3-2022

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Darius CHAN
Singapore Management University, dariuschan@smu.edu.sg

Zhi Jia KOH

Citation

CHAN, Darius and KOH, Zhi Jia. A requirement, a factor, or a figure of speech? Role of prejudice when challenging awards under the Model Law. (2022). *Journal of International Arbitration*. 39, (2), 185-212.
Available at: https://ink.library.smu.edu.sg/sol_research/4085

A Requirement, A Factor, or A Figure of Speech? Role of Prejudice When Challenging Awards Under the Model Law

Darius CHAN* & Zhi Jia KOH**

Both parties and courts routinely invoke the term 'prejudice' in applications to set aside an arbitral award or refuse its enforcement. This suggests that the use of the term is more than just a figure of speech. It is generally understood that prejudice, in the sense of impact or effect on the outcome of the arbitration, is relevant for procedural challenges but not jurisdictional challenges. However, questions remain as to whether prejudice is legally relevant for challenges that are neither strictly procedural or jurisdictional in nature, whether prejudice is relevant as a factor for consideration or as a legal requirement when challenging an award, and the meaning of prejudice. This article shows that the usage of the term 'prejudice' in case law is inconsistent and far from straightforward. This article attempts to elucidate a clear and structured way of understanding the role prejudice plays for each ground for challenging an award under the Model Law.

Keywords: Model Law, Article 34, Article 36, Setting Aside, Refusing Enforcement, Procedural Challenge, Jurisdictional Challenge, Residual Discretion, Materiality, Prejudice, Causative Link

1 INTRODUCTION

The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[1] ('Model Law') sought to address the disparity in national laws on recourse against arbitral awards by providing uniform grounds for such recourse.[2] An award debtor may challenge an award by seeking to annul it under Article 34 or resist its enforcement under Article 36. The grounds for challenging an

* Associate Professor of Law (Practice), Singapore Management University. Arbitrator & Advocate, Fountain Court Chambers, Director, Breakpoint Limited Liability Company. The author gratefully acknowledges the support of the Singapore International Dispute Resolution Academy's Belt & Road Initiative Program. Email: dariuschan@smu.edu.sg.

** Final-Year LL.B. Student (expected *summa cum laude*), Singapore Management University. The author is grateful for valuable comments given by Mr Alvin See on earlier versions of this article. All errors remain my own. Email: zhijia.koh.2018@law.smu.edu.sg.

1 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17.

2 United Nations Commission on International Trade Law, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* ('Explanatory Note on Model Law'), para. 44.

Chan, Darius & KOH, Zhi Jia. 'A Requirement, A Factor, or A Figure of Speech? Role of Prejudice When Challenging Awards Under the Model Law'. *Journal of International Arbitration* 39, no. 2 (2022): 185–212.

award under these provisions are materially identical as they are meant to 'mirror' grounds for non-recognition under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).[3] National courts, such as those of Singapore,[4] Canada,[5] and New Zealand[6] have also uniformly accepted these grounds for challenging an award as exhaustive.[7]

Despite attempts at harmonization, it remains uncertain whether an award debtor needs to show that it has been prejudiced when challenging an award under the Model Law. The notion of prejudice here refers to the impact of the ground for challenging the award, e.g., the procedural or jurisdictional defect, on the outcome of the arbitration. This uncertainty remains largely unaddressed in literature, and case law from Model Law jurisdictions does not seem to provide any general principle. In *Sanum Investments (CA)*,[8] the Singapore Court of Appeal provided us with a starting point that 'lack of prejudice is not relevant to a jurisdictional challenge but would be relevant to a procedural challenge'.[9] There is also further uncertainty as to whether, for each ground of challenge, prejudice is a legal requirement to be satisfied, or a consideration in the court's exercise of its

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[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3 (NYC); United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretary-General*, UN Doc. A/CN.9/264 (1985), Art. 34; Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 911, 1055 (1989) ('Holtzmann and Neuhaus'); David A. R. Williams & Amokura Kawharu, *Williams & Kawharu on Arbitration* 467, 559 (Lexis Nexis 2011); Peter Sarcevic, *Essays on Commercial Arbitration* 186 (Peter Sarcevic ed., Graham & Trotman 1989); Stefan Michael Kroll & Peter Kraft, *Arbitration in Germany, The Model Law in Practice* 436, 452 (Karl-Heinz Böckstiegel, Stefan Michael Kroll & Patricia Nacimiento eds, Kluwer Law International 2007); K. P. Berger, *International Economic Arbitration* 663 (1993); J. Lew, L. Mistelis & S. Kroll, *Comparative International Commercial Arbitration* (2003), paras 25–32; J. F. Poudret & S Besson, *Comparative Law of International Arbitration* (2d ed. 2007), para. 786; United Nations Commission on International Trade Law, *Report of the Secretary-General on the Possible Features of A Model Law of International commercial Arbitration*, UN Doc. A/CN.9/207 (1981), para. 110; United Nations Commission on International Trade Law, *Report on the Working Group on International Contract Practices on the Work of Its Fourth Session*, UN Doc. A/CN.9/232 (1983), para. 15.

[4] Michael Hwang & Yin Wai Chan, *b-Arbitra | Belgian Review of Arbitration* 629–661, 648, 655 (Annet van Hooft & Jean-François Tossens eds, Wolters Kluwer 2019, Volume 2019 Issue 2); International Arbitration Act (Cap. 143A, 2002 Rev. Ed.) (IAA), ss. 19, 24, 31.

[5] *Canada (Attorney Gen.) v. S. D. Myers Inc.* [2004] 3 F.C.R. 368; *D. Frampton & Co. v. Thibeault* [1988] F.C.J. No. 305; *Holding Tusculum B.V. v. Louis Dreyfus S.A.S. [2008]* Q.C.C.S. 5904; *Bayview Irrigation Dist. #11 v. United Mexican States* [2008] Can. L.I.I. 22120.

[6] *Carr v. Gallaway Cook Allan* [2014] N.Z.S.C. 75 ('*Carr v. Gallaway*'), para. 76; *Methanex Motunui Ltd v. Spellman* [2004] 1 N.Z.L.R. 95.

[7] P Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 447 (4th ed. 2019) ('Binder').

[8] *ST Group Co. Ltd and others v. Sanum Investments Ltd and another appeal* [2020] 1 S. L. R. 1 ('*Sanum Investments (CA)*').

[9] *Ibid.,* paras 93–94.

residual discretion to uphold an award notwithstanding that the ground for challenge is established.[10]

Section 2 briefly describes the role of prejudice and the court's residual discretion in setting-aside and enforcement proceedings as contemplated by the drafters of the Model Law. Section 3 analyses the role of prejudice in each ground for challenging an award under the Model Law. Section 4 concludes.

2 ROLE OF PREJUDICE IN CHALLENGING AN AWARD

The national laws of some jurisdictions expressly stipulate that an award debtor must show prejudice as a legal requirement to establish a ground for challenging an award. For instance, section 24(b) of Singapore's International Arbitration Act (IAA) provides that, notwithstanding the Model Law, a court may set aside an award if 'a breach of the rules of natural justice occurred in connection with the making of the award *by which the rights of any party have been prejudiced*'. Sections 3(a)(ii) and 3(a)(v) of article 17 of the Belgian Judicial Code also expressly provide that an award may not be set aside for a procedural defect if the defect has no effect on the award. In such jurisdictions, prejudice is an *element* of a ground for challenging an award. An award debtor must show prejudice in order to successfully invoke that particular ground for challenging an award. That is the most straightforward scenario.

However, most jurisdictions do not have such an express stipulation in their national laws, and there is no express reference to 'prejudice' in any of the Model Law grounds for challenging an award.[11] Even so, prejudice may be relevant to the court's residual discretion to uphold an award notwithstanding that one or more grounds for challenging the award have been made out (which this article will refer to as the court's 'Discretion' for convenience).[12] The Discretion to uphold awards is expressed in the Model Law itself. Article 34(2) provides that an award '*may* be set aside by the court', which suggests that it is not mandatory for the court to do so.[13] Indeed, the drafters considered that the word 'may' allowed the courts to

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[10] *CRW Joint Operation v. P.T. Perusahaan Gas Negara (Persero) TBK* [2011] 4 S.L.R. 305 ('*CRW*'), paras 98–100; *Grand Pacific Holdings v. Pacific China Holdings (in liquidation) (No. 1)* [2012] 4 H.K.L.R.D. 1 ('*Grand Pacific*'), para. 97.

[11] Model Law, Arts 34, 36. *See* e.g., Australian International Arbitration Act 1974, s. 19; British Columbia Arbitration Act, ss. 34, 36; Ontario International Commercial Arbitration Act of 2017, s. 5; German Code of Civil Procedure, ss. 1059, 1061; Indian Arbitration and Conciliation Act, s. 34; and New Zealand Arbitration Act 1996, ss. 34, 36.

[12] Gary B. Born, *International Commercial Arbitration* §25.03, 3421–3690 (3d ed., Kluwer Law International 2020) ('Born').

[13] *Ibid.*; Holtzmann & Neuhaus, *supra* n. 3; Pietro Ortolani, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 864 (Ilias Bantekas et al. eds 2020).

assess the nature of the defect before annulling an award.[14] Likewise, Article 36(1) provides that recognition or enforcement of an award '*may* be refused', and the use of 'may' was intentional.[15] Furthermore, these provisions are derived from Article V of the NYC, which does not oblige a Contracting State to refuse the recognition of awards.[16] Most importantly, this interpretation of the Model Law is consistent with the pro-enforcement approach taken by national courts in both common law and civil law jurisdictions,[17] and it gives due regard to the Model Law's 'international origin and to the need to promote uniformity in its application'.[18]

To further promote uniformity, the Discretion to uphold awards should be exercised within recognizable legal principles.[19] After all, the grounds for challenging an award have only been decided after lengthy discussions by the drafters of the Model Law,[20] and they represent the minimum standards for international arbitration. The drafters of Article 34 identified two main reasons for the court's exercise of its Discretion to uphold awards[21]: first, where a party had knowledge of the ground for challenging an award during the arbitration proceedings but failed

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14 United Nations Commission on International Trade Law, *Summary Record of the 318th Meeting, Held at the Vienna International Centre, Vienna, on Tuesday, 11 June 1985: United Nations Commission on International Trade Law, 18th Session*, UN Doc. A/CN.9/SR.318.

15 United Nations Commission on International Trade Law, *Fourth Working Group Report*, UN Doc. A/CN.9/245, paras 139, 141.

16 Born, *supra* n. 12, at 3741.

17 *Bayer Cropscience A.G. v. Dow Agrosciences L.L.C.*, 680 F. App'x 985 (2017); *Corporacion Mexicana de Mantenimiento Integral v. Pemex-Exploracion y Produccion*, 823 F. 3d 92 (2016); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Pakistan* [2010] U.K.S. C. 46 ('*Dallah Real Estate*'), para. 101; *Popack v. Lipszyc* [2018] O.N. C.A. 635; *Brostrom Tankers A.B. v. Factorias Vulcano S.A.* (2005) XXX Y.B. Comm. Arb. 591, 596–597; *Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2009] 12 H.K.C.F.A.R. 84; *Astro Nusantara International B.V. v P.T. First Media TBK* (2017) XLII Y.B. Comm. Arb. 390; *Vijay Karia v. Prysmian Cavi e Sistemi Srl* (2020) Civil Appeal No. 1544/2020; *OJSC Zarubezhstroy Tech. v. Gibb Africa Ltd* (2017) XLII Y.B. Comm. Arb. 421; *Huawei Tech. Inv. Co. Ltd v. Sampoerna Strategic Holdings Ltd* (2014) XXXIX Y.B. Comm. Arb. 354; *Carr v. Gallaway, supra* n. 6; *TCL Air Conditioner (Zhongshan) Co. Ltd v. Judges of the Federal Court of Australia* [2013] H.C.A. 5; Judgment of 14 Apr. 1988 (1990) XV Y.B. Comm. Arb. 450, 451–452; *Ryanair Ltd v. Syndicat Mixte des Aeroports de Charente* (2015) Case No. 797 FS-P+B+R+I Pourvoi No. N13-25.846; Judgment of 9 Dec. 2008, XXXIV Y.B. Comm. Arb. 810, 816; Judgment of 7 June 1995, XXII Y.B. Comm. Arb. 727, 731; *Européenne d'Etudes et d'Enterprise v. Yugoslavia* (1976) I Y.B. Comm. Arb. 195; Judgment of 14 Mar. 2017, XLII Y.B. Comm. Arb. 488; Judgment of 28 Jan. 1999, XXIV Y.B. Comm. Arb. 714, 722.

18 Model Law, Art. 2A.

19 *Yukos Oil Co. v Dardana Ltd* [2002] EWCA Civ 543, paras 8, 18; *Dallah Real Estate, supra* n. 17, paras 67, 127.

20 Holtzmann & Neuhaus, *supra* n. 3, at 912–913, 1056.

21 United Nations Commission on International Trade Law, *Note by the Secretariat: Model Law on International Commercial Arbitration: Draft Arts 37 to 41 on Recognition and Enforcement of Award and Recourse against Award*, UN Doc. A/CN/9/WG.II/WP.42, Art. 41.

to raise it contemporaneously[22]; secondly, where the ground for challenging an award does not materially affect the arbitration process or decision.

In Singapore, materiality has been referred to in two senses. The narrow sense entails that the court's Discretion to uphold awards 'ought to' be exercised '*only if* no prejudice has been sustained by the aggrieved party'.[23] This suggests that prejudice suffered by the award debtor is, effectively, a requirement for challenging an award. Otherwise, the Discretion to uphold awards 'ought to' be exercised by the courts. In contrast, the wider sense entails that the court's Discretion to uphold awards is be exercised where the breach is 'not serious enough'.[24] In this wider sense, prejudice appears to be one factor for consideration as to the seriousness of the breach; prejudice is not an absolute requirement for an award debtor to successfully challenge the award.[25]

In sum, prejudice may feature as a legal *requirement* to establish a particular ground for challenging an award, or as a factor for *consideration* in the court's exercise of its Discretion to uphold an award notwithstanding that a ground for challenging an award has been established. In this context, it is not unusual for an award creditor to argue that the award debtor has suffered no prejudice. Nevertheless, the onus generally lies on the award debtor who is challenging the award to show that it has been prejudiced.[26] In *Grand Pacific*,[27] the award debtor sought to argue that the burden should rest 'on the party resisting an application to set aside to show that the result could not have been different'.[28] The Hong Kong Court of Appeal disagreed, holding that the burden rests on an award debtor as 'an applicant who complains of a violation is best placed to show that it has been prejudiced'.[29]

3 ROLE OF PREJUDICE IN EACH GROUND FOR CHALLENGING AN AWARD UNDER THE MODEL LAW

This section explores, for each ground of challenging an award under the Model Law, the extent to which prejudice is relevant as a legal requirement to be satisfied or as a factor for consideration in the court's exercise of its Discretion to uphold awards. The following analysis does not draw a distinction between challenging an

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22 This appears to be the position of the Singapore Court of Appeal in *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and another* [2020] 1 S.L.R. 695 ('*China Machine New Energy*'), paras 102, 159, 170, in substance. However, it is not the focus of this article.

23 *CRW, supra* n. 10, para. 100.

24 *Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd* [2015] 1 S.L.R. 114 ('*Triulzi*'), para. 64.

25 *Ibid*.

26 *Ibid*., para. 66; *CBS v. CBP* [2021] S.G.C.A. 4 ('*CBS v. CBP*'), paras 83–84.

27 *Grand Pacific, supra* n. 10.

28 *Ibid*., para. 106.

29 *Ibid*.

award by setting it aside and by refusing its enforcement. This is because the grounds for setting aside an award are meant to be aligned with the grounds for refusing its enforcement.[30]

3.1 Incapacity of a party or invalidity of the arbitration agreement

An award debtor may challenge an award under Articles 34(2)(a)(i) or 36(1)(a)(i) if 'a party to the arbitration agreement … was under some incapacity; or the said agreement is not valid'.[31] Where such challenges are concerned, case law in Model Law jurisdictions suggests that an award debtor does not have to show prejudice. Prejudice is not a legal requirement to establish this ground of challenge. Neither would the lack of prejudice suffered by the award debtor entail that the court may exercise its Discretion to uphold the award in favour of the award creditor. Put simply, prejudice is entirely irrelevant to the outcome of the challenge.

In *Sanum Investments (CA)*, the Singapore Court of Appeal affirmed the general principle that 'lack of prejudice is not relevant to a jurisdictional challenge but would be relevant to a procedural challenge'.[32] There is differing treatment between jurisdictional and non-jurisdictional defects in other jurisdictions as well. In the UK Supreme Court decision of *Dallah Real Estate*, Lord Mance observed that, for some grounds of challenge it 'might be easier to invoke such discretion as the word "may" contains than it could be in any case where the objection is that there was never any applicable arbitration agreement'.[33] In that case, which concerned the lack of an arbitration agreement between the parties, Lord Mance was of the view that the courts are unlikely to exercise the Discretion unless there is 'some fresh circumstance such as another agreement or an estoppel'.[34] These principles have been applied in Model Law jurisdictions, for instance, by the Supreme Court of New Zealand in *Carr v. Gallaway*,[35] which similarly concerned an invalid arbitration agreement,[36] and cited with approval in Canada and Hong Kong.[37]

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30 *Triulzi, supra* n. 24, para. 57; Holtzmann & Neuhaus, *supra* n. 3, at 912; United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, UN Doc. A/CN.9/223, para. 187; *AJU v. AJT* [2011] 4 S.L.R. 379 ('*AJU v. AJT*'), paras 36–38.

31 Model Law, *supra* n. 1, Arts 34(2)(a)(i), 36(1)(a)(i).

32 *Sanum Investments (CA), supra* n. 8, paras 94–95.

33 *Dallah Real Estate, supra* n. 17, para. 68.

34 *Ibid*.

35 *Supra* n. 6, paras 77–79.

36 *Ibid*., para. 72.

37 *Popack v. Lipszyc* 129 O.R. (3d) 321 ('*Popack v. Lipszyc*'), para. 30; *Consolidated Contractors Group S.A. L. (Offshore) v. Ambatovy Minerals S.A.* [2016] O.J. No. 6314, para. 153; *Pacific China Holdings Ltd (in liquidation) v. Grand Pacific Holdings Ltd* [2012] 3 H.K.C. 498, paras 97–100.

It is an uphill challenge to invoke the Discretion for jurisdictional defects because they go 'to the root of the parties' intention to arbitrate their dispute'[38] and 'strike at the foundations of arbitration'.[39] As a matter of principle, arbitration agreements provide for the binding resolution of disputes in the form of an award.[40] Absent a valid and enforceable arbitration agreement, any award produced would not be binding upon the parties, and there is no reason why it should be upheld or enforced. Alternatively, it may be said that the Discretion should not be invoked as jurisdictional defects are necessarily or inherently prejudicial. Unlike procedural defects where '[i]t is possible to determine "what would have been"'[41] but for the 'discrete and contained [defects]',[42] an award should not have been rendered at all but for the jurisdictional defect.

Put simply, the absence of prejudice is irrelevant where a jurisdictional challenge is concerned. Accordingly, since 'arguments as to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional',[43] prejudice is irrelevant for a challenge under Articles 34(2)(a)(i) or 36(1)(a)(i).

3.2 Breach of natural justice

An award debtor may challenge an award for a breach of natural justice under Articles 34(2)(a)(ii) or 36(1)(a)(ii) if 'the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'.[44]

The weight of judicial authority in Model Law jurisdictions appears to support the stance that 'technical or procedural irregularities that have caused no harm in the final analysis'[45] are insufficient.[46] In support of this stance, some jurisdictions may exercise the Discretion to uphold an award if an award debtor fails to show prejudice,

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38 *Carr v. Gallaway, supra* n. 6, para. 80.
39 *Ibid.*, para. 78.
40 Born, *supra* n. 12, at 3426–3427.
41 *Ibid.*
42 *Ibid.*
43 *BBA and others v. BAZ and another appeal* [2020] 2 S.L.R. 453 ('*BBA v. BAZ*'), para. 78.
44 Model Law, Arts 34(2)(a)(ii), 36(1)(a)(ii); IAA, ss. 24(b), 31(2)(c).
45 *Soh Beng Tee & Co. Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 S.L.R.(R.) 86 ('*Fairmount Development*'), para. 91.
46 *Ibid.; L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 S.L.R. 125 ('*L W Infrastructure*'), para. 54; CBS *v. CBP, supra* n. 26, para. 84; *Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 49 (2017); *Orascom TMT Invs. S.A.R.L. v. Veon Ltd* [2018] E.W.H.C. 985, para. 27; *Ciech v. Comexport*, Judgment of 6 May 2009 (2010) Rev. Arb. 90; *Grand Pacific, supra* n. 10, para. 102; Judgment of 13 Feb. 2008, Case No. S.A.P.M. 2227/2008; *Hui v. Esposito Holdings Pty Ltd (No. 2)* [2017] F.C.A. 728, para. 184; *TCL Air Conditioner (Zhongshan) Co. v. Castel Electronics Pty Ltd* [2014] F.C.A.F.C. 83 ('*TCL Air Conditioner*'), para. 111; *Rhéaume v. D'Investissements l'Excellence Inc.* [2010] Q.C.C.A. 2269, para. 57; *United Mexican States v. Metalclad Corp.*, [2001] B.C.S.C. 664; Born, *supra* n. 12, at 3541. *See also* Holtzmann & Neuhaus, *supra* n. 3, at 921–922, 1057–1058.

i.e., the award debtor fails to show that a different result *could* have been achieved but for the breach of natural justice.[47] In *Brunswick*,[48] the Hong Kong Court of First Instance held that a court may exercise the Discretion to uphold the award if 'it is satisfied the result would be the same'.[49] This position was cited with approval by the Hong Kong Court of Appeal in *Grand Pacific*,[50] where the court further explained that the exercise of the Discretion 'depend[s] on the view [the court] takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different'.[51] *Grand Pacific* therefore suggests that, in addition to satisfying Article 34(2)(a)(ii), an award debtor also has to show that the breach was 'egregious' or, in other words, material. If the award debtor cannot show that the breach was material (by demonstrating that it has been prejudiced or otherwise), the court may exercise its Discretion to uphold the award notwithstanding that the ground for challenging the award is satisfied.

Similarly, the courts of New Zealand and Canada consider the prejudice to the award debtor and the materiality of the breach as factors for deciding whether the Discretion should be exercised.[52] Apart from considerations of prejudice to the award debtor, the courts also consider the following factors when deciding whether the Discretion should be exercised:

1. the seriousness of the breach itself[53];
2. the likely costs of holding a rehearing[54];
3. the potential prejudice caused by redoing the arbitration[55]; and
4. whether there is an estoppel.[56]

Jurisdictions such as New Zealand[57] Australia,[58] Hong Kong,[59] Malaysia,[60] and Canada[61] have been careful not to 'elevate [prejudice or the materiality of the

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47 *Grand Pacific, supra* n. 10, para. 105; *Kyburn Investments Ltd v. Beca Corporate Holdings Ltd* [2015] 3 N.Z. L.R. 644 ('*Kyburn v. Beca*'), paras 43, 46–47; *Popack v. Lipszyc, supra* n. 37, para. 36.

48 *Brunswick Bowling & Billiards Corp. v. Shanghai Zhonglu Industrial Co. Ltd & Another* [2009] H.K.C.U. 211 ('*Brunswick*'), paras 31–40.

49 *Ibid.*

50 *Grand Pacific, supra* n. 10, para. 101.

51 *Ibid.*, para. 105.

52 *Kyburn v. Beca, supra* n. 47, para. 47; *Grand Pacific, supra* n. 10, para. 105; *Popack v. Lipszyc, supra* n. 37, para. 36.

53 *Kyburn v. Beca, supra* n. 47, para. 47; *Grand Pacific, supra* n. 10, para. 105; *Popack v. Lipszyc, supra* n. 37, para. 36.

54 *Kyburn v. Beca, supra* n. 47, para. 47.

55 *Popack v. Lipszyc, supra* n. 37, para. 36.

56 *Grand Pacific, supra* n. 10, para. 102.

57 *Kyburn v. Beca, supra* n. 47, para. 47.

58 *TCL Air Conditioner, supra* n. 46, para. 111.

59 *Grand Pacific, supra* n. 10, para. 105.

60 *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 3 M.L.J. 608 ('*Sigur v. Master*'), para. 63.

61 *Popack v. Lipszyc, supra* n. 37, paras 23–24, 36.

breach] to a legal requirement'.[62] For instance, the courts of New Zealand and Malaysia have pointed out that the Model Law and cases from Model Law jurisdictions 'do not support the existence of an onus. Instead, the materiality of the breach and the possible effect on the outcome are treated as relevant factors'[63] to be considered and balanced in the round by the courts.[64]

This approach is similar to that of commentators such as Born, who agrees that the courts should require a procedural violation to have 'a material effect on the arbitral process and the tribunal's decision'.[65] In Born's view, however, prejudice need not be specifically shown (i.e., it may be inferred) where there are 'gross violations of fundamental rules of procedural integrity and fairness'.[66] This can be contrasted with Gaillard and Savage, who take the view that a procedural violation *per se* is 'sufficiently important'[67] to justify refusing recognition and enforcement of the award as '[t]he opposite interpretation would add to the text of the [NYC] and would seriously detract from its intended dissuasive effect'.[68]

Other commentators such as Beale and Goh go one step further to argue that the award debtor '*must show* that the tribunal's transgression was material and caused real prejudice' (emphasis added),[69] and that the requirement of materiality and prejudice 'appears to be a universal standard'.[70] Some jurisdictions do impose actual or real prejudice as a legal requirement. This means to say that an award debtor must show actual or real prejudice to establish the ground for challenging the award in the first place. By way of illustration, Singapore requires an award debtor to 'establish: (a) which rule of natural justice was breached; (b) how it was breached; *(c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights*'[71] (emphasis added). For limbs (a) and (b), the court will determine if what the tribunal did 'falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done'.[72] It will not 'intervene simply because it might have done things differently'.[73]

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62 *Kyburn v. Beca, supra* n. 47, para. 47.
63 *Ibid.,* paras 45–47; *Sigur v. Master, supra* n. 60, para. 64.
64 *Kyburn v. Beca, supra* n. 47, paras 45–47; *Sigur v. Master, supra* n. 60, para. 64.
65 Born, *supra* n. 12, at 3875, 3540–3542.
66 *Ibid.*
67 *Fouchard Gaillard Goldman on International Commercial Arbitration*, para. 1699 (Emmanuel Gaillard & John Savage eds, Kluwer Law International 1999) ('Gaillard and Savage').
68 *Ibid.*
69 Kenneth D. Beale & Nelson Goh, *Due Process Challenges in Asia: An Emerging High Bar*, Asian Int'l Arbitration J. 13(1) 1–25, 20.
70 *Ibid.*, at 23.
71 *Fairmount Development, supra* n. 45, para. 29.
72 *China Machine New Energy, supra* n. 22, para. 104.
73 *Ibid.*

Limbs (c) and (d) pertain to the prejudice requirement. In *CBS v. CBP*,[74] the Singapore Court of Appeal reaffirmed its earlier position in *L W Infrastructure*[75] that the 'requirement for prejudice'[76] entails an award debtor showing that the breach of natural justice had a real possibility of making a difference to the arbitral decision.[77] Both cases also referred to this as 'actual or real prejudice'.[78] As alluded to in section 2 above, prejudice is expressly stipulated as an *element* of establishing this ground for challenging an award under Singapore's International Arbitration Act. This is similar to section 68 of the English Arbitration Act 1996, which expressly requires a 'serious irregularity'. A serious irregularity has been defined as an irregularity 'which the court considers has caused or will cause substantial injustice to the applicant'.[79] Put simply, in these two examples, prejudice is legislatively prescribed as a requirement that the award debtor has to show in order to satisfy this particular ground for challenging an award.

Even in the absence of such express legislative stipulations, prejudice is a legal requirement in jurisdictions like Germany,[80] Spain,[81] and the United States.[82] While Articles 34(2)(a)(ii) and 36(1)(a)(ii) do not *expressly* require prejudice, these courts appear to have *interpreted* these provisions to contain a legal requirement of prejudice. In Germany, 'the *violation* of the right to be heard *requires* a causal nexus, that is, the violation must have affected the outcome of the proceedings'.[83] In Spain, a due process 'violation is *relevant* … if it is *material and real*, not only nominal, formal or apparent'.[84] Finally, in *Karaha Bodas*,[85] the US court endorsed the view that, similar to Article V(1)(d) of the NYC, Article V(1)(b) (which is in *pari materia* to Articles 34(2)(a)(ii) and 36(1)(a)(ii)) was not intended 'to permit reviewing courts to police every procedural ruling made by

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74 *CBS v. CBP, supra* n. 26.
75 *L W Infrastructure, supra* n. 46.
76 *CBS v. CBP, supra* n. 26, para. 84.
77 *Ibid.*, paras 84–85; *L W Infrastructure, supra* n. 46, para. 54.
78 *CBS v. CBP, supra* n. 26, paras 37, 83; *L W Infrastructure, supra* n. 46, paras 50–51, 54. *See also Fairmount Development, supra* n. 45, paras 86, 91.
79 English Arbitration Act 1996, s. 68.
80 OLG Karlsruhe (2009) Beck. R.S. 2011, 08009; OLG Celle (2004) Beck. R.S. 2004, 18356; OLG Hamm (1999) 17 Sch. H. 05/99; OLG Köln (1999) unpublished decision 9 Sch. 08/98 ('OLG Köln'); OLG Schleswig (decided 1999), Y.C.A. XXIX (2004), 687 ('OLG Schleswig').
81 *Rosso e Nero Gaststättenbetriebs G.m.b.H. v. Almendrera Industrial Catalana, S.A. (A.L.I.C.S.A.)* (2004) A.T.S. 765/2004.
82 *Karaha Bodas Co. LLC v. Perusahaan Pertanmbangan Minyak Dan Gas Bumi Negara* et al., 190 F. Supp. 2d 936 (5th Cir. 2003) ('*Karaha Bodas*'); *P.T. Reasuransi Umum Ondonesia v. Evanston Ins. Co.*, 92 Civ. 4623 (MGC) (S.D.N.Y. 1992) ('*Reasuransi*'); *Compagnie des Bauxites de Guinee v Hammermills Inc.*, No. 90 Civ. 0169 (D.D.C. 1992) ('*Hammermills*').
83 Andrés Jana L, et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 231–256, 252 (Herbert Kronke et al. eds, Kluwer Law International 2010) ('*Jana* et al.'). *See also* OLG Köln, *supra* n. 80.
84 *Ibid.*
85 *Karaha Bodas, supra* n. 82, at 945.

the Arbitrator and to set aside the award'.[86] Rather, 'a more appropriate standard of review would be to set aside an award based on a procedural violation *only if such violation worked substantial prejudice* to the complaining party'.[87] These statements appear to require the award debtor to show, as part of satisfying Article V(1)(b), that prejudice had been caused and suffered.

In this connection, the underlying rationale for imposing a legal requirement of actual or real prejudice by these jurisdictions can be justified as follows: (1) the broad consensus that awards should not be set aside for a procedural irregularity which does not cause prejudice[88]; (2) the policy of minimal curial intervention which 'implies that the court's focus should be on the proportionality between *the harm caused by the breach and how that can be remedied*'[89]; and (3) to 'promote the autonomy and finality of the arbitral process, so as to preclude unnecessary satellite litigation which would undermine arbitration as an efficient and cost-effective alternative dispute resolution mechanism'.[90]

In summary, the weight of judicial authority in Model Law jurisdictions appears to support the stance that technical or procedural irregularities that have caused no harm in the final analysis are insufficient to set aside an award or refuse its enforcement. Some jurisdictions enforce this stance by imposing a *legal requirement* of actual or real prejudice. If the award debtor cannot show actual or real prejudice, it will not be able to establish the ground of challenge under Articles 34(2)(a)(ii) or 36(1)(a)(ii) in the first place. Other jurisdictions enforce the same stance by *considering* actual or real prejudice as one factor when determining whether the Discretion should be exercised. If the award debtor cannot show actual or real prejudice or that the breach was otherwise material, the court may exercise the Discretion to uphold the award notwithstanding that Articles 34(2)(a)(ii) or 36(1)(a)(ii) have been satisfied.

For completeness, jurisdictions such as Singapore, Australia, and India have supplemented Article 34 of the Model Law. For instance, section 24 of Singapore's IAA provides that *in addition to* Article 34(2), an award may be set aside if the award was 'induced or affected by fraud or corruption'[91] or if there is 'a breach of the rules of natural justice … by which the rights of any party have been prejudiced'.[92] This suggests that section 24 provides separate and additional grounds for setting

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86 *Hammermills, supra* n. 82, at 16.
87 *Ibid.*, at 17.
88 Jonathan Hill, *Claims that an Arbitral Tribunal Failed to Deal with an Issue: The Setting Aside of Awards Under the Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration*, 34 (3) Arbitration Int'l 385–414, 408 (2018).
89 *Fairmount Development, supra* n. 45, para. 92.
90 *Ibid.*, para. 93.
91 IAA, s. 24(a).
92 IAA, s. 24(b).

aside an award. Section 24 was, after all, introduced upon the recommendation by the Law Reform Committee to implement an adaptation of section 36(3) of the Draft New Zealand Arbitration Act as 'a *further* safeguard'.[93] Nevertheless, the Singapore Court of Appeal recently clarified that '[t]he New Zealand provision was intended to expound upon what would be contrary to public policy'.[94] Thus, the 's. 24 grounds would in fact be a *subset* of the public policy ground in Art. 34 (2)(b)(ii), [as opposed to] a separate regime'.[95]

By way of similar illustrations, section 19 of the Australian International Arbitration Act 1974 specifies the same grounds as section 24 of Singapore's IAA 'for the purposes of [the public policy ground of challenging an award]'. Section 34 of the Indian Arbitration and Conciliation Act 1996 provides that 'an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud'. An award debtor may thus challenge an award for a breach of natural justice under the broader ground of a breach of public policy in these jurisdictions.

Additionally, or at least where Singapore is concerned, a challenge under section 24(b) of Singapore's IAA is almost certainly raised together with a breach of natural justice challenge under Article 34(2)(a)(ii) of the Model Law.[96] The Singapore courts 'have effectively interpreted them as a single ground for setting aside an award'.[97]

In these jurisdictions, therefore, an award debtor challenging an award for a breach of natural justice on the basis that he was 'unable to present his case' may do so under:

1. Articles 34(2)(a)(ii) or 36(1)(a)(ii);
2. specific national legislation, such as section 24 of Singapore's IAA or section 19 of the Australian International Arbitration Act; and/or
3. Articles 34(2)(b)(ii) or section 36(1)(b)(ii).

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93 Singapore Academy of Law, Law Reform Committee, *Report on Review of Arbitration Laws* (1993), para. 23.

94 *Bloomberry Resorts and Hotels Inc. and another v. Global Gaming Philippines L.L.C. and another* [2021] S.G. C.A. 9 ('*Bloomberry Resorts*'), para. 95.

95 *Ibid*.

96 Jonathan W. Lim, *Due Process as a Limit to Discretion in International Commercial Arbitration* 353–374, 358–359 (Franco Ferrari et al. eds, Kluwer Law International 2020) ('Lim').

97 *Ibid*., at 359; *China Machine New Energy Corp. v. Jaguar Energy Guatemala L.L.C. and another* [2018] S. G.H.C. 101, para. 115; *Triulzi*, *supra* n. 24, para. 123; *ADG v. ADI* [2014] 3 S.L.R. 481, para. 118; *Government of the Republic of the Philippines v. Philippine International Air Terminals Co., Inc.* [2007] 1 S.L. R.(R.) 278, para. 18; David Joseph & David Foxton, *Singapore International Arbitration: Law & Practice* 416–417 (2d ed., Lexis Nexis 2018).

An award debtor seeking to argue a breach of natural justice on any another basis, such as a breach of the principle of *nemo judex in causa sua*,[98] may only do so under (2) or (3). Either way, the award debtor must show that it has suffered actual or real prejudice as a requirement for challenging the award.

3.3 Dispute beyond scope of submission to arbitration

An award debtor may challenge an award under Articles 34(2)(a)(iii) or 36(1)(a)(iii) of the Model Law if the award 'contains decisions on matters beyond the scope of the submission to arbitration'.[99] This ground for challenging an award has commonly been considered to include a tribunal ruling on issues not presented to them ('*ultra petita*') or a tribunal failing to consider and decide on issues presented to them ('*infra petita*').[100]

More recently, jurisdictions like Singapore have considered *infra petita* challenges to come under Article 34(2)(a)(ii) (i.e., breach of natural justice) and not Article 34(2)(a)(iii) (i.e., award going beyond the scope of submission). In *AKN v. ALC*,[101] the Singapore Court of Appeal explained that *infra petita* challenges concern a breach of natural justice as '[c]onsideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem*'.[102] The court reiterated the test for challenges based on a breach of natural justice[103]: the award debtor must establish a breach of natural justice, a connection between the breach and the arbitral award, and that the award debtor's rights were prejudiced.[104] A tribunal acting *infra petita* is in and of itself a breach of natural justice,[105] but a court will only draw the inference that a tribunal has acted *infra petita* if it is 'clear and virtually inescapable'.[106] The court will not

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98 *Fairmount Development, supra* n. 45, para. 43; *Mount Eastern Holdings Resources Co., Ltd v. H&C S Holdings Pte Ltd* [2016] S.G.H.C. 01.

99 Model Law, Arts 34(2)(a)(iii), 36(1)(a)(iii); IAA, s. 31(2)(d).

100 *CRW, supra* n. 10, para. 31; *P.T. Prima International Development v. Kempinski Hotels S.A. and other appeals* [2012] 4 S.L.R. 98 ('*P.T. Prima*'); *BLB and another v. BLC and others* [2013] 4 S.L.R. 1169, para. 96; *AKM v. AKN and another and other matters* [2014] 4 S.L.R. 245, para. 156; *TMM Division Maritima S.A. de C.V. v. Pacific Richfield Marine Pte Ltd* [2013] 4 S.L.R. 972, para. 41; Born, *supra* n. 12, at 3582–3584.

101 *AKN v. ALC* [2015] 3 S.L.R. 488 ('*AKN v. ALC*').

102 *Ibid.*, para. 46. *See also Fairmount, supra* n. 45, para. 43; *Gas & Fuel Corporation of Victoria v. Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] V.R. 385, 386.

103 *AKN v. ALC, supra* n. 101, para. 48.

104 *Ibid.*

105 *Ibid.*, para. 46.

106 *Ibid.*

draw such an inference simply because the tribunal misunderstood the award debtor's case,[107] made a mistake of law,[108] or chose not to address the award debtor's submissions which the tribunal had thought to be irrelevant.[109]

In contrast, jurisdictions such as France are of the view that an award cannot be challenged based on a tribunal acting *infra petita*.[110] Unlike the laws of England and Switzerland which provide for the setting aside of awards involving the failure of a tribunal 'to deal with all the issues that were put to it'[111] or 'to decide one of the claims'[112] respectively, [113] the Model Law does not expressly provide an *infra petita* ground for challenging awards. The lack of an *infra petita* ground for challenging awards also appears to be intentional because proposals for its inclusion were rejected.[114]

The position that *infra petita* challenges fall within Article 34(2)(a)(ii) (i.e., breach of natural justice) is defensible. The Working Group rejected the proposal for an express *infra petita* ground for challenging an award as 'the grounds set forth in Article V of the NYC provided sufficient safeguards'.[115] Hence, the question is not whether an award made *infra petita* can be challenged but the appropriate ground under the Model Law to do so. As the Singapore Court of Appeal explained, the appropriate ground would be Article 34(2)(a)(ii) because an *infra petita* challenge concerns a breach of natural justice.

Furthermore, it is difficult to see how an *infra petita* challenge could fall within other grounds for challenging an award under the Model Law. In particular, while an *infra petita* challenge has been considered to fall within Article 34(2)(a)(iii), it concerns matters *actually submitted* to arbitration and not 'matters *beyond* the scope of the submission to arbitration'. Since an *infra petita* challenge arguably falls within Article 34(2)(a)(ii), it should be considered a challenge based on a breach of natural justice, and the principles as discussed in section 3.2 above apply.

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107 *Ibid*.
108 *Ibid*.
109 *Ibid*.
110 *M. Cohen v. Société Total Outre Mer S.A.*, Case No. 09/0819, 1 Judgment of 27 May 2010.
111 English Arbitration Act 1996, s. 68(2)(d).
112 Swiss Law on Private International Law, Art. 190(2)I.
113 *See also* Italian Code of Civil Procedure, Art. 829(4); European Convention providing a Uniform Law on Arbitration, Annex I, Art. 25(2)(e); Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* 273–329, 306–307 (Kluwer Law International 2010).
114 Paul Tan & Jawad Ahmad, *The UNCITRAL Model Law and Awards infra petita*, 31(3) J. Int'l Arb. 413–423, 418 (Kluwer Law International 2014) ('Tan and Ahmad'); United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the Work of Its Fifth Session*, UN Doc. A/CN.9/WG.II/WP.42, n. 29; United Nations Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, UN Doc. A/CN.9/233 ('*Report on International Contract Practices*'), para. 187; Binder, *supra* n. 7, at 380. *See also* Holtzmann & Neuhaus, *supra* n. 3, at 912.
115 Tan & Ahmad, *supra* n. 114, at 418; *Report on International Contract Practices, supra* n. 114, para. 187.

This leaves Article 34(2)(a)(iii) to *ultra petita* challenges. The Singapore Court of Appeal set out a two-stage approach for such challenges in *PT Asuransi*[116]: (1) determine matters within the scope of submission to arbitration; and (2) determine whether the award involved 'a new difference … outside the scope of the submission to arbitration and accordingly … *irrelevant to the issues requiring determination*'.[117]

For limb (1), the scope of submission to arbitration is narrower than the scope of an arbitration agreement as '[t]he parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration'.[118] Parties can set out the precise scope of submission to arbitration by way of pleadings,[119] and they may raise additional issues that are relevant to the dispute by way of an amendment to the pleadings so long as it does not 'result in prejudice to the other party which cannot be compensated by way of costs'.[120] For limb (2), 'any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded'.[121]

Crucially, various Model Law jurisdictions have taken the position that an award debtor is not required to show actual or real prejudice for an *ultra petita* challenge.[122] In contrast, Born's view is that 'a tribunal's excess of authority should warrant annulment only where it causes material prejudice to the award debtor'.[123] In Singapore, the position is less clear. In *GD Midea*,[124] for example, the Singapore High Court held that an award debtor is not required to show actual or real prejudice when a tribunal has acted *ultra petita*.[125] At the same time, the Singapore Court of Appeal previously held in the context of an *ultra petita* challenge that a court 'ought to exercise' the Discretion to uphold awards 'only if no prejudice has been sustained by the aggrieved party', suggesting that the lack of prejudice could

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116 *P.T. Asuransi Jasa Indonesia (Persero) v. Dexia Bank S.A.* [2007] 1 S.L.R.(R.) 597 ('*P.T. Asuransi*'), para. 44.
117 *Ibid.*, para. 40.
118 *P.T. Prima, supra* n. 100, para. 32.
119 *Ibid.*, para. 33.
120 *Ibid.*, para. 37.
121 *Ibid.*, para. 47.
122 *Louis Dreyfus S.A.S. (formerly known as S.A. Louis Dreyfus & Cie) v. Holding Tusculum B.V. and others* (2008) Q.C.C.S. 5903, para. 75; *Monongahela Valley Hosp. Inc. v. United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers International Union AFL-CIO CLC*, 946 F. 3d 195, 201 (3d Cir. 2019); Judgment of 11 June 1997, Case No. 94-19003; *Taurus Films G.m.b.H. v. Les Film du Jeudi*, Judgment of 4 Nov. 1997 (2000) Rev. Arb. 280; Judgment of 7 Jan. 2011, D.F.T. 4A_440/2010; Judgment of 19 Dec. 2001, D.F.T. 4P.114/2001.
123 Born, *supra* n. 12, at 3599.
124 *GD Midea Air Conditioning Equipment Co. Ltd v. Tornado Consumer Goods Ltd and another matter* [2018] 4 S.L.R. 271 ('*GD Midea*').
125 *Ibid.,* para. 60.

play a residual role in saving the award.[126] The court nevertheless remarked that annulment will normally be 'virtually automatic'.[127]

Recently, the Singapore Court of Appeal held that 'once an *order* is shown to have been made in excess of an arbitrator's jurisdiction … there is no further logical or legal requirement…to show prejudice'[128] (emphasis added). The position that actual or real prejudice need not be shown when an *order* is made in respect of issues beyond the scope of submission to arbitration is sensible. Prejudice would necessarily have been suffered by the party against whom the order was made.[129]

Moving away from the issue of tribunal exceeding the scope of the parties' submission to arbitration, jurisdictions such as Singapore have held that jurisdictional challenges based on the dispute exceeding the scope of the *arbitration agreement* fall within Article 34(2)(a)(iii).[130] Award debtors have not been required to show prejudice for such challenges.[131] In sum, similar to jurisdictional challenges, the weight of case law suggests that an award debtor making an *ultra petita* challenge or a challenge based on the dispute exceeding the scope of the parties' submissions or the scope of the arbitration agreement under Articles 34(2)(a)(iii) or 36(1)(a)(iii) is generally not required to show actual or real prejudice. Prejudice is generally irrelevant for such challenges, especially if the tribunal made an order in excess of its jurisdiction.

3.4 Breach of agreed procedure or composition of the tribunal

An award debtor may challenge an award under Articles 34(2)(a)(iv) or 36(1)(a)(iv): (1) if 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties'[132]; or (2) where the parties do not have an agreement on the composition of the tribunal or the specific arbitral procedure, if the composition or procedure is in breach of the Model Law[133] or the *lex arbitri*.[134]

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126 *CRW*, *supra* n. 10, para. 100. *See also* the decision at paras 32 – 34, 85; *AMZ v. AXX* [2016] 1 S.L.R. 549, para. 104, 172; *CDI v. CDJ* [2020] 5 S.L.R. 484, para. 90.

127 *CRW*, *supra* n. 10, para. 97; *CBX and another v. CBZ and others* [2021] S.G.C.A.(I.) 3 ('*CBX v. CBZ*'), para. 11.

128 *CBX v. CBZ*, *supra* n 127, para. 11.

129 *P.T. Prima*, *supra* n. 100, paras 32, 34.

130 *Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho* [2019] 1 S.L.R. 263 ('*Swissbourgh*'), para. 79.

131 *Ibid.,* para. 80.

132 Model Law, Arts 34(2)(a)(iv), 36(1)(a)(iv); IAA, s. 31(2)(e).

133 Model Law, Art. 34(2)(a)(iv).

134 *Ibid.*, Art. 36(1)(a)(iv); IAA, s. 31(2)(e).

This article will not discuss a challenge under Articles 34(2)(a)(iv) and 36(1)(a)(iv) in the *absence* of an agreed procedure or composition of the tribunal between the parties. This ground for challenging an award is 'virtually never invoked' in such a situation,[135] save where it is raised in conjunction with Articles 34(2)(a)(ii) or 36(1)(a)(ii) for a denial of an opportunity to be heard.[136] In brief, such a situation concerns the denial of equal treatment and a full opportunity to be heard.[137] This has been covered in section 3.2 above.

Where a breach of agreed procedure between the parties is concerned, the weight of authority leans towards actual or real prejudice being a *consideration* in the exercise of the court's Discretion to uphold the award, and not a legal requirement. *Sanum Investments (CA)*, which was discussed in section 3.1, for example, demonstrates this. In that case, the Singapore High Court enforced an arbitration award against the award debtors.[138] The award debtors appealed, arguing that the award should not be enforced on, among others, the following grounds: [139]

1. The tribunal's determination of the seat of arbitration was against the parties' agreement and the award should be refused enforcement pursuant to Article 36(1)(a)(iv).[140] The award debtors argued that the tribunal determined the seat of arbitration to be Singapore when the parties agreed for it to be Macau.[141] The award debtors framed their argument as a procedural challenge.[142] This characterization arguably makes sense as a wrongly seated arbitration is a procedural issue that concerns 'the arbitral tribunal's exercise of its undisputed competence, under a concededly valid arbitration agreement, to resolve disputes concerning the arbitral procedures'.[143]
2. The composition of the arbitral tribunal is in breach of the parties' agreement and the award should be refused enforcement pursuant to

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135 Born, *supra* n. 12, at 3557–3558.
136 *Ibid*.
137 Model Law, Art. 18; IAA, s. 15A(1); *Triulzi*, *supra* n. 24, para. 108; Born, *supra* n. 12, at 3558; US F.A. A., 9 U.S.C. §§1-16; *Carte Blanche (Singapore) Pte Ltd v. Carte Blanche International Ltd*, 683 F. Supp 945, 956 (1988); French Code of Civil Procedure, Arts 1502(3) – (4), 1504; J. L. Delvolvé, G. Pointon & J. Rouche, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2d ed. 2009), para. 440; E. Gaillard & J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), paras 1633, 1638–1634, 1701; B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3d ed. 2015), para. 1743; Schneider, *International Arbitration in Switzerland* Art. 182 (S Berti et al. eds, 2000), paras 2–3, 49–51.
138 *Sanum Investments (CA), supra* n. 8, para. 1.
139 *Ibid.*, paras 62–89.
140 *Ibid.*, para. 32.
141 *Ibid.*, paras 27, 31.
142 *Sanum Investments Ltd v. ST Group Co., Ltd and others* [2018] S.G.H.C. 141 ('*Sanum Investments (HC)*'), para. 106.
143 Born, *supra* n. 12, at 2253.

> Article 36(1)(a)(iv).[144] The award debtors argued that the relevant arbitration agreement did not provide for a three-member tribunal, and that the default rule pursuant to Rule 6.1 of the Singapore International Arbitration Centre Rules 2013 ought to have applied – a single member tribunal ought to have been appointed.[145]

The Court of Appeal found that there were indeed mistakes as to the seat of the arbitration[146] and the composition of the tribunal.[147] The court found that the phrase 'arbitrate such dispute using an international recognized … arbitration company in Macau, SAR PRC'[148] in the arbitration clause should be interpreted to mean that the parties 'shall arbitrate such dispute, using an internationally recognized arbitration company, in Macau'.[149] The court also held that the default rule under SIAC Rule 6.1 for the constitution of a tribunal applied.[150] Since the Registrar did not exercise its discretion under SIAC Rule 6.1 to constitute a three-person tribunal, a one-member tribunal should have been constituted.[151]

The award creditor contended that the mistakes were 'procedural not jurisdictional matters and therefore prejudice is required'[152] for the courts to refuse recognition of the award. The Singapore High Court was of the view that the mistakes were procedural in nature, and the Discretion to uphold the award should be exercised because the award debtors did not show that they were prejudiced by the mistakes.[153]

The Court of Appeal acknowledged that 'the differing treatment of procedural and jurisdictional challenges is justified because of the need to avoid misusing the applicable procedural provisions'[154] to refuse enforcement of an award. However, insofar as the tribunal's mistake as to the seat is concerned, the Singapore Court of Appeal emphasized the importance of the seat. The Court of Appeal held that 'it is not necessary for a party who is resisting enforcement of an award arising out of a wrongly seated arbitration to demonstrate actual prejudice',[155] notwithstanding the Court's acceptance of the characterization of that specific challenge as a breach of agreed *procedure* (rather than a challenge to the tribunal's jurisdiction).[156] The Court held that the tribunal's mistake as to the seat of arbitration was reason

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144 *Sanum Investments (CA), supra* n. 8, paras 27, 32.
145 *Ibid.*, paras 27, 31.
146 *Ibid.*, paras 84–85.
147 *Ibid.*, para. 89.
148 *Ibid.*, para. 76.
149 *Ibid.*, paras 78, 84.
150 *Ibid.*, para. 87.
151 *Ibid.*, paras 88–89.
152 *Ibid.*, para. 93.
153 *Sanum Investments (HC), supra* n. 142, paras 111, 114, 118; *Sanum Investments (CA), supra* n. 8, para. 95.
154 *Ibid.,* para. 94.
155 *Ibid.*, para. 103.
156 *Ibid.*, paras 27, 32–33, 85.

enough for the Court to refuse enforcement of the award.[157] The Court made it clear that in such a situation: (1) a distinction should not be drawn between setting aside an award or refusing its enforcement[158]; and (2) it was not necessary for the award debtors to show actual or real prejudice.[159]

Taking a step back, parties expend time and costs in the arbitral process. This would have been all the more so in a complex case involving multiple parties and multiple contracts such as *Sanum*. Yet at the end of the arbitral process, if a court holds that the tribunal had determined the seat wrongly, the award simply cannot be enforced and the issue of prejudice is irrelevant.

This has not been a point that has received much attention from commentators, but Born takes the view that, as with Articles 34(2)(a)(ii) and 36(1)(a)(ii), it is required for procedural non-compliance to have 'a material impact on the arbitral process *and* the tribunal's decision'.[160] Where there is non-compliance with an 'agreement regarding the arbitration's *basic structure* [such as the applicable] institutional rules … arbitral seat … language of the arbitration … or number of arbitrators', however, 'no showing of material prejudice … is required'.[161] Additionally, Born argues that *Sanum* 'fails to give proper effect to the arbitral tribunal's procedural authority'.[162] His argument is that, where the arbitration agreement is 'ambiguous' on the choice of arbitral seat,[163] the arbitral tribunal or arbitral institution has authority to interpret the parties' agreement.[164] The exercise of said authority is 'entitled to substantial deference in subsequent recognition proceedings'.[165]

The 'substantial deference' argument has been rejected by the UK Supreme Court[166] and the Singapore Court of Appeal[167] in favour of de novo review by the courts, at least in the context of *jurisdictional* challenges. Whether an arbitration agreement is 'ambiguous' in the first place may require a judgment call in certain cases. Nevertheless, to the extent *Sanum (CA)* characterized the tribunal's wrongful determination of the seat as a procedural rather than jurisdictional challenge, one

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157 *Ibid.*, paras 102–103.
158 *Ibid.*, para. 95.
159 *Ibid.*, para. 103. *See also CGS v. CGT* [2021] 3 S.L.R. 672 ('*CGS v. CGT*'), para. 94; *Triulzi*, *supra* n. 24, paras 64–66; *Coal & Oil Co. L.L.C. v. GHCL Ltd* [2015] 3 S.L.R. 154 ('*Coal & Oil*'), para. 51; *Lao Holdings N.V. v. Government of the Lao People's Democratic Republic and another matter* [2021] S.G.H.C. (I.) 10, para. 202.
160 Born, *supra* n. 12, at 3909.
161 *Ibid.*
162 *Ibid.*, at 3911.
163 *Ibid.*, at 3910–3911.
164 *Ibid.*
165 *Ibid.*
166 *Dallah Real Estate, supra* n. 17, paras 101–104.
167 *P.T. First Media TBK (formerly known as P.T. Broadband Multimedia TBK) v. Astro Nusantara International B.V. and others and another appeal* [2014] 1 S.L.R. 372, paras 162–164.

can argue that a tribunal's interpretation of the arbitral clause in relation to the seat should be treated the same as all other interpretations of the contract made by the tribunal: an error without more should not render the award susceptible to challenge. Put another way, if an award is not susceptible to challenge just because a tribunal interpreted a provision of the contract wrongly, the award should not be susceptible to challenge just because the court disagrees with the tribunal's interpretation of the arbitration clause as to the seat of the arbitration.

On the other hand, one way to rationalize the decision in *Sanum (CA)* is to argue that an award debtor is always necessarily or inherently prejudiced if the tribunal determines the seat wrongly because it affects the primary forum where the award debtor can seek redress against the award.[168] Specifically,[169] the Court of Appeal explained as follows:

> Although we have held that it was not necessary for the Lao Parties to demonstrate prejudice we will say a few words about what the wrongful choice of seat led to. As Macau was the chosen seat, it was the Macanese court that had jurisdiction over questions relating to the arbitral proceedings. Further, the Award should have been issued in Macau and when it was issued in Singapore instead as the product of a Singapore-seated arbitration, the Lao Parties were, if not completely deprived of their rights to set aside the Award, certainly in a very difficult position. Prima facie it would have been the High Court that was the supervisory court but applying to the High Court to set aside the Award could have been taken as an acceptance of Singapore as the seat as otherwise the High Court would have no jurisdiction to decide the matter. On the other hand, the Macanese court faced with an Award that stated it had been made in Singapore could very well refuse jurisdiction on that basis, ie, reject the case because the place of the Award was not Macau.

One solution to address the practical dilemma identified by the Singapore Court of Appeal may be to expand the existing Article 16(3) mechanism in the Model Law by allowing tribunals to determine the seat of the arbitration as a preliminary question, thereby giving parties the right to request the purported curial court to review the tribunal's ruling. In this way, the parties can obtain an early determination by the purported curial court on what the correct seat is. The same time and cost savings rationale that applies to allowing parties to seek curial review of a tribunal's ruling on jurisdiction would apply equally in this context.

We turn next to consider a breach of the parties' agreed composition of the tribunal. In *AQZ v. ARA*,[170] the Singapore High Court cited *Triulzi* for the proposition that 'prejudice is *not a legal requirement* for an award to be set aside pursuant to Article 34(2)(a)(iv) … it is a relevant *factor* that the supervisory court

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168 *Sanum Investments (CA), supra* n. 8, para. 98.
169 *Ibid.*, para. 105.
170 [2015] 2 S.L.R. 972 ('*AQZ v. ARA*').

considers in deciding whether the breach in question is serious and thus whether to exercise [the Discretion]'.[171]

The Singapore High Court in *Triulzi* sought to explain why actual or real prejudice should not be a requirement. The Court referred to its discretionary powers under Article 34(2), sometimes as a discretion to *refuse to set aside* an award even where a breach is established[172] and other times as a discretion to *set aside* an award.[173] The Court then explained that the exercise of its discretionary powers should not be confined to an inquiry on whether there is actual or real prejudice.[174]

It is not controversial that the exercise of the court's discretionary powers should not be strictly confined to an inquiry on whether there is actual or real prejudice caused to the award debtor. However, as explained in section 2 above, it is submitted that the Discretion enjoyed by the courts is a residual discretion to uphold the award notwithstanding that a ground for challenging the award has been duly established. Critically, that is not the same as a discretion to set aside an award or refuse its enforcement notwithstanding that a ground for challenging the award has not been established, which the courts do not have.

For completeness, in *Sanum (CA)*, the award creditor argued that prejudice should be required for procedural challenges as to the composition of the tribunal.[175] The Court of Appeal found that it was not necessary to deal with this point because their finding in relation to the effect of a wrong choice of seat disposes of the appeal.[176] The Court of Appeal commented in *obiter* that it would fall ill in the mouth of a party who did not participate at all in the arbitral proceedings to subsequently rely on an error in the appointment of the tribunal and argue that it that may result in a different outcome.[177]

Jurisdictions like Canada similarly take the position that, where Articles 34(2)(a)(iv) and 36(1)(a)(iv) are concerned, prejudice is a factor for *consideration* in the court's exercise of its Discretion to uphold the award, and not a legal requirement.[178] While an award debtor is not required to show that it has been prejudiced, it may nevertheless still want to show prejudice to persuade the court not to exercise its Discretion to uphold the

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171 *Ibid*., para. 136; *Triulzi*, *supra* n. 24, paras 54, 64, 66. Note, however, the Singapore Court of Appeal's comment in *Sanum Investments (CA), supra* n. 8, that it would fall ill in the mouth of a party who did not participate at all in the arbitral proceedings to subsequently rely on an error in the appointment of the tribunal and argue that it that may result in a different outcome.

172 *Triulzi, supra* n. 24, paras 61, 63, 65.

173 *Ibid*., paras 62, 64.

174 *Ibid*., paras 64–65.

175 *Sanum Investments (CA), supra* n. 8, paras 93, 107.

176 *Ibid*., para. 108.

177 *Ibid*.

178 Born, *supra* n. 12, at 3554–3555.

award.[179] The court will also consider other factors when determining whether the Discretion should be exercised, such as:

(1) the importance of the procedure in question[180];
(2) the seriousness of the breach itself. Where there is reasonable apprehension of bias on the part of an arbitrator, for example, the court will not exercise the Discretion 'in the absence of compelling evidence to the contrary'[181];
(3) the wording of the agreed procedure. Courts will not exercise the Discretion if the agreement was explicit and specific[182];
(4) the prejudice to the award creditor. The courts may exercise the Discretion if it would otherwise result in prejudice to the award creditor,[183] such as the death of a material witness with no record of said witness' evidence[184];
(5) the award debtor's conduct after learning of the breach.[185] In *Popack v. Lipszyc*, for instance, the Court of Appeal for Ontario held that '[the award debtor's] conduct after he learned of the [breach] speaks loudly against setting aside [the] award'.[186] The award debtor in that case chose not to raise concerns about the breach to the award creditor or make any formal complaints of the breach.[187] Instead, the award debtor sought to gain an advantage from the breach by putting his position to the tribunal *ex parte* without any notice to the award creditors.[188] The court found that the award debtor:

> positioned himself so that he could decide to raise the issue formally and on notice to [the award creditor] only if he was not satisfied with the award given by the panel. To reward that tactic by setting aside the award would eviscerate the finality principle that drives judicial review of arbitral awards and cause "a real practical injustice".[189]

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179 *Triulzi, supra* n. 24, para. 65; *CRW, supra* n. 10, para. 100.
180 *Sanum Investments (CA), supra* n. 8, para. 102.
181 *P.T. Central Investindo v. Franciscus Wongso and others and another matter* [2014] 4 S.L.R. 978, paras 144–148. *See also Re Shankar Alan s/o Anant Kulkarni* [2007] 1 S.L.R.(R.) 85, para. 103; *R. v. S. (R.D.)* [1997] 3 S.C.R. 484, 526.
182 Born, *supra* n. 12, at 3555; *Farhat Trading Co. v. Daewoo*, Judgment of 6 Mar. 1996 (1997) Rev. Arb. 69; *Sofidif v. OIAETII*, Judgment of 8 Mar. 1988 (1989) Rev. Arb. 481; *Food Services of America Inc. v. Pan Pacific Specialties Ltd* (1997) 32 B.C.L.R. 3d 225, para. 15; *Soaring Wind Energy, L.L.C. v. Catic USA Inc.*, 946 F. 3d 742, 757 (5th Cir. 2020).
183 *Joseph Popack, United Burlington Retail Portfolio Inc. and United Northeastern Retail Portfolio Inc. v. Moshe Lipszyc and Sara Lipszyc* (2015) O.N.S.C. 3460, paras 70–73, reaffirmed on appeal in *Popack v. Lipszyc, supra* n. 37, para. 36.
184 *Popack v. Lipszyc, supra* n. 37, para. 36.
185 *Ibid.*, paras 37–40.
186 *Ibid.*, para. 39.
187 *Ibid.*, para. 37.
188 *Ibid.*, para. 39.
189 *Ibid.*

The court eventually upheld the application judge's decision to exercise the Discretion.[190]

However, some jurisdictions appear to take the position that actual or real prejudice is a legal *requirement*. In *Karaha Bodas*,[191] for example, the United States District Court held that the award debtor '*must show* that there is a violation of an arbitration agreement between the parties and that the violation actually caused [the award debtor] substantial prejudice in the arbitration' (emphasis added).[192] In that case, the court found that the award debtor failed to 'show a violation of Article V(1)(d)' as the award debtor failed to show a violation of the parties' agreements *and* prejudice.[193] The court's statements suggest that an award should only be set aside or refused enforcement 'in cases of serious procedural [error], which is shown to have a material impact on the arbitral process or decision'.[194]

In sum, where Articles 34(2)(a)(iv) or 36(1)(a)(iv) is concerned, prejudice is relevant. Specifically, the weight of authority in Model Law jurisdictions leans towards regarding actual or real prejudice suffered by the award debtor as a factor for *consideration* in the court's exercise of its Discretion to uphold the award. In some jurisdictions prejudice is a legal requirement that the award debtor must establish to satisfy this particular ground for challenging an award. Insofar as the challenge involves a tribunal determining the seat wrongly, that has been treated by the Singapore courts as a challenge where it is not necessary for the award debtors to demonstrate prejudice. As explained above, an amendment to Article 16(3) of the Model Law may be considered to address such a situation.

3.5 Non-arbitrability

An award debtor may challenge an award under Articles 34(2)(b)(i) or 36(1)(b)(i) if 'the subject-matter of the dispute is not capable of settlement by arbitration'.[195] The essential criterion of non-arbitrability is 'whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration'.[196] Actual or real prejudice and the Discretion have, understandably, not been the subject of much discussion in this context. It has

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190 *Ibid*., para. 47.
191 *Karaha Bodas, supra* n. 82, citing *Hammermills, supra* n. 82, at 5. *See also Reasuransi, supra* n. 82, at 2.
192 *Karaha Bodas, supra* n. 82, at 945.
193 *Ibid*., at 947.
194 Born, *supra* n. 12, at 3822, 3875–3876, 3933.
195 Model Law, Arts 34(2)(b)(i), 36(1)(b)(i); IAA, s. 31(4)(a).
196 *Tomolugen Holdings Ltd v. Silica Investors Ltd* [2016] 1 S.L.R. 373 ('*Tomolugen*'), para. 75; *Duncan, Cameron Lindsay and another v. Diablo Fortune Inc and another matter* [2018] 4 S.L.R. 240, para. 20; *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 S.L.R. 414, para. 30.

been held that a tribunal does not have jurisdiction to hear non-arbitrable disputes as the arbitration agreement is considered 'inoperative' or 'incapable of being performed' when it comes to such disputes.[197] Following such reasoning, and as explained in section 3.1 above, prejudice is irrelevant where jurisdictional challenges are concerned.

3.6 Public policy

An award debtor may challenge an award under Articles 34(2)(b)(ii) or 36(1)(b)(ii) if it contradicts the public policy of the state where the challenge is made. Generally, errors of fact or law *per se* do not contradict public policy.[198] As discussed in section 3.1 above, an award debtor has several ways to make a public policy challenge in countries like Singapore, Australia, and India: (1) rely on the specific heads of public policy stipulated in the relevant national law, such as fraud or corruption,[199] or a breach of natural justice[200]; or (2) rely on public policy stipulated in Articles 34(2)(b)(ii) and 36(1)(b)(i). The 'general consensus of judicial and expert opinion'[201] is that option (2) is of a narrow scope,[202] which is engaged only when the award 'shocks the conscience',[203] is 'clearly injurious to the public good',[204] is 'wholly offensive to the ordinary reasonable and fully informed member of the public',[205] or violates 'the forum's most basic notion of morality and justice'.[206] The discussion in this section will be on public policy challenges other than a breach of natural justice, which has already been canvassed in section 3.2 above.

Case law from Singapore suggests that actual or real prejudice is a legal requirement which award debtors must show to satisfy Articles 34(2)(b)(ii) and 36(1)(b)(ii), but actual or real prejudice has a different meaning here. In the context of non-disclosure or suppression of evidence, for example, the Singapore High

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197 *Tomolugen, supra* n. 196, para. 74. *See also Westbridge Ventures II Investment Holdings v. Anupam Mittal* [2021] S.G.H.C. 244, paras 20, 40.

198 *Betamax Ltd v. State Trading Corp. (Mauritius)* [2021] U.K.P.C. 14, paras 42–52; *P.T. Asuransi, supra* n. 116, para. 57; *AJU v AJT, supra* n. 30, para. 66; *Oil & Natural Gas Corporation Ltd v. SAW Pipes Ltd* [2003] S.C. 3629.

199 IAA, s. 24(a); Australian International Arbitration Act, s. 19; Indian Arbitration and Conciliation Act, s. 34.

200 IAA, s. 24(b); Australian International Arbitration Act, s. 19.

201 *P.T. Asuransi, supra* n. 116, para. 59.

202 *Ibid.*

203 *Ibid.; Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 N.Z.L.R. 554 ('*Downer-Hill*'), para. 136.

204 *P.T. Asuransi, supra* n. 116, para. 59; *Deutsche Schachtbau v. Shell International Petroleum Co. Ltd* [1987] 2 Lloyds' Rep. 246, 254.

205 *Ibid.*

206 *P.T. Asuransi, supra* n. 116, para. 59; *Parsons & Whittemore Overseas Co. Inc v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F. 2d 969, 974 (2d Cir. 1974); Holtzmann and Neuhaus, *supra* n. 3, at 914.

Court in *BVU v. BVX*[207] cited *Dongwoo*[208] and *Swiss Singapore*[209] for, inter alia, the requirement that 'there must be a causative link between the deliberate concealment and the decision in favour of the concealing party'.[210] This requirement is an *element* of Articles 34(2)(b)(ii) and 36(1)(b)(ii). The Model Law requires that '*the award* is in conflict with' public policy or that 'the recognition or enforcement of *the award* would be contrary to' public policy (emphasis added). It is thus necessary to show a link between the act that is contrary to public policy and the award, in this case a causative link, such that it can be said that the award is contrary to public policy.

The requirement of the causative link applies in other contexts as well. In *Swiss Singapore*,[211] the Singapore High Court endorsed Cooke J's statement in *Thyssen Canada*[212] that the causative link is required 'whether the application is made on the basis that the award was obtained by fraud or procured in a manner that is contrary to public policy'.[213] This seems to suggest that the requirement of a causative link would apply to a public policy challenge based on other heads of public policy.

In more recent cases, however, the relatively high threshold of a causative link was not required.[214] The requirement of a causative link stems from English decisions interpreting section 68(2)(g) of the English Arbitration Act 1996,[215] which requires the award to be 'obtained by fraud or … procured [in a manner] contrary to public policy'. In contrast, national laws such as section 24(a) of Singapore's IAA, section 19 of the Australian International Arbitration Act 1974, and section 34 of the Indian Arbitration and Conciliation Act 1996 only require that the award be 'induced or affected by fraud or corruption'. While the Singapore High Court in *Swiss Singapore* took the view that the English position would still apply,[216] the Singapore Court of Appeal in *Bloomberry Resorts* took a more nuanced approach.[217] The Court of Appeal noted an earlier lower court decision which stated that 'there must be a causative link',[218] but the Court of

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[207] *BVU v. BVX* [2019] S.G.H.C. 69 ('*BVU v. BVX*').
[208] *Dongwoo Mann+Hummel Co. Ltd v. Mann+Hummel G.m.b.H.* [2008] 3 s. L.R.(R.) 871 ('*Dongwoo*').
[209] *Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India Pvt Ltd* [2010] 1 S.L.R. 573 ('*Swiss Singapore*').
[210] *BVU v. BVX, supra* n. 207, para. 47.
[211] *Swiss Singapore, supra* n. 209, para. 27.
[212] *Thyssen Canada Ltd v. Mariana Maritime S.A.* [2005] 1 Lloyd's Rep. 640 ('*Thyssen Canada*').
[213] *Ibid.*, at 644.
[214] *Downer-Hill, supra* n. 203, para. 84, where the court stated that 'there must be the likelihood that the [breach] resulted in a "substantial miscarriage of justice"'; *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd* [2016] F.C.A. 1131, paras 174–176.
[215] *BVU v. BVX, supra* n. 207, para. 45; *Thyssen Canada, supra* n. 212, at 644; *Elektrim S.A. v. Vivendi Universal S.A.* [2007] 1 Lloyd's Rep. 693, paras 79–82.
[216] *Swiss Singapore, supra* n. 209, para. 26.
[217] *Bloomberry Resorts, supra* n. 94, para. 42.
[218] *Ibid.*, para. 41.

Appeal took the view that 'the word "affected" must be understood in a manner similar to "induced" albeit perhaps *somewhat more broadly* … The party challenging the award on grounds of fraud must show a *connection* between the alleged fraud and the making of the arbitral award'.[219] Critically, the Court of Appeal cautioned against 'going too far … to allow an award to be set aside if the challenging party can merely show some *peripheral fraud* … relating to a case or the parties notwithstanding that that fraud played no part in the conduct of the arbitration or the making of the award'.[220]

By dint of reasoning, this article suggests that the requisite 'connection' between the infringement of public policy and the award could (but not exclusively) be actual or real prejudice – a real possibility that the act contrary to public policy would make a difference to the arbitral decision. This relatively lowered threshold strikes a balance by giving a broader meaning to the word 'affected' without requiring a definite causative link,[221] while assuaging the concern of awards being set aside due to a peripheral infringement of public policy.[222]

When applying the lowered threshold, the court assesses whether there is a real *possibility* that the act contrary to public policy affected the merits of the case. This is preferable to the courts applying the higher threshold of a causative link and deciding that the act contrary to public policy *actually* affected the merits of the case. As the Singapore Court of Appeal explained, to say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator.[223] Most importantly, the lowered threshold harmonizes the same requirement of actual or real prejudice for all public policy challenges, including those involving a breach of natural justice,[224] and promote uniformity in the application of the relevant provisions in the Model Law.[225]

4 CONCLUSION

The general principle provided by the Singapore Court of Appeal in *Sanum Investments (CA)* – the lack of prejudice is irrelevant to a jurisdictional challenge but is relevant to a procedural challenge – is helpful. However, once we move past

[219] *Ibid.*, para. 42.
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *L W Infrastructure, supra* n. 46, para. 54.
[224] *See supra* s. 3.2.
[225] Model Law, Art. 2A.

this starting point, questions remain as to whether prejudice is legally relevant for challenges that are arguably neither strictly procedural or jurisdictional in nature (such as challenges against a tribunal's determination of the seat in *Sanum Investments*), whether prejudice is relevant as a factor for consideration in the court's exercise of its Discretion or as a legal requirement for challenging an award, and the meaning of prejudice. Through comparative analysis, this article has shown that the usage of the terms 'discretion' and 'prejudice' in case law is inconsistent and far from straightforward. This article has attempted to elucidate a clear and structured way of understanding the specific role prejudice plays for each ground for challenging an award under the Model Law.