REPORT OF THE LAW REFORM COMMITTEE

ON

RIGHT TO JUDICIAL REVIEW OF NEGATIVE JURISDICTIONAL RULINGS

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

JANUARY 2011

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About the Law Reform Committee

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

About the Report

See Executive Summary below.

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I. Executive Summary

1 This brief paper examines the call for a right to judicial review of negative jurisdictional rulings made by arbitral tribunals in arbitrations governed by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"), which Act incorporates the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The Consultative Paper was distributed to various parties[1] in the industry. The current paper takes into account the comments received. On the whole, the industry supports the proposals contained herein.

II. Background

2 An arbitral tribunal's jurisdiction to determine a dispute and make decisions binding upon parties stems from the arbitration agreement. That jurisdiction may be challenged, by parties to an arbitration, in a variety of ways, namely, by disputing:

(a) the existence or validity of the arbitration agreement;[2]

(b) the scope and meaning of the arbitration agreement; and

(c) the validity of the arbitrator's appointment.

3 Two problems arose under earlier law on such challenge, namely:

(a) whether the arbitration clause continues to apply when the main contract containing it has been terminated whether by repudiation, rescission, frustration, or avoided by reason of illegality; and

(b) whether the arbitral tribunal has the power to rule on its own jurisdiction.

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1 Namely, Singapore International Arbitration Centre; Singapore Institute of Arbitrators; International Chamber of Commerce, Members of the International Council for Commercial Arbitration; Chartered Institute of Arbitrators; Singapore Business Federation, Mr C R Rajah, Chairman of Maxwell Chambers (in his personal capacity) and the Law Society (which declined to comment).

2 This challenge is usually made by impugning the main contract that contains the arbitration clause by pleas of lack of consensus, lack of consideration, lack of authority or illegality; or pleas of subsequent invalidity based on misrepresentation, repudiation, mistake, frustration or illegality.

The doctrines of "separability"[3] and *kompetenz-kompetenz*[4] evolved to address problem (a) and (b), respectively. The doctrines were in a state of evolution in common law jurisdictions when Singapore, by the Act, adopted the Model Law[5] and gave it the force of Law.[6] The two doctrines are now enshrined in Article 16(1) of the Model Law, which reads:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

A. Permitted judicial review

4 Under the Model Law regime, judicial intervention in arbitral proceedings is precluded unless permitted.[7] An important instance where judicial intervention is permitted occurs in relation to the arbitral tribunal's power to rule on its own jurisdiction. That power, under the Model Law, as was under the common law, is subject to judicial review[8] and is provided for in Article 16(3), and Article 34(2)(a)(iii) and (iv). These Articles read:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling,

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3 Singapore Law Reform and Revision Division of the Attorney-General's Chambers, The Review of Arbitration Laws (Final Report as of 4 Oct 2001) at para 2.12.2: "The doctrine of separability has evolved to save the continuing application of arbitration clauses in contracts which could have been terminated.… By this doctrine, an arbitration clause in a commercial contract is treated as a separate and distinct agreement with collateral obligations and as such would survive the termination or avoidance of all the primary obligations assumed under the underlying contract. The doctrine takes on a pragmatic instead of a logical reasoning approach and is well known and accepted in international arbitration."

4 This relates to the arbitral tribunal's power to rule on its own jurisdiction. This, under the Model Law is, as was under the common law, subject to court control. The Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration at para 25 states: "The arbitral tribunal's competence to rule on its own jurisdiction, *ie* on the very foundation of its mandate and power, is, of course, subject to court control".

5 The First Schedule to the Act.

6 See s 3 of the Act which states: "Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore".

7 See Article 5 of the Model Law that reads: "In matters governed by this Law, no court shall intervene except where so provided in this Law".

8 See footnote 4, above.

the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such request is pending, the tribunal may continue the arbitral proceedings and make an award.

[Article 16(3) is modified by s 10 of the Act that reads:

10-(1) Notwithstanding Article 16(3) of the Model Law, an appeal from a decision of the High Court made under Article 16(3) of the Model Law shall lie to the Court of Appeal only with the leave of the High Court.

(2) There shall be no appeal against a refusal for grant of leave of the High Court.]

Article 34. Application for setting aside as exclusive recourse against arbitral award

(2) An arbitral award may be set aside by the court specified in Article 6 only if:

(a) the party making the application furnishes proof that:

…

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;…

B. The current import of Article 16(3)

5 Under Article 16(3), the arbitral tribunal may deal with or dispose of a challenge to its jurisdiction in the following four ways, namely:

(a) as a preliminary question and decide that it has jurisdiction (positive jurisdictional ruling);

(b) postpone for decision in the award on merits and decide that it has jurisdiction (positive jurisdictional ruling);

(c) as a preliminary question and decide that it lacks jurisdiction (negative jurisdictional ruling); and

(d) postpone for decision in the award on merits and decide that it lacks jurisdiction (negative jurisdictional ruling).

6 If the decision is as in (a), the aggrieved party asserting the lack of jurisdiction may, under Article 16(3), ask the Court to decide the matter.

7 If the decision is as in (b), the aggrieved party asserting the lack of jurisdiction may resort to Article 34 to set aside the award (wholly or partly, as the case requires).[9]

8 If the decision is as in (c), under the law as it stands, the aggrieved party asserting that there is jurisdiction has no recourse to judicial review. This was settled by the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597.[10] Two other jurisdictions, namely, Germany and Croatia[11] have followed the same route.

9 If the decision is as in (d), then based on a plain reading of Articles 16 and 34, the aggrieved party asserting that the arbitral tribunal has jurisdiction does not have any recourse to judicial review.

III. Should Judicial Review of Negative Jurisdictional Rulings Be Permitted?

10 The reason why Article 16(3) was drafted such as to not enable an appeal from a negative ruling was that it was thought inappropriate to compel the tribunal to continue with the arbitration after it had so ruled.[12]

11 The question arises whether it is desirable for Singapore to permit judicial review of negative jurisdictional rulings by the arbitral tribunal.

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9 Where the seat of arbitration is not Singapore, an aggrieved party may resist enforcement under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded at New York on 10 June 1958, set out in the Second Schedule to the Act.

10 Where it held that Article 16(3) does not provide for an appeal from a negative jurisdictional ruling and that such (preliminary) ruling is not an "award" within the meaning of the Act as it is not a decision on the substance of the dispute and therefore there can be no recourse to Article 34. Section 2 defines an "award" as follows: "'award' means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12." See also the discussion in Lawrence GS Boo, "Ruling on Arbitral Jurisdiction – Is that an Award?" (2007) 3 Asian International Arbitration Journal 125 at 136–141. It ought to be noted that, in any event, Article34, on plain reading, does not provide for a review of a negative ruling.

11 See Annex A below, a comparative survey of the positions adopted in other jurisdictions.

12 See Report of UNCITRAL 18th Session (Vienna, June 1985, A/40/17) at para 163: "It was recognised that a ruling by the arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue the proceedings".

12 Various grounds have been or may be canvassed as to why judicial review of a negative ruling ought to be permitted:[13]

(a) That one of the principal purposes of international commercial arbitration is that no party should be able to bring the dispute to its national court. To distance themselves from the national courts of either party, a neutral seat of arbitration, which has little or no connection with either party or the subject matter of the dispute, may be chosen. A wrong negative jurisdictional ruling which is not capable of judicial review will, in effect, shut out access to the agreed form of resolution in that neutral seat; thereby, thrusting upon parties what they intended to avoid in the first place, namely, litigation in the national court of one of the parties.[14]

(b) That, depending on the circumstances of the case, problems or injustice can arise if the tribunal wrongly makes a negative ruling.[15]

(c) That potential claimants, for the reason stated in (a) above, will favour placing the arbitration in a seat where court review of a negative ruling is available.

(d) That, although the Model Law (and therefore Article 16(3)) may be said to reflect current international consensus, nonetheless, there is a discernable lack of international consensus specifically with regard to the Model Law's approach (as is set out in Article 16(3)) to negative jurisdictional rulings by arbitral tribunals.[16] See the comments of a learned writer:[17]

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13 The ensuing summary of the grounds are largely adopted from Mr Paulo Fohlin, "A Case for a Right of Appeal from Negative Jurisdictional Rulings in International Arbitrations governed by the UNCITRAL Model Law" (2008, Oct) Asian Dispute Review 113 which is based on a submission to the ICC Arbitration Committee of Hong Kong.

14 Netherlands has gone so far as to stipulate in its legislation that unless the parties have agreed otherwise, the court shall have jurisdiction to try the case if the arbitral tribunal declares it lacks jurisdiction: Article 1052 Netherlands Arbitration Act 1986, which the Hong Kong Institute of Arbitrators recommended adopting in its Report of Committee on Hong Kong Arbitration Law dated 30 April 2003, at para 24.15. This recommendation was accepted in the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill, 2007, at p 34. Section 34 of the Arbitration Ordinance which was passed by the Hong Kong Legislative Council on 10 November 2010 expressly provides that a ruling of the arbitral tribunal that does not have jurisdiction is not subject to appeal, and s 34(5) provides that in that case, the court must, if it has jurisdiction, decide that dispute.

15 This arose in the *Assuransi* case where a second tribunal made a wrong negative ruling by invoking the doctrine of estoppel by an erroneous interpretation of the award made by the first tribunal. See further the observations made in that case by SK Chan CJ at 627–628.

16 Or, for that matter, notwithstanding Article 5.

17 See Mr Paulo Fohlin, "A Case for a Right of Appeal from Negative Jurisdictional Rulings in International Arbitrations governed by the UNCITRAL Model Law" (Oct 2008) Asian Dispute Review 113 at p 114.

> There is…no such consensus with regard to erroneous negative jurisdictional rulings by arbitral tribunals. The arbitration laws of a number of non-Model Law countries make no provision for appeal from negative rulings. Conversely, the laws of some other countries, both Model Law and otherwise, expressly make such provision, or such rights are established by case law. Examples of the later include countries that are frequently the seat of international commercial arbitrations. Sweden, Belgium, Switzerland, England & Wales, Scotland, Northern Ireland, France, Italy, New Zealand and India are among such jurisdictions.

It ought to be observed that States that have the Model Law have exercised a fair amount of flexibility in their application of the Model Law provisions.[18] Singapore, in contrast, has been relatively conservative in this regard, having adopted almost all the provisions of the Model Law intact without modification. Section 10 of the Act is an instance of a minor modification of the Model Law as applied in Singapore. A comparative survey of the position adopted in other jurisdictions is annexed herewith as Annex A.

(e) That it is unfair and inconsistent to deny judicial review of negative jurisdictional rulings when judicial review of erroneous positive jurisdictional rulings[19] is permitted under Articles 16(3) and 34 of the Model Law.[20]

13 These considerations make a strong case for enabling judicial review.

14 As mentioned, there is overwhelming support in the industry for the proposals made herein. Singapore International Arbitration Centre ("SIAC"), International Chamber of Commerce ("ICC"), all members of the International Council for Commercial Arbitration ("ICCA"),[21] Mr C R Rajah SC and the majority of the

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18 *Cf* the Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration at para 16: "…article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this [Model] Law, except for matters not regulated by it (*eg* consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institution, or fixing of costs and fees, including deposits)."

19 Whether made as a preliminary ruling or in the award on merits. Enforcement of such award on merits may be refused under Article V of the New York Convention on the Enforcement of Foreign Arbitral Awards 1958.

20 There is a strong case for review where there is an erroneous positive ruling by the arbitral tribunal. That would amount to an arrogation unto itself of the mandate and power, and would be unacceptable to the commercial community.

21 Mr Veeder QC; Mr Neil Kaplan QC, Prof Martin Hunter, Mr Andrew Rogers QC, Prof Lalive Pierre, Dr Geroald Herrmann (in their personal capacities).

Singapore members of the Chartered Institute of Arbitrators[22] support the proposals. ICC commented that the absence of recourse from a negative ruling is an unfortunate *lacuna* in both the Model Law and most arbitration laws. Mr Veeder QC of ICCA in supporting the proposals added that having such access to justice in England has not caused any trouble in practice.

15 The Singapore Institute of Arbitrators ("SIArb"), whilst saying that it saw the force in the points made in the Consultative Paper, raised two points. First, SIArb commented that "the decision of the Singapore Court reversing the negative ruling may not be recognised overseas" and highlighted Prof LGS Boo's comments in an article[23] where the learned writer said that for sound reasons there is a lack of power under the Model Law to review negative rulings:

> There are indeed sound reasons… For an award on the merits subsequently made by such a tribunal who had earlier held that it did not have jurisdiction may still be challenged for want of jurisdiction when enforcement is sought. The lack of jurisdiction, whether on substantive or procedural basis, provides a strong ground for the refusal of enforcement under Article V (1) of the New York Convention.

However, no instances of jurisdictions that would not recognise such reversal were mentioned and we are not aware of any. Even assuming for the moment that there may be some jurisdictions that may not recognise a reversal, it is nonetheless our view that that does not tip the balance against judicial review of negative rulings. The matter, if such is the case, is best left to the party appealing against a tribunal's negative ruling to decide whether it wishes to exercise the right of appeal with its knowledge of the laws of the jurisdictions in which it may seek to enforce. In any event, when it comes to enforcement, it is impossible to cater to each and every approach (sometimes conflicting) that might be taken by the forums of enforcement.

16 Secondly, SIArb queried whether an award on merits made by a tribunal after the Court had ruled that the tribunal's negative ruling was wrong can be considered an "award" as it does not emanate from the tribunal. In our view, it would be an award as the tribunal's decision is on the substance of the dispute.[24]

17 Mr Christopher Lau, SC does not support the proposals on the ground that the drafting history of UNCITRAL Model Law shows that the Working Group had rejected recourse to the Court on negative rulings and that when revisions were made to the Model Law in 2006, Article 16(3) was not changed. A change, he opined, would not promote Singapore as an arbitral seat. We recognise that the proposals will mark a

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22 Six for and two against.

23 Lawrence GS Boo, "Ruling on Arbitral Jurisdiction – Is that an Award?" (2007) 3 Asian International Arbitration Journal 125.

24 See s 2 of the Act, see further the discussions below paras 18–21.

departure from the Model Law. However, that by itself cannot, in our view, be a reason not to adopt what is reasonable. We are comforted by the fact that members of the ICCA, many of whom were in the UNCITRAL Working Group, unanimously support the proposals. Notably Dr Herrmann (who was one of the persons credited for bringing about the Model Law) opined that the position adopted by UNCITRAL was "probably short-sighted".

A. Can a negative jurisdictional ruling be an award?

18 In enabling a review, it is important to consider whether or not a negative ruling can be an "award" within meaning of the Act. If it is an award within meaning of the Act, a modification of the Act to enable review of negative rulings would raise a concern. By permitting a review, the court will be enabled to review the resolution of the substance of a dispute by the arbitral tribunal. That would run against the grain of the Model Law and may be considered objectionable. We turn to address this.

19 Section 2 of the Act states that an award is a decision on the substance of the dispute. A jurisdictional ruling will not be a decision on the substance of the dispute. But there may be an occasion where it may be argued that such ruling is a decision on the substance of the dispute. Such argument may arise where a negative ruling is made by a finding of lack of consensus, lack of consideration or lack of authority. Some might argue that this is in reality a decision on the substance of the dispute. It is submitted that such argument would be fallacious for the following reason.

20 It is inherent in the concept of an award both under the common law and the Act that it has to be binding on the parties.[25] To be binding, it must arise from the mandate and power conferred by the parties. If the finding is that the agreement does not exist at all, then, it must logically follow that the tribunal cannot make a binding decision. The position would be the same if the arbitration agreement is impeached by illegality or if it fails by a finding of lack of consideration or lack of authority to enter into the arbitration agreement. The point was recognised by the House of Lords in *Premium Nafta Products Limited and others v Fili Shipping Company Limited and others* [2007] UKHL 40 where Lord Hope said at [34]:

> But as Longmore LJ said in para 21 of the Court of Appeal's judgment, this case is different from a dispute as to whether there was ever a contract at all. As everyone knows, an arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator's award can have no validity. So, where the arbitration agreement is set out in the same document as the main contract, the issue whether the entire agreement was procured by impersonation or forgery, for example, is unlikely to be severable from the arbitration clause.

25 See s 19B of the Act.

21 When Article 16(3) says that "the tribunal may rule on the pleas… in an award on merits", it envisages a positive ruling on jurisdiction in the award that allows the tribunal to proceed to an award on merits.[26] If there is a negative ruling, there would be no award on merits.

22 It is our view that judicial review of negative rulings ought to be enabled.

23 If the current effect of Article 16(3) is modified, the question arises: how are parties to proceed if a Court finds that the negative ruling is erroneous? The preferred course would be to require parties to proceed before the same tribunal if it agrees, or failing that, to leave it to parties to proceed afresh pursuant to the arbitration clause before a different tribunal.

IV. Suggested Amendment

24 Following from the discussions above, it is suggested that if an amendment is to be made to enable judicial review, the draftsmen need not draw a distinction between a ruling as a preliminary question and a ruling in an award on the merits.

25 To permit judicial review of both positive and negative rulings, New Zealand has directly amended Article 16(3) by removing the words "that it has jurisdiction" from the second sentence of Article 16(3) to read:

> The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as preliminary question, any party may request … the High Court to decide the matter.[27]

26 The Singapore approach hitherto with regards to the Model Law is not directly invasive. It attaches the Model Law as Sch 1 and complements or modifies specific provisions by the text of the Act. Section 10 of the Act is an example. It is preferable, for the sake of consistency, to modify the Model Law by amending s 10 of the Act.

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26 The Sub-committee appreciates Dr Herrmann's clarification of the point.

27 The New Zealand Law Commission agreed with the report of the Dervaird Committee of Scotland that access to the Court should extend to any preliminary ruling on a jurisdictional question, but disagreed that a decision by an arbitral tribunal to defer a jurisdictional ruling should be the subject of access to the Court: New Zealand Law Commission Report No 20 on Arbitration (1991) at p 179. Neither the Scottish nor the New Zealand legislation allows appeal from a decision to postpone the ruling on jurisdiction to the award on the merits. Although there have been appeals to the New Zealand court against positive rulings on jurisdiction, there is no reported decision of an appeal from a negative ruling. The Sub-Committee is grateful for the guidance of Tómas Kennedy-Grant QC on the New Zealand position.

27 We do not recommend that there be judicial review of a positive jurisdictional ruling made in an award on the merits. With such ruling, the tribunal would have proceeded to an award. The ruling should only be open for scrutiny on a setting aside application under Article 34, or in a challenge to enforcement of the award.

28 A suggested draft of an amendment to s 10 (by the addition of a new s 10A) is as follows:

> **Modification of Article 16(3) of Model Law**
>
> 10A (1) Notwithstanding Article 16 (3) of the Model Law:
>
> (a) The arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the proceedings.[28] If the arbitral tribunal rules on such a plea that it has no jurisdiction, any party may request, within 30 days after having received notice of that ruling, the High Court to decide the matter.
>
> (b) An appeal from a decision of the High Court made under paragraph (a) shall lie to the Court of Appeal only with the leave of the High Court.
>
> (c) There shall be no appeal against a refusal of leave of the High Court.
>
> (d) Where the High Court, or the Court of Appeal on appeal, decides that the tribunal has jurisdiction, the arbitral tribunal shall proceed with the arbitration. In the event any arbitrator is unwilling or unable to proceed, his mandate shall terminate and Article 15 of the Model Law shall apply.
>
> [10A (2)] (see para 33 below)

It ought to be mentioned that ICC raised the following query:

> We wonder how section [10A] would apply where parties have chosen arbitration rules like the ICC Rules of Arbitration to govern the arbitration. The References to Article 15 of the Model Law (in the proposed section [10A(1)(d)] and s 21 (in the proposed section [10A(2)] could give rise to uncertainty as neither of these provisions would apply in an ICC arbitration.

We would comment as follows: The IAA and the Model Law do not have to be on all fours with the Rules of Arbitration of every institution or organisation. We have not come across real difficulties in practice and s 15A of the IAA provides the mechanism to resolve conflicts between the applicable Rules of Arbitration and the IAA.

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28 In the light of the discussions at paras 18–21 above, we avoid the words "either as a preliminary question or in award on the merits".

V. Costs

29 There remains a question in relation to costs. There are three possible situations to consider:

(a) The arbitral tribunal determines that it has no jurisdiction.

(b) The arbitral tribunal determines that it has jurisdiction but the Court upon review declares otherwise.

(c) (Assuming that the Act is amended to provide for judicial review of negative jurisdictional rulings), the Court upon review of such negative jurisdictional ruling confirms that ruling.

30 In situation (a), there is much force of logic in the argument that once the arbitral tribunal rules that it has no jurisdiction; it lacks the power to make any order for costs with respect to the arbitration proceedings. However, in *Commonwealth Development Corporation v Montague* [2000] QCA 252, the Supreme Court of Queensland held that an order for costs following a negative jurisdictional ruling in an ICC arbitration was an award capable of enforcement. But that decision may have to be confined to the facts as the Court found an express agreement in the terms of reference as to costs:

> There was clearly an agreement between the Appellant and the defendant to the arbitral proceedings which he commenced in the International Court of Arbitration that the preliminary jurisdictional point raised by the defendants should be determined in the arbitration and the Appellant clearly agreed in writing that the Arbitrator should make a decision with respect to the cost of the arbitration in issue.[29]

It is our view that the arbitral tribunal ought to be given the statutory power to order costs against the unsuccessful party when making a negative jurisdictional ruling. The rationale is that the claimant who has wrongfully commenced arbitration proceedings ought to be made liable for the wasted costs incurred by the respondent.

31 In situation (b), the Court, in so far as the proceedings before it are concerned, clearly has the power to make an order for costs. But, it appears that it has no power to make an order for costs incurred in the arbitral proceedings. In *Crest Nicholson (Eastern) Limited v Mr and Mrs Western* [2008] EWHC 1325 (TCC), the English High Court upon a review of a positive jurisdictional ruling by an arbitrator declared that the arbitrator had no jurisdiction. Akenhead J, dealing with the issue of costs, said at [54]:

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29 *Per* Ambrose J, *Commonwealth Development Corporation v Montague* [2000] QCA 252 at [34].

> Two issues as to costs arose. The first concerned whether or not the Court had jurisdiction to make any order in relation to costs incurred by [the successful appellant] in the abortive or invalid arbitration proceedings. Doubtless, [the appellant] incurred costs in solicitors' fees and other expenses in relation to making representations to [the arbitrator] that he had no jurisdiction. I am of the view that the Court has no jurisdiction to make any order in relation to costs incurred by the parties in those proceedings. There is nothing in the Arbitration Act which suggests that the Court has jurisdiction in relation to such costs albeit obviously the Court has jurisdiction over costs of any proceedings under section 67 of the Arbitration Act 1996. If the purported arbitration proceedings were invalid, the Court could only have power to make an order in relation to those costs if there was some clear statutory power to do so. There is no such power.

It is similarly our view that the Court ought to be given the power to make an order for the costs incurred in the arbitral proceedings against the unsuccessful party.

32 In situation (c), the Court is entitled to order costs of the proceedings before it (see *Crest Nicholson (Eastern) Limited v Mr and Mrs Western* above) and the costs below could be dealt with by the tribunal if it is empowered to do so as suggested in the draft s 10A(2) below.

33 Taking into account the above, we propose that section 10A(2) do provide as follows:

> 10A (2) The arbitral tribunal may provide for the costs of the reference against the unsuccessful party when it rules that it has no jurisdiction and section 21 shall apply. A Court may likewise provide for the costs of the reference against the unsuccessful party when it rules that the arbitral tribunal has no jurisdiction.

VI. Arbitration Act (Cap 10, 2002 Rev Ed)

34 Section 21 Arbitration Act (Cap 10, 2002 Rev Ed) ("the Arbitration Act") currently contains the equivalent of Article 16 Model Law read with s 10, and likewise only allows appeals from positive jurisdictional rulings. The argument in support of the proposals made herein, namely, that it is unfair to deny judicial review of negative rulings applies equally to arbitrations under the Arbitration Act. Indeed, the *raison d'être* of the Arbitration Act is to permit a greater degree of curial supervision over domestic arbitrations. Thus, there is no reason to exclude judicial review of negative jurisdiction rulings under the Arbitration Act if it is to be enabled under the International Arbitration Act. For these reasons and for the sake of harmonisation, we are of the view that a corresponding amendment to the Arbitration Act is desirable.

ANNEX A

Country	Model Law Jurisdiction	Appeal from Negative Jurisdiction Ruling	Relevant Legislation	Outline of Legislation/Case Law	Comments
Australia	Yes	No	International Arbitration Act 1974 (Cth)	The International Arbitration Act 1974 (Cth) ("IAA 1974") does not contain any specific provisions pertaining to whether a tribunal is entitled to rule on its own jurisdiction, let alone whether an appeal can be made against a tribunal's negative jurisdiction ruling. However, to the extent that the IAA 1974 gives the Model Law the force of law in Australia (by virtue of s 16, IAA 1974), Article 16(3) of the Model Law would apply to arbitrations seated in Australia.	
Belgium	No	Allowed	Article 1697 of the Code Judiciaire 19 May 1998	Article 1697(3) states, *inter alia*, "The judicial authority may at the request of one of the parties decide whether a ruling that the arbitral tribunal has no jurisdiction is well founded."	
Croatia	Yes	Not Allowed	Article 15 of the Croatian Law on Arbitration	Article 15 is in pari materia to Article 16 of the Model Law. Case Law has established that appeals from negative jurisdiction rulings are not allowed. (See Case U-III-669-2003, Clout Case No 656 A/CN.9/SER.C/ABSTRACTS/60)	
England	No	Allowed	English Arbitration Act 1996, ss 30 and 67	The principle that the tribunal should determine its own jurisdiction is firmly enshrined in s 30 of the Act. If the tribunal declines to act on the basis of lack of jurisdiction, the claimant can either seek to pursue his case in court or he can apply to the court to challenge the tribunal's award as to jurisdiction under s 67 of the Act. *per Russell on Arbitration* (23rd Ed, 2007).	

France	No	Allowed – *per* Paulo Fohlin	French New Code of Civil Procedure, Articles 1466 and 1502	Article 1466 states that "If a party challenges in the arbitration the existence or scope of the arbitrator's jurisdiction, the arbitrator shall decide on the issue." Article 1502 states that "Appeal of a court decision granting recognition or enforcement is only available on the grounds: (3) if the arbitrator has not rendered his decision in accordance with the mission conferred upon him." Case Law has established in the Cour de cassation "there is no limitation to the capacity of its jurisdiction to seek in right and facts all the elements concerning the defects in question" [*Judgment of 6 January 1987, So. Pac. Properties Ltd v Republique Arabe d'Egypte*]. Paris Cour d'appel has declared "this power of review which is given to the court under Article 1502(1) in the case where the arbitrators hold that they have jurisdiction over the case, cannot be denied to the court in a case…where the arbitrators have denied jurisdiction. To hold the contrary would mean granting different guarantees to the parties." [*Judgment of 16 June 1988, Societe Swiss Oil Corp v Societe Petrogab & Republique du Gabon*].	
Germany	Yes	Not Allowed	German ZPO, S. 1040	Article 1040(1) states, *inter alia*, "The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement." Article 1040(3) states "If the arbitral tribunal considers that it has jurisdiction, it rules on a plea referred to in subsection 2 of this section in general by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, the court to decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award." Case Law has established that appeals from negative jurisdiction rulings are not allowed. (See Case III ZB	

				44/01, Clout Case No 506 A/CN.9/SER.C/ABSTRACTS/49)	
Hong Kong	Yes	Not Allowed	Hong Kong Arbitration Ordinance, ss 34(4) and 34(5)	Section 34(4) states: "A ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal." Section 34(5) states: "Despite s 20, if the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court must, if it has jurisdiction, decide that dispute."	
India	Yes	Allowed	Indian Arbitration and Conciliation Act, ss 16 and 37	Section 16(2) states, *inter alia*, "A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than the submission of the statement of defence." Section 37(2)(a) states, *inter alia*, "An appeal shall also lie to a court from an order of the arbitral tribunal accepting the plea referred to in [Section 16(2)]"	
Italy	No	Allowed – *per* Paulo Fohlin	Italian Code of Civil Procedure, Article 817		
Malaysia	No	*Prima Facie*, Not Allowed	Arbitration Act 2005, Chapter 4, s 18	Section 18 is in pari materia to Article 16 of the Model Law.	Section 18 is in pari materia to Article 16 of the Model Law, therefore, *prima facie*, appeals from negative jurisdiction rulings will be disallowed.
Netherlands	No	*Prima Facie*, Not Allowed	Netherlands Code of Civil Procedure, Article 1052	Article 1052 states that "Any decision in which the arbitral tribunal declares that it has jurisdiction can be challenged only by the means of recourse mentioned in Article 1064(1) in conjunction with the challenge of a subsequent final or partial award."	Framed in the same manner as the Model Law. *Ie Prima facie*, only appeals from positive jurisdiction rulings are allowed.
New Zealand	Yes	Allowed	Schedule 1, ss 16(2) and 16(3), Arbitration Act 1996	Section 16(2) states that "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Section 16(3) states that "The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a	The words "that it has jurisdiction" was deleted from the second sentence of Article 16(3) of the Model Law, providing that both positive

				preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as preliminary question, any party may request…the High Court to decide the matter."	and negative jurisdiction rulings are subject to appeal.
Sweden	No	Allowed	Section 2 of the Swedish Arbitration Act (SFS 1999:116)	Section 2 states "The arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court." Case Law has established that appeals from negative jurisdiction rulings are allowed. (See Supreme Court Case T 2113-06.)	
Switzerland	No	Allowed	Chapter 12, Articles 186 and 190 of the Federal Statute on Private International Law 1987, 12th Chapter: International Arbitration	Article 186 states that "1. The arbitral tribunal shall rule on its own jurisdiction…3. In general, the arbitral tribunal shall rule on its own jurisdiction by means of an interlocutory decision." Article 190 states that "2b) The award may be annulled if the arbitral tribunal wrongly accepted or declined jurisdiction."	
United States	No	Allowed	Section 10 (a) (4), Federal Arbitration Act	Section 10(a) states that "the United States court…may make an order vacating the award…(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." Case Law has established in the Supreme Court "if an arbitration agreement granted arbitrators the power to consider and decide their own jurisdiction, then their resulting jurisdictional award would be subject to the same highly deferential standard of judicial review applicable under the FAA to the merits of other arbitral awards" [*First Options of Chicago, Inc. v Kaplan, 514 US 938, U.S. S. Ct. 1995*]	