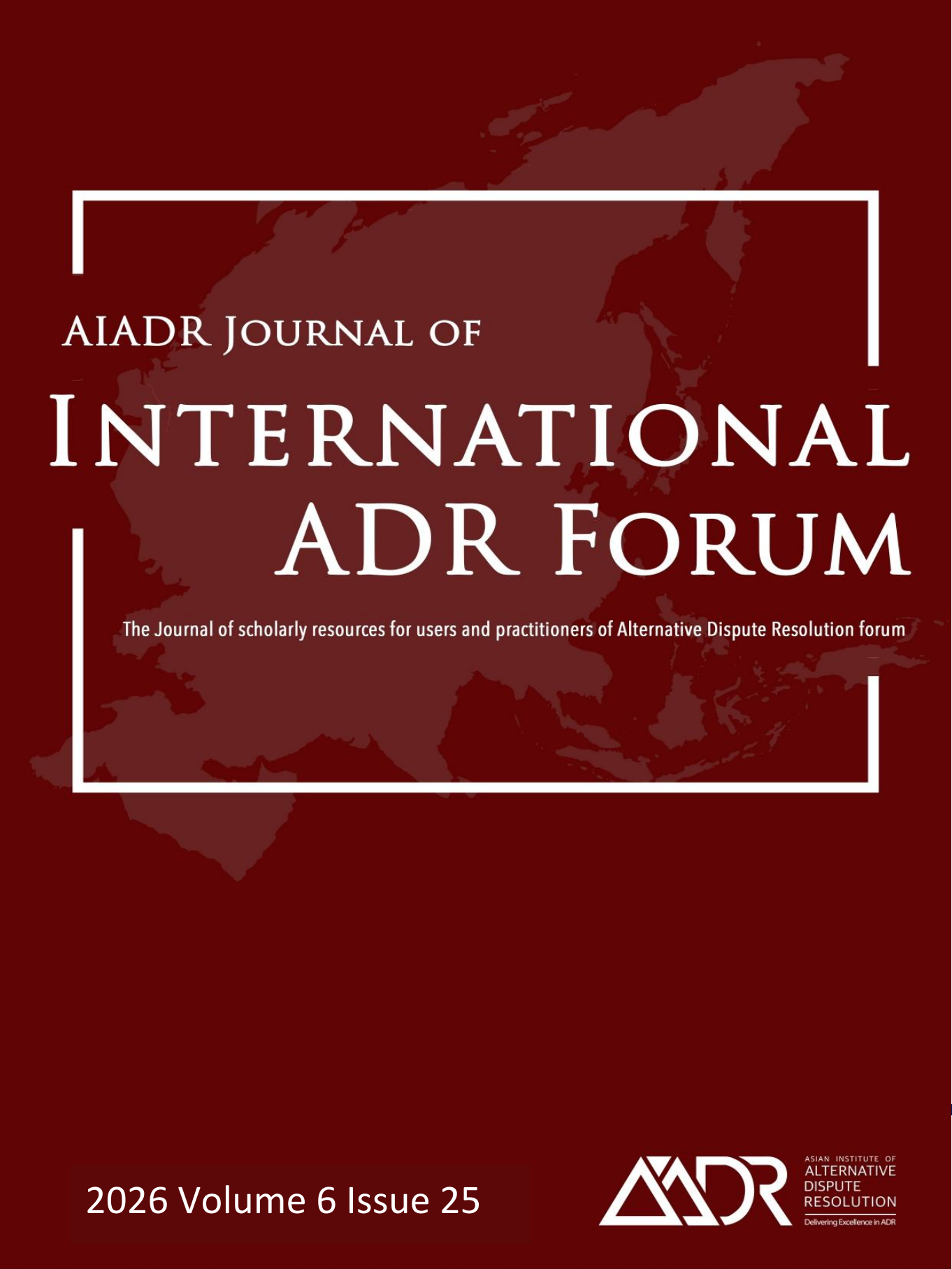




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Ethical Evidence – Coaching Witnesses in International Arbitration From An Asia-Pacific Perspective

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Introduction

The importance of ethics and morality in the legal profession has intrigued many philosophers for centuries. Plato once said that *“good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws”*¹. Though I agree with the said statement, but even bad people would find it very difficult to bypass well-drafted legal provisions. In law school, every student is taught advocacy, and witness preparation is one of the most important aspects of it. Professional ethics of legal representatives are generally governed by their respective national codes, but in the past decades, transnational disputes have triggered the creation of soft law instruments to regulate ethics, specifically in international arbitration².

It is difficult to standardise laws governing witness preparation in international arbitration due to its multi-jurisdictional nature. Legal representatives in

¹ Williamson R and Blackburn BR, *The Principalship from A to Z* (2;Second; ednRoutledge 2016) 149

² IBA Guidelines on Party Representation in International Arbitration (2013), IBA Rules on the Taking of Evidence in International Arbitration (2020)

international arbitration come from different jurisdictions and are bound by their respective national ethical laws, which are seldom compatible with other jurisdictions.³ In USA, lawyers are obligated to prepare witnesses by undertaking diverse preparatory activities like mock cross-examination and advising witnesses on strategy, etc. The courts have affirmed in various cases that failure to prepare a witness may violate the American Bar Association's Model Rules of Professional Conduct.⁴ However, the UK courts have taken a contrasting position, while holding that witness training by lawyers is not permissible at all.⁵ In Austria, there is no clarity on whether witness coaching is permitted.⁶ Italy, France, Belgium and Switzerland prohibit even contacting witnesses, but have created an exception in their national laws to allow counsel to interact with witnesses in arbitration.⁷

Ethics and witness interaction in international arbitration

A common question that arises is how national court procedures are relevant in international arbitration when they are inapplicable. Or how does the nationality of lawyers matter when international arbitration is governed by *lex arbitri* or ad hoc/institutional rules?

The importance of ethics in international arbitration cannot be overlooked as lawyers tend to abide by their traditional rules, which can lead to parties being placed at an unequal footing. Legal representatives are governed by many different rules in international arbitration (national codes, institutional rules, precedents, etc.). A situation such as *double deontology*, where one rule cannot

³ Anna Foerstel & Katharina Riedl, 'The IBA Guidelines on Party Representation in International Arbitration: Problem Solved?', (Global Arbitration News, 17 June 2015), <<https://www.globalarbitrationnews.com/2015/06/17/the-iba-guidelines-on-party-representation-in-international-arbitration-problem-solved-20150601/>> accessed 5 October 2025

⁴ Hyungi Lee, 'The Ethics of Witness Preparation: Balancing Zealous Advocacy with Ethical Standards' (The Georgetown Journal of Legal Ethics, 20 February 2025), <https://www.law.georgetown.edu/legal-ethics-journal/blog/the-ethics-of-witness-preparation-balancing-zealous-advocacy-with-ethical-standards/#_ednref2> accessed 5 October 2025

⁵ R v Momdou and others 2005 [EWCA] Crim 177.

⁶ Anna Foerstel & Katharina Riedl, 'The IBA Guidelines on Party Representation in International Arbitration: Problem Solved?', (Global Arbitration News, 17 June 2015), <<https://www.globalarbitrationnews.com/2015/06/17/the-iba-guidelines-on-party-representation-in-international-arbitration-problem-solved-20150601/>> accessed 5 October 2025

⁷ Cy Benson and Charlie Lightfoot 'Wanted: An ethical compass', (Global Arbitration Review, 1 June 2006), <<https://globalarbitrationreview.com/article/wanted-ethical-compass>> accessed 8 October 2025

be complied with without violating the other, can arise.⁸ There are other issues as well that can create complications in determining whether a conduct is ethical due to the non-uniformity in laws pertaining to professional conduct.

Unethical witness preparation can lead to serious repercussions, and the arbitration process can seriously be threatened, leading to an award being set aside, deemed unenforceable or revoked on appeal.⁹ The US Court of Appeals in **Nuvasive, Inc. v. Absolute Medical**¹⁰ upheld the District Court decision of vacating an arbitration award by holding that it was obtained fraudulently because the owner of *Absolute* had coached the witness during his cross-examination on Zoom by sending various text messages.¹¹ Similarly, in **Hernandez vs. La Fortazela**,¹² the counsel for the plaintiffs was caught on camera while coaching a witness during the trial conducted *via* video conferencing; the said act was termed as a fraud on the court by the Appellate Division. Further, the plaintiffs' claim was dismissed by awarding costs and attorney fees in favor of the defendant. Even in a liberal jurisdiction like the USA, where there is no clear distinction between the concepts of preparation and coaching, the courts have held certain unethical acts by parties and party representatives as fraudulent. Hence, due care must be exercised in preparing witnesses.

Tracing the development of ethical witness preparation by party representatives under non-national rules.

In 1956, the International Bar Association ('IBA') published an International Code of Ethics, which was later revised in the year 1988. This code was non-exhaustive and not arbitration-specific.¹³ Further, the code was completely silent on evidentiary procedure. In 1983, the IBA devised a set of additional rules to supplement the evidence procedure in international commercial arbitration.¹⁴

⁸ Eeiti Garg, 'Ethics of Counsel in International Arbitration: The Need for A Uniform Code of Conduct', (SSRN, 27 February 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756295> accessed 7 October 2025

⁹ Bernardo Cartoni, 'Ethics and International Arbitration: Coaching a Witness Under Different Perspectives', (SSRN, 2 October 2020). <<https://ssrn.com/abstract=3704067> or <http://dx.doi.org/10.2139/ssrn.3704067>> accessed 7 October 2025

¹⁰ *Nuvasive, Inc. v. Absolute Medical, LLC*, No. 22-10214 (11th Cir. Jun. 21, 2023)

¹¹ *Ibid.* (see page 29-33)

¹² *Hernandez vs. La Fortazela*, 2024 WL 65217 (N.J. Super. Ct. App. Div Jan. 5, 2024)

¹³ Doak Bishop, 'Ethics in International Arbitration', International Council for Commercial Arbitration, (ICCA, no date) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca_rio_keynote_speech.pdf> accessed on 7 October 2025

¹⁴ IBA Supplementary Rules Governing the Presentation and Reception of Evidence in

Perhaps, this can be considered as the first effort towards creating a harmonised framework specifically aimed at regulating the evidentiary procedure in multi-jurisdictional disputes. The IBA Rules strictly regulate the proceedings, unlike non-binding guidelines found in other instruments of the IBA.

These rules have been revised thrice (1999, 2010 and 2020) since they were first introduced by the IBA.¹⁵ The 1983 Rules contained a brief general clause that allowed a party or their legal advisers to interview witnesses/potential witnesses, but no guidance was provided on ethical witness preparation.¹⁶ Also, the term ‘interview’ is very broad to provide any clarity on the degree of assistance that could be rendered to witnesses. In 1999, the scope of party representatives was expanded to include officers, employees and other representatives in addition to lawyers.¹⁷ However, the issue of degree of witness preparation was not dealt with in the updated Rules. In 2010, the clause governing party interaction with witnesses was expanded to clarify that the IBA does not envisage an interview between party representatives and witnesses to be general in nature, and can relate to the content of the prospective deposition by a witness before the tribunal.¹⁸ This provided some certainty on the type of pre-testimonial discussions party representatives can have with witnesses.

A survey was conducted in 2010 by the IBA Task Force to assess whether comprehensive guidelines are required to be issued on contentious issues like ethics and party representation. The results reflected widespread support, with 75% of the respondents in favour of formulating such guidelines. Further, the survey reflected that a fraction of the practitioners were not sure if their own national code of ethics applied to them, and 8 % did not know which ethical rules governed their opposite counsels.¹⁹ The ILA Hague Principles, which lay down

International Commercial Arbitration (1983)

¹⁵ Joseph E Neuhaus, Andrew J Finn and David S Blackman, ‘The 2020 IBA Rules on the Taking of Evidence in International Arbitration: a history and discussion of the 2020 revisions’ (Global Arbitration Review, 9 September 2025) < <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/3rd-edition/article/the-2020-iba-rules-the-taking-of-evidence-in-international-arbitration-history-and-discussion-of-the-2020-revisions>> accessed on 7 October 2025

¹⁶ See Article 5(8), IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (1983)

¹⁷ See Article 4(3), IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999)

¹⁸ See Article 4(3), IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010)

¹⁹ Doak Bishop and Isabel Fernández de la Cuesta, ‘A Defense of the IBA Guidelines on Party

ethical standards for counsel appearing before international courts and tribunals, also contain a clause expressly allowing communication with witnesses pre-testimony. But like the IBA Rules, the clause therein is generic and suffers from the same issues of vagueness as mentioned above. Surprisingly, the Prague Rules, 2018²⁰, which are considered to provide a framework that caters to civil law practitioners, and the 2021 ICCA Guidelines, which aim to standardise ethical conduct in international arbitration, do not mention anything about witness preparation.²¹

The 2013 IBA Guidelines,²² in my opinion, were revolutionary as they laid down comprehensive ethical best practices for party representatives to follow in international arbitration. The Guidelines are not evidence-specific but provide clarity on various aspects of the evidentiary procedure. Party representatives under the Guidelines are obligated to advise the witnesses to depose truthfully and deter them from submitting any false evidence. In case of any later discovery by a party representative of any evidence to be false, remedial measures could be taken.²³ The ambit of witness preparation was also broadened by allowing counsels to meet and interact with witnesses/experts to assist them in preparing their prospective testimony, witness statements/expert reports, provided the written and oral testimony are original and reflect their own recollection of events.²⁴ These Guidelines attracted some controversy as well; critics argued that they gave rise to a conflict of interest with national laws, for example, assisting a witness in preparing their prospective testimony is incompatible with English law.²⁵ Another criticism was that the Guidelines were not binding and only recommendatory. In my opinion, the criticism was paradoxical in nature and arose out of two opposite arguments, i.e., firstly, the Guidelines were too

Representation' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation* (Bril 2015) 111

²⁰ Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018)

²¹ Amy C Kläsener and Courtney Lotfi, 'Party and counsel ethics in the taking of evidence', (Global Arbitration Review, 9 September 2025) < <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/3rd-edition/article/party-and-counsel-ethics-in-the-taking-of-evidence> > accessed 8 October 2025

²² IBA Guidelines on Party Representation in International Arbitration (2013)

²³ See Guideline 11, IBA Guidelines on Party Representation in International Arbitration (2013)

²⁴ See Guidelines 20 to 24, IBA Guidelines on Party Representation in International Arbitration (2013)

²⁵ Mark Friedman, 'Reflections on the IBA Guidelines on Party Representation in International Arbitration', *International Bar Association Arbitration Committee Articles* (12 September 2023) < <https://www.ibanet.org/reflections-on-guidelines-on-party-representation-friedman> > accessed 9 October 2025

comprehensive and binding on parties because tribunals will unilaterally consider them as best practice to determine ethical conduct; and secondly, the Guidelines were not binding and hence did not have a significant effect.

Interestingly, despite the Guidelines, the clause governing party interaction with witnesses has not undergone any change since 2010, and remains the same in the latest IBA Rules. Nevertheless, recently, some arbitral institutions have modelled their rules governing witness interaction and preparation on the IBA Rules and Guidelines.²⁶ Two decades ago, there existed no baseline standards of ethics in international arbitration; practitioners were guided by their own moral compass. The biggest contribution of transnational instruments has been to provide stakeholders in international arbitration something to fall back on for guidance on best practices. It is now established that party representatives, to some extent, can interact and assist witnesses in preparing their prospective testimonies in international arbitration. Provided the same is original and not ‘coached’ and adheres to the national ethical codes.

Despite the advances made by soft laws in creating transnational ethical rules in the past decades, it cannot be effectively argued that the issue of ethical witness interaction in international arbitration has been successfully resolved. It is an admitted fact that in the absence of an agreement stipulating the applicable ethical rules, or the tribunal expressly deciding to apply such rules to govern the evidentiary procedure, party representatives are on their own to decide which ethical rules apply to them.²⁷ This situation causes the same dilemma that existed before the advent of the aforesaid soft law instruments. Also, the distinction between preparation, coaching and familiarisation of witnesses has still not been explicitly addressed by any of the non-national instruments.

Comparative analysis between Singapore, Malaysia and Australia

Cartoni argued that, unlike other issues that arise in international arbitration due to procedural dissimilarity between civil and common law jurisdictions, the difference in party interaction with witnesses exists mainly between the USA and ‘other jurisdictions’.²⁸ I agree, however, the standard of flexibility in ‘other

²⁶ See Rule 20.6 LCIA Rules (2020), Rule 40.5 SIAC Rules 2025

²⁷ Fullelove G, Hamzi L and Harrison D (eds), “Counsel Ethics in International Arbitration in England: Navigating No-Mans Land” in , International Arbitration in England (Wolters Kluwer Law International 2022) 135

²⁸ Bernardo Cartoni, ‘Ethics and International Arbitration: Coaching a Witness Under Different

jurisdictions' can also vary. This section will dissect the different standards of flexibility in witness preparation in three main jurisdictions of the Asia-Pacific region.

SIAC Rules, since their inception, have incorporated a clause like the IBA Rules on Evidence, allowing party representatives to interview witnesses before their oral testimonies.²⁹ The latest edition, for the first time, substantially modifies the aforesaid clause to allow party representatives to interview witnesses, help them prepare statements, and meet them before they give their oral testimony before the tribunal. There is an obligation on party representatives to ensure that the statements are genuine and reflect the true opinion of the witnesses.³⁰ Rule 40.5 is similar to the IBA Guidelines and much broader than Article 4(3) of the IBA Rules. The ethical guidelines issued by SIArb³¹ and Singapore's national ethical code³² mandate that party representatives must not interview or interact with witnesses without the permission of the tribunal or court after the beginning of the cross-examination until it ends. SIAC Rules are silent on the issue and put no such obligation on party representatives. This highlights that intra-jurisdictional contradictions also exist on the issue of ethics.

In the *De La Sala*³³ case, the Singapore High Court held that a lawyer is allowed to ask the witnesses questions they might be asked during their cross-examination, but the line is crossed once the lawyer starts telling them the right answer.³⁴ This is more similar to the American approach than the UK. Additionally, the Court of Appeal in this case laid down three important rules; firstly, a lawyer or any other person shall not supplant the evidence provided by the witnesses; secondly, the preparation shall not be too repetitive or lengthy, and thirdly preparation shall not be done in groups.³⁵

The issue of ethical witness preparation is well established in Singapore through well-reasoned judgments, institutional rules and detailed guidelines. It is not

Perspectives', (SSRN, 2 October 2020). <<https://ssrn.com/abstract=3704067>> or <http://dx.doi.org/10.2139/ssrn.3704067>> accessed 7 October 2025

²⁹ See Rule 22.5, SIAC Rules 1991

³⁰ See Rule 40.5, SIAC Rules 2025

³¹ See Guideline 3.3 of Party Representative Ethics (2018)

³² See Rule 12(2) of Legal Profession (Professional Conduct) Rules, 2015

³³ *Compania De Navegacion Palomar, SA and others v Ernest Ferdinand Perez De La Sala and Anr.* [2017] SGHC 14

³⁴ *Ibid.* Rep. 279 at 163

³⁵ (2018) SGCA 16, see para 138 to 140

surprising, considering Singapore is now a global arbitration hub. However, neighbouring Malaysia is still developing its arbitration infrastructure, and the differences are obvious. The rules and guidelines of prominent arbitral institutions of Malaysia³⁶ do not mention anything about witness preparation by party representatives. The national code governing counsel ethics in Malaysia³⁷ does not provide any guidance as well. However, the Malaysian High Court in **Taff Hotels v Permodalan Nasional**³⁸ allowed an application for cross-examining a witness on allegations of coaching. The court held that if discussion between the counsel and witness pertains to what the latter is expected to say before the court, it is “*most reprehensible and calls for condemnation in the strongest terms*”³⁹ This approach is stricter than the one followed by the Singapore High Court in *De La Sala*. Thus, if Malaysian lawyers, while preparing witnesses, ask questions pertaining to the prospective testimony, it may amount to coaching, like in the UK. In **JMC Ventures v Ng Kee Wei**⁴⁰, it was further held that if counsels provide any answers in witness statements, the same would amount to coaching.⁴¹ The Malaysian Evidence Act is silent on counsels preparing witnesses for examination, but does stipulate that oral evidence shall be a direct and authentic version of the witness testifying.⁴² Furthermore, if party representatives interact with witnesses before the end of the cross-examination, the credibility of the evidence can be severely compromised in Malaysia.⁴³ This perspective is similar to the SIArb Guidelines, but it remains to be seen whether mere actions and signals by party representatives to a witness during cross-examination, like in Malaysia,⁴⁴ would severely compromise the evidence in Singapore. Despite institutional arbitration rules and domestic laws not providing any guidance to party representatives on best practices in witness preparation, the Malaysian courts stepped up and provided clarity on the subject.

The Australian Centre for International Commercial Arbitration (‘ACICA’) Rules do not provide a clause explicitly regulating witness preparation, but since their inception mandate that the IBA Rules shall be given ‘*regard*’ in matters of

³⁶ See the Rules of Asian International Arbitration Centre, Borneo International Centre for Arbitration and Mediation, Malaysian Institute of Architects, and the Institute of Engineers.

³⁷ Legal Profession (Practice and Etiquette) Rules, 1978

³⁸ Taff Hotels Sdn Bhd v. Permodalan Nasional Bhd, [2000] 4 MLJ 622

³⁹ Ibid. Rep. h at 2

⁴⁰ [2022] MLJU 401

⁴¹ Ibid. See para 36

⁴² See Section 60(1) of Evidence Act, 1950

⁴³ Tan Kay Soon v Tan Ching Ling [2020] 9 MLJ 15 and Simon Raj v Haikal Akmal [2022] MLJU 1412

⁴⁴ [2020] 9 MLJ 15, see para 54

evidence. However, the tribunal is not bound by these rules.⁴⁵ It can be inferred that the tribunal will allow party representatives to interact with witnesses in line with the IBA Rules. However, the tribunal could refuse to be guided by the IBA Rules if the contract mandates the usage of different evidentiary rules, but it's not clear if the tribunal would take a stricter position on witness preparation based on national ethical laws of the counsel. Rule 40.5 of SIAC is more detailed and provides that it is imperative to consider the constraints of the applicable law or rules that counsel are subject to.

In Australia, the ethical conduct of barristers and solicitors is governed differently. Both the rules provide that witness coaching is prohibited and witnesses shall not be advised to give misleading evidence. Unlike the ethical code of Singapore, the Australian legislations provide clear and detailed instructions on what constitutes ethical witness preparation.⁴⁶ Also, legal representatives are not allowed to communicate with witnesses in groups. The Courts in Singapore and Australia have taken an identical approach on the issue of witness coaching. In **Majinski v. The State of Western Australia**⁴⁷, the Court of Appeal, like in *De La Sala* case, held that if the original evidence of the witness is supplanted with a different version, it amounts to coaching. In **Day v. Perisher Blue Pty Ltd**,⁴⁸ the decision of the lower court was overturned on the ground that the judge did not give due importance to the issue of unethical witness preparation. In this case, witnesses discussed evidence in groups and were supplied documents that indicated questions which could be asked during examination, along with the suitable answers. The Singapore High Court in *De La Sala* talked about such a situation and had an identical opinion (see above). The kind of permissible advice that counsels can give witnesses has been comprehensively explained in the judgment of **Re Equiticorp Finance Ltd**⁴⁹, Singaporean Courts haven't provided any guidance on this aspect yet.

⁴⁵ See Rule 27.2 ACICA Arbitration Rules (2005), Rule 27.2 ACICA Arbitration Rules (2011), Rule 31.2 ACICA Arbitration Rules (2016), Rule 31.2 ACICA Arbitration Rules (2021)

⁴⁶ See Rule 25 and 26 of Legal Profession Uniform Australian Solicitors' Conduct Rules (2015), Rule 69 to 72 of Legal Profession Uniform Conduct (Barristers) Rules (2015)

⁴⁷ [2013] WASCA 10, see para 32

⁴⁸ [2005] NSWCA 110, see para 22

⁴⁹ (1992) 27 NSWLR 39. Acceptable witness preparation includes (1) Advising witnesses to refresh their memory from contemporaneous documents; (2) Advising witnesses on points they may be examined on; (3) familiarizing witnesses with the procedure; (4) Informing the witnesses on points that could be contradictory or irrelevant in their testimony and (5) Advising on witnesses on the type of answers to be given (eg. short, non-repetitive and concise etc.).

Witness preparation in the digital age

In an era when technology is rapidly expanding, the thin line between witness familiarisation and coaching gets even more blurred. As discussed above in **Nuvasive Inc.**,⁵⁰ and **La Fortazela**⁵¹, technology was misused to coach witnesses, and the court took serious exceptions to such acts. However, the question that arises is not whether courts will object to such acts (they will, more often than not); the more important issue is that technology makes it harder to track and catch individuals surreptitiously trying to bend the rules to their advantage. In the USA, the American Bar Association, in its Formal Opinion 508, has discussed the ethical issues that might arise in the digital age, such as coaching in remote settings using various communication platforms⁵². But the thin line between coaching and preparation is deemed to be the same as laid down by various decisions across jurisdictions: preparatory guidance is ethical, cooking up an anticipated testimony is not. Anyhow, the challenge now is that many popular messaging platforms are heavily encrypted, making it extremely difficult to prove that witness coaching has taken place. Additionally, with the advent of AI, the issue has become even more complicated, as many jurisdictions do not have a settled position on the permissible limits on the use of AI in witness preparation. The suggested method for using AI in witness preparation is the Nordstrom Method⁵³, which is a three-stage process. At the initial session, the witness has to answer certain key questions that have been prepared; then the AI analyses areas for improvement in the testimony; in the final stage, attorneys examine the AI feedback with the witness to address those areas. This method might be ethical in most jurisdictions if followed as is, but any feedback to the witness on what to say during testimony, by the AI or the attorney, might violate the ethical red line. It is also imperative to note that the UK has taken a conservative position on the use of AI in the recent High Court case of **Godwin v Godwin**⁵⁴. In this case, the testimonies were admittedly refined by using ChatGPT, to which the judge said that there was no need for the witnesses to

⁵⁰ Nuvasive, Inc. v. Absolute Medical, LLC, No. 22-10214 (11th Cir. Jun. 21, 2023)

⁵¹ Hernandez vs. La Fortazela, 2024 WL 65217 (N.J. Super. Ct. App. Div Jan. 5, 2024)

⁵² Standing Committee on Ethics and Professional Responsibility, 'Formal Opinion 508 – The Ethics of Witness Preparation' (American Bar Association, 2 August 2023) < https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-508.pdf > accessed 28 June 2026

⁵³ Rodney R. Nordstrom, 'A New Method of Witness Preparation Using AI' (Indiana Bar State Association, 13 April 2025) < <https://www.inbar.org/blogpost/1981821/509793/A-New-Method-of-Witness-Preparation-Using-AI> > accessed on 28 June 2026

⁵⁴ [2026] EWHC 923 (Ch), see para 44 to 49

use AI, as they were sophisticated people, and due to the usage of AI, the testimony has to be given less weightage and carefully examined, as it cannot be ascertained if the words used were their own. This ruling jeopardises the use of AI in preparing witness testimonies in common law jurisdictions, as it effectively negates its use altogether, since even minimal use could undermine the significance of the testimony.

Conclusion

The above analysis demonstrates that subtle ethical differences in witness preparation can also exist in countries following similar legal systems. Singapore has the most comprehensive laws and guidelines on the issue of ethical witness preparation from an arbitration perspective, whereas Australia has the most developed case laws and ethical codes, but the institutional arbitration rules are unclear. On the contrary, Malaysia has only basic case law, which advocates a much stricter approach to determining ethical conduct. Also, the use of modern technology in witness preparation has led to further confusion about the ethics of witness preparation.

Mr. Borne argues that in the event of unethical witness preparation, tribunals are likely to give less credibility to the evidence than removing the testimony from the record. Further, if such issues are raised at the post-award stage, courts are unlikely to be convinced unless perjury is made out. Also, if countries try to bind foreign lawyers to their national ethical code, it would be contrary to the New York Convention and the Model Law.⁵⁵ I agree, but theoretically in an international arbitration seated in UK, an award might be set aside if a local lawyer engages in witness preparation contrary to the national ethical code. The issue of not having a level playing field still exists. Hence, it is clear that international arbitration requires uniformity in the domain of evidence.

Some suggest that the choice of law rules shall apply to determine the ethical conduct of counsels in international arbitration. However, the different choice of law approaches, if applied, pose significant challenges in practice.⁵⁶ Others argue that developing a binding international code would provide certainty, create

⁵⁵ Gary B. Born, 'International Commercial Arbitration', (Wolters Kluwer, 2022), 3rd Ed, Chapter 21 [b]

⁵⁶ Fullelove G, Hamzi L and Harrison D (eds), "Counsel Ethics in International Arbitration in England: Navigating No-Mans Land" in , International Arbitration in England (Wolters Kluwer Law International 2022) 135. Choice of law rules in international arbitration include applying the law of: (1) the seat; (2) the country of party representatives; (3) parties' choice; (4) place of arbitration; and (5) lawyers' choice.

equality and improve fairness.⁵⁷ This would hamper party autonomy in arbitration and decrease attraction. Many advocate that institutional rules shall govern professional ethics.⁵⁸ But can such rules override national legislations? In my opinion, all the aforesaid suggestions are radical and aim to make sweeping changes to resolve the problem. The better approach is to make slight tweaks in the already existing mechanism. Firstly, transnational instruments like the IBA Rules shall make amendments to provide more clarity on the distinction between coaching and preparation and incorporate activities which amount to ethical preparation by referring to case laws like *Re Equiticorp*. Secondly, ad-hoc and institutional rules shall be amended to incorporate a clause that compulsorily mandates the parties to choose any of the available transnational rules on evidence to apply to the proceedings. Already, the IBA Rules have been applied or referred to for guidance in 48 % of the known arbitrations around the world.⁵⁹ This approach would not severely compromise party autonomy and would assist in creating a level playing field. Hence, creating a mechanism that will largely solve the issue of ethics in international arbitration.

⁵⁷ Margert Moses, 'Ethics in International Arbitration: Traps for the Unwary', (SSRN, 14 April 2013) 10

⁵⁸ Ibid. see page 2.

⁵⁹ Claus von Wobeser, 'A changing arbitration world and the IBA role', International Bar Association Arbitration Committee Articles (12 September 2024) < <https://www.ibanet.org/a-changing-arbitration-world-and-the-IBA-role> > accessed on 31 October 2025

Arbitral Award Enforcement Trends in Vietnam: Comparative Insights from International Best Practice

By: Jeremy Mark Holt



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ABSTRACT

Since the *Đổi Mới* reforms, Vietnam has undergone tremendous social and economic transformation. With the ambitious goal of reaching upper-middle-income status by 2050, the stakes for attracting and retaining foreign investment are high. Central to this article is the proposition that the efficient enforcement of international commercial arbitral awards is associated with increased foreign investor confidence and favourable investment decisions. This article first discusses an *international best-practice* benchmark for the enforcement of awards, subsequently reviewing Vietnam's legal framework, enforcement system and trends. Situating Vietnam within its Asia-Pacific context, this article identifies recurring grounds for resisting award enforcement, including expansive

public-policy exceptions, non-arbitrability relating to immovable property, procedural formalism and a tendency toward merits-style review. Central to this paper is the argument that such identified themes may manifest as a form of domestic protectionism, understood as a judicial tendency to prioritise domestic legal interests, local parties or state-linked assets over the pro-enforcement bias of the New York Convention observed in leading pro-arbitration jurisdictions. This article further argues for the adoption of a process-based enforcement framework, rather than further legislative reform alone, directed toward narrowing refusal grounds, improving judicial consistency and adopting institutional safeguards, such as China's mandatory court-reporting system. Vietnam remains an attractive destination for foreign investment; however, such attractiveness may be diminished where enforcement outcomes are uncertain.

Introduction

Since the *Đổi Mới* reforms, Vietnam has experienced rapid economic growth.¹ Contemporary legislation and policy provide that the government's *National Master Plan for the 2021-2030 period, with a vision toward 2050* (Master Plan),² is to attain upper-middle-income status by the 2050s. This places a high expectation on legal infrastructure, including arbitration, to grow investor confidence. Arbitration, though, can only deliver commercial reality when awards are enforced efficiently. This is especially so, where after a long and costly arbitration, the award is unenforceable.³ This article

¹ Ministry of Planning and Investment, 'FDI Attraction Situation in Vietnam and Vietnam's Commitments at COP28' (Web Page, 29 September 2023) <https://www.mpi.gov.vn/en/Pages/2023-9-29/FDI> ('MPI FDI Report'); World Bank, 'Foreign Direct Investment, Net Inflows (BoP, Current US\$) – Viet Nam' (Web Page, 23 June 2024) <https://data.worldbank.org/indicator> ('IMF FDI Data').

² *Resolution No 138/NQ-CP on the National Master Plan for the 2021–2030 Period, with a Vision towards 2050* (Government of the Socialist Republic of Vietnam, 25 October 2022) ('Master Plan').

³ Randall Peerenboom, 'Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC' (2001) 49(2) *American Journal of Comparative Law* 249, 284–5 ('Peerenboom'); Q Tannock, 'Judging the Effectiveness

observes that Vietnam's enforcement regime has reached a transitional phase where its current legislation, after undergoing several decades of reform, broadly reflects international pro-arbitration norms. However, its practical application at the recognition and enforcement phases remains inconsistent. This article argues that, in order to improve award enforceability and align with international best practice, Vietnam should adopt a process-based framework designed to narrow the grounds for refusing award enforcement, increase transparency and efficiency, including adopting mechanisms such as China's mandatory court reporting system.⁴

For the purposes of this paper, domestic protectionism may be described as the tendency of 'the judgment, or the execution of a judgment' being 'unduly influenced by the policies or actions of local governments, leading to injustice and unfairness' to the external party or award creditor seeking to enforce an award.⁵ Domestic protectionism is not suggested based on isolated cases alone. Instead, the proposition is advanced on the basis of a cumulative expression of indicia within enforcement decisions. Vietnam adopted legal doctrine to support its arbitration regime several decades ago, yet thematic patterns of case law over this period support such proposition. Alternative positions merit consideration, particularly including judicial inexperience relating to foreign arbitral award enforcement, where decisions are rendered far from Vietnam. Civil law formalism related to enforcement adds overlays of complexity, where technical requirements are perhaps not required or are more relaxed in foreign jurisdictions, particularly in relation to

of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards' (2005) 21(1) *Arbitration International* 77–88 ('Tannock').

⁴ Emma Garrett, 'Independence and Impartiality: Australia's Arbitrator Bias Test' (2024) 40(1) *Arbitration International* 154 ('Garrett'); see generally Petra Butler, 'International Commercial Arbitration Put to the Test in the Commonwealth' (2020) 51(3) *Victoria University of Wellington Law Review* 35, 35 n 9, citing *The Commonwealth, Commonwealth International Arbitration Study* (Report, 2020) ('Commonwealth Study') ('Butler'); Doug Jones, 'Arbitration around the World: Alive or Dead?' (2013) 7(3) *Romanian Arbitration Journal / Revista Română de Arbitraj* 1, 2–5 ('Jones').

⁵ See Shen Wei and Shang Shu (n 157) 147 where local protectionism is described as taking various forms, with the result that 'the judgment, or the execution of a judgment, is unduly influenced by the policies or actions of local governments, leading to injustice and unfairness'.

notarisation and service of awards. In consideration of such complexities, the argument is advanced that domestic protectionism is observed where domestic legal interests are prioritised over the *New York Convention's* (*Convention*) pro-enforcement bias, as reflected in several decades of thematic patterns providing indicia supporting the premise.

The article employs a comparative doctrinal methodology, reviewing the international best-practice framework for enforceability as understood from the application of the *Convention* and *UNCITRAL Model Law (Model Law)*. Jurisprudence from pro-arbitration states in the Asian region, including Singapore, Hong Kong, China and, selectively, other common law jurisdictions, is considered in detail. Comparisons are then made with Vietnam's *Law on Commercial Arbitration* and *Civil Procedure Code*, viewed through the lens of this best practice benchmark.⁶ Comparators are thematically analysed within commercial arbitral award enforcement, including: public policy exemptions; non-arbitrability of immovable property; procedural formalism; and where relevant, the propensity of state court to conduct merits review of awards. Mainland China is particularly relevant as a comparator, because of the reforms developed through the mandatory court-reporting system. Empirical data is limited to the 83 foreign arbitral award enforcement applications identified in the Ministry of Justice Spreadsheet for the period 2012 to September 2019. Secondary sources provide the predominant weight in the analysis of case law; primary cases are cited where available. The primary reason is

⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('Convention'); *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17 (1985) annex I ('Model Law'); Law on Commercial Arbitration No 54/2010/QH12 (Vietnam), 17 June 2010 ('LCA'); National Assembly, *Civil Procedure Code* No 92/2015/QH13 (Vietnam), 25 November 2015 ('CPC'); Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 86, 94 n 42 ('Hutchinson and Duncan'); Stephen A Smith, 'Comparative Legal Scholarship as Ordinary Legal Scholarship' (2010) 5(2) *Journal of Comparative Law* 331, 333, 336 ('Smith'); Lisa M Given, 'Constructivism' in Lisa M Given (ed), *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications Inc, 2008) vol 1, 116 ('Given'); M A Damirli, 'Comparative International Law in the Quest for Academic Identity' (2016) 11(1) *Journal of Comparative Law* 65 ('Damirli'); Michael Sunday Afolayan and Omolade Adeyemi Oniyinde, 'Interviews and Questionnaires as Legal Research Instruments' (2019) 83 *Journal of Law, Policy and Globalization* 51, iii ('Afolayan and Oniyinde'); *Judicial Manual on Arbitration and Mediation* (Sách Tham Khảo) (Nhóm tác giả, Nhà Xuất Bản Thanh Niên, 2017) 26, 41–2 ('Judicial Manual').

that limitations exist in locating published enforcement decisions, despite extensive research. Notably, in Vietnam, public reporting remains limited and within the discretion of the government, which has broad powers to not publish awards.⁷ Cited statistics on award enforcement rates within Vietnam, should therefore be read cautiously.

International Best Practice: Baseline Standards

This Part presents an international best-practice benchmark against which Vietnam's enforcement regime can be assessed. Although discussed exhaustively in the literature, the concept remains somewhat elusive. Firstly, this Part identifies the *Convention* and *Model Law* architecture as the foundation of contemporary award enforcement, before examining why best practice should be viewed as a process of pro-enforcement alignment, rather than a formulaic adoption of laws. Later parts of this paper thematically review whether Vietnam's courts apply refusal grounds narrowly as intended under the *Convention*.

A. New York Convention and UNCITRAL Model Law

International commercial arbitration (ICA) enjoys near universal adoption,⁸ and is generally perceived globally as the '*du jour*' for resolving international disputes.⁹ The 'denationalised' nature of ICA awards has a *Lazarus-like effect*,¹⁰ where, if unable to be

⁷ Resolution No 03/2017/NQ-HĐTP of the Council of Judges of the Supreme People's Court on the Publication of Court Decisions and Judgments on the E-Portal of the Court (Vietnam, 16 March 2017) ('Resolution 03/2017'), effective 1 July 2017 <https://thuvienphapluat.vn/van-ban/Cong-nghe-thong-tin/Nghi-quyet-03-2017-NQ-HDTP-cong-bo-ban-an-quyet-dinh-tren-Cong-thong-tin-dien-tu-Toa-an-343156.aspx>

⁸ Convention (n 6).

⁹ Jones (n 4) 2.

¹⁰ Fr Seraphim Holland, 'The Resurrection of Lazarus, the Four Days Dead, of Bethany', *Pravoslavie.ru* (Web Page, 7 January 2019) <https://pravoslavie.ru/45973.html>

enforced, or set aside at the seat, may be raised up and pursued in other jurisdictions.¹¹ Read together, the *Convention* and the *Model Law* provide a well-worn pathway and global architecture for ICA. Importantly, they provide refusal of award enforcement to several exceptional areas designed as a minimalist interventionist regime to prevent courts from revisiting cases on the merits. Pro-arbitration states typically adopt such architecture either wholesale into law or adapt their own arbitration laws such as illustrated by Australia and Singapore within the *International Arbitration Act 1974* (Cth) s 16, and *International Arbitration Act 1994* (Singapore) s 3(1).¹² Article IV of the *Convention* ensures that awards may be enforced efficiently and proportionally where the award and arbitration agreement is submitted, without the need for complicated procedural consular legalisations or certificates.

B. Best Practice and Pro-enforcement Burdens

Best practice of *ICA* should be understood against the central principles of party autonomy, neutrality, fairness, and enforceability.¹³ Although frequently discussed by scholars and practitioners, a black-letter definition remains elusive. Rather than a fixed definition, it should be understood as a subtle *process* of comparing how pro-arbitration jurisdictions, are practicing, and aligning, and in some cases merging local laws and

¹¹ Bruno Leurent, 'Reflections on the International Effectiveness of Arbitration Awards' (1996) 12(3) *Arbitration International* 269, 269–70 ('Leurent'), citing Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 *International and Comparative Law Quarterly* 53 ('Paulsson').

¹² See generally, as to Australia adopting the Model Law into domestic law, *International Arbitration Act 1974* (Cth) s 16 schs 1–3; and, as to Singapore, *International Arbitration Act 1994* (Singapore) s 3 schs 1–2.

¹³ See generally, regarding the central objectives of international commercial arbitration, Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd ed, 2021) ch 1 [1.02], 67–90 ('Born 2021').

systems.¹⁴ Ultimately, jurisdictions should cultivate a ‘pro-arbitration’ mindset,¹⁵ to ‘keep pace’ with international standards.¹⁶ Central to best practice, is the presumptive pro-enforcement bias under Article III of the *Convention*,¹⁷ which imposes a deliberate interpretive bias on courts toward upholding awards with the objective of facilitating the recognition and enforcement ‘to the greatest extent possible’.¹⁸

The *Model Law*, being based on the *Convention*, and designed as supplementary, in effect, mirrors it within Articles 34–36. Therefore, the process of best practice, should treat awards uniformly ‘irrespective of where they were made’, without conflict.¹⁹ However, the over judicialization of *ICA*, is taken by some authors to be treated cautiously, and may not provide the best quality that international best practice deserves. As such, it requires a more ‘situational way of looking at ICA rather than trying to promote a ‘one size fits all’ model’.²⁰ Best practice, therefore, should avoid becoming a formulaic

¹⁴ Emma Garrett, ‘Independence and Impartiality: Australia’s Arbitrator Bias Test’ (2024) 40(2) *Arbitration International* 135 (‘Garrett’); LM Given, ‘Constructivism’ in LM Given (ed), *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications Inc, 2008) 116 <https://doi.org/10.4135/9781412963909> (‘Given’); Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) *Deakin Law Review* 83, 94 n 42; Stephen A Smith, ‘Comparative Legal Scholarship as Ordinary Legal Scholarship’ (2010) 5(2) *Journal of Comparative Law* 331, 333; Jones (n 4) 4–5; Klaus Peter Berger, ‘Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion’ (2006) 22(4) *Arbitration International* 501, 501 n 9, citing JH Rubinstein and BB Guerrina (n 2) 601 (‘Berger’); WW Park, ‘Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion’ (2003) 19 *Arbitration International* 279, 294; Adrian Vincent, ‘International Arbitration in Australia: Rationalising the Creep of Judicialisation alongside Commercial Necessity’ [2017] (AUSLA) *ALSA Academic Journal* 278, 278 n 41, citing Leon Trakman and Hugh Montgomery, ‘The “Judicialization” of International Commercial Arbitration: Pitfall or Virtue?’ (2017) *Leiden Journal of International Law* 405, 417 (‘Trakman’).

¹⁵ Jones (n 4) 2.

¹⁶ See generally Garrett (n 4) 137, 144, 154, citing Felix Dasser, ‘Soft Law’ in *International Commercial Arbitration* (Brill, 2021) 82–3, citing International Bar Association Council, *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014, updated 10 August 2015) 6; see generally, as another example of the process of leading global arbitrators comparing global standards within the International Bar Association and cross-jurisdictional practices, Doug Jones, ‘Developing Best Practice in International Arbitration: Witness Statements’ (2011) 15(2) *Vindobona Journal of International Commercial Law and Arbitration* 303, 303 n 8, citing International Bar Association Working Party, ‘Commentary on the New IBA Rules of Evidence’ (2000) 14 *Business Law International* 14.

¹⁷ UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (United Nations, 2016) 80 [10] n 376, 125 n 566 (‘Guide to the NYC’), citing Andreas Börner, ‘Article III’ in Herbert Kronke et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 115; see also Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 3394 (‘Born 2014’).

¹⁸ Guide to the NYC (n 17) 125 n 566; Born 2014 (n 17) 3428–33; Teresa Cheng, ‘Celebrating the Fiftieth Anniversary of the New York Convention’ in AJ van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International, 2009) 679, 680.

¹⁹ UNCITRAL Secretariat, *UNCITRAL Model Law on International Commercial Arbitration (with Amendments as Adopted in 2006)* (United Nations, 2008) 36 [8], [50] (‘Model Law Commentary’).

²⁰ Trakman (n 14)

and arbitrary duplication of *ICA* rules as this may miss the ‘unavoidable contextual’ nature of,²¹ and the ‘fundamental value’, being the ability to tailor processes to serve their needs, and remain consistent with the ‘applicable law, trade or industry’ and critically ‘govern’ parties’ dealings; and, be reflective of the customs and ‘contractual relationship between the parties’.²² From the perspective of enforcement, within Vietnam, a holistic process should be considered that ‘attracts and adds value to *ICA*’, the outcome of which provides a ‘sustainable alternative for civil litigation’.²³ Adopting a pro-enforcement mindset ensures awards yield real remedies, not paper victories. In Vietnam this is especially important for gaining and maintaining credibility.

Vietnam’s Legal Framework for Award Enforcement

This Part reviews Vietnam’s legal framework for award enforcement. It then examines the legislative and institutional reforms undertaken over the previous two decades, including the present-day court restructuring and reforms continuing into 2025.²⁴ Vietnam has adopted a civil law system with a constitution,²⁵ and a unicameral legislature.²⁶ Since 1 July 2025, Vietnam has undergone transformative changes.²⁷

²¹ Trakman (n 14) 408.

²² Thomas J Stipanowich, ‘Arbitration: The “New Litigation”’ (2010) 2010 *University of Illinois Law Review* 1, 1–2.

²³ Trakman (n 14) 417.

²⁴ Phuong-Khanh Nguyen, ‘How to Conduct Research in Vietnamese Law: Overview of the Legal System of the Socialist Republic of Vietnam’ (1999) 27(3) *International Journal of Legal Information* 307, 307–8 (‘Phuong-Khanh’).

²⁵ Ibid 308.

²⁶ *Law on Promulgation of Legal Documents* No 64/2025/QH15 (Vietnam, 19 February 2025), as amended by *Law Amending and Supplementing a Number of Articles of the Law on Promulgation of Legal Documents* No 87/2025/QH15 (Vietnam, 25 June 2025); Phuong-Khanh (n 24) 314–15.

²⁷ Rouse, ‘Vietnam’s Major Judicial Reforms Take Effect 1 July 2025’, Rouse (Web Page, 1 July 2025) <https://rouse.com/insights/news/2025/vietnam-s-major-judicial-reforms-take-effect-1-july-2025>; *Resolution No 81/2025/UBTVQH15 on Establishing Provincial People’s Courts and Regional People’s Courts* (Vietnam, 27 June 2025); *Resolution No 01/2025/NQ-HĐTP on the Application of Certain Provisions concerning the Receipt of Duties and Exercise of Jurisdiction by People’s Courts* (Vietnam, 27 June 2025); See, eg, Reporters Without Borders, ‘“My Case Clearly Shows There Is Absolutely No Press Freedom in Vietnam,” Says Persecuted Journalist’ (Web Page, undated) <https://rsf.org/en/my-case-clearly-shows-there-absolutely-no-press-freedom-vietnam-says-persecuted-journalist>; Reporters Without Borders, ‘One Year into His Rule, Vietnamese Leader To Lam Continues His All-Out War on Independent Journalism’ (Web Page, 1 August 2025) <https://rsf.org/en/one-year-his-rule-vietnamese-leader-lam-continues-his-all-out-war-independent-journalism>; Sebastian Strangio, ‘Vietnam Approves Radical Consolidation of Provinces and Major Cities’, *The Diplomat* (Online, 13 June 2025) <https://thediplomat.com/2025/06/vietnam-approves-radical-consolidation-of-provinces-and-major-cities/>.

This judicial reorganisation affects the jurisdiction of arbitration. Applications to set aside Vietnam-seated awards are now heard in the three Provincial People's Courts of Hanoi, Ho Chi Minh City, and Da Nang. Applications for enforcement of foreign arbitral awards are heard in the newly established Regional People's Courts. Considering the application for enforcement of foreign awards is now relegated to the lower-tier Regional Courts, where the judiciary may have limited experience, practitioners note that the changes are welcome but caution that optimism should be tempered given the relative inexperience.²⁸ Complementing these reforms and with a view to competing with regional neighbours, the International Financial Centres (*IFCs*) were established effective 1 September 2025 in Ho Chi Minh City and Da Nang.²⁹

Vietnam acceded to the *Convention* on 12 September 1995,³⁰ making typical declarations of reciprocity, and limitation to commercial disputes.³¹ Notably, Vietnam has yet to accede to the *ICSID Convention*.³² In support of the arbitral regime, Vietnam implemented the *Law on Commercial Arbitration (LCA)* and the *Code of Civil Procedure*

²⁸ Minh Dang, 'The Rapidly Shifting Landscape of Arbitral Award Enforcement in Vietnam', *Kluwer Arbitration Blog* (Blog Post, 24 August 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/the-rapidly-shifting-landscape-of-arbitral-award-enforcement-in-vietnam/>; Tony Nguyen and Do Pham Khanh Huyen, 'Vietnam Narrows Jurisdiction for Setting Aside Arbitral Awards: A Key Step Toward Modern Arbitration Reform', *Lexology* (Web Page, 18 July 2025) <https://www.lexology.com/library/detail.aspx?q=6b8d9eff-2769-4228-a466-3cdebff37663>; Dentons LuatViet, 'New Regulations on Setting Aside Arbitral Awards by Courts in Vietnam' (Client Alert, 11 July 2025) <https://www.dentonsluatviet.com/en/insights/alerts/2025/july/11/new-regulations-on-setting-aside-arbitral-awards-by-courts-in-vietnam>.

²⁹ Tilleke & Gibbins, 'Vietnam's Resolution on International Financial Centers Brings New Opportunities', *Tilleke & Gibbins* (Insight, 2 July 2025) <https://www.tilleke.com/insights/vietnams-resolution-on-international-financial-centers-brings-new-opportunities/>; *Resolution No 222/2025/QH15 on the International Financial Center in Vietnam* (Vietnam, 27 June 2025) art 30(3) ('Resolution 222'); Abu Dhabi Global Market, 'ADGM Announces Launch of Digital Sandbox to Accelerate Financial Services Innovation' (Media Announcement, 4 March 2019) <https://www.adgm.com/media/announcements/adgm-announces-launch-of-digital-sandbox-to-accelerate-financial-services-innovation>; Minh Dang, 'The Rapidly Shifting Landscape of Arbitral Award Enforcement in Vietnam', *Kluwer Arbitration Blog* (Blog Post, 24 August 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/the-rapidly-shifting-landscape-of-arbitral-award-enforcement-in-vietnam/>.

³⁰ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* status: Viet Nam, accession 12 September 1995, *New York Arbitration Convention* <https://old.newyorkconvention.org/list%2Bof%2Bcontracting%2Bstates> ('NYC Accession'); *Order No 42-L/CTN on the Promulgation of the Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam* (Vietnam, 27 September 1995) ('Order No 42').

³¹ *Decision No 453/QĐ-CTN on the Accession of the Socialist Republic of Vietnam to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Vietnam, 28 July 1995) ('Decision 453').

³² *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('ICSID Convention').

(CPC).³³ The *LCA* draws heavily on the *Model Law*,³⁴ and together with the *CPC*, governs both domestic and international arbitration.³⁵ Signalling Vietnam's importance on the global stage, the Permanent Court of Arbitration opened an office in Hanoi in 2022, being only the second office in Asia, and the fifth outside of The Hague.³⁶ The *CPC* provides that a foreign award will have the same 'legal effect' as a domestic judgement.³⁷ Vietnamese courts apply the laws hierarchically: treaties first,³⁸ then designated arbitral rules chosen by the parties, and finally any Vietnamese domestic laws; awards being subject to a three-year limitation period. Vietnam may also enforce awards rendered in non-contracting states of the Convention, where there is a bilateral convention between parties.³⁹ Mirroring the *Convention* and *Model Law*, the *CPC* provides that an arbitral tribunal is empowered with jurisdiction where the dispute has an 'arbitration agreement',⁴⁰ and courts must refuse to accept a case where there is such an agreement.⁴¹ Foreign arbitration is considered 'foreign' when the arbitration is governed by foreign arbitration laws or resolved by a foreign institution.⁴² When seated in Vietnam,

³³ *Law on Enforcement of Civil Judgments* (Vietnam) Law No 26/2008/QH12, 14 November 2008 ('LECJ'); CPC (n 6).

³⁴ Deborah Loh, 'Interviews with Our Editors: In Conversation with Vu Anh Duong, Secretary General of the Vietnam International Arbitration Centre', *Kluwer Arbitration Blog* (Blog Post, 17 August 2023) <https://arbitrationblog.kluwerarbitration.com/2023/08/17/interviews-with-our-editors> ('Secretary Interview'); Model Law (n 5) annex I arts 7–8.

³⁵ CPC (n 6); Decree No 63/2011/ND-CP Guiding the Law on Commercial Arbitration (Vietnam) ('Decree 2011'); Resolution No 01/2014/NQ-HDTP Guiding the Implementation of Certain Provisions of the Law on Commercial Arbitration (Vietnam) ('Resolution 2014'); Civil Code No 91/2015/QH13 (Vietnam) (24 November 2015) ('Civil Code').

³⁶ Permanent Court of Arbitration, 'Permanent Court of Arbitration Officially Opens Office in Ha Noi' (Web Page, 1 December 2022) <https://pca-cpa.org/en/news/permanent-court-of-arbitration-officially-opens-office-in-ha-noi/>.

³⁷ CPC (n 6) art 424(3); LCA (n 6) arts 3(11)–(12), 5(1); See also, Judicial Manual (n 6) 22–23, 30; CPC (n 6) art 427(2).

³⁸ CPC (n 6) art 2(3); see generally LCA (n 6), mirroring Convention (n 6) art II(3); Model Law (n 6) annex I art 8(1); see generally Judicial Manual (n 6) 26, 41–2; Neil Andrews, 'The Landscape of International Commercial Arbitration' in *Arbitration and Contract Law* (Springer International Publishing, Cham) 8–9 ('Andrews'); Model Law (n 6) annex I arts 7–8; CPC (n 6) art 424(3); LCA (n 6) arts 3(11)–(12); see also Judicial Manual (n 6) 22–3, 30; LM Given, 'Constructivism' in LM Given (ed), *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications, Inc, 2008) 116–20 <https://doi.org/10.4135/9781412963909> ('Given'); Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 94 n 42; Stephen A Smith, 'Comparative Legal Scholarship as Ordinary Legal Scholarship' (2010) 5(2) *Journal of Comparative Law* 331.

³⁹ CPC (n 6) art 424(1)(a).

⁴⁰ LCA (n 6) arts 5(1), 6; see generally LCA (n 6), mirroring Convention (n 6) art II(3); Model Law (n 6) annex I art 8(1).

⁴¹ See generally Judicial Manual (n 6) 26, 41–2; Neil Andrews, 'The Landscape of International Commercial Arbitration' in *Arbitration and Contract Law* (Springer International Publishing, Cham) 8–9 ('Andrews'); Model Law (n 6) annex I arts 7–8.

⁴² CPC (n 6) art 424(3); LCA (n 6) arts 3(11)–(12); See also, Judicial Manual (n 6) 22–23, 30.

the *CPC* provides the typical court intervention found within articles 5-6 of the *Model Law*,⁴³ including the recognition and enforcement of an arbitral award⁴⁴. Article 459 of the *CPC* embodies the spirit of the public policy exception of Article V of the *Convention* and its *Model Law* equivalent, although it is phrased as being ‘contrary to the basic principles of law of the Socialist Republic of Vietnam’.⁴⁵ This *domestic-style phrasing* lacks a definition under the *CPC* and *LCA*, and deviates from best practice drafting, foreshadowing its generous application in Vietnam.⁴⁶

Concerning arbitrability of immovable property, the newly issued 2024 *Law on Land* No 31/2024/QH15 clarifies that commercial disputes relating to land may be resolved by arbitration or court for domestically seated cases involving land-adjacent commercial contracts.⁴⁷ However, these reforms do not alter state ownership and the ability of foreign award creditors to enforce awards against land use rights held by a Vietnamese award debtor, leaving non-arbitrability barriers unimpeded.⁴⁸ The *CPC* further provides that courts are not permitted to conduct a merits review of applications.⁴⁹ This aligns with the presumption of validity under Article III of the *Convention*, where an ‘enforcing authority to reconsider the merits of a dispute’ is not permitted, and which is ‘unanimously confirmed’ globally in case law and commentary.⁵⁰

⁴³ See generally *Model Law* (n 6) arts 5–6; *LCA* (n 6) arts 11(3), 11(4), 13(3), 14, 16(3), 34(2), 42, 44, 62; *CPC* (n 6) arts 414(1), (4), (7), 425, 451(1), 459.

⁴⁴ *LCA* (n 6) arts 42, 44, 62; *CPC* (n 6) arts 414(1), (4), (7), 425, 451(1), 459.

⁴⁵ *Judicial Manual* (n 6) 95, 203; *Convention* (n 6) Art V(2)(b); *Model Law* (n 6) Article 34(2)(b)(ii); *CPC* (n 6) Article 459(2)(b).

⁴⁶ Nguyen Manh Dzong and Nguyen Thi Thu Trang, DZUNGSRT & ASSOCIATES LLC, ‘Memorandum to Pascal Hollander Regarding IBA Sub-Committee on Recognition and Enforcement of Countries Report on the Public Policy Exception in New York’ (Memorandum, Hanoi, 15 March 2016) 3, 5 (‘Dzung 2016’).

⁴⁷ *Law on Land* No 31/2024/QH15 (Vietnam), arts 12, 13, 236(5) (‘Land Law 2024’).

⁴⁸ *Land Law* 2024 (n 47) art 12.

⁴⁹ *CPC* (n 6) art 458(4).

⁵⁰ Sébastien Fries et al, ‘Grounds to Refuse Enforcement’, *Global Arbitration Review* (Web Page, 16 June 2025) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/4th-edition/article/grounds-refuse-enforcement#footnote-049>; UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (United Nations, 2016) 126 [9], 173 [3] (‘NYC Commentary’) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf.

As to specific procedures for applications for enforcement of foreign arbitral awards, a creditor has three years from when the award takes legal effect to seek recognition of a foreign award. The application is submitted, post-2025 reforms, through the Regional Courts, unless a treaty diverts filing to the Ministry of Justice.⁵¹ The application should include standard documents such as the award and the arbitration agreement, being translated and notarised as appropriate.⁵² After acceptance, the court notifies the debtor and assesses the case against Article 459 of the *CPC*, being broadly equivalent to article V of the *Convention*.⁵³ Where recognition is granted, execution proceeds through the civil judgement enforcement system under the *Law on Enforcement of Civil Judgments* 2008 (*LECJ*) empowered through art 427 of the *CPC*.⁵⁴ Vietnam's enforcement regime will face fresh tests as the regional courts now hear the foreign applications. How they deal with 'fundamental principles' objections whilst resisting revisiting cases on the merits will be closely watched by observers as well as the proposed long-awaited enhancements to the *LCA*.⁵⁵ This is viewed against the backdrop of the Vietnam International Arbitration Centre (*VIAC*) which administered 424 cases in 2023 up from 6 settled in 1993 with disputes involving foreign investments accounting for 73, and 53 cases involved foreign related elements (18.63%).⁵⁶

The 2025 restructuring is in its infancy, and the effects on foreign arbitral award enforcement are unclear. It is possible that the Regional Courts, may lack the experience required to deal with enforcement applications on a consistent basis. Another perspective is that because applications will now be concentrated in Hanoi, Ho Chi Minh

⁵¹ *CPC* (n 6) art 451(1).

⁵² *CPC* (n 6) arts 452–453; Judicial Manual (n 6) § 4.2.

⁵³ *CPC* (n 6) arts 455–6, 458(4)–(5), 459; IBA Arbitration Committee, *Arbitration Guide: Vietnam* (October 2024) 19–21; *Global Arbitration Review*, 'Vietnam' in *The Guide to Challenging and Enforcing Arbitration Awards* (4th ed).

⁵⁴ *CPC* (n 6) art 427(2); *LECJ* (n 33).

⁵⁵ National Assembly Standing Committee (Vietnam), Plan No 81/KH-UBTVQH15 on Implementation of the Political Bureau's Conclusion No 19-KL/TW and the Scheme on Orientations for the Legislative Program of the 15th National Assembly Tenure, 5 November 2021; Nishimura & Asahi, 'Year in Review: International Arbitration in Vietnam', *Lexology* (Web Page, 6 June 2025) <https://www.lexology.com/library/detail.aspx?q=89495ce6-205d-48bd-9f06-121abf6c5e62>.

⁵⁶ Vietnam International Arbitration Centre, 'Statistics on Dispute Resolution Activities in 2023' (Web Page) <https://www.viac.vn/en/statistics/statistics-on-dispute-resolution-activities-in-2023-s43.html>.

City and Da Nang, this may create a more concentrated judiciary capable of resolving applications with greater efficiency. The clear risk identified in this paper, is that patterns involving expansive public policy exemptions, procedural formalism and others, may be reproduced and exacerbated in the Regional Courts.

The 2025 restructuring will likely be a significant stress test for the newly established Regional Courts. One argument that is consistent with the intent of the reorganisation, is that the concentration of the judiciary and the reduction in the number of courts may improve specialisation and administrative efficiency. On the other hand, such changes may create an additional barrier which award creditors are now required to overcome. In addition to considering the historical perspective and analysis of the identified gaps below, consideration is provided concerning the potential forward looking impact of the Regional Courts.

Enforcement Trends

This Part moves the analysis from legal architecture to enforcement practice. Unlike jurisdictions such as Hong Kong, Australia, Singapore and the United States, for example, where enforcement decisions are more transparent and published decisions are accessible and capable of empirical review, Vietnam's published record is an evolving process and remains incomplete and periodically inaccessible. Notable efforts towards greater transparency have been undertaken; however, there remains a noticeable gap between the use of enforcement statistics in commentary and the limitations of the public data and reported decisions on which those statistics often depend. This Part identifies the limits of the available evidence, and the laws governing and, in many circumstances, restricting publication in sensitive areas. This runs in parallel with the article's general observation that domestic protectionism may influence both enforcement transparency and practice. Indicative trends within Vietnam are explored against regional jurisdictions that provide clearer public records.

A. Lack of Reported Judgements

Historically, most court decisions in Vietnam have gone, and remain unreported, creating substantial obstacles in assessing arbitral award enforcement patterns. Locating any cases, even those that have attracted significant attention continues to present challenges. The primary public platform for searching publicised court decisions is the Supreme People's Court portal.⁵⁷ This *SPC* portal, however, operates exclusively in Vietnamese and requires language proficiency for effective querying. Vietnamese diacritics are required for search queries and searching by non-Vietnamese speakers is often impracticable. Judgements generally only appear written in Vietnamese. On 25 September 2020 the Ministry of Justice released an online spreadsheet listing some foreign-award enforcement decisions from 1 January 2012 to 30 September 2019 (*MOJ Spreadsheet*). The *MOJ Spreadsheet* also requires Vietnamese language skills and does not provide access or links to the published judgements, making its utility very limited; despite being frequently cited, in referring to decisions.⁵⁸

⁵⁷ Supreme People's Court, 'Công bố bản án, quyết định của Tòa án' (Web Page) <https://congboaban.toaan.gov.vn/>; Supreme People's Court, 'Cổng thông tin điện tử' (Homepage) <https://toaan.gov.vn/>; SB Law, 'The Electronic Information Portal of the Supreme People's Court – A Resource Channel Fulfilling the Public's Demand for Accessing to Judicial Activities' (Web Page, 6 January 2025) <https://sblaw.vn/the-electronic-information-portal-of-the-supreme-peoples-court-a-resource-channel-fulfilling-the-publics-demand-for-accessing-to-judicial-activities/>. The author accessed the Supreme People's Court portal and judgment search facility periodically between 2023 and 2025; at the time of final revision, public access to the relevant search functionality appeared unavailable.

⁵⁸ Ministry of Justice (Vietnam), 'CSDL CÔNG NHẬN VÀ CHO THI HÀNH BẢN ÁN, QUYẾT ĐỊNH CỦA TÒA ÁN NƯỚC NGOÀI, PHÁN QUYẾT CỦA TRỌNG TÀI NƯỚC NGOÀI' [Database on Recognition and Enforcement of Foreign Court Judgments, Decisions and Foreign Arbitral Awards] (Spreadsheet, 25 September 2020) (copy on file with author; originally available at <https://moj.gov.vn/http/Pages/dlcn-va-th-tai-Viet-Nam.aspx>, accessed 21 May 2024). The dataset records applications between 1 January 2012 and 30 September 2019. The author translated and coded the 30 non-recognition decisions by primary refusal ground. The categories are mutually exclusive for presentation purposes, notwithstanding overlap in some recorded reasons. Case numbers refer to the numbered entries in the *MOJ Spreadsheet*: notice / fair hearing, cases 9, 10, 13, 38, 39, 40, 41, 42, 43, 46, 64 and 75; arbitration agreement / authority, cases 2, 3, 8, 16, 18, 19, 36, 74, 77, 78, 79 and 80; tribunal procedure / scope, cases 11, 22 and 37; public policy / basic principles, cases 17 and 76; non-arbitrability / immovable property, case 31 ('*MOJ Spreadsheet*'); see also Nishimura & Asahi, 'Vietnam: Statistics on Enforcement of Foreign Court Judgements and Decisions and Arbitral Awards in Vietnam' (*N&A Newsletters*, 8 November 2021) <https://www.nishimura.com/en/knowledge/newsletters/20211108-34746>.

The *MOJ Spreadsheet* contains 83 applications for the recognition and enforcement of foreign arbitral awards.⁵⁹ The below table provides an overview of the dataset derived from the *MOJ Spreadsheet* which covers the period from 2012 to 2019.

Table 1. MOJ foreign arbitral award applications, 2012–2019

Outcome	Count	Percentage of 83 applications
Recognised / enforced	41	49.40%
Not recognised	30	36.14%
Suspended / not finally determined	12	14.46%
Total	83	100%

The lack of access to reported judgements however prompts the question concerning the nature of enforcement patterns within Vietnam.⁶⁰ Therefore, it is not possible to ascertain the total number of award applications that have been made, or are in progress, nor the precise statistics of successful enforcement. Statistics and datasets should therefore be treated with caution and regarded as indicative, rather than substantive empirical evidence of enforcement statistics.

In 2017, *Resolution No. 03/2017/NQ-HĐTP* began to compel courts to publish court decisions within 30 days of being rendered.⁶¹ This new framework represents a significant shift in transparency and provides a solid platform to build upon. However, broad exceptions to publication, exist, including: cases heard in camera; judgements

⁵⁹ Ibid

⁶⁰ Thu Luong Le and Elena Block, 'When Communist Propaganda Meets Western Public Relations: Examining Vietnam's Government Pandemic Communication' (2024) 13(1) *Public Relations Inquiry* 33.

⁶¹ Resolution No 03/2017/NQ-HĐTP of the Council of Judges of the Supreme People's Court (Vietnam) on Publication of Judgments and Decisions on the Electronic Information Portal of the Courts, 16 March 2017, art 6 ('Resolution 03/2017').

containing state secrets, business or trade secrets; cases that 'adversely affect cultural traditions, good customs and practices'; cases containing commercially sensitive information; and judgements that are currently the subject of appeal, all of which shall not be published.⁶² Read in totality, the powers of non-publication under *Resolution 03/2017* are broad, such that non-publication may become the norm, not the exception. It is therefore unsurprising that, when cases are discussed in secondary sources, locating the published court decision, remains elusive and challenging, even for well-known cases.⁶³ Where access to award publications, statistics, and transparency is generally low, it could be argued that the perception and confidence of an arbitral system is negatively impacted.

The 2025 transfer of enforcement applications to the Regional Courts could affect transparency and the publication of decisions required under *Resolution 03/2017*, such that consistency and volume may be materially impacted. Of particular note, regular access to the SPC portal as well as the MOJ Spreadsheet, whilst available in the lead-up to 2025, now appear seemingly inaccessible in 2026, within the year succeeding the reforms. In such circumstances, transparency has seemingly regressed, which may suggest that the immediate short-term and medium-term projections are similarly opaque. *Resolution 03/2017*, whilst novel and a much-needed welcome addition, likely requires a further resolution or circular to operationalise auditing and reporting of statistics. Such enhancement of *Resolution 03/2017* could fill the presently identified gap, which would require Regional Courts to improve auditability and traceability in the post-reform period. Where publication is not allowed under *Resolution 03/2017* the

⁶² *Resolution 03/2017/NQ-HDTP* (n 61) Art 3-4.

⁶³ Frasers Law Company, *Recognition and Enforcement of Foreign Arbitral Awards in Vietnam: A Case Analysis of Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company* (December 2023) 9–11; Tri Duc, 'Court Orders Vietnam's Rang Dong Holding to Pay \$6.4 mln to Japan's Sojitz Pla-Net', *The Investor* (Web Page, 27 September 2023) <https://theinvestor.vn/court-orders-vietnams-rang-dong-holding-to-pay-64-mln-to-japans-sojitz-pla-net-d6776.html>; see generally Nishimura & Asahi, 'Year in Review: International Arbitration in Vietnam', *Lexology* (Web Page, 6 June 2025) <https://www.lexology.com/library/detail.aspx?q=89495ce6-205d-48bd-9f06-121abf6c5e62>

additional requirement of providing a redacted version would go some way towards improving transparency.

B. Global Enforcement Trends Compared to Vietnam

Generally, a strong correlation exists between seat attractiveness and efficient, neutral, and reliable enforcement mechanisms, as well as a publicly accessible track record in accepting applications to recognise and enforce arbitral awards.⁶⁴ Global studies confirm that the rate of successful award enforcement is approximately 78%.⁶⁵ Reporting on voluntary compliance globally of arbitral enforcement is approximately 74%.⁶⁶ In contrast, earlier indications in Vietnam suggest that the enforcement rate prior to 2001 was zero.⁶⁷ In 2002, there were eight applications, with three being successful (37%).⁶⁸ Over the succeeding 20 years, that rate of enforcement appeared to steadily climb to approximately 50%.⁶⁹ However, frequently cited enforcement rates and percentages are done so without a primary empirical basis. This contrasts with studies where a forensic analysis of the complete number of cases is examined. Without transparency, a true enforcement rate cannot be established. However, very little 'empirical research of

⁶⁴ Queen Mary University of London, School of International Arbitration and White & Case LLP, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Report, 2021); Queen Mary University of London and White & Case LLP, *2025 International Arbitration Survey: The Path Forward* (Report, 1 June 2025) ('Queen Mary Reports')

⁶⁵ Roger P Alford et al, 'Empirical Analysis of National Courts' Vacatur and Enforcement of International Commercial Arbitration Awards' (2022) 39(3) *Journal of International Arbitration* 299–330 ('Alford'); see generally Kluwer Arbitration Blog, 'Empirical Analysis of National Courts' Vacatur and Enforcement of International Commercial Arbitration Awards' (Blog Post, 13 June 2022) <http://arbitrationblog.kluwerarbitration.com/2022/06/13/empirical-analysis-of-national-court-judgements-in-commercial-arbitration-what-do-the-data-tell-us/>; Ibid, Queen Mary Reports.

⁶⁶ Alford (n 65).

⁶⁷ Nguyen Gia Thien Le, *The Recognition and Enforcement of Foreign Arbitral Awards in Vietnam* (Doctoral Dissertation, Universität Osnabrück, 2019) 72 ('Nguyen Thesis'), citing Truong Van Toan and Sesto E Vecchi, 'Enforcing a Foreign Arbitral Award in Vietnam' (2001) 29(7) *International Business Lawyer* 321.

⁶⁸ Nguyen Thesis (n 67), citing Dao Van Hoa, *Hoàn thiện pháp luật giải quyết tranh chấp kinh tế ở nước ta* (National Political Publisher, 2004) 152.

⁶⁹ Nguyen Manh Dzung and Nguyen Thi Thu Trang, 'Summary of 20 Years of Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award', *Global Arbitration Review* (2019), citing Conference on 'Summary of 20 Years of Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award', Ministry of Justice, Hanoi, 21 November 2014.

national court recognition, enforcement and setting aside of international commercial arbitration awards' has been undertaken globally.⁷⁰

By contrast, within the United States, a study of 960 petitions filed in federal courts between 2011 and 2019 to enforce or vacate international awards, 96.7% of all petitions were resolved in favour of the applicant; and are all publicly available.⁷¹ The *MOJ Spreadsheet* (2012–2019) records 83 applications to recognise and enforce foreign arbitral awards and judgements, with 49% (41/83) being accepted.⁷² More recent commentary claims a rise to 62% for 2019–2023, but provides no primary data to support such position.⁷³ There also appears to be a tendency for award creditors to opt for domestic court options instead of arbitration enforcement, including bankruptcy, or to avoid arbitration entirely. Thus, the generally accepted and reported 50% figure is perhaps indicative of a small portion of a given sample.⁷⁴ The figures above underscore the need for greater transparency reforms such as China's Supreme People's Court reporting model, explored below.⁷⁵

⁷⁰ Alford (n 65) 299–330

⁷¹ Christopher R Drahozal et al, 'Challenging and Enforcing International Arbitral Awards in U.S. Federal Courts: An Empirical Study' (2024) 65 *Virginia Journal of International Law* 1.

⁷² Nishimura & Asahi, 'Vietnam: Statistics on Enforcement of Foreign Court Judgements and Decisions and Arbitral Awards in Vietnam' (*N&A Newsletters*, 8 November 2021) <https://www.nishimura.com/en/knowledge/newsletters/20211108-34746>; Ministry of Justice (Vietnam), 'CSDL CÔNG NHẬN VÀ CHO THI HÀNH BẢN ÁN, QUYẾT ĐỊNH CỦA TÒA ÁN NƯỚC NGOÀI, PHÂN QUYẾT CỦA TRỌNG TÀI NƯỚC NGOÀI' (Web Page) <https://moj.gov.vn/http/Pages/dlcn-va-th-tai-Viet-Nam.aspx>.

⁷³ Nguyen Thi Thu Trang and Nguyen Quang Thai, 'Key Challenges to Dispute Resolution in Vietnam' (Web Page, *Asia Business Law Journal*, 2 April 2025).

⁷⁴ Conversations with leading arbitrators and international counsel with expert experience in arbitrations across Asia-Pacific, at the Ho Chi Minh International Construction Conference, April 2024, without reference to this project; personal experience working in the arbitration field within Vietnam during 2023–2024; Isamu Imaizumi, Vu Le Bang and Nguyen Van Trang, 'Vietnam: Refusal to Enforce a Foreign Arbitral Award on the Ground of Violation of Fundamental Principles of the Laws of Vietnam' (Newsletter, Nishimura & Asahi, 12 July 2022); see also Vu Thi Thuy Duong, 'Enforcement of Foreign Arbitral Awards in Vietnam' (Lexology, 5 July 2024) (estimating two-thirds recognition as of 2020, but underscoring inconsistencies).

⁷⁵ Supreme People's Court (PRC), 'Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration' (Fafa [1995] No 18, promulgated 20 August 1995, effective 28 August 1995, revised 31 December 2008) <https://cicc.court.gov.cn/html/1/219/199/411/701.html> ('SPC Reporting System'); Supreme People's Court (PRC), 'Provisions of the Supreme People's Court on Several Issues concerning Deciding Cases of Arbitration-Related Judicial Review' (adopted at the 1,728th meeting of the Judicial Committee, 4 December 2017, issued 26 December 2017, commenced 1 January 2018) <https://cicc.court.gov.cn/html/1/219/199/201/782.html>.

Earlier research in China provides that even where the enforcement rate is higher, (around 70%) only about 40 - 50% of the award value was recoverable. At that time the perception was similar to Vietnam concerning the lack of reported judgements, where some authors postulated the enforcement rate to be as low as 25%.⁷⁶ More recent studies on empirical data indicate a 91% recognition rate for 2012–2022,⁷⁷ which has steadily risen over the last 30 years. The point should not be lost, that Vietnam's neighbours have been faced with similar issues concerning enforcement, and put in place processes to resolve this. Persistent recovery gaps remain, in part driven by issues such as asset transfers and debtor insolvency.⁷⁸ In Hong Kong, from 2009 to 2021, of the 426 applications made, 97% were successful.⁷⁹

Against the benchmarks of pro-enforcement neighbours, Vietnam deviates materially. A correlation can be drawn where states which have transparent open-access judgement portals, exhibit higher enforcement rates and are typically ranked as the preferred seats.⁸⁰

Divergences from Best Practices and Pathways to Alignment

⁷⁶ Peerenboom (n 3) 284–5; Tannock (n 3) 77–88.

⁷⁷ Sam (Ronghui) Li et al, 'Recognition and Enforcement of Foreign Arbitral Awards in China Between 2012–2022: Review and Remarks (Part I)', *Kluwer Arbitration Blog* (Blog Post, 12 September 2023) <https://arbitrationblog.kluwerarbitration.com/2023/09/12/recognition-and-enforcement-of-foreign-arbitral-awards-in-china-between-2012-2022-review-and-remarks-part-i/>.

⁷⁸ Chang Wang, *The Impact of Chinese Arbitration Law and Services on International Arbitration Law and Practice* (PhD Thesis, University of Exeter, 2021); Tannock (n 3) 88 n 72, citing Peerenboom (n 3).

⁷⁹ Hong Kong International Arbitration Centre, 'Enforcement of Awards in Hong Kong: 2021' (Web Page) <https://www.hkiac.org/about-us/statistics/enforcement-awards/enforcement-awards-hong-kong-2021>.

⁸⁰ Christopher R Drahozal and Donald Earl Childress III, 'Do National Courts Really Give Effect to 90% of All International Arbitral Awards?', *Kluwer Arbitration Blog* (Blog Post, 26 May 2024); See generally the top seats globally which have publicly available reporting portals, such as the United States, Singapore, Hong Kong, United Kingdom, Queen Mary Reports (n 64).

This Part distils the article's central thesis by analysing the principal themes and divergences within Vietnam from international best practice. Such divergences do not arise from an absence of Convention-style pro-arbitration laws, of the kind adopted by regional neighbours such as China and Singapore, but from the process by which Vietnamese courts apply the Article V refusal grounds at the recognition and enforcement phase, with broad discretion. Four key themes emerge: the broad application of public-policy exceptions, the functional non-arbitrability of immovable assets, procedural formalism and the application of merits-style review. These thematic patterns, documented over a long period of time, materially affect enforceability by allowing domestic legal interests to shield against, or displace, the Convention's narrow refusal framework, possibly manifesting as a form of domestic protectionism. In concluding, this analysis considers whether successful regional models, such as China's mandatory court-reporting mechanism, which has been associated with increased efficiency and reduced refusal rates, could be adopted in Vietnam, together with other practical reform considerations.

A. Public Policy: Overreach and Clarification Pathways

The public policy provisions in Vietnam are crafted with reference to Article V(2)(b) of the *Convention* and the corresponding *Model Law* provisions, which together provide that award enforcement may be refused where it is contrary to or in conflict with the 'law or public policy',⁸¹ of the State where 'it is sought to be relied upon'.⁸² The architecture within the *CPC* and *LCA* broadly reflects this general concept, except, as will be illustrated, the concept is not defined, and the utilisation is broad. The international standard deliberately sets the bar extremely high to trigger the public policy provision,

⁸¹ Born 2021 (n 13) n 984; Model Law (n 6) arts 34(2)(b)(ii), 36(1)(b)(ii).

⁸² Guide to the NYC (n 17) citing Convention on the Execution of Foreign Arbitral Awards, opened for signature 26 September 1927, 92 LNTS 301 (entered into force 25 July 1929) art 1(e).

which is intended to be ‘construed narrowly’⁸³ and used as a final ‘safety valve to be applied in exceptional circumstances’, where enforcement of the award would result in ‘abandoning the very fundamentals on which it is based’.⁸⁴ Comparative international doctrine frames this policy as a ‘narrow category of non-waivable’ norms where a breach amounts to a degree of ‘repugnancy’,⁸⁵ which is ‘fundamental to the legal or social order of a jurisdiction’,⁸⁶ and ‘should be approached with extreme caution’.⁸⁷ To violate public policy, the repugnancy must be ‘shown clearly’ for ‘an award to not be enforced’;⁸⁸ and further, ‘only where enforcement would violate the forum state’s most basic notions of morality and justice’.⁸⁹

Earlier attempts to define public policy in Vietnam are found within article 68(2)(e) of the *LCA*, and later within article 14(dd) of *Resolution No 01/2014/NQ-HĐTP*, which was designed to bring clarity to article 68(2)(e).⁹⁰ Article 370(2)(b) of the now superseded 2004 *CPC*, and the current version, in article 459(2)(b), provide, despite some wording differences, that recognition may be refused if a breach runs ‘counter to’ or is ‘contrary to the basic principles of law’. Basic principles of law may refer to laws found in the *Civil Code and Commercial Law of Vietnam (Civil Code)*, including such areas as national defence, social order, ethics, or public health, but remain very much undefined.⁹¹ The *Civil Code* further provides, that a foreign law may also be deemed non-applicable where it is inconsistent in application with Vietnamese laws, or where it is not identifiable.⁹² The

⁸³ Judicial Manual (n 6) 94, 201; See generally Model Law (n 5) art 36.

⁸⁴ Guide to the NYC (n 17) 240 [4].

⁸⁵ Born 2021 (n 13) n 993.

⁸⁶ Born 2021 (n 13) 3603.

⁸⁷ Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (1st ed, Routledge, 2017) ch 2, John K Arthur, ‘Setting Aside or Non-Enforcement of Arbitral Awards in International Arbitration on the Public Policy Ground – A Regional Perspective’ 22–3 [2.2], citing *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co* [1987] 2 All ER 769, 779.

⁸⁸ Born 2021 (n 13) n 994.

⁸⁹ Guide to the NYC (n 17) 240, 5, citing *Parsons & Whittemore Overseas Co Inc v Société Générale de L’Industrie du Papier (RAKTA)*, 508 F 2d 969 (2nd Cir, 1974).

⁹⁰ Civil Code (n 35); see also CPC (n 6) art 439(8) on the refusal of foreign judgments and decisions of foreign courts on public policy grounds, in addition to arbitral awards; Judicial Manual (n 5) 108–9, 225; LCA (n 5); Resolution 2014 (n 34) art 1.

⁹¹ Civil Code (n 35) arts 2(2), 4.

⁹² Civil Code (n 35) art 670; see also Tra Nguyen, ‘Determination of Laws Applicable to Civil Relations Involving Foreign

risk of blurring the lines between an ordinary conflict-of-law issue versus a legitimate public-policy issue is obvious in Vietnam's case considering the seemingly broad exceptions. When examining case law and commentary, it becomes apparent that the public policy provision is often invoked alongside other judicial reasoning, and in some circumstances, separately resembles merits-style review.⁹³

There is no definitive meaning of 'fundamental principles of Vietnamese laws'.⁹⁴ Practitioners have labelled the ambiguity absurd and fundamentally flawed, further noting that parties may seek to abuse and weaponize the process by firstly settling the arbitration, only to then challenge the enforcement of the award in court, abusing the principles of good faith.⁹⁵ Rather than being a final safety valve to be used with extreme caution, prominent authors cite this provision as one of the 'most commonly' used reasons for 'refusing to recognise a foreign arbitration award.'

In pro-arbitration jurisdictions, this tactic would likely face an estoppel defence, and indemnity costs orders for abuse of process.⁹⁶ Early cases regarding public policy grounds include *Energio Novus, Moscow v Vinatex (Energio)*.⁹⁷ Commentary provides that *Vinatex* submitted that the representative for *Energio* was in violation of the fundamental principles of Vietnamese law because they lacked capacity, were not authorised to enter any contract, and raised procedural issues regarding the adducing

Elements under the 2015 Civil Code', *Vietnam Law and Legal Forum* (Web Page, 13 January 2017) <https://vietnamlawmagazine.vn/determination-of-laws-applicable-to-civil-relations-involving-foreign-elements-under-the-2015-civil-code-5697.html>.

⁹³ Nadia Dridi, 'The Enforcement of Foreign Arbitration Awards in Vietnam: Overview and Criticisms', *Harvard International Law Journal* (Online, 8 December 2017) <https://journals.law.harvard.edu/ilj/2017/12/the-enforcement-of-foreign-arbitration-awards-in-vietnam-overview-and-criticisms/> ('Dridi'), citing Fred Burke, *Report from Investment and Trade Working Group* (Vietnam Business Forum, 2015) 1.

⁹⁴ Nguyen Manh Dzong and Nguyen Thi Thu Trang, DZUNGSRT & ASSOCIATES LLC, 'Memorandum to Pascal Hollander Regarding IBA Sub-Committee on Recognition and Enforcement of Countries Report on the Public Policy Exception in New York' (Memorandum, Hanoi, 15 March 2016) 3, 5 ('Dzung Memorandum 2016').

⁹⁵ Minh Nguyen, 'Ambiguous Rules Dent Foreign Arbitration Process', *Vietnam Investment Review* (Online, 19 July 2023) <https://vir.com.vn/ambiguous-rules-dent-foreign-arbitration-process-103637.html> ('Minh').

⁹⁶ See generally on estoppel, Richard Garnett, 'Estoppel and Enforcement of International Arbitration Awards' (2021) 95 *Australian Law Journal* 337.

⁹⁷ *Energio-Novus, Moscow v Vinatex* (Judgment No 02/ST, First Instance Court of Hanoi City, 18 November 1997); *Energio-Novus, Moscow v Vinatex* (Judgment No 59/KTPT, Appellate Court in Hanoi City, 4 June 1998).

of notarised, instead of original documents at hearing from the Russian arbitral tribunal. These issues point to procedural questions, not public policy issues. The first notable case to be documented on public policy which promoted debate was *Tyco Services Singapore Pte Ltd. v. Leighton Contractors (Vietnam) Ltd (Leighton)*. A 2002 decision by the Economic Court of Ho Chi Minh City to enforce an Australian award was subsequently overturned on appeal in 2003. The commentary indicates that the finding in *Leighton* provided that the construction project's lack of permit was a technical breach of Vietnamese tax law, despite being a very well-understood concept at an international level.⁹⁸ The court's reasons, provided in commentary, were that there was no commercial relationship between the parties, and thus a misapplication by the court seemingly treating public policy in a manner which extended to issues of procedural and substantive law.⁹⁹ Of note, the courts in *Leighton*, as well as *Energco* did not explain which public policy principle had been violated.¹⁰⁰

Early public policy decisions such as *Leighton* were seen as a lingering risk where Vietnamese courts were taking an 'expansive approach', to the public policy exemption and in some circumstances appear to also engage in a merits-styled review, being a separate error, rather than what Article V(2)(b) of the *Convention* was intended, namely, to be a narrowly restricted path.¹⁰¹ Several other earlier cases in 2007 were documented to some extent but were met with 'mixed success'.¹⁰² In *Toepfer v. Sao Mai*,¹⁰³ commentary suggests that enforcement was denied because the damages awarded to

⁹⁸ Guide to the NYC (n 17) 33–4, 85, citing Michael Pryles, 'Reservations Available to Member States: The Reciprocal and Commercial Reservations' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008) 161, 178–9.

⁹⁹ Elena Blanco, Tran Anh Dung and Umut Turksen, 'Evolving to Perfection? Enforcement of International Arbitral Awards in Vietnam' (2010) 11(6) *Journal of World Investment & Trade* 965 ('Blanco').

¹⁰⁰ *Ibid* 1004; Dzung Memorandum 2016 (n 94) 9, 11.2.

¹⁰¹ A Henderson, 'Enforcement of Arbitral Awards in Indochina—Law, Practice, and Alternatives' (2009) 26(6) *Journal of International Arbitration* 841, 852 ('Henderson'); See also Blanco (n 99).

¹⁰² Henderson (n 101) 853; Richard Garnett and Kien Cuong Nguyen, 'Enforcement of Arbitration Awards in Vietnam' (2006) 2(2) *Asian International Arbitration Journal* 137, 143.

¹⁰³ Dridi (n 94) n 19 citing *Toepfer v Sao Mai* (Decision of the Appellate Court of the Supreme People's Court in Vietnam in Hanoi, 2011).

Toepfer were not actual and direct, and, *Toepfer* had failed to mitigate losses.¹⁰⁴ In *Sudico v. STT* practitioner commentary provides that a decision to not enforce the award was in part related to the reliance of the tribunal on an expert opinion by a consultant, which the court held violated principles of protecting the freedom of agreement in commercial activities.¹⁰⁵ In both cases, neither decision addressed the international standards of public policy.

More recently, in *Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company* (*Sojitz*),¹⁰⁶ involved a dispute regarding a contractual breach of a share sale and purchase agreement (SPA). At first instance, practitioner commentary indicates that the SIAC arbitral award was denied for violations of the principle of freedom to contract for failing to apply the Commercial Law of Vietnam in making determinations regarding the SPA. Similarly, for applying the law of the seat of Singapore, and denying the respondent's counterclaim, it was held to be inconsistent with the principle of rights to claim. On Appeal, however more positively, in a reported judgement, the court held that the first instance court had no jurisdiction to revisit the merits of the award as provided in Article 458(4) of the *CPC*, and that the tribunal had correctly reasoned that Articles 3(2) and 4(4) of the *CPC* requires that Vietnamese courts shall apply the international treaties to the extent of any inconsistencies.¹⁰⁷ Commentary suggesting that *Sojitz* marks a new era of Vietnamese court's refusal to revisit the merits of disputes,¹⁰⁸ is perhaps premature. Counsel for the applicant noted that courts should resist revisiting the merits

¹⁰⁴ Dzung 2016 (n 46); Dzung Memorandum 2016 (n 94) 8-9, 11.1.

¹⁰⁵ See generally Dzung 2016 (n 46); Dzung Memorandum 2016 (n 94) 11, 11.4, citing *Sudico (Vietnam) v STT 260 Architects* [2015]; Civil Code (n 35) art 4; Law on Commerce 2005 (Vietnam) art 11.

¹⁰⁶ Frasers Law Company, *Recognition and Enforcement of Foreign Arbitral Awards in Vietnam: A Case Analysis of Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company* (December 2023) 12–13 ('*Sojitz*'); *Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company* (High People's Court in Ho Chi Minh City, Decision No 95/2023/KDTM-PT, 24 August 2023), recognising and enforcing SIAC Arbitral Award No 090 of 2022 and amending *Sojitz Pla-Net Corporation v Rang Dong Holding Joint Stock Company* (People's Court of Ho Chi Minh City, Decision No 42/2023/KDTM-ST, 10 January 2023).

¹⁰⁷ *Ibid.*

¹⁰⁸ EP Legal, 'Vietnamese High Court Makes It Crystal Clear That International Arbitral Proceedings Don't Follow the Civil Procedural Code' (Web Page, 30 September 2023) <https://eplegal.com/vietnamse-high-court-makes-it-crystal-clear-that-international-arbitral-proceedings-dont-follow-the-civil-procedural-code/>, citing Decision No 95/2023/KDTM-PT (High People's Court in Ho Chi Minh City, Vietnam, 24 August 2023).

of foreign awards and apply Articles III and V of the *Convention*, as they were designed.¹⁰⁹

Vietnam's pro-arbitration neighbours, Hong Kong, Australia and Singapore have adopted the *Model Law* into their respective arbitration laws, except for mainland China (*PRC*).¹¹⁰ The *PRC*'s Arbitration Law adopts the phrasing 'contrary to the public interest', being a slight variation of the *Convention* and *Model Law*.¹¹¹ Similar to laws in Vietnam, mainland China also faced inconsistencies concerning the definition of public policy, which is generally understood as 'social public interest'. The consensus view of the definition is understood to be viewed by reference to Article 274(4) of the *Civil Procedure Law (CPL)*, framing public interest specifically within the scope of arbitration.

Similarities with Vietnam end there, however, as China's prior-reporting system establishes a unified regulatory scheme for judicial review, centralising any intended denials of award enforcement.¹¹² Inter-regionally, the mainland–Hong Kong Arrangement's public policy provisions further align the *PRC*'s 'social public interest' with Hong Kong's *Model Law* based interpretation, thereby enhancing further consistency in enforcement alongside the *CPL*.¹¹³ Considering Vietnam's drafting localisations in its

¹⁰⁹ *Ibid.*

¹¹⁰ Arbitration Ordinance (Hong Kong) cap 609 s 4; International Arbitration Act 1994 (Singapore) s 3(1); International Arbitration Act 1974 (Cth) s 16.

¹¹¹ Arbitration Law of the People's Republic of China (2025 rev) arts 71, 76, 83–4; Arbitration Ordinance (Hong Kong) cap 609, ss 81, 89(3)(b); International Arbitration Act 1994 (Singapore) ss 24(b), 31(4)(b); International Arbitration Act 1974 (Cth) ss 8(7)(b), 8(7A), 19.

¹¹² Zhang Xiaohui, *The Public Policy Exception in the Judicial Review of International Commercial Arbitral Awards: Lessons from and for China* (PhD Thesis, City University of Hong Kong, 2014) 90, 367; *Civil Procedure Law of the People's Republic of China* art 274; Supreme People's Court (PRC), 'Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration' (Fafa [1995] No 18, promulgated 20 August 1995, effective 28 August 1995, revised 31 December 2008) <https://cicc.court.gov.cn/html/1/219/199/411/701.html>; Supreme People's Court (PRC), 'Relevant Provisions of the Supreme People's Court on Issues concerning Applications for Verification of Arbitration Cases under Judicial Review' (issued 26 December 2017) <https://cicc.court.gov.cn/html/1/219/199/201/785.html>.

¹¹³ *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*, signed 21 June 1999, effective 1 February 2000, art 7(5).

legislation such as ‘counter to’ or ‘contrary to the basic principles of law’,¹¹⁴ are seemingly intended to have the same effect as the Convention and *Model Law*’s public-policy ground, best practice would ensure uniform alignment, however.

The trend regarding public policy awards, is that Vietnamese courts have often applied an expansive approach, rather than using this provision as a final safety valve and applying it with extreme caution.¹¹⁵ The lack of definition and correct application concerning article 459(2) of the *CPC* is potentially detrimental to the enforcement of arbitral awards within Vietnam, especially so considering the pro-enforcement bias adopted by Vietnam regarding the *Convention*. Two clarifications would reduce tension without undermining autonomy: firstly, a practice note guiding courts on the definition of ‘basic principles’; and secondly, for courts to provide explicit reasoning of the precise causal nexus by which enforcement would violate public policy, or in this case the basic principles of Vietnam.

The public policy defence in Vietnam has been, and remains, a problematic enforcement issue, because of the domestic style interpretation conflicting with the *Convention*’s narrow and restricted pathway for refusing enforcement. Commentary has consistently emphasised that judicial reasoning treats ‘basic principles’ in a manner which is far broader than the *Convention*’s narrow interpretation. What appears to be a heightened risk in the Regional Courts is the lack of a clear definition within the *CPC* and *LCA*. This type of technical distinction is likely to be exacerbated within the Regional Courts. The more balanced and forward-looking view therefore is that until there is sufficient clarification within the legal architecture as to how the public policy defence should be defined, then the inconsistencies will remain within the Regional Courts. Consistent appellate guidance, along with robust practice notes, will go some way toward improving

¹¹⁴ *CPC* (n 6) art 459(2)(b).

¹¹⁵ *Guide to the NYC* (n 17) 240, 4.

the medium-term outlook. However, until such time, award creditors will be faced with a similarly difficult path in resisting a public policy defence in Vietnam within the Regional Courts.

B. Non-Arbitrability and Immovables: Barriers to Execution and Asset Mechanisms

Vietnam's legislation appears to have the mechanisms in place to enforce recognised foreign arbitral awards against property in Vietnam, including both movable and immovable property. In practice, award creditors face obstacles at the recognition phase, as Vietnamese courts invoke the exclusive jurisdiction provision under article 470(1)(a) of the *CPC*, which effectively prevents enforcement against land-use rights associated with the Vietnamese award debtor.

This has the effect of firstly appearing to support the efficiency principles and realisation of funds for award creditors, but in practice, property becomes functionally non-arbitral under Article V(2)(a) of the *Convention*.

1. Regional comparisons: execution against immovables

In pro-arbitration common law jurisdictions, such as Singapore, Hong Kong, and the UK, as a non-Southeast Asian control, provide enforcement mechanisms against immovable property, and is standard practice.¹¹⁶ Typically, once recognition is granted, remedies will take the form of a charging order, and subsequently if required, seizure and sale of property. Accordingly, an arbitral award may be enforced against the landholdings of the award debtor. Interim measures may be initiated without notice on an *ex parte* basis to freeze assets, either as part of the charging order or as a standalone application, where there is asset interference or dissipation risk. Mainland China provides similar statutory

¹¹⁶ Rules of Court 2021 (Singapore) O 22 rr 2(a)–(b), 10C; Civil Procedure Rules 1998 (UK) r 73.1; Rules of the High Court (Hong Kong) O 50 rr 1, 9A.

provisions for property preservation, such as seizure and freezing orders where execution timelines and preservation decisions may be made on an expedited basis. Courts then have the power to dispose of assets, including sale of property to satisfy the award debt.¹¹⁷ In Vietnam, Article 427 and 429 of the *CPC* provide the statutory basis and guarantee to deal with ‘property collected from the enforcement’ to satisfy a foreign arbitral award. Articles 100-101 of the *LECJ* provide for the distraint (seizure) and sale or auction of such property; and Article 2(1)(d) specifically provides that foreign arbitral awards fall within the scope of this instrument. Therefore, at least on paper, Vietnam compares favourably with its pro-arbitration neighbours and has defined statutory mechanisms to seize and sell property to satisfy a foreign arbitral award debt.

2. Vietnam’s land-use rights

Against this backdrop, both China and Vietnam maintain exclusive state authority over immovable property and rights.¹¹⁸ Instead of private ownership, land is administered through state-recognised use rights. In Vietnam, land is owned by the people and managed by the state; as such, landowners rather than holding an indefeasible title, hold a right of use as provided in articles 12-14 of the *Law on Land*. Non-Vietnamese are, however, excluded from this list.¹¹⁹ Despite the remarks above regarding the statutory pathway of asset enforcement, Article 470(1)(a) of the *CPC* further provides that immovable property ‘involving a foreign element’ within Vietnam falls under state jurisdiction.¹²⁰ Practically speaking, this may not immediately preclude enforcement

¹¹⁷ *Civil Procedure Law of the People’s Republic of China* (People’s Republic of China) pt III ch XIX (as amended 27 June 2017).

¹¹⁸ Land Law 2024 (n 47) art 12; *Constitution of the People’s Republic of China* (People’s Republic of China) art 10.

¹¹⁹ Thi My Hanh Nguyen and Hoang Minh Hai Nguyen, ‘Foreign Ownership Restriction to Real Estate in Vietnam’ (2023) 11(4) *International Journal of Science, Technology and Society* 153, 156.

¹²⁰ See generally Loi Pham, ‘Exclusive Jurisdiction of Vietnamese Courts over Disputes Relating to Rights over Real Properties in Vietnam’, *VILAF* (Web Page) <https://www.vilaf.com.vn/blog/exclusive-jurisdiction-of-vietnamese-courts-over-disputes-relating-to-rights-over-real-properties-in-vietnam/> (‘Pham’).

under the *LECJ*, and only judicial interpretation would provide the answer at the recognition phase.

If recovery is not available for immovable property, then this asset class may likely fall under the non-arbitral characteristics contemplated under Article V (2)(a) of the *Convention*.

3. Exclusive jurisdiction in practice – art. 470 *CPC*

Earlier decisions in 2012 cited in practitioner commentary, concerning land-use rights, provide that courts declared arbitration agreements void because the subject matter fell within the exclusive jurisdiction of Vietnam. In 2014, a court declined to set aside an award, again relating to land use rights.¹²¹ A 2016 decision involving the land-use rights for a 2,638 m² land parcel in Vietnam arose after the respondent failed to obtain the requisite licenses to complete the contractual agreement. The applicant brought the matter to *SIAC*, claiming USD 50 million in damages due to a contractual violation in 2012, where favourable awards were obtained in their favour. In Vietnam, recognition and enforcement was rejected by the People's Court at first instance; and subsequently affirmed on appeal by the High People's Court; both courts relied on the exclusive jurisdiction provision in Article 470(1)(a) of the *CPC* as the basis for their decisions.¹²²

Following this trend, in a recently reported case in 2023,¹²³ a Korean applicant was unable to enforce a *SIAC* rendered award concerning breaches of a share purchase

¹²¹ Decision No 86/2012/QDPT-KDTM (High Court in Ho Chi Minh City, 20 February 2012); Decision No 1222/2014/QD-PQTT (People's Court of Ho Chi Minh City, 14 October 2014), both cited in Nguyen Manh Dzong et al, *Enforcement of Arbitral Awards in Vietnam* (Presentation, SIAC, 2021) 8, citing *CPC* (n 6) art 470.

¹²² Pham, (n 120) citing Đỗ Văn Đại, *Pháp luật Trọng tài Thương mại Việt Nam* (Nhà Xuất Bản Hồng Đức – Hội Luật Gia Việt Nam, 2017) and Decision No 33/2016/QDPT-KDTM (High People's Court in Ho Chi Minh City, 8 August 2016).

¹²³ *Global Payment Service and UTC Investment Co Ltd v VMG Media Joint Stock Company* (High People's Court in Hanoi, Judgment No 09/2023/HS-PT, 17 January 2023), refusing recognition and enforcement of *SIAC* Arbitral Award No 186 of 2019 and upholding *Global Payment Service and UTC Investment Co Ltd v VMG Media Joint Stock Company* (Hanoi City People's Court, First-Instance Decision No 07/2022/QDST-TTMM, 30 June 2022) ('Global

agreement against property held in Vietnam. Interestingly, the judgement refers to both 'moveable and immovable property' belonging to the exclusive jurisdiction of Vietnam as provided within article 470 of the *CPC*.

The exclusive jurisdiction ground appears to have been raised on its own motion, *sua sponte*, by the *High People's Court*,¹²⁴ rather than by the applicant:¹²⁵

Ground 5: If recognised, the Award would then be enforced against the assets of the Respondent in Vietnam, including both movable and immovable assets. Meanwhile, pursuant to Article 470 of the Civil Procedure Code 2015, the Vietnamese Courts shall have exclusive jurisdiction on disputes relating to rights over immovable assets in the territory of Vietnam.

Leading commentators suggest that these types of decisions are likely to affect the credibility of Vietnamese courts and 'raises grave concerns' about the correct application of article V(2)(a) of the *Convention*.¹²⁶ Further commentary notes the following as a potential status quo on immovable property in Vietnam: 'any disputes where the award debtor has immovable assets in Vietnam' may fail because the subject matter would 'fall

Payment'); see generally Nguyen Ngoc Minh and Nguyen Thi Thu Trang, 'Arbitrability of Land-Related Disputes in Vietnam: Divergence in Setting-Aside and Recognition Procedures', *Global Arbitration Review* (Web Page, 26 May 2023) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2024/article/arbitrability-of-land-related-disputes-in-vietnam-divergence-in-setting-aside-and-recognition-procedures> ('Dzung, Land Disputes'), citing Decision No 1015/2022/QĐ-PQTT (Vietnam, 7 July 2022) ('Decision 1015').

¹²⁴ Born 2021 (n 13) 3761 [26.05[A]] n 348; *sua sponte* meaning on its own motion, which is an accepted basis on which courts may raise this defence.

¹²⁵ Nguyen Ngoc Minh and Nguyen Thi Thu Trang, 'Arbitrability of Land-Related Disputes in Vietnam: Divergence in Setting-Aside and Recognition Procedures', *Global Arbitration Review* (Web Page, 26 May 2023) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review-archived/2024/article/arbitrability-of-land-related-disputes-in-vietnam-divergence-in-setting-aside-and-recognition-procedures> ('Nguyen, Arbitrability of Land'), citing Appeal Decision No 09/2023/QĐ-PT (17 January 2023); VILAF, 'Exclusive Jurisdiction of Vietnamese Courts over Disputes Relating to Rights over Real Properties in Vietnam' (Web Page) https://www.vilaf.com.vn/blog/exclusive-jurisdiction-of-vietnamese-courts-over-disputes-relating-to-rights-over-real-properties-in-vietnam/#_ftn1. (Global Arbitration Review)

¹²⁶ Dzung Memorandum 2016 (n 94); Nguyen, Arbitrability of Land (n 125).

within the exclusive jurisdiction of Vietnamese courts and, therefore, be non-arbitrable' under Article V(2)(a) of the *Convention*.¹²⁷ One possible reform option for Vietnam, could be to adopt a charging order provision and, at the same time, amend Article 470 to allow an exception for foreign arbitral awards. As a middle road, award creditors may be precluded from owning land or receiving the benefit of the land-use right, but in this scenario, they would receive the funds recouped from the sale of land.

Vietnam emerges as a noticeable outlier with regards to the enforcement of awards against immovable property. Whilst the legislative mechanisms exist on paper to enforce arbitral awards against immovable property, a significant divergence exists at the recognition phase. In contrast to the comparators, enforcement against immovables generally proceeds without substantial jurisdictional bars such as public policy or land-use rights defences. When assessing Vietnam both as a choice of seat and an investment location, careful consideration will likely be needed regarding alternative security arrangements in place of land to protect their investments. Such alternatives may include security instruments (in place of land) such as bonds, bank guarantees, offshore escrow arrangements, or complex layered holding structures.¹²⁸ Importantly, where land is a primary project asset, particularly in real estate or infrastructure deals, the asset realisation economics of the project are likely to require additional assessment before commitment.

For example, *The National Power Development Plan for 2021 to 2030* contemplates for example 15 new LNG thermal power plants to be developed during this period.¹²⁹ Most of the investment is projected to come offshore from Japan and Korea. Debate about

¹²⁷ Dzung, Land Disputes (n 123).

¹²⁸ Dominic Katter, 'Security Provisions in a Building Contract' in *Halsbury's Laws of Australia* (LexisNexis, at 7 December 2021) [65-1330] ('Katter').

¹²⁹ "Gov't Approves National Power Development Plan 8", *Bao Chinh Phu* (Web Page) <https://en.baochinhphu.vn/govt-approves-national-power-development-plan-8-111230516085506239.htm>.

such security arrangements will no doubt occupy long discussions in boardrooms. As suggested, in pro-arbitration jurisdictions, questions about recognition of immovable property are often a moot point, as assets are realised at the enforcement stage where courts facilitate the conversion of property into funds for award creditors. Vietnam's divergence therefore lies not within the legislative framework that has been developed, but the judicial recognition and execution phases. Such divergence is likely to affect the perception of efficiently enforcing arbitral awards, which in turn impacts the credibility of the enforcement regime. More broadly, statistics concerning enforcement may overstate the recognition stage recourse against immovable assets in Vietnam, a finding drawn from the seeming difficulty of asset realisation in practice.

Historically, Vietnamese courts have been reluctant to enforce awards against immovable property, and in some circumstances, even movable property. Although the concentration of the judiciary may create the opportunity for reform, there is no present indication that such optimism is justified. As discussed, this is especially so because the legislative architecture already exists to enforce awards against immovable property, yet significant obstacles remain in terms of land use rights for foreign award creditors. Therefore, the scope for the newly established and less experienced Regional Courts to reverse this trend and accept enforcement applications against immovable property in the short to medium term appears limited.

C. **Procedural Formalism**

Article V(1)(b) of the *Convention* goes to the heart of denying award enforcement on the 'grounds of procedural fairness, or denial of an opportunity to present a party's case'.¹³⁰ Such denial occurs where the 'basic notions of morality and justice are violated' in a 'situational context', as determined by the 'procedure laid down in the applicable legal

¹³⁰ Born 2021 (n 13) § 26.05[C].

system' as agreed by the parties.¹³¹ This defence parallels similar protections provided within Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the *Model Law*. This limited exception provided in Article V(1)(b) of the *Convention* to the 'presumptive validity' and enforceability of arbitral awards,¹³² shares similarities with Article V(1)(d) and is closely related to the public policy ground under article V(2)(b).¹³³ Although Article V(1)(b) is primarily concerned with lack of notice and the inability to present the case, its formulation is designed to be 'broad and inclusive',¹³⁴ 'expansive in scope, not subject to technical conditions or limitations'¹³⁵ and, 'encompassing all potential grounds for a party's inability to present its case'.¹³⁶ The defence within Article V(1)(b) is best viewed as a 'basis for uniform international standards of procedural fairness in international arbitration proceedings' but is primarily reserved for 'grave breaches of procedural fairness'.¹³⁷ National courts have been very reluctant to uphold such objections, doing so in 'only a small fraction' of cases, making the path very narrow indeed.¹³⁸

¹³¹ Mohammed Zaheeruddin, 'Violation of Due Process under the New York Convention' (2026) 18(2) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 04525040.

¹³² Gary B Born, 'The New York Convention: A Self-Executing Treaty' (2018) 40(1) *Michigan Journal of International Law* 115, 123 [2].

¹³³ Dan Xie, *Transnational Due Process and Article V(1)(b) of the New York Convention: Grounding Interpretation and Application of the Due Process Defence in the Public International Law Framework for Treaty Interpretation* (PhD Thesis, University of New South Wales, 2022) [2.2.2]; *Model Law* (n 6) arts 34(2)(a)(ii), 36(1)(a)(ii).

¹³⁴ Lei Zhu and Yongping Xiao, 'Article V(1)(B) of the New York Convention in China: Applying the Due Process Defense without the Doctrine of Due Process' (2019) 49(1) *Hong Kong Law Journal* 57, 64.

¹³⁵ Born, 2021 (n 13) 26.05[C][3][a] p 3822.

¹³⁶ Born, 2021 (n 13) 26.05[C][3][a] p 3821-2; Guide to the NYC (n 17) 156 [5]–[6], 158 [13].

¹³⁷ Born, 2021 (n 13) 26.05[C][3][a] p 3821-2.

¹³⁸ Born, 2021 (n 13) § 26.05[C][3][a], 3822–3 n 673, citing Pierre Karrer, 'Must an Arbitral Tribunal Really Ensure That Its Award Is Enforceable?' in Gerald Aksen et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005) 429, 431; Herman Verbist, 'Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008) 679, 692; Sébastien Fries et al, 'Grounds to Refuse Enforcement', *Global Arbitration Review* (Web Page, 16 June 2025) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/4th-edition/article/grounds-refuse-enforcement>; Andrés Lana Linetzky and Johanna Klein Kranenberg, 'New York Convention, Article V(1)(b) [violation of Due Process]' in Herbert Kronke et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2nd ed, 2024) para 2; Dan Xie, *Transnational Due Process and Article V(1)(b) of the New York Convention: Grounding Interpretation and Application of the Due Process Defence in the Public International Law Framework for Treaty Interpretation* (Kluwer Law International, 2024) 1.

1. Notice of Hearings and Arbitration (NOA)

Courts have generally taken a narrow interpretation in applying standards as to proper notice of arbitration, and other steps of arbitration.¹³⁹ That said, this defence surprisingly appears to be ‘the most frequently’ invoked grounds under Article V(1)(b), with a ‘significant number of national courts denying recognition based on lack of notice’.¹⁴⁰ Lack of notice, as suggested above may not just be limited to the hearing itself, but to discrete steps within arbitration such as appointment of experts, submission of evidence, with the most common and obvious example being the notice of the arbitration itself.¹⁴¹ The key inquiry into Article V(1)(b) is ‘whether the lack of notice of a step in the arbitral process denied the award debtor the opportunity to present its case’.¹⁴² Article 459(1)(c) of the *CPC* and Article 370(1)(c) of the repealed 2004 version of the *CPC* provide equivalent provisions for proper notice relevant to article V(1)(b) of the *Convention*. The wording differences are significant, but the essence goes to award-debtors not being given notice. The *MOJ Spreadsheet* provides an insight as to how Vietnamese courts have dealt with award-debtor defences when invoking article 459(1)(c). Of the 83 reported enforcement applications, 29 were refused by invoking such defence between 2011 – 2019.

a. German Coffee Association Awards

The *MOJ Spreadsheet* provides coded excerpts of 21 applications involving the same parties between 2011 and 2012, heard by the German Coffee Association at the Hamburg Chamber of Commerce.¹⁴³ Seven awards were declined enforcement by the Da Nang City People’s Court and the Ho Chi Minh City People’s Court (*Coffee Cases*). Among these, the Vietnamese respondents successfully resisted enforcement primarily

¹³⁹ Guide to the NYC (n 17) A [157].

¹⁴⁰ Born, 2021 (n 13) §26.05[C][3][g] [3840] n 762.

¹⁴¹ Born, 2021 (n 13) §26.05[C][3][g] [3842].

¹⁴² Born, 2021 (n 13) §26.05[C][3][g] [3841-3842].

¹⁴³ *MOJ Spreadsheet* (n 58) case numbers: 9, 10, 38, 39, 40, 42, 43, 45, 47 – 59.

under Article 370(1)(c) of the *CPC*, as a standalone or in conjunction with other grounds. Service was affected in some cases (possibly all) on the branch office of the respondent, which the courts treated as being both improper, and involving an unauthorised entity operating under the parent company. In denying these applications, Vietnamese courts repeatedly measured compliance against domestic standards under the *CPC* instead of the designated institutional rules.

b. International Cotton Association Awards

The *MOJ Spreadsheet* further provides coded excerpts of a parallel cluster of 14 awards from the International Cotton Association (Liverpool) spanning a four-year period between 2012 to 2016 heard at the Ho Chi Minh City, Hanoi, Long An, Nam Dinh, Thai Binh and Hai Phong People's Courts.¹⁴⁴ Five awards were successful and nine were not. In these decisions, procedural defects under Article 370(1)(c) of the *CPC* are again cited, among other grounds to not enforce the awards. FedEx courier receipts were criticised by the courts for failing to prove the precise requirements of service, that in the courts view, were required either under the arbitration rules, or domestic *CPC* procedures. What seemingly would not hold in a pro-arbitration court is service of emails concerning notice sent to individual employees or non-official addresses as being considered defective in form. As in the *Coffee Cases*, service by mail that was signed by a branch representative was treated as defective. The Vietnamese courts found that the compliance with the parties' chosen arbitration rules by the tribunal, concerning service rules was not treated as decisive, as illustrated in case 02/2017/VKDTM-ST, where service by fax was preferred; and the validity of FedEx receipts were questioned:¹⁴⁵

...

Regarding the arbitration proceedings: The requesting party sent the procedural documents to the brokerage company, and there is no evidence that Son Nam Company received the documents from the brokerage company. The documents were not sent to SN Company's official email address. The documents sent via Fedex express delivery

¹⁴⁴ MOJ Spreadsheet (n 58) case numbers: 14, 16, 28, 29, 32, 35, 41, 74 – 80.

¹⁴⁵ MOJ Spreadsheet (n 58) case 76.

were only printed copies and photocopies, with no legal basis to determine their validity. Only 1 of the 8 mail items sent by the arbitrator was received, but the recipient could not be verified as an authorized person. Records show no documents were sent to SN by fax.

By contrast, in numerous reported cases concerning service, delivery to a relative, party representative, or to the contractual address of the respondent was deemed effective. This interpretation of the procedural rules underscores the *Convention's* policy in promoting efficiency of enforcement procedural requirements, rather than a formalistic interpretation of rules. The burden of proof rests with the award debtor to 'prove the absence of actual knowledge of the arbitral proceedings', rather than any breach of discrete arbitral rules.¹⁴⁶ The *MOJ spreadsheet* contains other denials of applications similar to the above cases concerning procedural defects noted from other leading institutional bodies such as SIAC, the Swiss International Arbitration Centre, the ICC and HKIAC. In particular, the cases illustrate the Vietnamese courts' perennial and repeated revisitation of arbitral tribunal decisions through the *CPC* procedure requirements, not the institutional rules of the hearing.¹⁴⁷ A recent 2023 reported case appears to represent what could be the higher watermark in procedural formalism. In *Global Payment Service & UTC Investment Co Ltd v VMG Media Joint Stock Company* heard at the High People's Court in Hanoi the applicant raised grounds concerning the use of virtual background in an online hearing:

...the Arbitration Panel continued the arbitration proceedings and issued an Arbitration Award even when the Plaintiff violated the Arbitration Rules... backdrops and tarpaulins to partially cover the room where the Plaintiff's representative and witnesses were to participate in the trial.

The court held that the ground breached Article 459(1)(d) of the *CPC* and refused recognition. It is a well-known precept of international arbitration that the arbitral tribunal may determine what procedures and jurisdiction it may follow during proceedings. As

¹⁴⁶ Born, 2021 (n 13) §26.05[C][3][g] [3844]-[3846] n 779; 781.

¹⁴⁷ *Global Payment* (n 124); See generally, *MOJ Spreadsheet* (n 58) cases 17, 18, 22.

such, this finding by Vietnamese courts appears to be one of the broadest applications of article V(1)(b) of the *Convention*.

c. Consular Notarisations

Generally, in Vietnam, there exists a requirement for documents from foreign countries to be consularly certified as provided in Article 4(2) of *Decree 111/2011/ND-CP* and Article 478(1)(a) of the *CPC*. Article 9(1)-(4) of *Decree 111* however, provides an express exemption from such legalisation requirements, where the parties are subject to relevant international treaties or reciprocal principles:¹⁴⁸

Article 9. Papers and documents exempted from consular certification and legalization

1. Papers and documents exempted from consular certification and legalization under treaties to which Vietnam and foreign countries concerned are contracting parties, or on the reciprocity principle.

...

4. *Papers and documents not required of consular certification and legalization by receiving Vietnamese or foreign agencies under relevant Vietnamese or foreign laws.*

Article 478(1)(b) of the *CPC* relevantly provides a further exemption:¹⁴⁹

Article 478. Recognition of papers and materials sent by foreign agencies, organizations, or individuals to Vietnamese Courts

1. Vietnamese Courts shall recognize papers and documents made, issued or certified by competent foreign agencies or organizations in the following cases:

...

b) Papers and documents are exempt from consular legalization in accordance with Vietnamese law or International treaties to which the Socialist Republic of Vietnam is a signatory.

¹⁴⁸ Decree No 111/2011/ND-CP on Consular Certification and Legalisation (Vietnam) arts 2, 4, 9 ('Decree 111').

¹⁴⁹ CPC (n 6) art 478.

The exemptions above appear to have been drafted precisely to facilitate the finality of arbitral awards and their efficient enforcement under Article IV of the *Convention*, rather than serving as an additional procedural obstacle to be overcome.¹⁵⁰ However, compounding a propensity for procedural formalism, Vietnamese courts have consistently held that awards are not enforceable because such exemptions do not apply. In a reported 2020 decision 1768/2020/QĐ-PQTT (*Decision 1768*), practitioner commentary indicates that the People's Court of Ho Chi Minh City denied a Cambodian award-creditor enforcement on the basis that the power of attorney (*POA*) of the award creditor was not 'consular legalized'.¹⁵¹ The court determined that there was no exemption under Article 9(1) of *Decree 111* or Article 478(1)(b) of the *CPC*; and, further, in conflation with the public policy provisions, that this lack of notarised *POA* was 'contrary to the fundamental principles of Vietnam'. Practitioners note that the court did not explain how the fundamental principles were breached; and that they may have misapplied the law relevant for domestic proceedings; and that, in any event, Article 9(4) also would apply where the arbitral tribunal applied foreign laws, and their arbitral rules. Importantly, practitioners further note that there are no provisions in the arbitration rules, or 'Vietnamese legislation' which require that a '*POA* issued by a party to an arbitration must be legalized'.¹⁵²

The approach contrasts starkly with the accepted international practice concerning notice; the test under Article V(1)(b) being whether the award debtor was denied the actual opportunity to present their case.¹⁵³ Decision 12/2023/QĐ-PPT (*Decision 12*),

¹⁵⁰ Guide to the NYC (n 17) 97 [3].

¹⁵¹ Tony Nguyen and Manh Pham, 'Vietnamese Court Sets Aside Arbitral Award for Failure to Legalize POA: An Abuse of Due Process Requirements', *Kluwer Arbitration Blog* (Blog Post, 26 July 2023) ('POA Notarisation'); Minh Dang, Nguyen Do and Thang Pham, 'The Vietnamese Courts Have Spoken: Consular Authentication of Foreign Powers-of-Attorney Is a Must to Initiate a Vietnamese Arbitration', *Kluwer Arbitration Blog* (Blog Post, 25 August 2023), discussing Decision No 1768/QĐ-PQTT (Ho Chi Minh City People's Court, 6 October 2020) ('POA Decisions').

¹⁵² *Ibid*

¹⁵³ Born, 2021 (n 13) §26.05[C][3][g] [3841-3842].

heard at the Hanoi People's Court, further examined in practitioner commentary, provides that similar *POA* notarisation issues arose where an award was not enforced. Practitioners again noted that, together with *Decision 1768*, that these decisions effectively overrule the exemptions provided in Article 9 of *Decree 111* and Article 478 of the *CPC*.¹⁵⁴ The effect being, that with such practices, Article 459.1(c) of the *CPC* may be invoked as a defence where the procedural aspects concerning notarisation are not adhered to, which may 'continue to hinder Vietnam's popularity as a seat for international arbitration'.¹⁵⁵

By way of contrast, case law heard in the Chinese Supreme People's Court (*SPC*) provides a pro-enforcement stance in practice, not just on paper, concerning similar issues on notice. In *Boertong Corp (Group) v Beijing Liantaichang Trade Co Ltd (Boertong)*, and *TS Haimalu Co Ltd v Daqing Popeyes Food Co Ltd (Haimalu)* the *SPC* enforced Korean Commercial Arbitration Board (*KCAB*) awards despite defence arguments concerning service.¹⁵⁶ The Court in *Boertong* held that 'the propriety of the delivery shall be subject to the arbitration rules' rather than external conventions such as the *Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commerce*; similarly, in *Haimalu*, the court held that the failure to provide service by mail, without translation, did not violate the institutional arbitral rules.

Vietnam seemingly has the legislative mechanisms in place to facilitate international best practices in procedural aspects concerning international arbitration. Vietnamese courts, in practice, have however ventured well beyond a generous interpretation of Article V(1)(b) of the Convention despite the pro-enforcement intention of the legislation.

¹⁵⁴ *POA Notarisation* (n 152)

¹⁵⁵ *POA Notarisation* (n 152)

¹⁵⁶ *Boertong Corp (Group) v Beijing Liantaichang Trade Co Ltd* [2006] Min Si Ta Zi No 36 (Supreme People's Court, China, 14 December 2006); *TS Haimalu Co Ltd v Daqing Popeyes Food Co Ltd* [2005] Min Si Ta Zi No 46 (Supreme People's Court, China, 3 March 2006); Guide to the NYC (n 17) 157 [9], 158 [12].

The opportunity for medium-term procedural reform exists within the Regional Courts, considering the concentration and consolidation of courts. The key question is whether such reform can overcome several decades of noted irregularities in form being used as a mechanism for refusing award enforcement. This is despite the fact that, procedural objections from the perspective of international best practice, provide a very narrow ground for denying an award enforcement, yet have had a very generous application within Vietnam. Typically, such defects are curable within general court administrative processes. While the immediate short-term prospects may not show any signs of improvement, the medium-term prospects are more favourable if the Regional Courts can develop consistent practices aligning with the *Convention's* pro-enforcement bias.

D. Enhancing Enforcement Efficiency: China's Court-Reporting Mechanism

Vietnam has an opportunity to draw on systems and processes, and perhaps philosophies in neighbouring pro-arbitration jurisdictions that have patently improved efficiency in levels of arbitral award enforcement. In mainland China, partially in response to a perception of protectionist views that arbitral awards were 'incompatible with public policy',¹⁵⁷ and the generous application of Article V of the *Convention*, a mandatory prior-reporting mechanism was introduced by the Supreme People's Court (SPC) in 1995.¹⁵⁸ Applications for recognition and enforcement of foreign arbitral awards

¹⁵⁷ Peerenboom (n 3); 'Yuxiang Liu, Camilla Andersen and Bruno Zeller, 'The Unruly Horse in China: The Enforcement of Foreign Arbitral Awards and Public Policy' (2016) 19 *International Trade and Business Law Review* 72; Arthur (Xiao) Dong, 'Reflections on the 30th Anniversary of the Establishment of China's Prior Reporting Mechanism for Foreign-Related Arbitration', *Kluwer Arbitration Blog* (Blog Post, 3 September 2025) ('Arthur Xiao'); Shen Wei and Shang Shu, 'Tackling Local Protectionism in Enforcing Foreign Arbitral Awards in China: An Empirical Study of the Supreme People's Court's Review Decisions, 1995–2015' (2020) 241 *China Quarterly* 144 ('Shen Wei and Shang Shu').

¹⁵⁸ Supreme People's Court of the People's Republic of China, 'Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-Related Arbitration and Foreign Arbitration' (Fafa [1995] No 18, promulgated 20 August 1995, effective 28 August 1995, revised 31 December 2008) <https://cicc.court.gov.cn/html/1/219/199/411/701.html>; *Civil Procedure Law of the People's Republic of China* (People's Republic of China) art 258; Supreme People's Court of the People's Republic of China, 'Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Arbitration-Related Judicial Review Cases' (Fa Shi [2017] No 22, adopted 4 December 2017, promulgated 26 December 2017, effective 1 January 2018); Arthur Dong

in China submitted to a People's Court must pass through a two-stage reporting and review process prior to denying recognition and execution. Firstly, if a lower People's Court denies a foreign award recognition and execution, then the matter must be reported to the High People's Court (*HPC*). Subsequently if the *HPC* agrees with the lower court, it is then reported to the *SPC*. Only after the *SPC* gives its reply, can the ruling of recognition and execution be made.¹⁵⁹ The sentiment and commentary, including those surrounding the subsequent enhancements in 2017, have generally been positive, and the system has largely curbed local protectionism, and improved efficiency.¹⁶⁰

Criticisms do exist, however. Importantly, the reporting process is not an independent judicial review; there is no prescribed time limit within the reporting process, or reply opinion; and parties are not afforded procedural fairness, nor have standing to appear and make submissions.¹⁶¹ Earlier research around the time the *SPC* reporting model was being introduced points to an enforcement rate of approximately 49% based on 72 awards between 1991 and 1999. That study observed a difficulty in obtaining reliable empirical data generally but also being 'extremely difficult in China.'¹⁶² Against this backdrop, later empirical analysis of enforcement rates and sentiment indicates a thematically positive outcome for the *SPC* reporting model. Commentary indicates, based on 98 reported *SPC* reply letters to lower courts' initial decision to not enforce a foreign award (being a 40.8% reversal rate), from 1995 to 2014, that, such reporting model is a 'useful tool to restrain local protectionism as it places lower-level courts under the direct control of higher-level courts' and therefore has an insulative effect from 'the

and Alex Yuan, 'An Empirical Study on Recognition and Enforcement of Foreign, Hong Kong, Macau, and Taiwan Arbitral Awards in Mainland China' (2022) 39(3) *Journal of International Arbitration* 491 ('Dong and Yuan').

¹⁵⁹ *Ibid.*

¹⁶⁰ Jingzhou Tao and Mariana Zhong, 'China's 2017 Reform of Its Arbitration Related Court Review Mechanism with a Focus on Improving Chinese Courts' Prior Reporting System' (2018) 35(3) *Journal of International Arbitration* 371 ('Tao and Zhong').

¹⁶¹ See generally, except in rare cases, parties may not appear, Arthur Xiao (n 157).

¹⁶² Peerenboom (n 3).

potentially negative influences of local governments'.¹⁶³ Of significance, foreign investors were perceived as having a heavier 'reliance on this reporting system to have their interests protected'; because of potential discrimination of foreign awards; the data supporting this proposition, as the reversal rate for foreign heard awards was 54% versus 38% for domestically heard matters.¹⁶⁴

Accordingly, where enforcement rates are suppressed at lower courts, the necessity of a governing reporting model under the *SPC* correspondingly increases. Seemingly a central hierarchical governing court therefore tempers domestic protectionism whilst enhancing award efficiency under the *Convention*. A further study provides that between 2001 and 2018 there were only 37 refusals under the *SPC* reporting system. However, the study does not account for the total number of enforcement applications heard; 28 (75%) occurred between 2001 and 2012; the remaining 9 between 2013 and 2018, indicating a measurable decline in refusals over time under the *SPC* reporting system.¹⁶⁵ A further recent study between 2012 and 2022 examining 203 rulings confirms that 90% were enforced. Of the 17 applications refused the *SPC* published 12 reply opinions (70% reporting rate); 46% of cases were disposed of within 180 days.¹⁶⁶ Read together, these statistics, whilst only an aggregate, demonstrate a strong pro-arbitration bias in Chinese practice and adoption of best practice efficiency standards.

1. Operationalisation of Proposed Reporting Model

¹⁶³ Shen Wei and Shang Shu (n 157)

¹⁶⁴ Shen Wei and Shang Shu (n 157) [149]–[154], citing Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (Cambridge University Press, 2016).

¹⁶⁵ Arthur Dong and Alex Yuan, 'An Empirical Study on Recognition and Enforcement of Foreign, Hong Kong, Macau, and Taiwan Arbitral Awards in Mainland China' (2022) 39(3) *Journal of International Arbitration* 491.

¹⁶⁶ Sam (Ronghui) Li, Michael (Haomin) Zhang, Lucas (Zhouquan) Lu and Tina (Yanfei) Qian, 'Recognition and Enforcement of Foreign Arbitral Awards in China Between 2012–2022: Review and Remarks (Part I)', *Kluwer Arbitration Blog* (Blog Post, 12 September 2023); Sam (Ronghui) Li, Michael (Haomin) Zhang, Lucas (Zhouquan) Lu and Tina (Yanfei) Qian, 'Recognition and Enforcement of Foreign Arbitral Awards in China Between 2012–2022: Review and Remarks (Part II)', *Kluwer Arbitration Blog* (Blog Post, 12 September 2023).

During the 2025 reforms, the previous four-level structure: District, Provincial, High People's Courts, followed by the highest court, the Supreme People's Court (SPC), was replaced by a new three-tier structure: the Supreme People's Court, Provincial-level People's Courts, and newly established Regional People's Courts. The SPC has existing power under Article 46 of the Law on Organisation of People's Courts to supervise the adjudication of Regional Courts, including reviewing decisions; and, among other broad powers, to propose laws and assess adjudication practices. The LCA and CPC already provide the legal framework for the Regional Courts power to hear and determine enforcement applications. Therefore, no substantive change in the legal architecture would be required to operationalise the proposed reporting model. China, by comparison, did not alter its legislation to create its reporting model; rather, the Supreme People's Court introduced the reporting mechanism through judicial instruments in 1995, and later in 2017.¹⁶⁷ Vietnam would be afforded the same opportunity under its existing powers for the SPC to issue a resolution and judicial practice notes binding and directing the Regional Courts in the handling of proposed refusal decisions through the reporting model.

In order to address capacity concerns, so as to not overwhelm such reporting obligations, a twofold system is suggested: firstly, initially limiting reporting obligations to public policy grounds under Article 459(2)(b); secondly, to adopt a specialised Arbitration Enforcement

¹⁶⁷ Rouse, 'Vietnam's Major Judicial Reforms Take Effect 1 July 2025', *Rouse* (Web Page, 1 July 2025) <https://rouse.com/insights/news/2025/vietnam-s-major-judicial-reforms-take-effect-1-july-2025>; *Resolution No 81/2025/UBTVQH15 on Establishing Provincial People's Courts and Regional People's Courts* (Vietnam, 27 June 2025); *Resolution No 01/2025/NQ-HĐTP on the Application of Certain Provisions concerning the Receipt of Duties and Exercise of Jurisdiction by People's Courts* (Vietnam, 27 June 2025); See, eg, Reporters Without Borders, 'My Case Clearly Shows There Is Absolutely No Press Freedom in Vietnam,' Says Persecuted Journalist' (Web Page, undated) <https://rsf.org/en/my-case-clearly-shows-there-absolutely-no-press-freedom-vietnam-says-persecuted-journalist>; Reporters Without Borders, 'One Year into His Rule, Vietnamese Leader To Lam Continues His All-Out War on Independent Journalism' (Web Page, 1 August 2025) <https://rsf.org/en/one-year-his-rule-vietnamese-leader-lam-continues-his-all-out-war-independent-journalism>; Sebastian Strangio, 'Vietnam Approves Radical Consolidation of Provinces and Major Cities', *The Diplomat* (Online, 13 June 2025) <https://thediplomat.com/2025/06/vietnam-approves-radical-consolidation-of-provinces-and-major-cities/>; Law on Organisation of People's Courts No 34/2024/QH15, art 46 (SPC duties: supervise adjudication, ensure uniform application of law, review trial practices); see also Law on Promulgation of Legal Documents No 64/2025/QH15, art 16(1) (authority for judicial normative documents/resolutions); CPC (n 6) arts 451–463, esp. art 459 (refusal grounds for foreign awards); LCA (n 6) 68.

List, consistent with specialised lists which are adopted in many courts, supported by specialised judicial staff and practice notes. This suggestion would manage initial reviews, and would enable the development of further refinements which include auditing of Regional Courts to ensure compliance, and specified timelines for reply opinions.¹⁶⁸ Non-compliance by Regional Courts with reporting requirements could be regarded as a procedural error capable of correction on appeal. Delays of decisions moving through the reporting model are likely inevitable, initially, however the benefit for award creditors is a mandatory second review of their application rather than having to mount an appeal themselves. Such benefit may significantly outweigh any potential initial delay, especially considering the costs and time-consuming nature of an appeal. As a final enhancement, whilst drawing from China's model, a single stage review by the SPC would likely speed up reply opinions by removing the intermediary two stage step process currently observed within China.

Conclusion

Vietnam's adoption of the *Convention*, and the systematic updates to its statutory architecture concerning international arbitration, embodies a best-practice process of aligning domestic laws with leading jurisdictions.¹⁶⁹ Read together as a whole, notable thematic trends emerge in Vietnam at the recognition stage, rather than any fundamental deficiency in the legislation. Upon reflection of leading research and commentary, other Southeast Asian jurisdictions with comparable challenges and aspirational goals to Vietnam, have historically faced similar questions to those posed in this paper.¹⁷⁰ Strategically, Vietnam can draw on, and adopt such regional successes to further refine its practices, and enhance the efficiency of arbitral award enforcement, perhaps progressing towards its 2021 – 2030 *Master Plan* objectives more quickly.¹⁷¹

¹⁶⁸ See Federal Court of Australia, 'Arbitration' (National Practice Area), which operates under the Commercial Arbitration Practice Note (CA-1) (1 March 2024). The Practice Note governs the case management of applications concerning commercial arbitration in the Court, including applications to recognise and enforce foreign arbitral awards under s 8 of the International Arbitration Act 1974 (Cth) and the New York Convention.

¹⁶⁹ NYC Accession (n 30); Secretary Interview (n 34)

¹⁷⁰ Peerenboom (n 3).

¹⁷¹ Master Plan (n 2)

However, persistent divergences in judicial application are evident in four key aspects: opaque reporting mechanisms, expansive application of public policy, barriers restricting execution against immovable property and procedural formalism overriding party autonomy. Viewed against regional comparators, such divergences could be viewed as an opportunity for targeted reforms, rather than incurable obstacles.

Firstly, pro-arbitration jurisdictions maintain predictable and transparent reporting of award enforcement decisions similar or identical to standard court judgements, which form an empirical backbone traceable over decades. Arguably, the importance of such transparency increases in investment destinations such as Vietnam where investors seek greater certainty in the legal system.¹⁷² In Vietnam, there are few published decisions to review. There has generally been only a traceable historical record for approximately two decades, and the availability of published decisions remains limited. Most decisions remain unpublished. In Vietnam, there are few published decisions to review. Of note, the release of data in the form of the *MOJ Spreadsheet* and the *SPC* portal is contrasted by their seemingly periodic unavailability, or in many circumstances, becoming inaccessible. *Resolution 03/2017/NQ-HĐTP*,¹⁷³ despite requiring decisions to be published within a certain time, may also create a disincentive to publish, because its broad drafting exceptions may operate where non-publication becomes the norm, not the exception.¹⁷⁴ Vietnam could, in theory, adopt a reporting mechanism with pared-down or redacted decisions, for all applications for enforcement, designed to comply with, but not offend the exceptions within *Resolution 03/2017/NQ-HĐTP*. This may be overly optimistic, but when the goal is to enhance credibility, such middle ground might be palatable. The laws discussed restraining publication, as well as limitations of access to reported judgements, may be construed as a form of institutional domestic protectionism.

¹⁷² Henderson (n 101).

¹⁷³ Resolution 03/2017 (n 61).

¹⁷⁴ CPC (n 6) art 459(2)(b); LCA (n 6) art 68(2)(e); Resolution No 03/2017/NQ-HĐTP (n 61).

Secondly, regional pro-arbitration courts honouring the intent of the *Convention*, have consistently emphasised that courts charged with reviewing applications based on the public policy defence, ‘and especially an appellate court, ought to view such a case with the utmost suspicion’.¹⁷⁵ Instead, Vietnamese courts have consistently invoked such defence creating tension with the *Convention*’s design, which frames public policy as a narrow pathway of refusal. The pattern of refusal, argued in this paper as a reflection of a possible form domestic state protectionism,¹⁷⁶ sits uncomfortably with Vietnam’s pro-arbitration stance and adoption of legislation based on the *Model Law*. A carefully tailored practice note could assist regional courts, by clarifying that the public policy defence must only be based on the narrow thresholds under the *Convention*. Where such defence is being relied upon, which could be further provided within practice notes, courts could be tasked with outlining the specific causal nexus between the recognition of an award, and the precise violation of the fundamental principles, that may occur should the award be enforced. However, to be effective, such reforms should accompany a formal reporting model, as alluded to below, such that the higher courts can review the decision prior to denying recognition and enforcement.

Thirdly, despite recent attempts by award creditors, noted in reported decisions, the availability of immovable property as an enforceable asset remains effectively unavailable. Seemingly, no published decisions or commentary indicate otherwise. While the law provides a framework for seizure and sale of assets, including land, courts typically invoke Article 470(1)(a) of the *CPC*, at the recognition stage, preventing realisation. Practically, this operates as a jurisdictional bar over immovable property rendering this subject matter non-arbitrable under Article V(2)(a) of the

¹⁷⁵ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136 (Litton PJ) (*‘Polytek’*) (Court of Final Appeal of the Hong Kong Special Administrative Region, FACV No 10 of 1998, 9 February 1999); see generally, as to the binding nature of arbitral awards in Oceania, *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533; *International Arbitration Act 1974* (Cth) sch 2 arts 35–6.

¹⁷⁶ Arthur Xiao; Shen Wei and Shang Shu (n 157); Dong and Yuan (n 158); Tao and Zhong (n 160).

Convention. This constitutes a material divergence from the *Convention*, and practice from regional pro-arbitration neighbours, where execution against land or land-use rights commonly proceeds through standard court enforcement mechanisms. As suggested, a potential option, which may not offend Article 470(1)(a), would be to permit the seizure and sale of land without conferring the land-use rights on foreign award creditors. Whilst the status quo remains unchanged, for infrastructure projects, where land-related assets are frequently offered as security, creative solutions will likely be required by investors to guarantee their interests.¹⁷⁷

Fourthly, like the public policy defence, procedural formalism often dominates court decisions in Vietnam. A thematic trend has emerged whereby award debtors may raise minor procedural anomalies and defects as a strategic defence. Arguably, many such defences would not have a realistic prospect of success in a pro-arbitration jurisdiction, considering the rare nature of success.¹⁷⁸ Practice notes may go some way towards reform. However, considering that the current legislation seemingly already provides a pro-arbitration basis that has consistently not been practiced, this seems impractical for legitimate reform. Procedural formalism is most noticeable with respect to the lack of consularisation of awards, agreements, and powers of attorney. Such application of domestic laws, to an award heard outside of Vietnam, undermines party autonomy. A conclusion that could be drawn, is that such practice is another example of *de facto* state protectionism.¹⁷⁹ There is an irony of courts accepting procedural defects, such as consular notarisations not being required by institutional rules, as a valid defence, as they bear strong similarities to the relic and long discarded double *exequatur* regime under the 1927 *Geneva Convention*. At that time, award creditors were required to satisfy multiple, complex layers of judicial validation

¹⁷⁷ Katter (n 128).

¹⁷⁸ Born, 2021 (n 13) § 26.05[C][3][a], 3822–3 n 673.

¹⁷⁹ Shen Wei and Shang Shu (n 157).

prior to enforcement.¹⁸⁰ The *Convention* was designed to relieve award creditors of burdensome obligations, not to introduce a domestic styled overlay of laws incompatible with the *Convention's* efficiency-centric principles. These concerns are heightened where tribunals are empowered by the parties to decide questions on an *ex aequo et bono* or *amiable compositeur* basis.¹⁸¹ Such circumstances enable the tribunal to relax a strict black letter law approach and apply equitable reasoning based on fairness and good conscience, *inter alia*. Such decisions could result in a negative perception, particularly of Vietnam's attractiveness as a choice of seat, and constitute a material divergence from the *Convention's* commitment to party autonomy. A pro-arbitration approach mandates relegating the Geneva era model to history, not bringing it back.

Leading researchers note that the importance of arbitration, particularly in emerging jurisdictions in support of international trade and investment, grows in inverse proportion to the strength of the legal system at the place of investment.¹⁸² Where parties perceive inefficiency in the state legal system, the arbitral enforcement regime becomes correspondingly more important. In emerging jurisdictions such as Vietnam, this inverse relationship is more pronounced. A central reporting mechanism,¹⁸³ as adopted by mainland China, offers a carefully calibrated stabilising function that could possible counter domestic protectionist practices and reduce enforcement risk, potentially closing the inverse-correlation gap observed in Vietnam. Empirical data provides that the credibility of the arbitral regime and the efficiency of enforcement mechanisms in mainland China have grown substantially in the past three decades and are now comparable with reporting systems such as the United States. Such a reform

¹⁸⁰ Guide to the NYC (n 17) 207 [2]–[3], citing *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 LNTS 301 (entered into force 25 July 1929) art 1(e); CPC (n 6) art 478(1)(a); Decree 111 (n 146) art 4(2).

¹⁸¹ Model Law (n 5) art 28(3); see also Leon E Trakman, 'Ex Aequo et Bono: De-Mystifying an Ancient Concept' (2007) 24(1) *Journal of International Arbitration* 1, 3–5.

¹⁸² Henderson (n 101).

¹⁸³ SPC Reporting System (n 75); Arthur Xiao; Shen Wei and Shang Shu (n 157); Dong and Yuan (n 158); Tao and Zhong (n 160).

program could be further refined to include publication of decisions in enforcement cases.

A pilot program could be adopted within the IFCs and used as a testing ground for broader adoption.¹⁸⁴ This is especially relevant given the recent announcement of a potential adoption of common law within the IFCs in Vietnam.

With such tremendous change in Vietnam, a pivot point within international arbitration appears present.

¹⁸⁴ Resolution 222 (n 29).

Beyond the Matrix Contract the Doctrine of Separability and Its Challenges to Justice

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Abstract

The doctrine of separability remains a foundational pillar of international commercial arbitration. It is designed to preserve the jurisdiction of arbitral tribunals even when the validity of the underlying matrix contract is challenged. While this legal principle successfully neutralises jurisdictional paradoxes and promotes procedural efficiency, its unyielding application risks precipitating profound substantive injustice. Specifically, treating the arbitration agreement as an entirely insulated entity can trap vulnerable parties within private dispute resolution mechanisms in cases involving non-existent contracts, egregious fraud, gross illegality, and severe inequalities in bargaining power. Through a comparative analysis of the jurisprudential and statutory frameworks in the United Kingdom, the United States, Malaysia, and Singapore, alongside international arbitral practices, this article critically examines the operational boundaries of the separability doctrine. The study reveals a global consensus favouring arbitral autonomy but underscores the imperative for carefully calibrated judicial intervention. To prevent the arbitral regime from shielding corporate malfeasance or circumventing the fundamental prerequisite of genuine mutual consent, this article advocates for the enforcement of strict *de novo* standards of curial review

for threshold questions of contract formation. Furthermore, it argues for comprehensive legislative modernisation by highlighting recent statutory amendments in the UK and Malaysia that establish unambiguous default rules. Moreover, it emphasises the need to legalise third-party funding, mandatory, transparent arbitrator disclosures, and the restriction of abusive delegation clauses. Notably, securing the future legitimacy of commercial arbitration necessitates a comprehensive approach. It must strike an equitable balance where procedural efficacy actively supports, rather than undermines, the pursuit of fundamental substantive justice.

1.0 Introduction

Arbitration is the preferred dispute resolution mechanism for commercial transactions, offering autonomy, efficiency, and neutrality.¹ Central to this system is the arbitration clause, a mutual pledge to forego domestic litigation in favour of a chosen tribunal.² However, disputes frequently arise where one party alleges the underlying matrix contract is entirely invalid due to fraud, misrepresentation, illegality, or lack of consent.³ When this commercial foundation collapses, the

¹ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [13]; Antonopoulou, G. (2023). The 'Arbitralization' of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts. *Journal of International Dispute Settlement*, 14(3), 328, 328; Meshel, T. (2015). "Commercial Peacemaking"—The New Role of the International Commercial Arbitration Legal Order. *Cardozo Journal of Conflict Resolution*, 16(2), 1, 1; Rhodes-Vivour, A. (2023). Recent Trends and Opportunities in International Commercial Arbitration. *International Law Association (Nigerian Branch) Committee on International Commercial Arbitration*, 1, 1-2; Mukherjee, P. (2025). Enhancing the Framework for International Commercial Arbitration: Through the Landscape of Institutional Arbitration. *International Journal of Law Management & Humanities*, 8(2), 1024, 1025.

² *First Options of Chicago Inc v Kaplan* 514 US 938 (1995), 943; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [13]; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1550-1551; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 370; Siva Subramaniam, 'Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach' (2020) 47(2) *Journal of Malaysian and Comparative Law* 1, 1; Masika, J. G., & Kalicharan, M. L. (2024). International commercial arbitration: principles and procedures. *TIJER - International Research Journal*, 11 (5), 1, 1; Latham & Watkins. (2014). *Guide to International Arbitration*. London, UK: Latham & Watkins, 6.

³ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 398; *BCY v BCZ* [2017] 3 SLR 357, 385; Douglas, Z. (2014). The Plea of Illegality in Investment Treaty Arbitration. *ICSID Review*, 29(1), 155, 158-159; Yu, H. L. (2020). Adopting a 'Range of Factors' and 'Division of Systems' Approach: Establishing Principles for a Consistent Standard of Proof to Assess Illegality in Foreign Investment Disputes. *Journal of Business Law*, 1, 1 & 5; Phang, A. (2005). Vitiating Factors in Contract Law—Some Key Concepts and Developments. *Singapore Academy of Law Journal*, 17, 148, 151 & 160-163; Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in M A Fernandez-Ballesteros

critical inquiry is whether the arbitration clause survives.⁴ To resolve this, arbitration relies upon the doctrine of separability.⁵ This legal doctrine postulates that an arbitration clause is a distinct, self-contained agreement.⁶ Even if the

and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 699, 699; Deeksha Malik and Geetanjali Kamat, 'Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication' (2013) 2 *The Arbitration Brief* 1, 1; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 422.

⁴ *Heyman v Darwins Ltd* [1942] AC 356, 370-374 ; *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 897, 914-915; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) s 5.05; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 421; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 373; Park, W. W. (2006). *Arbitration of International Business Disputes*. Oxford University Press, 26; Yu, H. L. (2020). Adopting a 'Range of Factors' and 'Division of Systems' Approach: Establishing Principles for a Consistent Standard of Proof to Assess Illegality in Foreign Investment Disputes. *Journal of Business Law*, 1, 1 & 5; Phang, A. (2005). Vitiating Factors in Contract Law—Some Key Concepts and Developments. *Singapore Academy of Law Journal*, 17, 148, 151 & 160-163.

⁵ Daimsis, A.. Liquidating Separability: *Peace River v Petrowest* and the Meaning of Separability in Canadian Arbitration Law. *The Canadian Journal of Commercial Arbitration*, 2(1), 1, 1; Smit, R. H. (2003). Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?. *American Bar Association Section of International Law and Practice Spring Meeting*, 1.

⁶ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-71; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 422; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) s 5.05; Siva Subramaniam, 'Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach' (2020) 47(2) *Journal of Malaysian and Comparative Law* 1, 1; Ngowi, E. (2024). The Fictitious Notion of Separability of Arbitration Agreement and its Conformity to Consensual Nature of ADR in Tanzania Main Land. *International Journal of Law Management & Humanities*, 7(5), 142, 142; Daimsis, A. Liquidating Separability: *Peace River v Petrowest* and the Meaning of Separability in Canadian Arbitration Law. *The Canadian Journal of Commercial Arbitration*, 2(1), 1, 1.

matrix contract is void, the arbitration clause still survives.⁷ This empowers the tribunal to adjudicate the contract's demise.⁸

Without separability, the arbitral regime would face a jurisdictional paradox.⁹ If an arbitrator found the main contract invalid, an inseparable arbitration clause would also perish.¹⁰ This nullifies the arbitrator's authority to make that declaration.¹¹ Separability neutralises this paradox and prevents parties from utilizing tactical domestic litigation to evade arbitral obligations merely by alleging contractual defects.¹²

⁷ *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 914-915; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-71; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) s 5.05; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 421.

⁸ Phang, A. (2005). Vitiating Factors in Contract Law—Some Key Concepts and Developments. *Singapore Academy of Law Journal*, 17, 148, 151 & 160-163; Yu, H. L. (2020). Adopting a 'Range of Factors' and 'Division of Systems' Approach: Establishing Principles for a Consistent Standard of Proof to Assess Illegality in Foreign Investment Disputes. *Journal of Business Law*, 1, 1 & 5.

⁹ Chang Zheng Ting, C. (2025). What is the proper law of the arbitration agreement?. *The Oxford University Undergraduate Law Journal*, 14, 167, 178; Goel, S. On the termination of the agreement, the arbitration clause subsists?. *West Bengal National University of Juridical Sciences*, 1, 5-6.

¹⁰ *Heyman v Darwins Ltd* [1942] AC 356, 370-371; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 55; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) 47 (Section 5.04); Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 21-22.

¹¹ *Heyman v Darwins Ltd* [1942] AC 356, 370-371; *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 914-915; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47, 47-48; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 422; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) s 5.05.

¹² *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [10]-[13], [17]; *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 914-915; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) ss 5.04-5.05; Smit, R. H. (2003). Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?. *American Bar Association Section of International Law and Practice Spring Meeting*, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47, 68; Huda, M.. The Doctrine of Separability of Arbitration Clause in

Nevertheless, the doctrine raises profound questions concerning substantive justice.¹³ Treating an arbitration agreement as an insulated entity can produce a legal fiction, particularly regarding contracts that are forged or void *ab initio*.¹⁴ If an agreement never existed legally, applying separability allows an arbitrator to rule on a contract lacking genuine consent.¹⁵ This potentially traps fraud victims within private tribunals.¹⁶

Commercial Arbitration Revisited. 1, 1.

¹³ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1641; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 429-433; Ngowi, E. (2024). The Fictitious Notion of Separability of Arbitration Agreement and its Conformity to Consensual Nature of ADR in Tanzania Main Land. *International Journal of Law Management & Humanities*, 7(5), 142, 158; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47, 67-68.

¹⁴ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 77-79; *BCY v BCZ* [2016] SGHC 249, [97]; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47, 56 & 58; Ngowi, E. (2024). The Fictitious Notion of Separability of Arbitration Agreement and its Conformity to Consensual Nature of ADR in Tanzania Main Land. *International Journal of Law Management & Humanities*, 7(5), 142, 142; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 370, 373, 429; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1633.

¹⁵ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* (The Newcastle Express) [2022] EWCA Civ 1555, [57], [62]; *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 412-414; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224, 231-232; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 1; Stuart Isaacs KC and Elizabeth Houghton, 'The Separability Principle: the Newcastle Express Case' (Wilberforce Arbitration Insight, 10 June 2023) 1.

¹⁶ *BCY v BCZ* [2017] 3 SLR 357, 381, 385; Reuben, R. C. (2003). First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions. *SMU Law Review*, 56, 819, 841 & 866; Rogers, A., & Launder, R. (1993). The Indestructible Arbitration Clause. *The Arbitrator*, 192, 192; Kariuki, F., & Sebayiga, V. (2022). Arbitrability of Fraud in Kenya. *Alternative Dispute Resolution Journal*, 2(1), 11, 13 & 15; Ilijana Todorović, 'A Closer Look at the Doctrine of Separability in Arbitration' (2021) 1(1) *IUS Law Journal* 6, 9; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 54-55.

This article critically examines whether the doctrine of separability consistently delivers justice. By exploring its conceptual foundations and its comparative application in various jurisdictions, this study analyses how the doctrine operates across different legal systems. Importantly, it offers recommendations to ensure that the pursuit of arbitral efficiency does not overshadow the need for fundamental fairness.

2.0 History and Common Law Development of Doctrine of Separability

Separability, frequently termed the autonomy of the arbitration clause, postulates that an arbitration agreement is juridically distinct from the substantive commercial contract in which it is embedded.¹⁷ While physically integrated, the arbitration clause functions as a collateral procedural agreement capable of surviving the termination, breach, or fundamental invalidity of the primary matrix contract.¹⁸

This doctrine emerged within the common law not as an inherent fixture, but as a pragmatic necessity.¹⁹ Historically, English courts treated arbitration

¹⁷ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 914–915; Zarra, G. (2025). Separability of arbitration clauses contained in international treaties: an unrevealed truth. *Journal du Droit Transnational*, 1, 1, 1; Subramaniam, S. (2020). Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach. *Journal of Malaysian and Comparative Law*, 47(2), 1, 1; Ngowi, E. (2024). The Fictitious Notion of Separability of Arbitration Agreement and its Conformity to Consensual Nature of ADR in Tanzania Main Land. *International Journal of Law Management & Humanities*, 7(5), 142, 142; Anaghara-Uzor. Separability of the Arbitration Agreement/Clause In International Commercial Arbitration: How Absolute?. *Madonna University, Nigeria Faculty OF Law Law Journal*, 55, 55; Anthony Daimsis, 'Liquidating Separability: Peace River v Petrowest and the Meaning of Separability in Canadian Arbitration Law' (2021) 2(1) *Canadian Journal of Commercial Arbitration* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Journal of International Arbitration* 1, 1.

¹⁸ *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [40]–[41] & [62]; Goel, S. (2018). On the termination of the agreement, the arbitration clause subsists?. *Shivam Goel*, 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47.

¹⁹ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [10]–[13], [37]; *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 914–915; Reuben, R. C. (2003). First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions. *SMU Law Review*, 56, 819, 840–841; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47–48; Ngowi, E. (2024). The Fictitious Notion of Separability of Arbitration

clauses as ancillary provisions that perished alongside a repudiated agreement.²⁰ A paradigm shift occurred with the House of Lords decision in *Heyman v Darwins*²¹, which established that an arbitration agreement could survive a contract's repudiation, thereby empowering the arbitrator to adjudicate the breach.²² Subsequently, the English Court of Appeal in *Harbour Assurance v Kansa General*²³ expanded this principle.²⁴ The court affirmed that separability preserves arbitral jurisdiction even when the underlying contract is alleged to be void *ab initio* for initial illegality.²⁵ Currently, the doctrine is applied in different jurisdictions worldwide.²⁶

Agreement and its Conformity to Consensual Nature of ADR in Tanzania Main Land. *International Journal of Law Management & Humanities*, 7(5), 142, 142; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1550-1551, 1633; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Journal of International Arbitration* 1, 1.

²⁰ *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [62]; Goel, S. (2018). On the termination of the agreement, the arbitration clause subsists?. *Shivam Goel*, 1, 1; Rogers, A., & Launders, R. (1993). The Indestructible Arbitration Clause. *The Arbitrator*, 192, 192.

²¹ *Heyman v Darwins Ltd* [1942] AC 356.

²² *Heyman v Darwins Ltd* [1942] AC 356, [362]-[363], [366] & [373]-[374]; Rogers, A., & Launders, R. (1993). The Indestructible Arbitration Clause. *The Arbitrator*, 192, 192; Goel, S. (2018). On the termination of the agreement, the arbitration clause subsists?. *Shivam Goel*, 1, 1; Winner Sitorus, 'Separability Doctrine in Arbitration Agreement (A Comparative Study)' (2021) 24(6) *Journal of Legal, Ethical and Regulatory Issues* 1, 3; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Journal of International Arbitration* 1, 8.

²³ *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897.

²⁴ Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Journal of International Arbitration* 1, 1, 8; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) s 5.05.

²⁵ *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 897, 914-915; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 58.

²⁶ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; Siva Subramaniam, 'Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach' (2020) 47(2) *Journal of Malaysian and Comparative Law* 1, 1; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1; George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *Yale Journal of International Law* 1, 13-15.

3.0 Application of Doctrine of Separability

3.1 United Kingdom

In the United Kingdom, the doctrine of separability is formally codified and given explicit statutory recognition under **Section 7 of the Arbitration Act 1996**.²⁷ This provision establishes that an arbitration agreement forming part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective.²⁸ Instead, the statute dictates that it shall be treated as a distinct agreement.²⁹ This ensures that an arbitral tribunal retains the jurisdictional competence to adjudicate upon the very validity or existence of the matrix contract.³⁰ This principle was applied by the House of Lords in the case of *Fiona Trust & Holding Corporation v Privalov*^{31,32}. In this case, Lord Hoffmann articulated that rational business actors intend for all disputes arising out of their relationship, including allegations of fraud, bribery, or initial invalidity, to be determined by the same tribunal.³³ Thus, under English law, unless a vitiating factor directly

²⁷ Arbitration Act 1996 (United Kingdom) s 7; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [40] & [41]; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 49 & 72; Lembo, S. (2010). Internal and International Arbitration Law: The 1996 UK Arbitration Act and the UNCITRAL Model Law A Contemporary Analysis [Doctoral dissertation, LUISS Guido Carli].

²⁸ Arbitration Act 1996 (United Kingdom) s 7; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 49.

²⁹ *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [40]; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 49.

³⁰ Sitorus, W. (2021). Separability Doctrine in Arbitration Agreement (A Comparative Study). *Journal of Legal, Ethical and Regulatory Issues*, 24(6), 1, 1; Rogers, A., & Launders, R. (1993). The Indestructible Arbitration Clause. *The Arbitrator*, 192, 192; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47 & 49.

³¹ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 [2007] UKHL 40.

³² Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 56 & 58; *International Arbitration* (2nd ed). Cambridge, UK: Cambridge University Press, 1; Kariuki, F., & Sebayiga, V. (2022). Arbitrability of Fraud in Kenya. *Alternative Dispute Resolution Journal*, 2(1), 11, 15; Douglas, Z. (2014). The Plea of Illegality in Investment Treaty Arbitration. *ICSID Review*, 29(1), 155, 158.

³³ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [7] & [13]; Douglas, Z. (2014). The Plea of Illegality in Investment Treaty Arbitration. *ICSID Review*, 29(1), 155, 158; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 56.

impeaches the arbitration clause itself, the clause survives the demise of the main contract.³⁴

Beyond mere survival, the conceptual independence of the arbitration agreement has been heavily scrutinised by the UK Supreme Court in the complex context of determining its governing law.³⁵ Since the arbitration clause is treated as a distinct contract, English courts recognize that it may be governed by a different national law than the substantive matrix contract.³⁶ However, the precise boundaries of this conceptual separation were recently tested in *Kabab-Ji SAL v Kout Food*^{37, 38}. In this decision, the Supreme Court clarified the limits of the separability fiction when interpreting the parties' contractual intent regarding the applicable law.³⁹ The court held that a general choice-of-law clause governing the main contract will typically extend to the arbitration agreement, unless there is specific language to the contrary.⁴⁰ The Court emphasised that separability does

³⁴ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17] & [35]; Douglas, Z. (2014). The Plea of Illegality in Investment Treaty Arbitration. *ICSID Review*, 29(1), 155, 158; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 56-57.

³⁵ *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [40]-[41]; Ho, R. H. (2022). Breaking with Convention: The Supreme Court's Approach to Separability in *Kabab-Ji v KFG*. *LSE Law Review*, 8, 37, 37-38; Subramaniam, S. (2020). Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach. *Journal of Malaysian and Comparative Law*, 47(2), 1, 1; (2022). Determining the Proper Law of the Arbitration Agreement in an International Arbitration. *Alternative Dispute Resolution Journal*, 1, 57, 57.

³⁶ *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [1] & [40]-[41]; Mustafayeva, A. (2015). Doctrine of separability in International Commercial Arbitration. *Baku State University Law Review*, 1, 98, 98; Subramaniam, S. (2020). Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach. *Journal of Malaysian and Comparative Law*, 47(2), 1, 1.

³⁷ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 [2021] UKSC 48.

³⁸ Ho, R. H. (2022). Breaking with Convention: The Supreme Court's Approach to Separability in *Kabab-Ji v KFG*. *LSE Law Review*, 8, 37, 38-39 & 51; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis. *Journal of Private International Law*, 17(3), 439, 448-449; Samuel, A. (2021). Separability of Arbitration Clauses - Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice, 6.

³⁹ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [33]-[35] & [39]; Ho, R. H. (2022). Breaking with Convention: The Supreme Court's Approach to Separability in *Kabab-Ji v KFG*. *LSE Law Review*, 8, 37, 38-39 & 51; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis. *Journal of Private International Law*, 17(3), 439, 448-449.

⁴⁰ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [33], [35] & [39]; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis. *Journal of Private International Law*, 17(3), 439, 448 & 471; Ho, R. H. (2022). Breaking with Convention: The Supreme Court's Approach to Separability in *Kabab-Ji v KFG*.

not mean the arbitration clause is completely insulated from the interpretative context of the broader document.⁴¹ Rather, it is a functional doctrine designed to preserve jurisdiction, not to rewrite the parties' choice of law.⁴² This framework was subsequently affirmed and expanded in *UniCredit Bank v RusChemAlliance*.⁴³ ⁴⁴ The Supreme Court confirmed that the arbitration agreement stands as an autonomous contract capable of distinct legal protection.⁴⁵ Specifically, the Court upheld an anti-suit injunction to restrain Russian litigation brought in breach of a Paris-seated arbitration agreement.⁴⁶ Further, the court held that the arbitration agreement was governed by English law.⁴⁷ This reinforced the robust protective measures English courts will deploy to defend the autonomy of the arbitral process.⁴⁸

LSE Law Review, 8, 37, 38-39 & 51.

⁴¹ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [39]; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis. *Journal of Private International Law*, 17(3), 439, 448-449; Ho, R. H. (2022). Breaking with Convention: The Supreme Court's Approach to Separability in *Kabab-Ji v KFG*. *LSE Law Review*, 8, 37, 51.

⁴² *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [51]-[52]; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis. *Journal of Private International Law*, 17(3), 439, 448-449.

⁴³ *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 [2024] UKSC 30.

⁴⁴ *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, [21]-[22], [57]-[58] & [61]-[63]; Fasolo, N. (2025). Anti-Suit Injunctions in Support of Arbitration: A Comparative Study of English and French Law Through the Lens of *UniCredit v RusChemAlliance* [Master's thesis, Paris-Panthéon-Assas University], 50-51 & 57-58; Berard, M., Mah, N., & Shu, R. (2024). Supreme Court provides guidance on English court's jurisdiction to issue anti-suit injunctions in support of foreign seated arbitrations. *Clifford Chance*, 3.

⁴⁵ *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, [90], [99] & [112]; Fasolo, N. (2025). Anti-Suit Injunctions in Support of Arbitration: A Comparative Study of English and French Law Through the Lens of *UniCredit v RusChemAlliance* [Master's thesis, Paris-Panthéon-Assas University], 53-54 & 64; Berard, M., Mah, N., & Shu, R. (2024). Supreme Court provides guidance on English court's jurisdiction to issue anti-suit injunctions in support of foreign seated arbitrations. *Clifford Chance*, 4.

⁴⁶ *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, [1] & [113]; Berard, M., Mah, N., & Shu, R. (2024). Supreme Court provides guidance on English court's jurisdiction to issue anti-suit injunctions in support of foreign seated arbitrations. *Clifford Chance*, 1.; Fasolo, N. (2025). Anti-Suit Injunctions in Support of Arbitration: A Comparative Study of English and French Law Through the Lens of *UniCredit v RusChemAlliance* [Master's thesis, Paris-Panthéon-Assas University], 7 & 48.

⁴⁷ *Ibid.*

⁴⁸ *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, [68], [71] & [112]; Berard, M., Mah, N., & Shu, R. (2024). Supreme Court provides guidance on English court's jurisdiction to issue anti-suit injunctions in support of foreign seated arbitrations. *Clifford Chance*, 4; Fasolo, N. (2025). Anti-Suit Injunctions in Support of Arbitration: A Comparative Study of English and French Law Through the Lens of *UniCredit v RusChemAlliance* [Master's thesis, Paris-Panthéon-Assas University], 3 & 64.

Despite this strongly pro-arbitration stance, English courts have meticulously drawn strict boundaries around the doctrine, particularly concerning matters of contract formation and mutual consent.⁴⁹ The separability doctrine is not absolute and cannot retroactively conjure an arbitration agreement into existence when the parties never reached a consensus *ad idem*.⁵⁰ This limitation was illustrated by the Court of Appeal in *DHL Project v Gemini Ocean Shipping*^{51, 52} In that case, the Court set aside an arbitral award because the main contract was negotiated with a specific condition precedent requiring shippers and receivers approval.⁵³ Since the explicit pre-condition was never satisfied, a binding contract was never formed.⁵⁴ The Court ruled that the arbitration clause, embedded within a draft agreement that never legally materialised, similarly failed to come into existence.⁵⁵ This highlights a critical distinction in English arbitration

⁴⁹ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57], [62] & [75]; Todorović, I. (2021). A Closer Look at the Doctrine of Separability in Arbitration. *IUS Law Journal*, 1(1), 6, 9; Sitorus, W. (2021). Separability Doctrine in Arbitration Agreement (A Comparative Study). *Journal of Legal, Ethical and Regulatory Issues*, 24(6), 1, 6.

⁵⁰ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57] & [62]; Bo, C. C. (2020). An Introduction to the Meeting of the Minds: Consensus Ad Idem. *University of Malaya Law Review Lex Omnibus*, 1, 1-2 & 10; Todorović, I. (2021). A Closer Look at the Doctrine of Separability in Arbitration. *IUS Law Journal*, 1(1), 6, 9.

⁵¹ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555.

⁵² *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57], [62] & [75]; Pidgeon, R. (2023). Separability and arbitral tribunals being 'open for business?'. *New Zealand Dispute Resolution Centre*, 1, 1-2; Isaacs, S., & Houghton, E. (2023). The Separability Principle: the Newcastle Express Case. *Wilberforce Arbitration Insight*, 1-2; Roberts, L. (2023). Newcastle Express and the separability principle. *Campbell Johnston Clark*, 1.

⁵³ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [41], [80] & [84]; Peykova, M. (2023). Arbitration agreements "subject to contract", and the limited scope of the separability principle. *3PB*, 1; Pidgeon, R. (2023). Separability and arbitral tribunals being 'open for business?'. *New Zealand Dispute Resolution Centre*, 1, 2; Roberts, L. (2023). Newcastle Express and the separability principle. *Campbell Johnston Clark*, 1.

⁵⁴ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [41] & [80]; Isaacs, S., & Houghton, E. (2023). The Separability Principle: the Newcastle Express Case. *Wilberforce Arbitration Insight*, 1; Pidgeon, R. (2023). Separability and arbitral tribunals being 'open for business?'. *New Zealand Dispute Resolution Centre*, 1, 2; Peykova, M. (2023). Arbitration agreements "subject to contract", and the limited scope of the separability principle. *3PB*, 1.

⁵⁵ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57] & [62]; Pidgeon, R. (2023). Separability and arbitral tribunals being 'open for business?'. *New Zealand Dispute Resolution Centre*, 1, 2; Peykova, M. (2023). Arbitration agreements "subject to contract", and the limited scope of the separability principle. *3PB*, 1; Isaacs, S., & Houghton, E. (2023). The Separability Principle: the Newcastle Express Case. *Wilberforce Arbitration Insight*, 1; Roberts, L. (2023). Newcastle Express and the separability principle. *Campbell Johnston Clark*, 1.

law.⁵⁶ Although Section 7 of the Arbitration Act 1996 and the *Fiona Trust*⁵⁷ principle can save an arbitration clause within a contract that is later deemed void *ab initio* or rescinded for fraud, the doctrine cannot bypass the fundamental requirement of initial contract formation.⁵⁸

3.2 United States

In the United States, the statutory framework governing arbitral dispute resolution is anchored by the Federal Arbitration Act.⁵⁹ Although the Federal Arbitration Act does not explicitly mention the word 'separability', the US Supreme Court has established that it is a foundational principle of the Act.⁶⁰ The leading authority cementing this doctrine is the landmark decision in *Prima Paint v. Flood and*

⁵⁶ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWCA Civ 1555, [57], [62]; Stuart Isaacs KC and Elizabeth Houghton, 'The Separability Principle: the Newcastle Express Case' (Wilberforce Arbitration Insight, 10 June 2023) 1; Richard Pidgeon, 'Separability and arbitral tribunals being "open for business"?' (New Zealand Dispute Resolution Centre, 2023) 1, 2; Mariya Peykova, 'Arbitration agreements "subject to contract", and the limited scope of the separability principle (DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555)' (3PB, 13 February 2023) 1; Lucinda Roberts, 'Newcastle Express and the separability principle' (Campbell Johnston Clark, March 2023) 1.

⁵⁷ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

⁵⁸ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57] & [62]; Pidgeon, R. (2023). Separability and arbitral tribunals being 'open for business?'. *New Zealand Dispute Resolution Centre*, 1, 2; Isaacs, S., & Houghton, E. (2023). The Separability Principle: the Newcastle Express Case. *Wilberforce Arbitration Insight*, 1; Peykova, M. (2023). Arbitration agreements "subject to contract", and the limited scope of the separability principle. *3PB*, 1.

⁵⁹ Carbonneau, T. E. (1990). Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform. *Ohio State Journal on Dispute Resolution*, 5(2), 232; Plass, S. A. (2016). Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties. *Catholic University Law Review*, 65(1), 79-80; Caplan, L. M., Feighery, T. J., Tai, J., Love, B., & Malpass, L. (2024). Guide to Arbitration Places (GAP): United States of America. *Delos Dispute Resolution*, 7; Hioureas, C., Younger, S., Schimmel, D., Bard, Y., Reiner, S., Nicolas, N., & Figueroa, K. J. (2021). Arbitration Procedures and Practice in the United States: Overview. *Practical Law*, 4; Freyer, D. H. (2006). The United States Federal Arbitration Act and the UNCITRAL Model Law: How and Why are They Different?. *IPBA Journal*, 29.

⁶⁰ *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967), 403-404; *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010), 70-71; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 377-378; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 224; Rau, A. S. (2006). Separability in the United States Supreme Court. *Stockholm International Arbitration Review*, 2.

Conklin Manufacturing^{61, 62} The core legal principle dictates that claims relating to fraud in the inducement of the overarching commercial contract must be adjudicated by arbitrators.⁶³ A judicial body may only intervene if the arbitration clause itself is specifically challenged.⁶⁴ Significantly, this severability reserves issues of contract validity exclusively to the arbitrator, becoming an integral part of substantive federal common law.⁶⁵ This framework operates on the premise that the arbitration provision satisfies requisite elements of contract formation.⁶⁶ Thus, it allows severance from the underlying contract even when the main agreement faces fundamental challenges.⁶⁷

Building upon this foundation, the Supreme Court has consistently reinforced that arbitration agreements are treated as entirely independent

⁶¹ *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967).

⁶² *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967), 403-404; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 224; Rau, A. S. (2006). Separability in the United States Supreme Court. *Stockholm International Arbitration Review*, 2; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 372-373 & 379.

⁶³ *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967), 403-404; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 224; Rau, A. S. (2006). Separability in the United States Supreme Court. *Stockholm International Arbitration Review*, 2; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 378.

⁶⁴ *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967), 403-404; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 372-373, 378; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 246-247; Rau, A. S. (2006). Separability in the United States Supreme Court. *Stockholm International Arbitration Review*, 2.

⁶⁵ *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967), 403-404; *Moses H Cone Memorial Hospital v Mercury Constr Corp*, 460 US 1 (1983), 24; Rau, A. S. (2006). Separability in the United States Supreme Court. *Stockholm International Arbitration Review*, 2; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 246-247; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 372-373, 378.

⁶⁶ *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010), 70 n 2; *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440 (2006), 444 n 1; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 246-247; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363; Peykova, M. (2023). Arbitration agreements "subject to contract", and the limited scope of the separability principle. *3PB*, 1.

⁶⁷ *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967), 403-404; *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010), 70-71; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 246-247.

contracts.⁶⁸ In *Rent A Center West v. Jackson*⁶⁹, the Court validated the use of delegation clauses that explicitly assign the threshold question of arbitrability directly to the arbitrator.⁷⁰ Under the Federal Arbitration Act, if a party challenges the enforceability of the agreement as a whole rather than the specific delegation provision, the dispute must be sent to the arbitrator.⁷¹ This judicial approach ensures the autonomous power of the arbitral mechanism is respected.⁷² The principle was further entrenched in the unanimous decision of *Henry Schein v Archer*^{73,74}. The Court held that when a commercial contract explicitly delegates the arbitrability question to an arbitrator, a court may not override that contractual agreement by applying a wholly groundless exception.⁷⁵ This judgment illustrates profound judicial deference that ensures the doctrine of separability protects the arbitral process from premature judicial interference.⁷⁶

⁶⁸ *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010), 70-71; Fox, W. F., & Dautaj, Y. (2019). The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act. *Cardozo Journal of Conflict Resolution*, 21, 1, 19; Moses, M. L. (2006). Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. *Florida State University Law Review*, 34, 99, 116 & 148.

⁶⁹ *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010).

⁷⁰ *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010), 68-70; Horton, D. (2018). Arbitration About Arbitration. *Stanford Law Review*, 70, 363, 363 & 381-382.

⁷¹ *Rent-A-Center, West, Inc v Jackson*, 561 US 63 (2010), 63, 70-72; *Henry Schein, Inc v Archer & White Sales, Inc*, 586 US 63 (2019), 68-70; *Coinbase, Inc v Suski*, 602 US 143 (2024), 150-151.

⁷² *Henry Schein, Inc v Archer & White Sales, Inc*, 586 US 63 (2019), 68 ; Mohmeded, S. S. M. (2016). Party autonomy doctrine is the cornerstone of arbitral provisional measures. *International Academic Journal of Law and Society*, 1(1), 28, 30, 42-43; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 246-247.

⁷³ *Henry Schein, Inc v Archer & White Sales, Inc*, 586 US 63 (2019), 68-70.

⁷⁴ Fox, W. F., & Dautaj, Y. (2019). The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act. *Cardozo Journal of Conflict Resolution*, 21(1), 21, 25.

⁷⁵ *Henry Schein, Inc v Archer & White Sales, Inc*, 586 US 63 (2019), 68-70; Fox, W. F., & Dautaj, Y. (2019). The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act. *Cardozo Journal of Conflict Resolution*, 21(1), 21, 25-27.

⁷⁶ *Henry Schein, Inc v Archer & White Sales, Inc*, 586 US 63 (2019), 68, 70; Monestier, T. J. (2001). Nothing Comes of Nothing... Or Does it? A Critical Re-Examination of the Doctrine of Separability in American Arbitration. *American Review of International Arbitration*, 12, 223, 246-247; Fox, W. F., & Dautaj, Y. (2019). The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act. *Cardozo Journal of Conflict Resolution*, 21(1), 10, 25, 33; Mohmeded, S. S. M. (2016). Party autonomy doctrine is the cornerstone of arbitral provisional measures. *International Academic Journal of Law and Society*, 1(1), 42-43.

Despite this strongly pro-arbitration stance, a critical limitation was introduced in the decision of *Coinbase Incorporated v. Suski*^{77,78} The Supreme Court clarified the boundaries of the separability doctrine in scenarios where parties have executed multiple conflicting contracts over time.⁷⁹ Specifically, when an initial contract contains an arbitration provision with a delegation clause and a subsequent promotional agreement directs disputes to a judicial forum, the courts must determine which contract governs the relationship.⁸⁰ Consequently, courts remain careful not to afford the doctrine too wide a berth.⁸¹ By ensuring judges resolve fundamental conflicts between competing forum selection clauses, the US framework prevents reckless application of the separability doctrine and preserves the fundamental integrity of contract law.⁸²

3.3 Malaysia

The Malaysian legislature expressly codified the separability doctrine under **Section 18(2) of the Arbitration Act 2005**.⁸³ This section dictates that an arbitral tribunal's decision rendering the underlying commercial contract null and void shall not automatically entail the invalidity of the arbitration clause itself.⁸⁴ The

⁷⁷ *Coinbase, Inc v Suski*, 602 US 143 (2024).

⁷⁸ *Coinbase, Inc v Suski*, 602 US 143 (2024), 149-150; Sashikanth, N. K. (2023). Arbitral Clauses and the Blue Pencil: Doctrine of Separability. *International Journal of Law Management & Humanities*, 6(4), 775, 782.

⁷⁹ *Coinbase, Inc v Suski*, 602 US 143 (2024), 149-150; Sashikanth, N. K. (2023). Arbitral Clauses and the Blue Pencil: Doctrine of Separability. *International Journal of Law Management & Humanities*, 6(4), 775, 782.

⁸⁰ *Coinbase, Inc v Suski*, 602 US 143 (2024), 145-146, 149-150; Sashikanth, N. K. (2023). Arbitral Clauses and the Blue Pencil: Doctrine of Separability. *International Journal of Law Management & Humanities*, 6(4), 775, 782.

⁸¹ Sashikanth, N. K. (2023). Arbitral Clauses and the Blue Pencil: Doctrine of Separability. *International Journal of Law Management & Humanities*, 6(4), 775, 782.

⁸² *Coinbase, Inc v Suski*, 602 US 143 (2024), 149-150; Sashikanth, N. K. (2023). Arbitral Clauses and the Blue Pencil: Doctrine of Separability. *International Journal of Law Management & Humanities*, 6(4), 775, 782.

⁸³ *Arbitration Act 2005* (Malaysia), s 18(2); Nathan, R. S., Mogan, K. S., & Gomez, R. (2021). *The Legal 500 Country Comparative Guides: Malaysia - International Arbitration*. Legalease, 4; Abraham, C., Abraham, S., & Asnani, S. S. (2023). *Malaysia Arbitration Guide*. Cecil Abraham & Partners, 10-11.

⁸⁴ *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417, [37]; *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233, [13]; Nathan, R. S., Mogan, K. S., & Gomez, R. (2021). *The Legal 500 Country Comparative Guides: Malaysia - International Arbitration*. Legalease, 4; Mustafayeva, A. (2015). Doctrine of separability in International Commercial Arbitration.

court has affirmed this approach in the case of *Standard Chartered Bank Malaysia v City Properties*^{85, 86}. The court established the judiciary's *prima facie* duty to enforce arbitration agreements even when the broader contractual framework faces fundamental validity challenges.⁸⁷ Thus, this protects the original intent of the parties to arbitrate.⁸⁸

Other than that, in *Press Metal Sarawak v Etiqa Takaful*⁸⁹, the Federal Court emphasised the profound necessity of judicial deference to the arbitral process.⁹⁰ The court ruled that arbitrators possess the autonomous jurisdiction to resolve all substantive claims and ancillary matters without premature interference from the courts.⁹¹ The Court of Appeal subsequently expanded this paradigm of deference in *Setia Awan v SPNB*^{92, 93}. The court established a strikingly low evidentiary threshold for granting a stay of court proceedings.⁹⁴ The court ruled that even if there exists doubts regarding the validity of the arbitration agreement, the judiciary must pivot in favour of arbitration to respect the severed contractual bargain.⁹⁵

Baku State University Law Review, 1, 98.

⁸⁵ *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233.

⁸⁶ *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233, [13]; Abraham, C., Abraham, S., & Asnani, S. S. (2023). *Malaysia Arbitration Guide*. Cecil Abraham & Partners, 24-25; Nathan, R. S., Mogan, K. S., & Gomez, R. (2021). *The Legal 500 Country Comparative Guides: Malaysia - International Arbitration*. Legalease, 4.

⁸⁷ *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233, [27]-[29]; Nathan, R. S., Mogan, K. S., & Gomez, R. (2021). *The Legal 500 Country Comparative Guides: Malaysia - International Arbitration*. Legalease, 4; Abraham, C., Abraham, S., & Asnani, S. S. (2023). *Malaysia Arbitration Guide*. Cecil Abraham & Partners, 24-25.

⁸⁸ *Ibid.*

⁸⁹ *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417.

⁹⁰ *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417, [38], [112]-[114]; Abraham, C., Abraham, S., & Asnani, S. S. (2023). *Malaysia Arbitration Guide*. Cecil Abraham & Partners, 16.

⁹¹ *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417, [38], [113]; Nathan, R. S., Mogan, K. S., Lee, A., & Gomez, R. (2021). *Chambers Global Practice Guides: International Arbitration 2021 - Malaysia*. Chambers and Partners, 11.

⁹² *Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd* [2025] 4 MLJ 181.

⁹³ *Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd* [2025] 4 MLJ 181, [106]; Heng, A. Y. H., & Sedek, A. Y. (2025). *Stay Pending Arbitration: When Parties have the Option to Arbitrate or to Litigate in Court*. Zain Megat & Murad, 4-5, 7.

⁹⁴ *Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd* [2025] 4 MLJ 181, [106]; Jeyaratnam, A. K. (2025). Highlights from the Appellate Courts: *Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd* (CA). *Malaysian Bar Council Circular No 204/2025*, 3.

⁹⁵ *Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd* [2025] 4 MLJ 181, [45].

Furthermore, the doctrine of separability provides a critical protective shield during complex corporate insolvency proceedings.⁹⁶ This ensures that agreed dispute resolution mechanisms survive contractual frustration.⁹⁷ In *Peninsula Education v Biaxis*⁹⁸, the Court of Appeal ruled that an arbitration agreement does not automatically become inoperative merely because a contracting party enters liquidation.⁹⁹ Instead, the severable clause remains wholly applicable to resolve disputed debts between the insolvent entity and its creditors.¹⁰⁰ The Federal Court solidified this intersection of insolvency and arbitration in *V Medical Services v Swissray Asia*^{101, 102}. The court held that when a disputed debt arises under a contract containing an arbitration clause, courts must require a genuine dispute on substantial grounds before allowing statutory winding up petitions to bypass the chosen arbitral forum.¹⁰³

Despite this strongly supportive stance, the Malaysian judiciary recognises that the separability doctrine cannot be applied recklessly to override the basic principles of contract formation.¹⁰⁴ In *ING Bank NV v Tumpuan Megah*

⁹⁶ *Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (in liquidation)* [2024] 5 MLJ 388, [85]-[86]; Tan, S. S. S., & Koh, S. L. (2024). *Arbitration: An Interplay Between Liquidation and Arbitration: Malaysian Court of Appeal's Stance*. Zul Rafique & Partners, 1, 3.

⁹⁷ *Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (in liquidation)* [2024] 5 MLJ 388, [85]-[86]; Tan, S. S. S., & Koh, S. L. (2024). *Arbitration: An Interplay Between Liquidation and Arbitration: Malaysian Court of Appeal's Stance*. Zul Rafique & Partners, 1, 3.

⁹⁸ *Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (in liquidation)* [2024] 5 MLJ 388.

⁹⁹ *Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (in liquidation)* [2024] 5 MLJ 388, [84]; Tan, S. S. S., & Koh, S. L. (2024). *Arbitration: An Interplay Between Liquidation and Arbitration: Malaysian Court of Appeal's Stance*. Zul Rafique & Partners, 1.

¹⁰⁰ *Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (in liquidation)* [2024] 5 MLJ 388, [84]-[85]; Tan, S. S. S., & Koh, S. L. (2024). *Arbitration: An Interplay Between Liquidation and Arbitration: Malaysian Court of Appeal's Stance*. Zul Rafique & Partners, 2.

¹⁰¹ *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744.

¹⁰² *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744, [1], [84], [162]; Heng, A. Y. H. (2025). Fortuna Injunction: Lower Threshold Test Where There Is An Arbitration Agreement? - Revisited. *Zain Megat & Murad*, 1, 5-6; Devaraja, N. (2025). Highlights from the Appellate Courts: *V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd* (FC). *Malaysian Bar Council Circular No 134/2025*, 4.

¹⁰³ *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744, [162], [166]; Heng, A. Y. H. (2025). Fortuna Injunction: Lower Threshold Test Where There Is An Arbitration Agreement? - Revisited. *Zain Megat & Murad*, 6; Devaraja, N. (2025). Highlights from the Appellate Courts: *V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd* (FC). *Malaysian Bar Council Circular No 134/2025*, 7.

¹⁰⁴ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [43], [53], [318]-[320]; Sashikanth, N. K. (2023). Arbitral Clauses and the Blue Pencil: Doctrine of Separability. *International Journal of Law Management & Humanities*, 6(4), 775, 782.

*Development*¹⁰⁵, the Federal Court established a critical boundary at the enforcement stage.¹⁰⁶ The court ruled that when a party challenges the formation of the underlying contract by arguing it was never legally concluded, the court must conduct a *de novo* review of the jurisdictional challenge.¹⁰⁷ Courts should not blindly defer to the findings of the tribunal under the doctrine of separability.¹⁰⁸

Ultimately, the trajectory of the separability doctrine in Malaysia reflects a mature, pro-arbitration regime that fiercely protects party autonomy and the efficacy of agreed dispute resolution mechanisms.¹⁰⁹ However, the judiciary's calibrated approach ensures that this legal fiction serves to promote commercial certainty rather than acting as a shield to bypass fundamental defects in contract formation.¹¹⁰

3.4 Singapore

The doctrine of separability serves as a foundational pillar within Singapore's dual-track commercial arbitration regime.¹¹¹ This cultivates a robust, pro-

¹⁰⁵ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751,.

¹⁰⁶ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [279]-[288], [306]-[320]; Faiz, A. U. F. B. (2025). Highlights from the Appellate Courts (No 16/2025): *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* (FC). *Malaysian Bar Council Circular No 342/2025*, 8; Lim, C. Y., & Lim, S. J. S. (2025). REJA 1958 and AA 2005: Which Route for the Enforcement of Arbitral Awards. *LHAG Insights*, 2.

¹⁰⁷ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [43], [50], [54]-[55], [288]-[291], [317]-[320]; Faiz, A. U. F. B. (2025). Highlights from the Appellate Courts (No 16/2025): *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* (FC). *Malaysian Bar Council Circular No 342/2025*, 8; Lim, C. Y., & Lim, S. J. S. (2025). REJA 1958 and AA 2005: Which Route for the Enforcement of Arbitral Awards. *LHAG Insights*, 2.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417, [38]; *Peninsula Education (Setia Alam) Sdn Bhd v Biaxis (M) Sdn Bhd (in liquidation)* [2024] 5 MLJ 388, [85]-[86]; Rajoo, S. (2020). Arbitration and its Development in Malaysia. *Malayan Law Journal Articles*, 1(55), 11; Abraham, C., Abraham, S., & Sebastian, A. S. (2022). *Judicial Approach to the Application and Construction of the Arbitration Act 2005 in Malaysia: Section 8*. Cecil Abraham & Partners, 1, 10.

¹¹⁰ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [279], [312], [317]-[320]; Sitorus, W. (2021). Separability Doctrine in Arbitration Agreement (A Comparative Study). *Journal of Legal, Ethical and Regulatory Issues*, 24(6), 1.

¹¹¹ Warren B Chik, 'Recent Developments in Singapore on International Commercial Arbitration' (2005) 9 SYBIL 259, 259; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 SAcLJ 421, 421; Goh Jia Jun Benjamin, 'Separability Doctrine:

arbitration ecosystem.¹¹² For international arbitrations, the doctrine is enshrined in the **International Arbitration Act 1994** through the legislative adoption of the UNCITRAL Model Law, specifically **Article 16(1)**.¹¹³ Concurrently, for domestic arbitrations, the principle is expressly codified under **Section 21(2) of the Arbitration Act 2001**.¹¹⁴ Under both statutory regimes, the separability principle relies upon the legal fiction that an arbitration clause embedded within a matrix contract constitutes a distinct and autonomous agreement.¹¹⁵

The conceptual independence of the arbitration agreement necessitates a distinct analytical framework when ascertaining its governing law.¹¹⁶ In *BCY v BCZ*¹¹⁷, the High Court reaffirmed the autonomy of the arbitration clause.¹¹⁸ The court established that while there is a general presumption that the proper law of the main contract governs the arbitration agreement, this presumption can be displaced to protect the validity of the arbitration agreement itself.¹¹⁹ This

Perspectives from China, England and the Model Law' (2025) 37 SAcLJ 47, 47.

¹¹² *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158; Chik, W. B. (2006). The Law of International Commercial Arbitration in Singapore. *Transnational Dispute Management*, 25; Lim, G., Foo, Y. M., Rai, M., & Tan, Y. K. (2025). *The Legal 500 Country Comparative Guides: Singapore - Investment Treaty Arbitration*. Legalease, 11.

¹¹³ International Arbitration Act 1994 (Singapore), s 3(1); UNCITRAL Model Law on International Commercial Arbitration, Article 16(1); Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 SAcLJ 47, 56; Warren B Chik, 'The Law of International Commercial Arbitration in Singapore' (2006) TDM 1, 2; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 SAcLJ 421, 434, 436.

¹¹⁴ *Arbitration Act 2001* (Singapore), s 21(2); Chik, W. B. (2005). Recent Developments in Singapore on International Commercial Arbitration. *Singapore Year Book of International Law*, 9, 259.

¹¹⁵ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554, [54]; *BCY v BCZ* [2017] 3 SLR 357, [38]-[44]; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 SAcLJ 421, 423; Anthony Daimsis, 'How Heuristics Misshape Reasoning and Lead to Increased Costs in Arbitration' (2019) SSRN, 3; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 SAcLJ 47, [69].

¹¹⁶ *BCY v BCZ* [2017] 3 SLR 357, [40], [60]-[61]; Darius Chan and Jim Yang Teo, 'Re-formulating the test for ascertaining the proper law of an arbitration agreement: A comparative common law analysis' (2022) 17(3) JPIL 439, 471-472; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 SAcLJ 47, 52-53; Siva Subramaniam, 'Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach' (2020) 47(2) JMCL 1, 1.

¹¹⁷ *BCY v BCZ* [2017] 3 SLR 357.

¹¹⁸ *BCY v BCZ* [2017] 3 SLR 357, [60]-[61], [65], [74]; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: A comparative common law analysis. *Journal of Private International Law*, 17(3), 439, 440-441; Goh, J. J. B. (2025). Separability Doctrine: Perspectives from China, England and the Model Law. *Singapore Academy of Law Journal*, 37, 47, 52-53, 62; Subramaniam, S. (2020). Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach. *Journal of Malaysian and Comparative Law*, 47(2), 1, 1.

¹¹⁹ *BCY v BCZ* [2017] 3 SLR 357, [43], [65], [74]; Subramaniam, S. (2020). Determining the Law to Govern

approach underscores the judiciary's commitment to actualising the parties' original intent to arbitrate.¹²⁰ Thus, it insulates the severed dispute resolution mechanism from the substantive legal complexities of the broader contract.¹²¹

Furthermore, Singaporean courts have actively delineated the boundaries of arbitral autonomy by enforcing a strict dichotomy between jurisdictional challenges and admissibility issues.¹²² In *DRO v DRP*¹²³, the High Court ruled that non-compliance with contractual pre-arbitration conditions, such as multi-tiered escalation clauses or mandatory mediation steps, goes strictly to the admissibility of the claim rather than the jurisdiction of the arbitral tribunal.¹²⁴ This critical judgment distinction prevents parties from weaponising alleged procedural breaches of the matrix contract to prematurely invalidate the tribunal's autonomous authority.¹²⁵

The doctrine of separability also provides a potent protective shield during corporate insolvency proceedings.¹²⁶ This resolves the inherent tension between arbitral autonomy and statutory liquidation.¹²⁷ In *AnAn Group v VTB Bank*¹²⁸, the court established a tripartite test, holding that statutory winding-up petitions based on a disputed debt subject to an arbitration agreement will typically be

an Arbitration Agreement: A Quest for the Best Approach. *Jurnal Undang-Undang dan Masyarakat*, 47(2), 5; Daimsis, A. (2019). How Heuristics Misshape Reasoning and Lead to Increased Costs in Arbitration. SSRN, 6-7; Chan, D., & Teo, J. Y. (2022). Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis. *Journal of Private International Law*, 17(3), 441-442.

¹²⁰ *BCY v BCZ* [2017] 3 SLR 357, [65], [74]; Subramaniam, S. (2020). Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach. *Journal of Malaysian and Comparative Law*, 47(2), 1, 22; Sitorus, W. (2021). Separability Doctrine in Arbitration Agreement (A Comparative Study). *Journal of Legal, Ethical and Regulatory Issues*, 24(6), 1.

¹²¹ *BNA v BNB* [2019] SGHC 142, [74]; *BCY v BCZ* [2017] 3 SLR 357, [61]; Goh, J. J. B. (2025). Separability Doctrine: Perspectives from China, England and the Model Law. *Singapore Academy of Law Journal*, 37, 62-63.

¹²² *DRO v DRP* [2025] SGHC 255, [59], [63], [100]-[101]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 64.

¹²³ *DRO v DRP* [2025] SGHC 255.

¹²⁴ *DRO v DRP* [2025] SGHC 255, [59], [63], [100].

¹²⁵ *DRO v DRP* [2025] SGHC 255, [62]-[63].

¹²⁶ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [56], [62]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 60.

¹²⁷ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [68]-[71]; Ho, D., & Boo, L. (2024). 4. Arbitration. *SAL Annual Review*, 24, 58, 60 (paras 4.4, 4.11).

¹²⁸ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158..

stayed or dismissed.¹²⁹ This principle is provided the dispute is *prima facie* genuine and not raised in an abuse of process.¹³⁰ Such lower threshold of review showcases profound judicial deference to the severed arbitration clause.¹³¹ Therefore, it ensures that creditors cannot exploit insolvency mechanisms to bypass the agreed arbitral forum.¹³²

Similarly, the Singaporean judiciary strictly regulates the application of separability to prevent procedural abuse, particularly concerning fundamental disputes over contract formation.¹³³ In *Founder Group v Singapore JHC*¹³⁴, the court addressed a scenario wherein a debtor attempted to resist a winding-up application by invoking an arbitration clause.¹³⁵ Simultaneously, the debtor argued that the underlying commercial contracts were "sham" transactions and entirely void *ab initio*.¹³⁶ The court ruled this posture to be "manifestly inconsistent."¹³⁷ The judgment established a critical boundary: a litigant cannot aggressively deny the very existence or conclusion of a contract while simultaneously wielding the doctrine of separability to extract and enforce the arbitration clause as a jurisdictional shield.¹³⁸ Therefore, the application of separability in Singapore reflects a sophisticated balancing act that champions

¹²⁹ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [56]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 60.

¹³⁰ *Ibid.*

¹³¹ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [56], [62]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 60.

¹³² *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [62]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 60.

¹³³ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554, [55]-[58], [61]-[62]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 61-62.

¹³⁴ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554.

¹³⁵ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554, [1]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 58-60.

¹³⁶ *Ibid.*

¹³⁷ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554, [61]-[62]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 62.

¹³⁸ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554, [68]-[75]; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 60.

arbitral efficacy while remaining vigilant against the manipulation of this legal fiction.¹³⁹

3.5 International Arbitration Practice

Within the autonomous paradigm of international arbitration practice, the doctrine of separability functions as an indispensable jurisdictional safeguard.¹⁴⁰ By legally severing the arbitration agreement from the substantive commercial agreement, the doctrine ensures that preliminary invalidity claims do not prematurely paralyse the dispute resolution process.¹⁴¹

The doctrine is enshrined in **Article 16(1) of UNCITRAL Model Law on International Commercial Arbitration**.¹⁴² The Model Law explicitly dictates that an arbitration clause embedded within a contract must be treated as a distinct, independent agreement.¹⁴³ Consequently, the tribunal's mandate is structurally

¹³⁹ *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158, [56], [62]; *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554, [55], [58], [61]-[62]; Lim, G., Foo, Y. M., Rai, M., & Tan, Y. K. (2025). *The Legal 500 Country Comparative Guides: Singapore - Investment Treaty Arbitration*. Legalease, 11; Ho, D., & Boo, L. (2024). 4. Arbitration. *Singapore Academy of Law Annual Review of Singapore Cases*, 24, 57, 62.

¹⁴⁰ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* (Award) PCA Case No 2015-40; Ayten Mustafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 *Baku State University Law Review* 96, 96; George A Bermann, 'The Self-Styled "Autonomy" of International Arbitration' (2020) 36 *Arbitration International* 221, 221; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

¹⁴¹ Anaghara-Uzor, 'Separability of the Arbitration Agreement/Clause in International Commercial Arbitration: How Absolute?' (2020) 11(3) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 48, 55; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

¹⁴² UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 16(1); Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *SaLJ* 421, 436; Anthony Daimsis, 'How Heuristics Misshape Reasoning and Lead to Increased Costs in Arbitration' (2019) SSRN 1, 4; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *SaLJ* 47, 56.

¹⁴³ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 16(1); Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *SaLJ* 421, 436; Anthony Daimsis, 'How Heuristics Misshape Reasoning and Lead to Increased Costs in Arbitration' (2019) SSRN 1, 4; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *SaLJ* 47, 56.

immunised from disputes concerning the formation, termination, or frustration of the main contract.¹⁴⁴

Leading international arbitral institutions systematically embed the synergistic doctrine of separability directly into their regulatory architecture to preserve procedural efficacy.¹⁴⁵ For instance, **Rule 26 of the Asian International Arbitration Centre Arbitration Rules 2026** confers upon tribunals the explicit authority to rule on their own jurisdiction.¹⁴⁶ Specifically, this mandates the independent treatment of the arbitration clause.¹⁴⁷ Similarly, this principle is codified within **Article 41(1) of the ICSID Convention**.¹⁴⁸ It enables tribunals to autonomously ascertain their jurisdictional boundaries in complex investor-state disputes despite sweeping preliminary objections by host states.¹⁴⁹

Furthermore, tribunals operating under the auspices of the Permanent Court of Arbitration actively operationalise this doctrine to navigate threshold

¹⁴⁴ Anthony Daimsis, 'How Heuristics Misshape Reasoning and Lead to Increased Costs in Arbitration' (2019) SSRN 1, 9; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6; Ayten Mustafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 *Baku State University Law Review* 96, 98.

¹⁴⁵ William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 18, 23; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *SacLJ* 421, 436; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1.

¹⁴⁶ *Asian International Arbitration Centre Arbitration Rules 2026*, r 26.1(a); Abraham, C., Abraham, S., & Asnani, S. S. (2023). *Malaysia Arbitration Guide*. Cecil Abraham & Partners, 5; Huda, M. (2006). The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited. *Indonesian Journal of International Law*, 3(1), 1, 1; Park, W. W. (2007). The Arbitrator's Jurisdiction to Determine Jurisdiction. *ICCA Congress Series*, 13, 55, 7.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), art 41(1).

¹⁴⁹ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia Award*, PCA Case No 2015-40, 29 March 2019), paras 69, 103–108, 112–115; Gerui Lim, Foo Yuet Min, Mahesh Rai and Tan Yuan Kheng, 'Singapore: Investment Treaty Arbitration' (2025) *Legal 500 Country Comparative Guides*, 11-12; Jack I Garvey, 'Arbitration Involving Governmental Entities' (2018) *University of San Francisco Law Research Paper No 2018-06*, 2-3; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

jurisdictional impasses.¹⁵⁰ In *Indian Metals v Indonesia*¹⁵¹, the tribunal was confronted with extensive jurisdictional objections raised by the respondent state.¹⁵² By anchoring its jurisdiction in the doctrine of separability, the tribunal effectively safeguarded its adjudicatory mandate.¹⁵³ The doctrine enabled the tribunal to surmount the Respondent's extensive threshold objections.¹⁵⁴ Thus, it ensures the proceedings could progress to a substantive examination of the merits.¹⁵⁵

Importantly, by applying the separability doctrine, international tribunals ensure that the resolution of complex, cross-border disputes is not stalled by preliminary invalidity claims.¹⁵⁶ This preserves the fundamental efficacy of the international dispute resolution mechanism.¹⁵⁷

¹⁵⁰ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* Award, PCA Case No 2015-40, 29 March 2019), [69], [103]–[108], [112]–[115]; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1118; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

¹⁵¹ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* Award, PCA Case No 2015-40, 29 March 2019.

¹⁵² *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* Award, PCA Case No 2015-40, 29 March 2019, [70]–[183]; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

¹⁵³ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* Award, PCA Case No 2015-40, 29 March 2019, [70]–[183]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 421–422; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* Award, PCA Case No 2015-40, 29 March 2019, [184]; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1129; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6.

¹⁵⁶ *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia* Award, PCA Case No 2015-40, 29 March 2019, [70]–[183]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 6; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1116.

¹⁵⁷ Ayten Mustafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 *Baku State University Law Review* 96, 98; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the

4.0 Instances Where the Doctrine May Cause Injustice

4.1 Non-Existent Contracts

Although the doctrine of separability serves as a vital procedural safeguard for arbitral jurisdiction, its rigid application can precipitate profound injustice, most notably when a commercial agreement never legally came into existence.¹⁵⁸ The application of separability in such contexts effectively forces a party into a private tribunal to which they never legitimately consented.¹⁵⁹ As highlighted in the *Newcastle Express*¹⁶⁰ case, the separability doctrine cannot be weaponised to retroactively conjure an arbitration agreement out of a matrix contract that failed to form due to an unsatisfied condition precedent.¹⁶¹ The court determined that since the main contract was never concluded, the arbitration clause remained a mere proposal rather than a binding obligation.¹⁶²

Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 424, 434; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1.

¹⁵⁸ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57], [62] & [75]; *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [279]-[288], [306]-[320]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 52-55.

¹⁵⁹ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [57], [62] & [75]; *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [279]-[288], [306]-[320]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 54-55.

¹⁶⁰ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555.

¹⁶¹ *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [41], [57], [80]; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 52-55; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1.

¹⁶² *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (The Newcastle Express)* [2022] EWCA Civ 1555, [80]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore*

Similarly, the Malaysian Court in *ING Bank NV v Tumpuan Megah*¹⁶³ recognised the dangers of absolute arbitral deference in the absence of a concluded bargain.¹⁶⁴ The court noted that enforcing separability where the underlying contracts and invoices were allegedly completely fabricated or forged would result in the enforcement of a phantom agreement.¹⁶⁵ In these circumstances, utilising separability to grant an arbitrator initial jurisdiction bypasses the fundamental requirement of mutual consent.¹⁶⁶ This demonstrates that the pursuit of procedural efficiency cannot override the fundamental rules of contract formation and the requirement for a consensus *ad idem*.¹⁶⁷

4.2 Fraud, Misrepresentation, and Defective Consent

The rigid separation of the arbitration clause from the main contract becomes highly controversial in cases involving severe fraud or when the mechanism of mutual consent is fundamentally defective.¹⁶⁸ Following the judgment of the US

Academy of Law Journal 47, 54-55.

¹⁶³ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751.

¹⁶⁴ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [13], [43], [264]-[266]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 52-55.

¹⁶⁵ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [13], [259], [302]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16.

¹⁶⁶ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [13], [259]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 54-55.

¹⁶⁷ Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 54-55.

¹⁶⁸ *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [13], [259]; *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 412-414; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1119; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16.

Supreme Court in *Prima Paint Corporation*¹⁶⁹, allowing arbitrators to adjudicate disputes involving potentially fraudulent contracts forces victims to litigate within a private dispute resolution mechanism that was inherently dictated by the fraudster.¹⁷⁰ This framework operates on the requirement that the judiciary may only intervene if the arbitration clause itself is specifically challenged as being the product of fraud, rather than the entire contract.¹⁷¹

This procedural trap is further compounded by the presumption established in the UK *Fiona Trust*¹⁷² decision.¹⁷³ The English courts dictated that allegations of the underlying contract being procured by bribery or fraud do not automatically taint the arbitration agreement.¹⁷⁴ Consequently, unless the victim can meet the exceptionally high evidentiary bar of proving that the fraud was directed specifically and exclusively at the arbitration clause itself, the aggrieved party is deprived of public judicial recourse.¹⁷⁵ American judgments highlight this

¹⁶⁹ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967).

¹⁷⁰ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 403-404; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1120; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16.

¹⁷¹ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 403-404; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1120; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16.

¹⁷² *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

¹⁷³ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [13], [17], [35]; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 53-54; Ilijana Todorović, 'A Closer Look at the Doctrine of Separability in Arbitration' (2018) 1(1) *IUS Law Journal* 12, 16-17.

¹⁷⁴ *Premium Nafta Products Ltd v Fili Shipping Company Ltd (Fiona Trust)* [2007] UKHL 40, [17], [19], [35]; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 52-53.

¹⁷⁵ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17], [35]; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1119; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 53-54; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16.

tension further.¹⁷⁶ The decision in *First Options of Chicago*¹⁷⁷ indicates that an overreliance on separability threatens to replace actual consent with implied fictions.¹⁷⁸ When courts refuse to examine whether the parties genuinely agreed to arbitrate a fraudulently induced contract, the doctrine ceases to protect party autonomy and instead facilitates jurisdictional overreach.¹⁷⁹

4.3 Illegality and Public Policy

When the underlying contract involves gross illegality or serves as a mere facade for an illicit scheme, courts and tribunals must carefully balance arbitral autonomy against the demands of overriding public policy.¹⁸⁰ The modern pro-arbitration approach heavily relies on the separability doctrine to dictate that these highly sensitive disputes remain confined within private tribunals.¹⁸¹ For instance, the

¹⁷⁶ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 403-404; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-71; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1119; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 370-372.

¹⁷⁷ *First Options of Chicago Inc v Kaplan* 514 US 938 (1995).

¹⁷⁸ *First Options of Chicago Inc v Kaplan* 514 US 938 (1995), 943-945; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 370-376; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1121-1125; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1.

¹⁷⁹ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407, 412; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 372-376; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1120-1121; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1.

¹⁸⁰ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407, 412; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1120-1121; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 372-376.

¹⁸¹ *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, 897, 914-915; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [13], [17]; John J Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1115, 1116, 1119-1120; David Horton,

English approach in *Fiona Trust*¹⁸² treats even serious allegations of bribery as an issue that an arbitrator is fully competent to resolve.¹⁸³ This may keep matters of severe public interest out of the transparent scrutiny of open courts.¹⁸⁴ As a result, it potentially shields corruption from public accountability.¹⁸⁵

Furthermore, bad-faith actors may attempt to weaponise the separability doctrine to legitimise illicit transactions.¹⁸⁶ As demonstrated in *Founder Group (Hong Kong) Ltd*¹⁸⁷, debtors may utilise the doctrine as a procedural shield to demand arbitration while simultaneously arguing the underlying contracts were illicit sham transactions.¹⁸⁸ Although the Singaporean judiciary rightly intervened against such abuses, the doctrine's broad potential to shield illegal contracts from immediate judicial intervention remains a pressing concern.¹⁸⁹ In international arbitration practice, pushing the separability doctrine in the face of gross illegality often leads to systemic clashes between international and domestic orders.¹⁹⁰ This historical tension is illustrated by the international tribunal decision in *ICC Award No. 1110 of 1963*¹⁹¹.¹⁹² In a dispute involving a contract procured by

¹⁸² 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 370-376.

¹⁸³ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

¹⁸⁴ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17], [19], [34]-[35]; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 *ICCA Congress Series* 55, 16; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 53-54.

¹⁸⁵ Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2006) 3(1) *Indonesian Journal of International Law* 1, 1; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 433; Law Senate, 'The Doctrine of Separability in Arbitration' (2023) *Law Senate Arbitration Law Firm* 1, 1.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGCA 40, [51], [62]; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 433; Law Senate, 'The Doctrine of Separability in Arbitration' (2023) *Law Senate Arbitration Law Firm* 1, 1.

¹⁸⁸ *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGCA 40.

¹⁸⁹ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGCA 40, [51], [62]; Delphine Ho and Lawrence Boo, '4. Arbitration' (2024) 24 *Singapore Academy of Law Annual Review* 57, 59, 61-62; Law Senate, 'The Doctrine of Separability in Arbitration' (2023) *Law Senate Arbitration Law Firm* 1, 1.

¹⁹⁰ *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] SGCA 40, [62]; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 433; Delphine Ho and Lawrence Boo, '4. Arbitration' (2024) 24 *Singapore Academy of Law Annual Review* 57, 61-62.

¹⁹¹ David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 433; Adam Samuel, 'Separability of Arbitration Clauses - Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice' (2000) *Arbitration and Dispute Resolution Law Journal* 36, 1.

¹⁹² *ICC Award No 1110 of 1963* (Award) (1994) 10 *Arbitration International*.

¹⁹³ *ICC Award No 1110 of 1963* (Award) (1994) 10 *Arbitration International* 282, 294; A Timothy Martin,

bribing state officials, the international tribunal bypassed the separability doctrine and outright denied jurisdiction.¹⁹³ The tribunal held that parties engaged in such gross corruption had forfeited the right to ask for assistance from the machinery of justice.¹⁹⁴

'International Arbitration and Corruption: An Evolving Standard' (2002) *Mineral Law Series* 1, 3; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration: Law and Reality' (2012) 8 *Asian International Arbitration Journal* 1, 4, 70; Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in M A Fernandez-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 699, 702 (fn 2011).

¹⁹³ ICC Award No 1110 of 1963 (Award) (1994) 10 *Arbitration International* 282, 294; A Timothy Martin, 'International Arbitration and Corruption: An Evolving Standard' (2002) *Mineral Law Series* 1, 3; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration: Law and Reality' (2012) 8 *Asian International Arbitration Journal* 1, 43; Deeksha Malik and Geetanjali Kamat, 'Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication' (2013) 2 *The Arbitration Brief* 1, 4.

¹⁹⁴ ICC Award No 1110 of 1963 (Award) (1994) 10 *Arbitration International* 282, 294; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration: Law and Reality' (2012) 8 *Asian International Arbitration Journal* 1, 4; A Timothy Martin, 'International Arbitration and Corruption: An Evolving Standard' (2002) *Mineral Law Series* 1, 3; Deeksha Malik and Geetanjali Kamat, 'Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication' (2013) 2 *The Arbitration Brief* 1, 4; Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in M A Fernandez-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 699, 702.

4.4 Inequality of Bargaining Power

Finally, the unyielding application of the separability doctrine can disproportionately disadvantage vulnerable parties and exacerbate inherent inequalities in bargaining power.¹⁹⁵ Large corporations frequently embed mandatory arbitration clauses containing class-action waivers into non-negotiable standard-form contracts.¹⁹⁶ Relying on the doctrine of separability and its controversial extension to delegation clauses, corporations can effectively force weaker parties to argue unconscionability claims before a private arbitrator rather than a public judge.¹⁹⁷ As a result, issues concerning the fairness of the process are relegated to the arbitral forum.¹⁹⁸ This reinforces structural disadvantages faced by the weaker party.¹⁹⁹

This framework was applied by the US Supreme Court in *Rent-A-Center*²⁰⁰, which treated delegation clauses as independent agreements within the already

¹⁹⁵ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-72; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1633; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 404, 429-433.

¹⁹⁶ *AT&T Mobility LLC v Concepcion* 563 US 333 (2011), 344-347; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 77, 79; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1641; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 365.

¹⁹⁷ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-72, 77-79 ; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1633; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 373-376, 429.

¹⁹⁸ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 72, 79, 86; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 373-376, 429; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1633.

¹⁹⁹ *Ibid.*

²⁰⁰ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010).

severed arbitration clause.²⁰¹ Notably, the recent US judgment in *Coinbase Incorporated*²⁰² has placed some boundary limitations on delegation clauses when multiple conflicting contracts exist.²⁰³ However, the baseline separability presumption still poses immense procedural and financial hurdles.²⁰⁴ This preserves the exclusive domain of the arbitrator over the remainder of the contract completely regardless of claims that the entire arrangement was unfair.²⁰⁵ By isolating the arbitration clause from the broader context of contractual oppression, the separability doctrine effectively restricts access to justice.²⁰⁶ The exorbitant costs associated with private arbitral proceedings and unequal negotiating power, cause the doctrine to often operate as an insurmountable barrier to equitable relief.²⁰⁷

²⁰¹ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-72; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 373-376; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1633.

²⁰² *Coinbase, Inc v Suski* 602 US 143 (2024).

²⁰³ *Coinbase, Inc v Suski* 602 US 143 (2024), 147-152; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 58-59.

²⁰⁴ David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 373-376, 429; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1633; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333.

²⁰⁵ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 72; *Henry Schein, Inc v Archer & White Sales, Inc* 139 S Ct 524 (2019), 529; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1633; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 376, 429.

²⁰⁶ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 77-79, 86; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 376, 429, 433; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333.

²⁰⁷ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86-87; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 429; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1641; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333.

5.0 Recommendations

5.1 Resolving the Paradox of Non-Existent Contracts

The most severe injustice associated with the separability doctrine occurs when an arbitration clause is retroactively conjured from a commercial agreement that never legally formed.²⁰⁸ Applying separability in such circumstance violates the fundamental principle that a legal obligation cannot arise from a nullity.²⁰⁹ To rectify this jurisdictional paradox, the courts' approach to contract formation must be strictly delineated from questions regarding contract validity.²¹⁰

Reform must abandon semantic debates over voidability and adopt a strict threshold determination test.²¹¹ Courts must determine whether challenges to the main contract also affect the validity of the arbitration agreement.²¹² If the

²⁰⁸ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *BCY v BCZ* [2016] SGHC 249, [97]; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Jurnal Hukum dan Pembangunan* 1, 1-2; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47-48.

²⁰⁹ *Ibid*; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 1.

²¹⁰ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWCA Civ 1555, [55]-[56]; *BCY v BCZ* [2016] SGHC 249, [97]; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224, 231-232; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 1; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 47-48.

²¹¹ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 403-404; *Coinbase, Inc v Suski* 602 US 143 (2024), 149-150; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 21-22; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 231-232, 246-247; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 72.

²¹² *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 71; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17], [35]; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 373-376; Marie Berard, 'Arbitration Agreement Enforced Even if Main Contract is Void for Illegality' (12 September 2013) *International Law Office* 1, 1; Ayten Mustafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 *Baku State University Law Review* 94, 98.

overarching challenge implies that consensus *ad idem* never materialised, the court must intervene immediately.²¹³ Judgments such as the Singaporean decision in *BCY v BCZ*²¹⁴ demonstrates that where pre-contractual negotiations fail to yield an executed agreement, the arbitration clause cannot be artificially severed and enforced as a binding obligation.²¹⁵

To prevent parties from being bound by phantom agreements, the authority to adjudicate threshold issues of contract formation must reside exclusively with the public judiciary.²¹⁶ When a disputant presents a *prima facie* case that the matrix contract was never concluded, the reviewing court must apply a strict *de novo* standard of review.²¹⁷ This rigorous standard is codified within Singapore's statutory framework, specifically through **Section 10(3) of the International Arbitration Act 1994**.²¹⁸ The provision expressly empowers a

²¹³ *BCY v BCZ* [2016] SGHC 249, [97]; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Journal of International Arbitration* 1, 1; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224; Alan Scott Rau, 'Understanding (and Misunderstanding) Primary Jurisdiction' (2006) *University of Texas School of Law Public Law and Legal Theory Research Paper No 06-10* 1, 107; Bo Chi Chian, 'An Introduction to the Meeting of the Minds: Consensus Ad Idem' *The University of Malaya Law Review Lex Omnibus* 10, 10.

²¹⁴ *BCY v BCZ* [2016] SGHC 249.

²¹⁵ *BCY v BCZ* [2016] SGHC 249, [90], [93], [97]; Miftahul Huda, 'The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited' (2007) *Journal of International Arbitration* 1, 1; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 1; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224.

²¹⁶ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; *BCY v BCZ* [2016] SGHC 249, [97]; Alan Scott Rau, 'Understanding (and Misunderstanding) Primary Jurisdiction' (2006) *University of Texas School of Law Public Law and Legal Theory Research Paper No 06-10* 1, 107; Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 1.

²¹⁷ Tanya J Monestier, 'Nothing Comes of Nothing... Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration' (2001) 12 *American Review of International Arbitration* 223, 224; Darius Chan, 'The Scope of 'De Novo' Review of an Arbitral Tribunal's Jurisdiction' (2015) *Singapore Law Gazette* 1, 1-2; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 21-22.

²¹⁸ International Arbitration Act 1994, s. 10(3); Darius Chan, 'The Scope of 'De Novo' Review of an Arbitral

party to apply to the High Court for a declaration regarding the arbitral tribunal's jurisdiction.²¹⁹ This ensures that the tribunal's preliminary rulings are subjected to a comprehensive *de novo* rehearing without affording absolute deference to the tribunal's prior factual findings.²²⁰ The Singaporean model statutorily maintains this full *de novo* standard for jurisdictional challenges.²²¹ It represents the superior equitable approach to safeguarding substantive justice.²²² Therefore, such reform is necessary to ensure justice in arbitration.²²³

5.2 Dismantling the Jurisdictional Shield for Fraud and Illegality

Furthermore, the absolute separation of the arbitration clause from the main commercial contract becomes procedurally oppressive in cases involving severe fraud or gross illegality.²²⁴ The presumption established in the English *Fiona*

Tribunal's Jurisdiction' (2015) *Singapore Law Gazette* 1, 1–2; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 437

²¹⁹ *DRO v DRP* [2025] SGHC 255, [1]; Jack Tsen-Ta Lee, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 *Singapore Academy of Law Journal* 421, 437; Darius Chan, 'The Scope of 'De Novo' Review of an Arbitral Tribunal's Jurisdiction' (2015) *Singapore Law Gazette* 1, 1–2.

²²⁰ *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] HCA 28, [92]; Darius Chan, 'The Scope of 'De Novo' Review of an Arbitral Tribunal's Jurisdiction' (2015) *Singapore Law Gazette* 1, 1–2; Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (ABA Section of International Law and Practice Spring Meeting, Washington DC, May 2003) 21–22; Enid Campbell, 'Judicial Review and Appeals as Alternative Remedies' (1982) 9 *Monash University Law Review* 14, 21–22.

²²¹ *PT First Media TBK v Astro Nusantara Int'l BV* [2013] SGCA 57, [163]; *AKN v ALC* [2015] SGCA 18, [112]; *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57, [40], [44]; Darius Chan, 'The Scope of 'De Novo' Review of an Arbitral Tribunal's Jurisdiction' (2015) *Singapore Law Gazette* 1, 1–2; Brief of Amici Curiae Arbitration Scholars and Practitioners in Support of Petitioners, *Beijing Shougang Mining Investment Company, Ltd v Mongolia*, No 21-1244 (US Supreme Court, 29 April 2022) 11–12.

²²² *BCY v BCZ* [2016] SGHC 249, [97]; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; Darius Chan, 'The Scope of 'De Novo' Review of an Arbitral Tribunal's Jurisdiction' (2015) *Singapore Law Gazette* 1, 1–2; Alan Scott Rau, 'Understanding (and Misunderstanding) Primary Jurisdiction' (2006) *University of Texas School of Law Public Law and Legal Theory Research Paper No 06-10* 1, 107; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 363, 429–433.

²²³ *BCY v BCZ* [2016] SGHC 249, [97]; Darius Chan, 'The scope of "de novo" review of an arbitral tribunal's jurisdiction' (2015) *Singapore Law Gazette* 1, 1–2; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429–433.

²²⁴ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law*

*Trust*²²⁵ decision dictates that rational business actors intend for all disputes to be decided by the exact same tribunal.²²⁶ However, when corruption infects the very mechanism of dispute resolution, forcing victims to arbitrate before private tribunals perpetuates the initial injustice.²²⁷

Historical precedents, most notably the landmark *ICC Award Number 1110*²²⁸ established that parties engaging in gross corruption forfeit the right to ask for assistance from the machinery of justice.²²⁹ Modern arbitration must integrate this principle by empowering arbitrators to conduct *sua sponte* investigations when corruption arises.²³⁰ Significantly, arbitration tribunals should mandate proactive fact-finding to prevent tribunals from acting as confidential shields for illicit actors.²³¹ Moreover, jurisdictions globally should codify the

Review 363, 429-433; Adam Samuel, 'Separability of Arbitration Clauses - Some Awkward Questions About the Law on Contracts, Conflict of Laws and the Administration of Justice' (2000) *Journal of International Arbitration* 1, 16; Niall Mackay Roberts, 'Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act' (2016) 49 *UC Davis Law Review* 1547, 1551, 1641.

²²⁵ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [7], [13].

²²⁶ Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 55; Marie Berard, 'Arbitration Agreement Enforced Even if Main Contract is Void for Illegality' (12 September 2013) *International Law Office* 1, 1.

²²⁷ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17], [35]; Alan Scott Rau, 'Understanding (and Misunderstanding) Primary Jurisdiction' (2006) *University of Texas School of Law Public Law and Legal Theory Research Paper No 06-10* 1, 107; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433; Adam Samuel, 'Separability of Arbitration Clauses - Some Awkward Questions About the Law on Contracts, Conflict of Laws and the Administration of Justice' (2000) *Journal of International Arbitration* 1, 16.

²²⁸ ICC Award No 1110 of 1963, [1994] 10(3) *Arbitration International* 282.

²²⁹ ICC Award No 1110 of 1963, [1994] 10(3) *Arbitration International* 282, Opinion [23]; Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in Miguel Angel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 699, 703; A Timothy Martin, 'International Arbitration and Corruption: An Evolving Standard' (2002) *Transnational Dispute Management* 1, 3; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 2, 43.

²³⁰ Shokhrukh Khamidov, 'Corruption of the Investor as a Ground for Excluding the Jurisdiction of Arbitral Tribunal in International Investment Arbitration' (Master's Thesis, Uppsala University 2022) 2; Deeksha Malik and Geetanjali Kamat, 'Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication' *The Arbitration Brief* 18, 22; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 8.

²³¹ ICC Award No 1110 of 1963, [1994] 10(3) *Arbitration International* 282, Opinion [23]; *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [149], [157], [161]; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 8; Deeksha Malik and Geetanjali Kamat, 'Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication'

judicial second look doctrine.²³² This framework allows the tribunal to decide first, but courts later review mandatory rules and public policy afresh at the enforcement stage.²³³ This sophisticated approach protects the sovereign authority of the state while mitigating the risk of sanitizing transnational criminal enterprises.²³⁴

5.3 Rebalancing Inequality of Bargaining Power

The unyielding application of the separability doctrine disproportionately disadvantages vulnerable parties when embedded within non-negotiable standard form contracts.²³⁵ Such adhesive contracts leave weaker parties with no

The Arbitration Brief 18, 22; Jonathan Bonnitcha and Alisha Mathew, 'Corruption in investor-state arbitration' (Transparency International Anti-Corruption Helpdesk Answer, 28 September 2020) 1, 25; Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in Miguel Angel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 699, 703.

²³² *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 US 614 (1985), 638; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 51, 74-77; Ibrahim Mohamed Nour Shehata, 'Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis' (2017) 11(4) *World Arbitration & Mediation Review* 383, 388.

²³³ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 US 614 (1985), 638; Brief of Amici Curiae Arbitration Scholars and Practitioners in Support of Petitioners, *Beijing Shougang Mining Investment Company, Ltd v Mongolia*, No 21-1244 (US Supreme Court, 29 April 2022) 11-12; Ibrahim Mohamed Nour Shehata, 'Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis' (2017) 11(4) *World Arbitration & Mediation Review* 383, 388; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 74-77.

²³⁴ *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [157], [181]; ICC Award No 1110 of 1963, [1994] 10(3) *Arbitration International* 282, Opinion [20], [23]; Ibrahim Mohamed Nour Shehata, 'Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis' (2017) 11(4) *World Arbitration & Mediation Review* 383, 388; Jonathan Bonnitcha and Alisha Mathew, 'Corruption in investor-state arbitration' (Transparency International Anti-Corruption Helpdesk Answer, 28 September 2020) 1, 25; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 74-77.

²³⁵ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business &*

choice or room for bargaining.²³⁶ By treating the arbitration clause and internal delegation clauses as entirely autonomous agreements, dominant corporations effectively force weaker parties to litigate the fairness of the contract in a prohibitively expensive private forum.²³⁷

The US Supreme Court judgments surrounding delegation clauses exemplify how this framework creates insurmountable procedural hurdles.²³⁸ To counter this weaponisation, comprehensive legislative intervention is required to disable the separability doctrine in contexts of extreme power imbalances.²³⁹ Legislation must invalidate pre-dispute arbitration agreements in consumer and

Economic Review 73, 82-84.

²³⁶ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86; *Zarai Taraqiati Bank Ltd v Muhammad Asim Rafique* 2016 SCMR 1756; Siti Aliza Alias and Zuhairah Ariff Abdul Ghasas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 74, 81-82.

²³⁷ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 82-84; Siti Aliza Alias and Zuhairah Ariff Abdul Ghasas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433.

²³⁸ *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 72, 86; *Henry Schein, Inc v Archer & White Sales, Inc* 586 US 63 (2019), 70; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433; Andrew McWhorter, 'A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration' (2019) 52(4) *Columbia Journal of Law and Social Problems* 558, 558.

²³⁹ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407; Goh Jia Jun Benjamin, 'Separability Doctrine: Perspectives from China, England and the Model Law' (2025) 37 *Singapore Academy of Law Journal* 47, 72; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 73, 89; Andrew McWhorter, 'A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration' (2019) 52(4) *Columbia Journal of Law and Social Problems* 558, 558.

employment settings.²⁴⁰ As a result, this restores the constitutional right of citizens to choose the public court system after a dispute materialises.²⁴¹

In jurisdictions where legislative repeal is not feasible, the judiciary must actively restrict the enforceability of delegation clauses by retaining the equitable power to strike unconscionable provisions.²⁴² Additionally, improving institutional transparency through the publication of anonymised awards would vastly empower vulnerable populations and prevent the perpetual freezing of legal precedent.²⁴³

5.4 Comprehensive Statutory and Institutional Enhancements

Beyond doctrinal shifts, the broader statutory architecture governing commercial arbitration requires significant modernisation.²⁴⁴ Ascertaining the

²⁴⁰ David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 73, 89; Andrew McWhorter, 'A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration' (2019) 52(4) *Columbia Journal of Law and Social Problems* 558, 558.

²⁴¹ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 407, 412-414; Andrew McWhorter, 'A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration' (2019) 52(4) *Columbia Journal of Law and Social Problems* 558, 558; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 82-84.

²⁴² *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 71-72, 86; Siti Aliza Alias and Zuhairah Ariff Abdul Ghasas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 89; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433.

²⁴³ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31; Adv Pooja Kumari, 'Confidentiality versus Transparency in Arbitration: A Legal Dilemma' (2025) 2(2) *Advances in Consumer Research* 276, 277-278; Janet Walker and Doug Jones, 'Transparency and Efficiency in International Commercial Arbitration' (8th Asia Pacific ADR Conference, Seoul, 20 September 2019) 5-6, 8-9; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433.

²⁴⁴ Zebiniso Khalilova, 'Practice of Commercial Arbitration and Recognition and Enforcement of Foreign Arbitral Awards Concerning Disputes in Uzbekistan: A Comparison with Germany' (PhD Thesis, University of Bremen 2020) 3; Leon Trakman, 'Australia: The Reform of Commercial Arbitration in Australia: Recent and Prospective Developments' in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration* (Hart Publishing 2018) 2, 28; 'Arbitration Act 2025: Key Changes and Implications'

specific governing law of the severed arbitration agreement has historically generated immense unpredictability.²⁴⁵ To provide commercial certainty, jurisdictions must enact unambiguous statutory default rules.²⁴⁶ Recent legislative reforms in Malaysia and the United Kingdom serve as highly instructive blueprints for this approach.²⁴⁷ Specifically, in the UK, the **Arbitration Act 2025** introduces **Section 6A**, while in Malaysia, the **Arbitration (Amendment) Act 2024** introduces a mirrored **Section 9A**.²⁴⁸ Both amendments dictate that the law governing the arbitration agreement automatically defaults to the law of the seat unless the parties expressly agree otherwise.²⁴⁹ Crucially, to fortify the separability of the clause, both statutes explicitly state that a general choice of law clause for the main underlying contract does not constitute an express agreement regarding the arbitration clause itself.²⁵⁰ By anchoring the severed arbitration clause to the procedural framework chosen by the parties, these new statutory rules legislatively overturn the complex, unpredictable common law

(CANDEY, May 2025) 1; Weixia Gu, 'China's Modernization of International Commercial Arbitration and Transnational Legal Order' (2024) 9(1) *UC Irvine Journal of International, Transnational, and Comparative Law* 1, 2, 32.

²⁴⁵ *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [1]-[2], [117]-[118]; Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (Herbert Smith-SMU Asian Arbitration Lecture, Singapore, 4 August 2011) 25-30; Siva Subramaniam, 'Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach' (2020) 47(2) *Journal of Malaysian and Comparative Law* 1, 1-2.

²⁴⁶ *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [106]-[108]; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1; Law Commission, *Review of the Arbitration Act 1996: Responses to First Consultation Paper* (2023).

²⁴⁷ Daniel Lau Hsien Yuong, Aghesh Krishendra Jeyaratnam and Noor Sumaeya Sofea Shamsudin, 'The Arbitration (Amendment) Act 2024 and the Key Changes to Malaysian Arbitration Practice & Procedure' (Zul Rafique & Partners, 29 August 2024) 1, 4; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 1.

²⁴⁸ Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1.

²⁴⁹ Arbitration Act 2005 (Malaysia), s. 9A; Arbitration Act 2025 (UK), s 6A; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1.

²⁵⁰ Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1; 'UK Arbitration Reform: Amendments Receive Royal Assent' (Debevoise & Plimpton, 28 February 2025) 1.

conflict of laws analyses.²⁵¹ This ensures greater clarity, reducing jurisdictional disputes, and saving parties time and costs.²⁵²

Furthermore, arbitral tribunals must be explicitly empowered with statutory mechanisms to dismiss bad faith jurisdictional defences used merely to delay enforcement.²⁵³ Simultaneously, if the doctrine of separability compels parties into a private forum, the impartiality of the tribunal must be absolutely unimpeachable.²⁵⁴ Legislatures must codify the continuing duty of arbitrators to disclose any circumstances which might reasonably give rise to justifiable doubts regarding their neutrality.²⁵⁵ Essentially, this eliminates unconscious discrimination and upholds the natural justice principles.²⁵⁶

Finally, since defending against a phantom contract or investigating sophisticated fraud requires vast resources, jurisdictions must formally legalise and regulate third-party funding.²⁵⁷ Embracing non-recourse funding ensures that

²⁵¹ 'UK Arbitration Reform: Amendments Receive Royal Assent' (Debevoise & Plimpton, 28 February 2025) 1; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 1.

²⁵² *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [106]; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1; Reem Ayad, 'The Key Reforms to Arbitration Act 2025 Which Will Reinforce the UK's Position as World Leader in Arbitration' (Troutman Pepper Locke, 17 March 2025) 1; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 3.

²⁵³ *Arbitration Act 2025* (UK) s 7; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 3; 'Arbitration Act 2025: Practical Implications for Clients Arising From Changes to England's Arbitration Act' (Squire Patton Boggs, March 2025) 1; 'International Arbitration Focus: Reform' (Reed Smith, 2026) 2.

²⁵⁴ *Arbitration Act 2025* (UK) s 2; *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [49], [55]; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 2; 'Arbitration Act 2025: Practical Implications for Clients Arising From Changes to England's Arbitration Act' (Squire Patton Boggs, March 2025) 1.

²⁵⁵ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [109], [116]; 'Arbitration Act 2025: Practical Implications for Clients Arising From Changes to England's Arbitration Act' (Squire Patton Boggs, March 2025) 1; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 2.

²⁵⁶ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [55], [69]; Adv Pooja Kumari, 'Confidentiality versus Transparency in Arbitration: A Legal Dilemma' (2025) 2(2) *Advances in Consumer Research* 276, 277-278; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 2; 'Arbitration Act 2025: Practical Implications for Clients Arising From Changes to England's Arbitration Act' (Squire Patton Boggs, March 2025) 1.

²⁵⁷ *Arbitration (Amendment) Act 2024* (Malaysia) s 10; Daniel Lau Hsien Yuong, Aghesh Krishendra Jeyaratnam and Noor Sumaeya Sofea Shamsudin, 'The Arbitration (Amendment) Act 2024 and the Key Changes to Malaysian Arbitration Practice & Procedure' (Zul Rafique & Partners, 29 August 2024) 1;

victims of systemic corporate malfeasance possess the financial capacity to effectively challenge the misapplication of the separability doctrine.²⁵⁸ Significantly, this aligns with international arbitral practice which emphasises the fundamental pursuit of substantive justice.²⁵⁹

6.0 Conclusion

The doctrine of separability remains a foundational pillar of modern commercial arbitration.²⁶⁰ By legally insulating the dispute resolution mechanism from the substantive commercial agreement, the doctrine successfully neutralises jurisdictional paradoxes and prevents parties from utilizing tactical domestic litigation to evade their arbitral obligations.²⁶¹ However, as this article has demonstrated, an unyielding application of this legal fiction can precipitate profound substantive injustice.²⁶² When rigidly applied to non-existent contracts,

Center on Civil Justice, *Recent Developments in Arbitration: Articles from the Conference Presented by the Center on Civil Justice at NYU School of Law* (New York University School of Law) 138; Rachel Howie and Geoff Moysa, 'Financing Disputes: Third-Party Funding in Litigation and Arbitration' (2019) 57(2) *Alberta Law Review* 465, 466, 501; Wayne Attrill, 'Ethical Issues in Litigation Funding' (IMF (Australia) Ltd, 16 February 2009) 1, 20; Peter Cashman and Amelia Simpson, 'Class actions and litigation funding reform: the rhetoric and the reality' (Submission 55 Supplementary Submission, 16 July 2020) 62.
²⁵⁸ Rachel Howie and Geoff Moysa, 'Financing Disputes: Third-Party Funding in Litigation and Arbitration' (2019) 57(2) *Alberta Law Review* 465, 465-466; Peter Cashman and Amelia Simpson, 'Class actions and litigation funding reform: the rhetoric and the reality' (Submission 55 Supplementary Submission, 16 July 2020) 62; David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 429-433.
²⁵⁹ *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [157]; Darius Chan and Elias Khong, 'Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards' (2024) 41(3) *Journal of International Arbitration* 287, 287 (paras 115-116); Paolo Busco, 'The defence of illegality in international investment arbitration: a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration' (PhD Thesis, Université Panthéon-Sorbonne 2018) 1; Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 331, 331-333.

²⁶⁰ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 403-404; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]; Shivam Goel, 'On the termination of the agreement, the arbitration clause subsists?' (2019) *SSRN Electronic Journal* 1; George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *Yale Journal of International Law* 1, 13-15.

²⁶¹ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [17]-[18]; George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *Yale Journal of International Law* 1, 13-15; Faidon Varesis, 'Regulating Arbitral Jurisdiction: A Private International Law Proposal' (PhD Thesis, University of Cambridge 2020) 297-298.

²⁶² *ING Bank NV & Anor v Tumpuan Megah Development Sdn Bhd* [2025] 6 MLJ 751, [43], [50], [52],

agreements procured through egregious fraud, or adhesive contracts characterised by severe power imbalances, separability risks trapping vulnerable parties within private tribunals devoid of genuine mutual consent.²⁶³

A comparative analysis of jurisdictions such as the United Kingdom, the United States, Malaysia, and Singapore reveals a global consensus favouring arbitral autonomy.²⁶⁴ Yet, this pro-arbitration trajectory must be carefully calibrated to preserve the integrity of basic contract formation and fundamental public policy.²⁶⁵ To prevent the arbitral regime from operating as a shield for illicit activity or corporate malfeasance, judicial frameworks must enforce strict *de novo* standards of review for threshold questions of contract existence.²⁶⁶ Furthermore,

[307]-[308], [319]; *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [157]; Paolo Busco, 'The defence of illegality in international investment arbitration: a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration' (PhD Thesis, Université Panthéon-Sorbonne 2018) 1; Darius Chan and Elias Khong, 'Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards' (2024) 41(3) *Journal of International Arbitration* 287, 287 (para 115).

²⁶³ *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967), 412-414; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 86-87; Paolo Busco, 'The defence of illegality in international investment arbitration: a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration' (PhD Thesis, Université Panthéon-Sorbonne 2018) 1; Rukhsana Shaheen Waraich, Muhammad Fayaz and Hayyan Zahid, 'Consent Theory and Adhesion Contract: A Critical Analysis of Contemporary Global Business Practices' (2022) 14(1) *Business & Economic Review* 73, 82-84.

²⁶⁴ *BCY v BCZ* [2016] SGHC 249, [65]-[74]; *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417, [113]-[114]; *Rent-A-Center, West, Inc v Jackson* 561 US 63 (2010), 70-72; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [13]; Brief of Amici Curiae Arbitration Scholars and Practitioners in Support of Petitioners, *Beijing Shougang Mining Investment Company, Ltd, et al v Mongolia*, No 21-1244 (US Supreme Court, 29 April 2022) 4-15.

²⁶⁵ *BCY v BCZ* [2016] SGHC 249, [97]; *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [157]; Darius Chan and Elias Khong, 'Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards' (2024) 41(3) *Journal of International Arbitration* 287, 287 (paras 1, 115-116); George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *Yale Journal of International Law* 1, 1; Paolo Busco, 'The defence of illegality in international investment arbitration: a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration' (PhD Thesis, Université Panthéon-Sorbonne 2018) 1.

²⁶⁶ *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [157]; Paolo Busco, 'The defence of illegality in international investment arbitration: a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration' (PhD Thesis, Université Panthéon-Sorbonne 2018) 1; Darius Chan, 'The scope of 'de novo' review of an arbitral tribunal's jurisdiction' (2015) *Singapore Law Gazette* 1.

legislative modernisation is imperative.²⁶⁷ Recent statutory blueprints, such as the amendments in Malaysia and UK, illustrate how establishing unambiguous default rules can foster commercial certainty and reduce costly jurisdictional friction.²⁶⁸

Significantly, securing justice within arbitration demands a comprehensive approach.²⁶⁹ By legalizing third-party funding, mandating transparent arbitrator disclosures, and restricting abusive delegation clauses, legal systems can effectively empower weaker parties.²⁷⁰ The future legitimacy of commercial arbitration depends on finding a fair balance where efficiency supports, rather than undermines, substantive justice.²⁷¹

²⁶⁷ Weixia Gu, 'China's Modernization of International Commercial Arbitration and Transnational Legal Order' (2024) 9(1) *UC Irvine Journal of International, Transnational, and Comparative Law* 1, 1; 'International arbitration report: Issue 23' (Norton Rose Fulbright, June 2025) 1.

²⁶⁸ *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [106]; 'Arbitration Act 2025: Key Changes and Implications' (CANDEY, May 2025) 1; Steven Perian KC, 'The Law of the Seat: Untangling the Threads of Jurisdiction in Malaysian Arbitration' [2025] *Current Law Journal* 1, 1.

²⁶⁹ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [55], [116]; *World Duty Free Company Limited v Republic of Kenya* (Award) ICSID Case No ARB/00/7 (4 October 2006) [157]; Paolo Busco, 'The defence of illegality in international investment arbitration: a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration' (PhD Thesis, Université Panthéon-Sorbonne 2018) 1; Darius Chan and Elias Khong, 'Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards' (2024) 41(3) *Journal of International Arbitration* 287, 287 (paras 115-117).

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