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Case Note

THE POWER TO REMIT OR GRANT COSTS AFTER A SETTING ASIDE?

CBX v CBZ
[2022] 1 SLR 47

In *CBX v CBZ* [2022] 1 SLR 47, the Singapore Court of Appeal set aside part of an arbitral award on the ground of excess of jurisdiction under Art 34(2)(a)(iii) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. Apart from clarifying how the introduction of new claims into a pre-existing arbitration should be addressed, the Singapore Court of Appeal highlighted the lacuna in the law regarding the question of costs after a costs award has been set aside. This note argues that legislative intervention is necessary.

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I. Introduction

1 Arbitration has long been lauded for its efficiency as an alternative dispute resolution mechanism.[2] Unsurprisingly, the Singapore courts adopt a pro-arbitration approach guided by a policy of minimal curial intervention[3] to protect the sanctity of the arbitration award and facilitate the process of arbitration.[4] But "a pro-arbitration approach does not mean a blind approach", and although "[c]ourts will be slow

1 The author would like to express his gratitude to Associate Professor Darius Chan for his invaluable guidance, and to Chang Wen Yee, Louis Lau Yi Hang and Soh Kian Peng for their support and encouragement. All errors remain the author's own.

2 *BTN v BTP* [2021] 1 SLR 276 at [72]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(c)].

3 *CAJ v CAI* [2022] 1 SLR 505 at [1]; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [25]; *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [1].

4 Michael Hwang SC, *Selected Essays on International Arbitration* (Academy Publishing, 2013) at pp 39–41. See also *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14; *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28] and *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 at [61].

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to upset arbitration awards, … it would be wrong to say that courts will never or are reluctant [to do so]".[5] To set aside an award, parties may rely on the exclusive[6] grounds preserved in Art 34 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration[7] ("ML") and s 24 of the International Arbitration Act 1994[8] ("IAA"). Grounds for setting aside an award include finding that disputes that are not within the scope of the submission to arbitration in the former[9] and breaches of the rules of natural justice in the latter.[10]

2 Because such grounds are narrowly construed,[11] the setting aside of arbitral awards was generally uncommon.[12] However, the recent slew of successful setting aside applications may suggest that the tides have changed,[13] especially where partial annulment of arbitral awards are

5 The Honourable Justice V K Rajah, opening address at the Singapore Academy of Law Conference 2011 (24 February 2011). See also M Sornarajah & Sundaresh Menon, "International Commercial Arbitration and the Courts: Competition or Partnership?" in *Singapore Academy of Law Conference 2006: Developments in Singapore Law between 2001 and 2005* (Singapore Academy of Law, 2006) at para 143 and Chief Justice Sundaresh Menon, "Judicial Attitudes towards Arbitration and Mediation in Singapore", speech at ASEAN Law Association Malaysia & Kuala Lumpur Regional Centre for Arbitration Talk & Dinner 2013 (25 October 2013) at para 30.

6 See, *eg*, *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 and *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95. See also United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985) at p 71.

7 (1985) (A/40/17, adopted by the United Nations Commission on International Trade Law (21 June 1985); (2006) (A/61/17, amended by the United Nations Commission on International Trade Law (7 July 2006) (hereinafter "Model Law").

8 2020 Rev Ed.

9 Model Law Art 34(2)(a)(iii).

10 International Arbitration Act 1994 (2020 Rev Ed) s 24(*b*).

11 For the principles applicable to Art 34(2)(a)(iii) of the Model Law, see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [31]–[33]. This ground covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters. There must be actual prejudice to either (or both) parties to the dispute; mere errors of law or fact are insufficient. See also Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) at p 117 and *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]–[22]. For the principles applicable to s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed), see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65] and *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18].

12 *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [2]; David Joseph QC & David Foxton QC, *Singapore International Arbitration: Law and Practice* (LexisNexis, 2nd Ed, 2018) at para 4.129.

13 Joseph Lopez & Kyle Yew, "Setting Aside Arbitral Awards in Singapore: Application of Trite Principles to Novel Questions" [2021] SAL Prac 18.

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concerned.[14] Article 34(2)(a)(iii) of the ML, for instance, provides for the partial annulment of an award where only part(s) of the award exceeding the tribunal's jurisdiction would be set aside. One such case is the recent decision in *CBX v CBZ*,[15] where the Court of Appeal set aside part of the arbitral award, to the extent that it was made in excess of jurisdiction.[16]

II. Background facts

3 The dispute arose from two sale and purchase agreements ("SPA I" and "SPA II") governed by Thai law, for the sale and purchase of shares in a company which indirectly owned eight windfarm projects in Thailand (five of which were incomplete).[17] SPA I was between CBZ as seller and CBX as buyer, while SPA II was between CCA and CCB as seller and CBY as buyer. The sellers are collectively referred to as "Sellers", and the buyers as the "Buyers". The two SPAs each provided for payment of a first instalment, and thereafter, for payment of the "Remaining Amounts" in three tranches over three years.[18]

A. Arbitral proceedings and the Singapore International Commercial Court's decision

4 Before the payment dates for any of the tranches of the Remaining Amounts had been reached,[19] disputes between the parties led to two Singapore-seated International Chamber of Commerce ("ICC") arbitrations in June 2016. Both arbitrations were heard by the same arbitral tribunal, which issued in 2019, *inter alia*, two phase II partial awards ("Phase II PAs") and a final award on costs ("Costs Award").[20]

5 In the arbitrations, the Remaining Amounts were claimed on the basis that these were due because the Buyers' defaults or conduct accelerated the due dates. The tribunal rejected this and ordered that the Buyers make payment on the Remaining Amounts when they became due, independently of any acceleration.[21] Additionally, the tribunal by its Phase II PAs awarded compound interest on those amounts. However, the tribunal eventually described this as a "regrettable oversight" on its

14 *CAI v CAJ* [2021] 5 SLR 1031; *CBX v CBZ* [2022] 1 SLR 47; *BRS v BRQ* [2021] 1 SLR 390.
15 [2022] 1 SLR 47.
16 *CBX v CBZ* [2022] 1 SLR 47 at [63]–[64].
17 *CBX v CBZ* [2022] 1 SLR 47 at [2].
18 *CBX v CBZ* [2022] 1 SLR 47 at [13].
19 *CBX v CBZ* [2022] 1 SLR 47 at [6].
20 *CBX v CBZ* [2022] 1 SLR 47 at [3].
21 *CBX v CBZ* [2022] 1 SLR 47 at [5]–[6].

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part because the parties had agreed that compounding was unlawful and unenforceable under Thai law. Such agreement had been communicated to the tribunal before the issue of the Phase II PAs.[22]

6 The Buyers' applications to the international judge were therefore to set aside parts of the Phase II PAs and, consequentially, the entirety of the Costs Award. As regards the Phase II PAs, the relevant parts included the tribunal's decision that:[23] (a) the Buyers pay the Sellers the Remaining Amounts; and (b) interest should run on those amounts at the rate of 15% compounded annually ("the Compound Interest Order"). The setting aside application was made on three grounds, the first of which is the focus of this case note, that the tribunal:[24]

(a) exceeded its jurisdiction;

(b) failed to afford the Buyers a reasonable opportunity to present their case; and/or

(c) contravened Singapore public policy.

7 Additionally, as regards the Costs Award, the Buyers alleged that it could not stand if the relevant parts of the Phase II PAs, on which it was predicated, were set aside in whole or part.[25] The judge dismissed the applications, finding that the tribunal "had jurisdiction over claims to the Remaining Amounts existing independently of any claims for accelerated payment of the sums due".[26] He acknowledged that although the Buyers had commenced another ICC arbitration ("the ALRO arbitration") to establish that the Remaining Amounts could not and would not fall due on what would otherwise be their relevant payment dates, the Buyers had failed to explain to the tribunal the nature and grounds of such relief, and had accordingly not suffered any undue prejudice or failure of natural justice.[27] On the Compound Interest Order, the judge held that:

(a) the Tribunal had the (procedural) power to award compound interest under the IAA;[28]

(b) the Buyers had had a reasonable opportunity to present their case;[29] and

22 *CBX v CBZ* [2022] 1 SLR 47 at [7].
23 *CBX v CBZ* [2022] 1 SLR 47 at [4].
24 *CBX v CBZ* [2022] 1 SLR 47 at [8].
25 *CBX v CBZ* [2022] 1 SLR 47 at [8].
26 *CBX v CBZ* [2022] 1 SLR 47 at [9].
27 *CBX v CBZ* [2022] 1 SLR 47 at [9].
28 *CBX v CBZ* [2020] 5 SLR 184 at [47]–[49].
29 *CBX v CBZ* [2020] 5 SLR 184 at [50].

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(c) the award of compound interest was not contrary to Singapore public policy.[30]

B. The Court of Appeal's decision

8 The Buyers appealed against the High Court's decision. The Court of Appeal allowed the appeal, setting aside the Phase II PAs on the ground of excess of jurisdiction.

(1) On the setting aside of the Phase II PAs on the ground of excess of jurisdiction

9 At the outset, the Court of Appeal rejected the tribunal's and judge's interpretation of the Buyers' counsel's statements as any form of acceptance that it was within the tribunal's power to order payment of the Remaining Amounts.[31] In the Court of Appeal's view, it was clear that the Buyers had never accepted the claims for the Remaining Amounts as coming within the Tribunal's jurisdiction.[32] To the contrary, the Buyers not only repeatedly objected to the consideration of such claims but also made their position on jurisdiction eminently clear by commencing the ALRO arbitration and in their post-hearing briefs.[33]

10 The Court of Appeal characterised the issue as one "aris[ing] from the absence of any clear identification of or ruling on the issue or exercise of the Tribunal's jurisdiction over claims to the Remaining Amounts, other than on an accelerated basis".[34] In this connection, the terms of reference ("TORs") in the arbitrations did not include any claims to the Remaining Amounts save by way of acceleration. The Court of Appeal acknowledged that the arbitration clauses provided that the TORs "shall not include a list of issues to be determined" and, indeed, the TORs recorded that the tribunal had:[35]

> … not deemed it appropriate at this stage to establish a list of issues to be decided. Consequently, the issues to [be] determined will be those contained in the Parties' pleadings, including forthcoming submissions, and such other issues as may arise during the course of the arbitration, *subject to Article 23(4) of the ICC Rules*. [emphasis added]

30 *CBX v CBZ* [2020] 5 SLR 184 at [51]–[52] and [57].
31 *CBX v CBZ* [2022] 1 SLR 47 at [21].
32 *CBX v CBZ* [2022] 1 SLR 47 at [41].
33 *CBX v CBZ* [2022] 1 SLR 47 at [41].
34 *CBX v CBZ* [2022] 1 SLR 47 at [45].
35 *CBX v CBZ* [2022] 1 SLR 47 at [45].

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11 The reference to Art 23(4) of the ICC Rules of Arbitration[36] ("ICC Rules") is significant because the provision states:

> After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

12 In the Court of Appeal's view, it was unequivocal that Art 23(4) contemplated that any new claim required express consideration and determination by the arbitral tribunal before it was permitted.[37] In any event, where one party challenges another party's introduction of a claim, a clear jurisdictional ruling should follow.[38] Given the lack thereof, the Sellers relied on *PT Prima International Development v Kempinski Hotels SA*[39] ("*PT Prima*") for the proposition that the Sellers had the right at any time to introduce any new matter, including any claims that might have arisen or might accrue prospectively by the time of final award.[40] The Court of Appeal rejected this and distinguished *PT Prima* on several bases.

13 First, besides the fact that the TORs and Art 23(4) of the ICC Rules specifically applied in the present case, in *PT Prima*, the court was not granting an unrestrained licence to introduce a new claim.[41] Rather, the court there was addressing new and unpleaded facts or changes of an "ancillary" nature, which were known to all the parties and addressed expressly without any jurisdictional objection by both parties.[42] Secondly, whereas *PT Prima* was concerned with a new development occurring during an arbitration and providing a further potential defence, the present case concerned the introduction of new or potential causes of action relating to payments becoming due, if at all, largely in the future and in many cases after any award.[43] In the Court of Appeal's view, the latter requires "a clear identification and admission by the tribunal, even if that were only to occur by conduct rather than express words or a pleading amendment".[44] Finally, in *PT Prima*, "the issue was raised by Prima with the arbitrator and was the subject of specific directions by him

36 Entry into force 1 January 2021.
37 *CBX v CBZ* [2022] 1 SLR 47 at [46].
38 *CBX v CBZ* [2022] 1 SLR 47 at [47].
39 [2012] 4 SLR 98.
40 *CBX v CBZ* [2022] 1 SLR 47 at [48].
41 *CBX v CBZ* [2022] 1 SLR 47 at [48].
42 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [47].
43 *CBX v CBZ* [2022] 1 SLR 47 at [51].
44 *CBX v CBZ* [2022] 1 SLR 47 at [51].

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and very extensive submissions and evidence before him".[45] However, in the present case, there was no clear identification of any claims regarding the Remaining Amounts other than by way of acceleration;[46] conversely, the Buyers made clear their jurisdictional objection to any such claims.

14 The tribunal's failure to rule on the issue of jurisdiction (that is, whether or not the Sellers were or should be permitted to pursue any claim to the Remaining Amounts, other than on an accelerated basis),[47] coupled with its decision to simply proceed "on the basis that it had jurisdiction as a result of the Sellers' Reply",[48] meant that the permissibility of any such claims and the Buyers' jurisdictional objections were not identified or addressed in the manner contemplated by Art 23(4) of the ICC Rules.[49]

15 For these reasons, the Court of Appeal held that the jurisdictional issue raised by the Buyers should have been, but never was, resolved by a ruling determining whether or not any claim should be permitted to the Remaining Amounts other than by way of acceleration.[50] Consequently, the tribunal had no jurisdiction to rule on them in its Phase II PAs. Thus, the Court of Appeal set aside the Phase II PAs on the ground of excess of jurisdiction, in so far as they ordered the payment of all Remaining Amounts,[51] because:[52]

> (a) the Tribunal dealt with disputes not properly brought within the terms of, and beyond the scope of, the relevant submissions by the parties to arbitration, within the meaning of Art 34(2)(a)(iii) of the Model Law; and
>
> (b) in any event, even if that were not so, the making of the Partial Awards by the Tribunal involved breaches of the rules of natural justice by which the Buyers' rights were prejudiced, within the meaning of s 24(*b*) of the IAA.

16 As regards the Compound Interest Order, the Court of Appeal noted that it would be set aside following the decision on the Remaining Amounts.[53] Nevertheless, the Court of Appeal went on to consider, in *obiter dicta*, what the position would have been if the orders for payment of the Remaining Amounts had not been set aside.[54] The Court of Appeal found that the tribunal's Compound Interest Order:[55]

45 *CBX v CBZ* [2022] 1 SLR 47 at [52].
46 *CBX v CBZ* [2022] 1 SLR 47 at [52].
47 *CBX v CBZ* [2022] 1 SLR 47 at [55].
48 *CBX v CBZ* [2022] 1 SLR 47 at [54].
49 *CBX v CBZ* [2022] 1 SLR 47 at [53].
50 *CBX v CBZ* [2022] 1 SLR 47 at [57].
51 *CBX v CBZ* [2022] 1 SLR 47 at [57] and [64].
52 *CBX v CBZ* [2022] 1 SLR 47 at [63].
53 *CBX v CBZ* [2022] 1 SLR 47 at [86].
54 *CBX v CBZ* [2022] 1 SLR 47 at [86].
55 *CBX v CBZ* [2022] 1 SLR 47 at [95].

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> … went beyond the scope of the submission to arbitration under Art 34(2)(*a*)(iii) of the Model Law, in that it went (inadvertently) outside the scope of what both parties had agreed that the Tribunal could, under the relevant governing law, or should, afford by way of relief.

The parties had agreed to give effect to the overriding provision of the governing substantive law (that is, Thai law), where compound interest provisions are illegal and unenforceable.[56] The Court of Appeal further regarded that this too involved an inadvertent breach of natural justice under s 24(*b*) of the IAA.[57]

(2) On the setting aside of the Costs Award

17 The Court of Appeal set aside the Costs Award because the tribunal's conclusions on the substantive aspects, which had been set aside, were significant to the Costs Award. In this connection, the Court of Appeal observed that costs awards are usually ancillary to and reflective of the outcome of the substantive issues and therefore have a low likelihood of surviving significant changes in the substantive outcome.[58] Justice commonly requires their setting aside because "[a]ny other conclusion would have the potential for "extraordinary anomalies and serious injustice" which would serve neither the cause of, nor the sensitive supportive role which courts have towards, arbitration.[59] Ultimately, it should be noted that the test for whether a costs order survives is one of materiality and judgment.[60]

III. Commentary

18 Two key observations can be gleaned from this decision. The first relates to the introduction of new claims into a pre-existing arbitration. For parties, they should be aware that tribunals have to clearly identify and admit such new claims. Any failure to do so renders the award susceptible to attack on jurisdictional grounds and would likely allow the objecting party to successfully set aside impugned parts of the award.[61] In this connection, tribunals should endeavour to be sensitive both to fresh claims that may arise belatedly and to any party's jurisdictional objections in respect of such claims. Such considerations are even more pertinent for ICC-seated arbitrations as Art 23(4) of the ICC Rules prohibits any

56 *CBX v CBZ* [2022] 1 SLR 47 at [93].
57 *CBX v CBZ* [2022] 1 SLR 47 at [95].
58 *CBX v CBZ* [2022] 1 SLR 47 at [73].
59 *CBX v CBZ* [2022] 1 SLR 47at [73]–[75].
60 *CBX v CBZ* [2022] 1 SLR 47 at [74].
61 *CBX v CBZ* [2022] 1 SLR 47 at [51].

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party from making new claims which fall outside the limits of the signed and approved TORs, unless they have been authorised by the tribunal.

19 In practice, it is recognised that tribunals have a difficult role not only in ensuring efficiency in arbitration, which has been characterised by the relationship between time, cost and quality,[62] but also to keep track of the parties' claims, which can constantly evolve during the arbitration. In this regard, *CBX v CBZ* helpfully outlines several considerations, for instance: (a) when the new claim or cause of action arose;[63] (b) whether the claim advanced is prospective and will or may only arise at some future date between the close of submissions and the issue of an award, or even thereafter;[64] (c) whether the new issues were raised by the parties with the arbitrator;[65] and (d) whether there was any jurisdictional objection.[66] In any event, the bottom line is clear. New claims must be unequivocally identified and admitted – parties and tribunals that exercise prudence in this regard will reduce the risk of the award being set aside.

20 Additionally, on a theoretical note, while the Court of Appeal in *CBX v CBZ* set aside the award *ultra petita* (that is, that matters decided by the tribunal exceeded the scope of the claims presented to it),[67] it dismissed any possibility that the award was made *infra petita* by observing that "[t]he situation where an arbitral tribunal ha[d] not dealt with all the issues submitted to it for decision" was "conceptually distinct and presently irrelevant".[68] However, it is submitted that an alternative characterisation of the facts may potentially render the award *infra petita*, especially since the Court of Appeal had pointedly observed that "[b]earing in mind that the issue of jurisdiction had been squarely raised before it, it was incumbent on the Tribunal to rule on it".[69] Given that the notion of the tribunal not deciding an issue that was *infra petita* refers to a tribunal's failure to decide matters presented to it,[70] the tribunal's failure to consider the Buyers' repeated jurisdictional objections would fall squarely within the meaning of *infra petita*. Although which ground an

62 Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?" (2015) 32(6) J Int'l Arb 689 at 689. See also Louis Lau Yi Hang, "Two Steps Forward, One Step Back? An Attempt to Cure Due Process Paranoia" (2021) 1(1) *Singapore Law Journal* 17 at 17.

63 *CBX v CBZ* [2022] 1 SLR 47 at [51].

64 *CBX v CBZ* [2022] 1 SLR 47 at [51].

65 *CBX v CBZ* [2022] 1 SLR 47 at [52].

66 *CBX v CBZ* [2022] 1 SLR 47 at [52].

67 *CBX v CBZ* [2022] 1 SLR 47 at [63]; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at p 3575.

68 *CBX v CBZ* [2022] 1 SLR 47 at [11].

69 *CBX v CBZ* [2022] 1 SLR 47 at [55].

70 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at pp 3575–3577.

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award *infra petita* falls under is not entirely clear in light of the drafting history of the ML,[71] it has been clarified that Art 34(2)(a)(iii) of the ML envisages such a situation.[72] Ultimately, it is recognised that any difference may be merely theoretical in so far as both *ultra petita* and *infra petita* are encapsulated under Art 34(2)(a)(iii) of the ML.[73] Regardless of whether a party's claim involves *ultra petita* or *infra petita* or even both, the parties can nonetheless have recourse to this ground.

21 The second observation relates to the remission of the question of costs after the setting aside of a costs award.[74] In *CBX v CBZ*, the Court of Appeal noted the potential unfairness that may arise after the Costs Award is set aside,[75] if "matters simply lay where they fall after the setting aside of [the] Costs Award".[76] For the present case, this is conceivable because the tribunal nevertheless had jurisdiction over the parts of the Phase II PAs that were not set aside. However, unlike the English courts that have the statutory power to remit a case to the tribunal for further consideration and a fresh order,[77] Singapore courts do not have the equivalent power to order a remission to the same tribunal after a setting aside,[78] a position also made clear in *AKN v ALC*.[79] This is because neither the IAA nor the ML grants the Singapore courts the power to award costs in respect of the underlying arbitral proceedings.[80] In the same vein, the same tribunal cannot reopen the question of costs because it will be *functus officio*.[81] The only way for parties to avoid this conundrum is by internally agreeing on how to proceed. For instance, they may agree that the same tribunal that issued the costs award should issue a fresh one.[82]

71 Paul Tan & Jawad Ahmad, "The UNCITRAL Model Law and Awards *Infra Petita*" (2014) 31(3) J Int'l Arb 413 at 417.

72 See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [41] and Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at p 3583.

73 Darius Chan, Paul Tan & Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Academy Publishing, 2022) at para 8.120.

74 *CBX v CBZ* [2022] 1 SLR 47 at [76]–[77]. See also *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2019] 3 SLR 12 at [345].

75 *CBX v CBZ* [2022] 1 SLR 47 at [76].

76 *CBX v CBZ* [2022] 1 SLR 47 at [77].

77 *CBX v CBZ* [2022] 1 SLR 47 at [77].

78 *CBX v CBZ* [2022] 1 SLR 47 at [78].

79 [2016] 1 SLR 966 at [25] and [39].

80 Law Reform Committee, Singapore Academy of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings* (February 2019) at para 3.2.

81 *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2019] 3 SLR 12 at [345], citing s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed); *AKN v ALC* [2016] 1 SLR 966 at [18]; *CBX v CBZ* [2022] 1 SLR 47 at [84].

82 *CBX v CBZ* [2022] 1 SLR 47 at [80].

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But the law provides no recourse if the parties reach an impasse. That a winning party's ability to recover costs hinges on the co-operation of the losing party is problematic.

22 The present state of affairs is surprising in so far as there are very few instances where the Singapore courts lack jurisdiction or power to make an order in the context of arbitration proceedings.[83] Article 34(4) of the ML is the starting point for understanding the Singapore courts' lack of power for remission after setting aside an award.[84] The Court of Appeal in *AKN v ALC* clarified that Art 34(4) is the only express provision in the ML or the IAA that permits remission,[85] the effect of which is to confer further jurisdiction on the arbitral tribunal, thereby allowing it to consider the matters that are remitted.[86] However, Art 34(4), on its face, confers only a limited power and does not empower the court to remit any matter after the setting aside of an award.[87] This is because any power for remission rests on the court first being satisfied that it is appropriate to suspend the setting aside proceedings.[88] But if an arbitral award has in fact been set aside, the power for remission cannot and will not arise. Additionally, any arguments relying on the *travaux préparatoires* of the ML to suggest that Art 34(4) was intended to preserve the national courts' option to remit an award where it deemed appropriate[89] can be rebutted by the UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[90] Drawing upon the latter, the Court of Appeal noted that the "explicit intent" of Art 34(4) was that remission was conceived as an alternative to setting aside[91] and, accordingly, there is no power to remit an award after it has been set aside. This interpretation of Art 34(4) was most recently affirmed by the Court of Appeal in *CBS v CBP*.[92] In that case, the Court of Appeal also observed that any such remittal power under Art 34(4) would only be vested with the High Court in so far as the provision states "[t]he *court*, *when asked to set aside an award*, may, where appropriate and so

83 Nicholas Poon, "The Power to Consider Remittal as a New Point in an Appeal: A Matter of Jurisdiction or Power" [2021] SAL Prac 16 at para 1.

84 *AKN v ALC* [2016] 1 SLR 966 at [17].

85 *AKN v ALC* [2016] 1 SLR 966 at [18].

86 David Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) at para 8-175.

87 *AKN v ALC* [2016] 1 SLR 966 at [22].

88 *AKN v ALC* [2016] 1 SLR 966 at [25].

89 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.219.

90 United Nations General Assembly, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985) at p 74.

91 *AKN v ALC* [2016] 1 SLR 966 at [28] and [33].

92 [2021] 1 SLR 935 at [104].

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requested by a party"[93] [emphasis added by the Court of Appeal; other emphasis omitted]. Although the issue of remittal did not arise on the facts,[94] future parties seeking to rely on Art 34(4) before the Court of Appeal may face difficulty in doing so.

23 It is interesting to note that the potential unfairness arising after a setting aside under s 24 of the IAA and Art 34 of the ML does not arise in challenges brought under s 10 of the IAA. Under s 10(7), in the context of a finding that an arbitral tribunal has no jurisdiction, there is an express power conferred on the courts to make an award or order of costs of the proceedings, including the arbitral proceedings. This has been noted to be sensible and useful because it prevents parties from being left without any way to recover their costs after they have successfully disputed an arbitral tribunal's jurisdiction.[95] Despite the practicality of this provision, there is no good explanation for why there exists no corresponding provision under s 24 of the IAA or the ML.[96] When parliament amended s 10 of the IAA to insert s 10(7) in 2012, Minister for Law K Shanmugam had explained that the amendments were intended 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".[97] Indeed, that the introduction of s 10(7) was to fill the lacuna was recognised by the High Court[98] and the Law Reform Committee, the latter of which had suggested that "the Court ought to be given the power to make an order for the costs incurred in the arbitral proceedings against the unsuccessful party".[99] Such reasoning can apply with similar force to s 24 of the IAA, and there is no good reason for such an asymmetry.[100] If the court can make costs orders under s 10, it ought to be able to do likewise under s 24 of the IAA or Art 34(2) of the ML.[101]

93 Article 34(4) of the Model Law, quoted in *CBS v CBP* [2021] 1 SLR 935 at [103].
94 *CBS v CBP* [2021] 1 SLR 935 at [103].
95 Law Reform Committee, Singapore Academy of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings* (February 2019) at para 3.3.
96 Law Reform Committee, Singapore Academy of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings* (February 2019) at para 3.4.
97 Singapore Parl Debates; Vol 89; [9 April 2012].
98 *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2019] 3 SLR 12 at [346].
99 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (January 2011) at para 31.
100 Law Reform Committee, Singapore Academy of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings* (February 2019) at para 3.5.
101 Law Reform Committee, Singapore Academy of Law, *Report on Certain Issues Concerning Costs in Arbitration-Related Court Proceedings* (February 2019) at para 3.5.

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24 Ultimately, the Court of Appeal in *CBX v CBZ* aptly expressed that it would be regrettable if it were not possible for parties to seek an order for costs from a tribunal or court after a setting aside.[102] This, however, was left to the consideration of "those having an oversight of arbitration law".[103] In view of the Court of Appeal's observations, one can only hope that the Legislature will consider enacting either a statutory power for remission to the tribunal after a setting aside, or a provision equivalent to s 10(7) of the IAA which empowers the court to make an order of costs. This may help to break the potential impasse faced by parties.

IV. Conclusion

25 As Steven Chong JCA aptly opined in *CAJ v CAI*, awards will be set aside:[104]

> … *only* when there is good reason to do so. This strikes a balance between the need to respect the autonomy of arbitration proceedings and to give effect to the principle of minimal curial intervention, while ensuring that meritorious challenges are properly ventilated [emphasis in original].

With only approximately 20% of all setting aside applications proving successful,[105] the Court of Appeal's decision in *CBX v CBZ* is to be welcomed for the important practical lessons that can be gleaned therefrom, chief amongst which is how future parties and tribunals should approach issues which arise late in the day to reduce the likelihood of the award being set aside on *ultra petita* or *infra petita* grounds. The Court of Appeal's call for legislative intervention in respect of the question of costs after a setting aside is also timely in patching a lacuna in the law, and it is hoped that change will come soon.

102 *CBX v CBZ* [2022] 1 SLR 88 at [85].
103 *CBX v CBZ* [2022] 1 SLR 88 at [85].
104 *CAJ v CAI* [2022] 1 SLR 505 at [1].
105 *CAJ v CAI* [2022] 1 SLR 505 at [2].

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