration-originating-summons.pdf*>).

2. The first measure: costs schedules

2.9 Costs schedules are a well-understood means of mitigating the risk of successful parties inflating their costs after the event. They require parties to state their costs before the outcome of the case or application is known, and so force the parties to commit to their positions on costs. Costs schedules also allow decision-makers to see a breakdown of where costs have been incurred, and thus to understand why the costs have reached the level that they have.

2.10 Generally, applicants and respondents both have incentives to draw up their schedules accurately: understated schedules risk under-recovery, while overstated schedules risk over-recovery by the opposing party (since overstated schedules afford a weaker basis on which to argue that the opposing party's figures are excessive). It might be objected that these incentives do not apply in an application under section 10 of the IAA since costs in such an application are awarded either to the applicant or not at all. This objection, however, lacks force when one considers the following. Although it is true that an unsuccessful application under section 10 does not result in any costs order (because the issue of costs can be left to the tribunal), any costs schedules that had been submitted to the court would be capable of being put before the tribunal during the costs phase of the arbitral proceedings, thus exposing the makers of those schedules to the usual risks and incentives. In other words, a respondent to a section 10 application is incentivised to be truthful in its costs schedule despite the fact that it *would not* be awarded costs of the underlying arbitration whether the section 10 application succeeds or not because the information in the costs schedule can be used against the respondent in the underlying arbitration. This incentive is particularly pertinent to the respondent given that the respondent (being the party resisting the challenge to jurisdiction) is the party that is fighting for the arbitration to proceed before the tribunal.

2.11 It is also proposed that the *Guide* should provide:

(a) that the parties' costs schedules furnish the relevant costs information in a manner that is as concise and informative as possible, in a format which should be agreed between the parties where possible; and

(b) a non-binding exemplar of what such a costs schedule might look like (as shown in the Appendix to this Report), which the parties may adapt to their circumstances as necessary.

2.12 The court should use the schedules to benchmark each party's costs against the other's. This will give the court a very useful reference point, because (in addition to the application of general principles and considerations such as proportionality) the simplest test for parity is to assess the quantum of costs that any party should be entitled to recover commensurate with the quantum that the other party would have sought had the parties' positions been reversed. Should there be any major

disparity in the position taken by the parties in the overall figure (for the case and for each phase of the proceedings), the court may then wish to take into account the number of hours spent by the fee-earners or the hourly rate, and make the relevant inquiries in order to assess an appropriate quantum despite the disparity.

2.13 Equipped with the above information, the court or the registrar (as the case may be) would be better able to make a decision on costs once the application is determined.

2.14 It is noted that the *Guide* applies to originating summonses under both the IAA and AA. Although the issues of uncertainty surrounding an assessment of costs for an international arbitration do not arise to the same extent for domestic arbitration, it is submitted that the court would still be assisted by costs schedules in deciding the quantum of costs pursuant to a successful appeal under section 21A of the AA. Accordingly, the above proposed reforms to the *Guide* should apply to both a section 10 IAA application and a section 21A AA application.

3. The second measure: assessors

2.15 Notwithstanding the existence of the costs schedules, the court may still find it difficult to reach a conclusion on the appropriate level of costs. There may be such a great disparity between the parties' position on costs which cannot be fairly overcome simply by recourse to the costs schedule and general principles, although admittedly such cases should be in the very small minority.

2.16 To overcome these issues, the subcommittee proposes that the court should consider appointing an assessor to assist it. This, the subcommittee submits, would be preferable to taxation, because taxation is a time-consuming and expensive process, and because in reality the registrar in charge of the taxation would face the same difficulties as the judge.

2.17 In practical terms, it is envisaged that the Registrar of the SIAC could in some cases be an appropriate assessor to appoint. This is so given that the SIAC already offers the service of having costs of arbitration assessed by the Registrar with transparent and clearly stipulated scaled fees for such a service.[16]

2.18 If the parties are agreeable, they may even simply agree to have the costs of the arbitration taxed by the Registrar of the SIAC with no further

16 "SIAC Schedule of Fees", Singapore International Arbitration Centre website <*http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees#Tax_Fees*> (accessed 30 January 2019; archived at <*https://web.archive.org/web/20180831201959/http://siac.org.sg/estimate-your-fees/siac-schedule-of-fees*>).

judicial act required on the part of the Singapore court save perhaps to record such an agreement to avoid any dispute.

2.19 The court's power to appoint an assessor is enshrined in section 10A of the Supreme Court of Judicature Act.[17] The only difficulty is that, under section 10A(3), assessors' remuneration must be at the public expense unless at least one party to the proceedings has applied for the assessor to be appointed. The subcommittee suggests that court will not find it difficult to encourage parties to make such applications in appropriate cases. After all, it is to the parties' benefit to have the quantum of costs determined fairly and given the issues surrounding taxation flagged above, the parties may well consider a summary assessment by the judge with the assistance of an assessor preferable to taxation. In an appropriate case, the court may well appoint an assessor on its own motion.

2.20 Naturally, the court would not be bound by the assessor's advice and so would retain a discretion to depart from those findings in appropriate cases. The assessor assists the judge but "ultimately, the judge must form his own view. […] The assessors only advise and it is for the judge to decide how much of that advice should be accepted."[18] The subcommittee believes, however, that the courts will likely follow assessors' recommendations in most cases where they are appointed. Of course, the assessor's fees may not be insignificant, and so the appointment of an assessor should only be regarded as a viable option where the costs at stake are very high.

2.21 All of the above would take the form of judicial practice, and would not require any amendments to the procedural rules. Nonetheless, to give a degree of clarity and certainty, the subcommittee proposes that the *Guide* be amended so as to indicate (in non-binding language) that the court will encourage parties to have recourse to this option in appropriate cases in the international arbitration context. The subcommittee is of the view that the costs of a domestic arbitration are unlikely to give rise to such complexity as to require an assessor.

4. The third measure: determination of costs by the arbitrator

2.22 The tribunal would be well-positioned to make pronouncements on the reasonableness of costs incurred up to the stage of the jurisdictional challenge having adjudicated up to that stage.

2.23 It would greatly assist the court if the tribunal, in making a determination on jurisdiction could, at the same time, make

17 Cap 322, 2007 Rev Ed. The process for appointment of an assessor is further set out in the ROC, above, n 8, O 32, r 12, and O 33, r 4.

18 See *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR(R) 375, at 378–379, [6], HC.

pronouncements on the reasonableness of costs incurred up to the stage of the jurisdictional challenge.

2.24 In this regard, it is immediately acknowledged that, ordinarily, where the tribunal has decided it has jurisdiction, it would not need to make any pronouncement on costs (apart for costs of the jurisdictional challenge in some instances) of the arbitration itself, given that the arbitration would proceed and any costs of the arbitration would be reserved right to the end. Accordingly, any such pronouncement made would be primarily for the benefit of the court which could take cognisance of this pronouncement in deciding the issue of costs of the arbitration should the court find that the tribunal has no jurisdiction.

2.25 Given that the tribunal would not ordinarily make such a pronouncement, the subcommittee's proposal is that arbitral institutions such as the SIAC and the ICC consider instituting a practice of having the tribunal, in making a decision on a jurisdictional challenge, make a pronouncement on costs of the arbitration incurred up to that stage. The mode of instituting such a practice may be left to the relevant institution.

CHAPTER 3

THE SECOND QUESTION

A. THE PROBLEM

1. The position in Singapore

3.1 Section 10 of the IAA is only available where the tribunal rules on a preliminary question that it has jurisdiction or where it rules at any stage that it has no jurisdiction. It is not available where the tribunal finds at the final stage that it has jurisdiction, nor where it simply proceeds on the basis that it has jurisdiction without hearing any argument.[19] In such circumstances, a party wishing to challenge the tribunal's jurisdiction[20] must rely on section 24 of the IAA or article 34(2) of the Model Law, which also allows challenges on other grounds to set aside the award.

3.2 Where a challenge is brought under section 24 of the IAA or article 34(2) of the Model Law, the question of costs of the arbitration proceedings is somewhat complex. The outcome depends on two factors: whether the tribunal has already made a costs award and whether the challenge is successful. Taking each of the possibilities in turn:

(a) Where the tribunal has already made a costs award and the challenge fails, there is no issue as to costs, because the tribunal's award can stand.

(b) Where the tribunal has already made a costs award and the challenge succeeds, logically the question of costs will need to be reopened. The tribunal will be unable to do this, however, since it will be *functus officio*.[21] Case law from England (which has been cited favourably in Singapore) suggests that the court will be similarly powerless to make a new costs order unless the relevant arbitration statute expressly gives it such a

19 *Sinolanka Hotels & Spa (Private) Limited v Interna Contract SpA* [2018] SGHC 157 at [79], HC.

20 It may of course be difficult for a party to challenge the tribunal's jurisdiction after the award has been made where that party has not raised the jurisdictional issue at an earlier stage: *Rakna Arakshaka Ltd v Avante Garde Maritime Services (Pte) Ltd* [2018] SGHC 78 at [71], HC. There are, however, circumstances where this can happen (for example, where the tribunal purports to make a final award on a legal basis not ventilated during the proceedings).

21 *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195, at [345], HC ("*Lesotho*"), citing s 19B of the Act; and *AKN v ALC* [2016] 1 SLR 966, at 974–975, [18], CA.

power.[22] The IAA currently does not do this: although the court may naturally award costs in respect of the proceedings before it, there is nothing in section 24 or article 34(2) of the Model Law which gives the court the power to award costs in respect of the underlying arbitral proceedings.

(c) Where the tribunal has not made a costs award and the challenge fails, there is unlikely to be any issue as to costs, provided that the tribunal is not yet *functus officio* (i.e., the issue of costs has been submitted to the tribunal, but the tribunal is yet to decide on it).

(d) Where the tribunal has not made a costs award and the challenge succeeds, the outcome will depend on the reason why the challenge succeeds. Where, for example, the challenge succeeds for breach of natural justice under section 24(b) of the IAA, the tribunal will be able to make a costs award if and only if it is not yet *functus officio*. Where, however, the challenge succeeds on the basis that the tribunal lacks competence, the tribunal will obviously be unable to make any award, and the court will be similarly powerless for the reasons given at (b) above.

3.3 Complexities of this type do not arise in challenges brought under section 10 of the IAA because subsection (7) specifically confers on the court the power to award costs in respect of the underlying arbitral proceedings. Therefore, even where the tribunal is incapable of making a costs award, the court can step in. This is sensible and useful. Without section 10(7), parties who had successfully disputed an arbitral tribunal's jurisdiction would be left without any way to recover their costs. This would cut against the grain of the general costs regime in Singapore, which seeks to ensure that parties who are justified in litigating are not out of pocket.

3.4 Despite the usefulness of section 10(7), there is no corresponding provision in section 24. This *lacuna* does not appear to be the result of any deliberate decision. When Mr K Shanmugam, the Minister for Law, invited Parliament in 2012 to amend section 10 of the IAA to insert the present sub-section (7), he said that the amendments were designed to "allow the tribunal and the court to award costs against any party for the arbitral and/or court proceedings, when it rules that the tribunal has no jurisdiction".[23] While this description sounds general enough, the amendments proposed in 2012 did not include amendments to section 24.

22 *Lesotho*, *id* at [346], citing *Crest Nicholson (Eastern) Ltd v Western* [2008] EWHC 1325 (TCC), [2008] BLR 426, at [54], HC (England & Wales).

23 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.

Indeed, the High Court has said that section 10(7) was introduced "precisely to plug such a lacuna *in the context of s 10*",[24] while appearing to doubt the existence of any corresponding power in the context of section 24.

3.5 There does not seem to be any good reason for maintaining this asymmetry. As noted above, some jurisdictional challenges cannot be brought under section 10, but must instead be brought under section 24 or article 34(2) of the Model Law. It is hard to find any distinction between the two groups that merits the unequal costs treatment. Therefore, it seems hard to resist the argument that if the court can make costs orders in respect of arbitral proceedings following jurisdictional challenges under section 10, it ought to be able to do the same following jurisdictional challenges under section 24 or article 34(2) of the Model Law.

3.6 Once the foregoing argument is accepted, it follows that the court should be able to make the same costs orders following non-jurisdictional challenges under section 24 or article 34(2) of the Model Law. There is no functional difference between a tribunal that has been found to lack competence and one which has ruled in error but is *functus officio*: neither can satisfy a successful party's request for costs. In both cases, therefore, the court should be able to assume the tribunal's mantle and award the costs of the arbitral proceedings.

2. The position in other jurisdictions

3.7 As has already been mentioned, the position in England is that "costs incurred by a party in relation to the abortive or invalid arbitration proceedings are irrecoverable".[25] This is true across the board: neither the equivalent of section 10 of the Act[26] nor the equivalent of section 24[27] contains any costs provisions. Therefore, the English position has the advantage of consistency, even though it is disadvantageous to defendants who rightly contest the tribunal's competence. The leading commentators have suggested that it might be possible to argue that a party who initiates arbitration impliedly consents to an adverse costs order being made if the tribunal rules that it has no substantive jurisdiction,[28] but this is untested.

24 *Lesotho*, above, n 21 at [346], citing the *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (Singapore: Law Reform Committee, Singapore Academy of Law, 2011) at 11–12, [31] (emphasis added).

25 A G Guest, "Arbitration" in H G Beale (ed), *Chitty on Contracts* (32nd ed) (London: Sweet & Maxwell, 2015) ("*Chitty*"), vol II, 119 at 196, [32-151], citing *Crest Nicholson (Eastern) Ltd v Western* [2008] EWHC 1325 (TCC), [2008] BLR 426.

26 Arbitration Act 1996 (c 23; United Kingdom) ("AA (UK)"), s 32.

27 AA (UK), *id*, s 67.

28 *Chitty*, above, n 25 at 196, [32-151] and n 669.

3.8 The position in Hong Kong would appear to be the same as in England: neither the equivalent of section 10 of the Act[29] nor the equivalent of section 24[30] contains any costs provisions.

3.9 In Australia, each of the various states' and territories' arbitration statutes contains a provision that allows the court to make an order for costs in respect of the arbitral proceedings where the arbitration "fails".[31] An arbitration "fails" if a final award is not made or if the award is wholly set aside. This provision is undoubtedly useful, but it does not go far enough because it does not allow the court to act where the tribunal's award is set aside only in part. There may be cases where such a partial setting aside should result in a change to the costs order. For example, a claimant may successfully have sued a defendant in arbitration on two contracts, and been awarded its costs accordingly. However, if the court finds that the tribunal only had jurisdiction to arbitrate a dispute arising out of one of the contracts, but not the other, the court may set aside the tribunal's award insofar as it concerns the latter contract. In such a case, the court may consider it just for the claimant to be awarded its costs of the arbitration proceedings only insofar as they relate to the contract over which the tribunal had jurisdiction.

B. THE PROPOSED REFORM

3.10 The tenor of the English commentary and the Australian legislation is that the law should strive to give parties who rightfully contest a tribunal's jurisdiction or decision a chance to recover their costs. Singapore has already taken one step in that direction with the introduction of section 10(7) of the IAA.

3.11 To bring consistency to the law, and to protect all parties who are wrongfully pursued in arbitration, the subcommittee proposes that section 24 of the IAA should be amended so as to read as follows:

29 Model Law, art 34, in Schedule 1 of the Arbitration Ordinance (Cap 609; Hong Kong) ("AO (HK)").

30 Model Law, art 81, in Schedule 1 of the AO (HK), *ibid*.

31 The Commercial Arbitration Act 2010 (No 61 of 2010; New South Wales, Australia); the Commercial Arbitration (National Uniform Legislation) Act 2011 (No 23 of 2011; Northern Territory, Australia); the Commercial Arbitration Act 2013 (Queensland, Australia); the Commercial Arbitration Act 2011 (No 32 of 2011; South Australia); the Commercial Arbitration Act 2011 (No 13 of 2011; Tasmania, Australia); the Commercial Arbitration Act 2011 (No 50 of 2011; Victoria, Australia); the Commercial Arbitration Act 2012 (No 23 of 2012; Western Australia); and the Commercial Arbitration Act 2017 (A2017-7; Australian Capital Territory), at s 33D. (In 2010, the Standing Committee of General Attorneys agreed on a Model Commercial Arbitration Bill as a way of creating a uniform arbitration law throughout Australia. It took until 2017 for all states and territories to pass the model bill into law.)

> *(1)* 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.
>
> *(2)* *Where the award of the arbitral tribunal is set aside in whole or in part pursuant to this section or Article 34(2) of the Model Law, the High Court may make an order of costs of the proceedings, including the arbitral proceedings, against any party. Such an order may modify or replace any costs award already made by the arbitral tribunal*. [Additions in underlined italics.]

3.12 In this revised wording, subsection (1) replicates the wording that currently makes up the entire section, while the first sentence of subsection (2) is modelled on section 10(7), the effects of which it is designed to mimic.

3.13 Of course, the mere power to make a costs order would not deal with the difficulties of deciding the appropriate order. These difficulties have been canvassed in Chapter 2 above, as have the subcommittee's recommendations for overcoming them. The subcommittee therefore further proposes that the measures proposed above in relation to applications under section 10 of the IAA also be adopted in relation to applications under (the revised) section 24 or article 34(2) of the Model Law.

3.14 As stated at the outset, these reforms should apply *mutatis mutandis* to the AA given that there is no good rationale for so empowering the court in the international arbitration context but not in the domestic arbitration context (indeed, one may argue that *a fortiori* the court should be so empowered in the domestic arbitration context which allows for greater curial intervention).

3.15 Section 48 of the AA may thus be amended as follows:

> **Court may set aside award**
>
> 48.—(1) An award may be set aside by the Court —
>
> (a) if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that —
>
> (i) a party to the arbitration agreement was under some incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the laws of Singapore;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the

arbitral proceedings or was otherwise unable to present his case;

(iv) 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, except 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;

(v) the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties, unless such agreement is contrary to any provisions of this Act from which the parties cannot derogate, or, in the absence of such agreement, is contrary to the provisions of this Act;

(vi) the making of the award was induced or affected by fraud or corruption;

(vii) 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; or

(b) if the Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under this Act; or

(ii) the award is contrary to public policy.

(2) An application for setting aside an award may not be made after the expiry of 3 months from the date on which the party making the application had received the award, or if a request has been made under section 43, from the date on which that request had been disposed of by the arbitral tribunal.

(3) When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitral proceedings or take such other action as may eliminate the grounds for setting aside an award.

(4) Where the award of the arbitral tribunal is set aside in whole or in part pursuant to this section, the Court may make an order of costs of the proceedings, including the arbitral proceedings against any party. Such an order may modify or replace any costs award already made by the arbitral tribunal. [Additions in underlined italics.]

CHAPTER 4

INDUSTRY FEEDBACK

A. INTRODUCTION

4.1 Comments were sought on the proposed reforms from key stakeholders in the industry such as the ICC, the SIAC, the Chartered Institute of Arbitrators ("**CiArb**") and the Singapore Institute of Arbitrators ("**SiArb**").

4.2 The ICC declined to comment on the proposed reforms, as it did not feel able to do so consistently with its role as a neutral arbitral institution. However, feedback was received from the SIAC, CiArb and SiArb.

B. FEEDBACK FROM THE SIAC

4.3 The SIAC is supportive of the proposal that the Court consider appointing the Registrar of the SIAC to assess costs of the arbitration where an award has been set aside on the prevailing terms and costs for such an assessment.

4.4 As regards the subcommittee's proposal that arbitral institutions such as the SIAC consider instituting a practice of having the tribunal, in making a decision on a jurisdictional challenge, make a pronouncement on costs of the arbitration incurred up to that stage, the SIAC confirmed that there were no current plans to amend its arbitration rules to formalise such a practice. The SIAC has additionally raised two challenges to formalising such a practice:

(a) First, there is the potential undesirable perception that the tribunal is acting inconsistently or is lacking in confidence in its decision if despite deciding it has jurisdiction, proceeds to deal with the issue of costs of the proceedings up to the jurisdiction stage.

(b) Second, the SIAC's policy is also to refrain from intervening in the conduct of proceedings once the tribunal has been constituted. Furthermore, even if the SIAC is prepared to make a suggestion for the tribunal to decide costs of the proceedings up to the jurisdiction stage, there is always a chance of the tribunal declining to do so given that the tribunal is ultimately seized of the conduct of the proceedings.

4.5 The subcommittee is of the view that, while helpful, even without this measure to aid the court in deciding the issue of costs, the other measures recommended in this paper which have received overall support

from the industry respondents will provide adequate assistance to the court.

C. FEEDBACK FROM CIARB

1. CiArb's feedback on the First Question

4.6 The CiArb agreed that on the First Question, there is currently little guidance as to how the court should determine the costs of the arbitration following a successful application under section 10 of the IAA.

4.7 Accordingly, the CiArb supported the subcommittee's proposals to:

(a) amend the *Guide* to require parties to file costs schedules in applications under section 10 of the IAA, and, in appropriate cases, encourage the use of assessors; and

(b) encourage arbitral institutions to have the tribunal make a pronouncement on costs of the arbitration incurred up to the jurisdictional challenge.

4.8 In addition, the CiArb suggested that:

(a) there be express provisions in the *Guide* that the court should have the discretion to depart from the traditional rule in litigation that costs follow the event, in light of the different approaches taken to costs in international arbitration; and

(b) where tribunals are asked to make a pronouncement on costs, consideration should also be given to the appropriate costs regime to be applied.

4.9 The subcommittee has carefully considered the CiArb's proposals. As far as the CiArb's first suggestion is concerned, given that the ROC already provide that costs are in the discretion of the court, the subcommittee sees no harm in also providing in the *Guide* that costs need not necessarily follow the event.

4.10 However, the subcommittee does not consider that the CiArb's second suggestion is properly within the scope of reform which the subcommittee can propose. Such guidance is more effectively communicated to arbitral tribunals by the appointing arbitral institutions, or should be the subject of costs submissions made by the parties.

2. CiArb's feedback on the Second Question

4.11 Unlike the First Question, there was no consensus within the Board of the CiArb on the Second Question.

4.12 On the one hand, there was support for the subcommittee's proposal to give the court the power to make appropriate orders as to costs

following a successful application to set aside an award, in order to maintain consistency with the position under section 10(7) of the IAA.

4.13 On the other hand, there was also the view that a distinction could be drawn between the position under section 10 of the IAA and under section 24 of the IAA (and article 34(2) of the Model Law), particularly when the latter is premised upon the tribunal's errors or failures in the arbitral proceedings. Furthermore, there was concern that the subcommittee's proposal is not found in the Model Law and no Model Law jurisdiction has enacted such legislation.

4.14 The objection that the subcommittee's proposal is not found in the Model Law is not entirely compelling. It is precisely because the position as set out in the Model Law and the IAA has been found to give rise to practical problems that reform is being proposed: by definition, such reform will not be found in the Model Law. As is well-known, section 10 of the IAA was in fact amended in 2012 to provide for judicial review of negative jurisdictional rulings (upon the recommendation of the Law Reform Committee), despite some concern that that would mark a departure from the Model Law.[32]

4.15 The fact that no Model Law jurisdiction has enacted similar legislation may suggest that the problem identified is not one that is common or significant enough to warrant legislative intervention, particularly since successful applications to set aside awards are themselves infrequent.

4.16 As against this, however, is the fact that successful applications to set aside awards, whilst uncommon, are by no means unknown. For instance, in the past three years alone, there have been at least twice as many decisions setting aside awards on one or more grounds.[33] Given this, it does not seem satisfactory that the legal position concerning the costs of the arbitration in such a situation be left at large.

4.17 Nonetheless, the subcommittee appreciates the force of the argument that a successful setting aside application may not necessarily mean that the losing party should be liable for the costs of the arbitration, particularly when it was not in some way at fault (for example, where the award is set aside because of due process errors committed by the tribunal).

32 See the *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings*, above, n 24 at 7–8, [17].

33 See, for example, *AKN v ALC*, above, n 21; *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768, HC; *Lesotho*, above, n 21; and *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2018] 4 SLR 271, HC. In addition, the subcommittee is aware of at least one other unpublished decision in which an award was successfully set aside.

4.18 However, the subcommittee believes that the present status quo is even less desirable, as it may result in situations where the court is arguably powerless to award the costs of the arbitration even when it is appropriate to do so (for example, in a situation which might otherwise have been dealt with by section 10(7) of the IAA had the arbitration proceedings been bifurcated into a separate jurisdictional phase).

4.19 The subcommittee believes that it would be preferable to expressly confer upon the court the power to award or assess the costs of the arbitration when an award is set aside, and that the reforms proposed in this Report are sufficient to ensure that such a power will be appropriately utilised depending on the circumstances.

D. FEEDBACK FROM SIARB

1. SiArb's feedback on the First Question

4.20 The SiArb agreed that the First Question identified a real problem that needed to be addressed. The SiArb accordingly supported the subcommittee's proposals for the filing of costs schedules by parties in applications under section 10 of the IAA (and the corresponding section 21A of the AA), as well as for the possible appointment of assessors.

4.21 While the SiArb considered that the creation of default formats for the costs schedules would be useful, it was suggested that, bearing in mind the variability of arbitration procedure, there should be flexibility in the format of the costs schedules, with two or three alternative default formats from which parties may choose. Further, where both parties have already submitted information on costs to the tribunal, it would be simpler to provide the court with the information in the same format as it was provided to the tribunal.

4.22 The subcommittee agrees with these points. However, given that arbitration procedure varies widely, providing multiple alternative default formats for costs schedules may not assist any more than providing one default format. Instead, in light of the SiArb's feedback, the subcommittee has amended its recommendations to recommend that the *Guide* provide:

(a) that the parties' costs schedules furnish the relevant costs information in a manner that is as concise and informative as possible, in a format which should be agreed between the parties where possible; and

(b) a non-binding exemplar of such a costs schedule as set out in the Appendix to this Report, which the parties may adapt to their circumstances as necessary.

4.23 In relation to the subcommittee's proposal that due consideration be given where appropriate to the appointment of an assessor, the SiArb makes the following points:

(a) the appointment of an assessor whose experience is in assessing litigation costs would not be appropriate;

(b) the default approach should not be to appoint the Registrar of SIAC as the assessor, given the workload of the SIAC Registry, and the fact that the arbitration may have been held under the auspices of a different arbitral institute;

(c) an alternative approach would be to maintain a panel of experienced arbitrators who are willing to serve as assessors, and the SiArb would be open to discussions as to how to take such an approach forward;

(d) there may be some cases in which the tribunal itself may be the appropriate assessor, notwithstanding that its decision was overturned, though this would not be appropriate in cases of procedural unfairness or where there has been substantial criticism of the award or ruling.

4.24 The subcommittee considers that there is merit in all of these points, and accordingly the Report has been clarified to observe that it may only be appropriate to appoint the Registrar of the SIAC as the assessor in some cases.

4.25 However, the subcommittee does not believe that it would be helpful at this juncture to be overly-prescriptive as regards the appointment of an assessor. Such an approach should best be left to be worked out on a case-by-case basis.

2. SiArb's feedback on the Second Question

4.26 In relation to the Second Question, the SiArb agreed with and supported the Report's proposal to amend the IAA and AA to provide the court with a power to award or assess the costs of the arbitration following the successful setting aside of an award.

CHAPTER 5

CONCLUSION

5.1 In conclusion, the subcommittee recommends the following:

(a) that the *Guide* be amended to require the filing of costs schedules prior to the determination of (i) appeals against jurisdiction pursuant to section 10 of the IAA and section 21A of the AA; and (ii) applications to set aside an award pursuant to section 24 of the IAA (or article 34(2) of the Model Law and section 48 of the AA);

(b) that the *Guide* be amended to state that the court will, in appropriate cases of complexity, encourage parties to agree to or apply to appoint an assessor to assist the court in making a summary assessment as to costs. One such potential assessor could be the SIAC Registrar; and

(c) that section 24 of the IAA and section 48 of the AA be amended to expressly empower the court to make an order providing for costs of the arbitration consequent on an order to set aside an award wholly or in part.

APPENDIX

SAMPLE COSTS SCHEDULE

Stage of Proceedings	Work Done	Estimated Costs	Disbursements	Total
Pleadings	Notice of arbitration: 20 pages Statement of claim: 50 pages Reviewing response to notice of arbitration: 30 pages Reviewing defence: 30 pages	S$80,000	S$10,000	S$90,000
Procedural Conference	Telephone hearing: 2 hours Finalising procedural order 1: 2 pages	S$20,000	S$2,000	S$22,000
Disclosure	Reviewing documents: 500 pages Disclosure request/ application/preparation of Scott Schedules: 20 pages Reviewing opponent's disclosure request/ application/preparation of Scott Schedules: 30 pages	S$200,000	S$30,000	S$230,000
Witness Statements	Factual witness statements: 300 pages Expert witness statements: 100 pages Reviewing opponent's factual witness statements: 200 pages Reviewing opponent's expert witness statements: 80 pages	S$250,000	S$10,000	S$260,000
Procedural Conference	Telephone hearing: 2 hours Finalising procedural order 2: 2 pages	S$20,000	S$2,000	S$22,000
Evidential Hearing	5-day evidential hearing	S$300,000	S$80,000	S$380,000
Closing Submissions	Written submissions: 100 pages	S$80,000	S$5,000	S$85,000
Award	Review of award: 200 pages	S$30,000	S$1,000	S$31,000
Total		S$980,000	S$140,000	S$1,120,000

ISBN 978-981-14-0682-9