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Harmonizing International Commercial Arbitration: A Special Focus on Time Limit to Setting Aside an Award

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ABSTRACT: Harmonizing international commercial arbitration with domestic courts is paramount in international commercial law. In this aspect, the time limit decided for setting aside an award is an essential aspect of the entire process of harmonization. By using in-depth analysis, this paper aimed to analyze the judicial practice of the period to set aside an award across common law jurisdictions. This paper contended that domestic courts lack the authority to extend the period for applying to vacate an award and some recurrent fact patterns that arise when parties attempt to argue for such discretion and how courts in other countries have addressed comparable instances. It delved into the harmonization of international commercial arbitration by considering the authority of domestic courts to extend the period for applying to vacate the award given that a significant reason for the success of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) is the cross-jurisdictional consistency of standards that can result from the Model Law's uniform application, particularly concerning those provisions considered mandatory. While leaving aside common law jurisdictions that have not adopted the Model Law, one would expect that the Common Law jurisdictions that have adopted the UNCITRAL Model Law must be consistent in their interpretations. Then, a proper international jurisprudence will harmonize international commercial arbitration proceedings globally for the benefit of parties. However, such cross-border uniformity is difficult to establish, as the Model Law discussed in this paper showed. Article 34(3) of the Model Law on the time bar for setting aside an award, not providing domestic courts the authority to extend this time restriction, several unusual cases from Asian Model Law States imply that such authority exists.

KEYWORDS: International Commercial Arbitration, UNCITRAL, Model Law.

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I. INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) approved the Model Law in June 1985, and it has been a significant success after 118 jurisdictions in 85 states have accepted it.[1] As Redfern and Hunter stated, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards elevated international arbitration to the global stage, and the Model Law elevated it to stardom.[2] Previous studies have addressed the availability of such an option and the harmonization of arbitration laws across jurisdictions, focusing on several other principles.[3] The Model Law's *raison d'être* deals with harmonizing diverse nations' internal arbitration rules.[4] The three principles influenced its formulation, *inter alia,* party autonomy, curial involvement only when necessary, and certainty and finality in arbitral procedures.

It is critical in determining how the Model Law should be understood, particularly Article 34(3) of the Model Law. Article 34 aimed at the only

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1 UNCITRAL, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", (2010), online: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

2 Nigel Blackaby, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015) at 1220; J L Greenblatt & P Griffin, "Towards the Harmonization of International Arbitration Rules: Comparative Analysis of the Rules of the ICC, AAA, LCIA and CIETAC" (2001) 17:1 Arbitration International at 101–110. Andreas R Wehowsky & Johannes Landbrecht, "Transnational Coordination of Setting Aside and Enforcement of Arbitral Awards – A New Treaty and Approach to Reconciling the Choice of Remedies Concept, the Judgment Route, and the Approaches to Enforcing Awards Set Aside?" (2020) 37:6 Journal of International Arbitration at 679-719. K D Kerameus, "Waiver of Setting-Aside Procedures in International Arbitration" (1993) 41:1 The American Journal of Comparative Law at 73.

3 Nigel Blackaby, et al, *supra* note 2. J. L. Greenblatt & P. Griffin, *supra* note 2. Andreas R. Wehowsky & Johannes Landbrecht, *supra* note 2. K. D. Kerameus, *supra* note 2.

4 UNCITRAL, "Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration," UN Doc. A/CN.9/207, 16 (1981). Frank-Bernd Weigand, *Practitioner's handbook on international commercial arbitration* (Oxford, New York: Oxford University Press, 2010) at 1-10. Joshua Karton, *The culture of international arbitration and the evolution of contract law* (Oxford: Oxford University Press, 2013). Tamar Meshel, "Procedural Cross-Fertilization in International Commercial and Investment Arbitration: A Functional Approach" (2021) 12:4 Journal of International Dispute Settlement at 585-616. Elvia Adriano, "Commercial Arbitration: Its Harmonization in International Treaties, Regional Treaties, and Internal Law" (2009) 27:3 Penn State International Law Review at 818-849.

active remedy available against an arbitral judgment for a very short time and a relatively limited range of grounds.[5] It is likely the most significant element of the Model Law since it restricts national courts' jurisdiction to examine and set aside an arbitral ruling. The time restriction for bringing an application to set aside an arbitral award is specified in Article 34(3). The provision is succinct, stating that an application for setting aside may not be made after three months have elapsed from the date the party making that application received the award. Otherwise, if a request had been made under Article 33, the arbitral tribunal had disposed of that request from the date.[6]

This paper refers to the time restriction within which a setting-aside application must ordinarily be submitted as the Setting-Aside Time Period (SATP), whether in Model Law or the applicable domestic legislation. Despite the apparent clarity of the text, courts in numerous jurisdictions have been faced with the issue of whether there is any general curial discretion to allow a setting-aside motion to be submitted after the stipulated three-month term has expired. In other words, whether courts have the power to extend the SATP.

This paper aimed to analyze the judicial practice of the period to set aside an award across common law jurisdictions. This paper contended that domestic courts lack the authority to extend the period for applying to vacate an award and some recurrent fact patterns that arise when parties attempt to argue for such discretion and how courts in other countries have addressed comparable instances. It examined how major common law Model Law (and some non-Model Law) countries have addressed this question, including more recent judgments in a few jurisdictions. The courts have considered three primary elements in determining how to answer this issue by analyzing a detailed study of the relevant case law categorized by jurisdiction. Further, this paper discusses how the major

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[5] UNCITRAL, "Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session," UN Doc. A/40/17, 15 (1985); UNCITRAL, "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration," UN Doc. A/CN.9/264, 1 (1985), Article 34.

[6] Model Law, Article 34(3).

common law Model Law courts have addressed two fact patterns or lines of argument that frequently arise when parties seek to challenge the applicability of the SATP. First, whether a timely setting-aside application can be amended or supplemented after the SATP has expired. Second, whether fraud affecting the arbitral award was discovered after the award was rendered constitutes a judicial error. Finally, the paper considers the case in which the SATP and the deadline for contesting an award have expired. In a recent test case, the Singapore courts demonstrated that their readiness to consider these periods differ depending on whether or not they had the option to extend them. They emphasize the conceptual distinction between these two remedies.

II. METHODS

This paper was conducted by critically analyzing various domestic and international law legislation and the court's interpretation and application. It considered various cases in various Asian common law jurisdictions and uses them as the basis for the study. It took a case law-based analysis of several different jurisdictions worldwide. Theoretical analysis combined descriptive and analytical approaches based on the primary and secondary sources best suited current research. The data was collected through an extensive literature survey, library research, and internet search.

III. JURISPRUDENCE IN MODEL LAW COUNTRIES

A. Singapore

The Singapore High Court first addressed whether courts may extend the SATP in its 2003 judgment in *ABC Co. v. XYZ Co. Ltd.*, the first recorded case on Article 34(3) in an Asian Model Law nation.[7] In that instance, the claimants sought to vacate the award via an originating petition. This application for setting aside was submitted within the SATP. However, more than thirteen months after the arbitral judgment was delivered, the claimants sought to alter that petition to include six additional reasons for

[7] *ABC Co. v. XYZ Co. Ltd.*, [2003] SGHC 107.

setting aside the verdict. The High Court judge, Judith Prakash (now Justice of Appeal), held that Article 34(3) had been drafted as the all-inclusive and exclusive basis for challenging an award in court, and thus that Article 34(3) did not confer on the court the authority to extend the time limit for applying to set aside an international arbitration award beyond the prescribed three months.[8] *PT Pukuafu Indah v. Newmont Indonesia Ltd.* was the next Singaporean case to address this point (albeit obliquely and briefly).[9] The primary finding, in this case, was that an arbitral tribunal's interlocutory order was not an award and so could not be set overturned by the courts.

However, the High Court continued to analyze the SATP issue for completeness. Lee Seiu Kin concurred with Prakash's reasoning in *ABC* and determined that Article 34 (3) placed a necessary time restriction on setting-aside petitions filed after the SATP expired.[10] Subsequently, Anselmo Reyes (a former judge of the Hong Kong Court of First Instance) had the chance to expound on the Singapore position in the 2019 case of *BXS v. BXT*, sitting as an International Judge in the Singapore International Commercial Court (SICC).[11] The circumstances of the case are irrelevant; a plaintiff sought to vacate a judgment after the SATP had expired. Thus, one of the court's issues was whether the court has the discretion to prolong the SATP. Reyes's exhaustive ruling considered the methodologies followed by other countries in resolving this question and the line of relevant Singapore case authority. Reyes ultimately decided that Article 34(3) did not allow courts to extend the SATP.

With the Singapore Court of Appeal's recent decision in early 2021 in *Bloomberry Resorts and Hotels Inc v. Global Gaming Philippines LLC*, Singapore courts have no discretion to extend the SATP. In ostensibly deserving cases involving fraud, it is discovered after the arbitral award was

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8 *Ibid* at 9.

9 *PT Pukuafu Indah v. Newmont Indonesia Ltd.*, [2012] SGHC 187.

10 *Ibid* at 30.

11 *BXS v. BXT*, [2019] SGHC(I) 10; The SICC is a division of the Singapore High Court, and decisions rendered by SICC International Judges are accorded the same precedential weight as those rendered by other Singapore High Court judges.

rendered.[12] This decision concludes a long line of Singapore authorities who have repeatedly supported the stringent implementation of the SATP.

B. Malaysia

Malaysia's stance on the strictness of the SATP is ambiguous. This issue was discussed in both the High Court and Court of Appeal in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co. Ltd.*, with the Court of Appeal reaching the same conclusion as the High Court, but significantly different reasons and with a conflicting *ratio decidendi*.[13] Confusion is exacerbated by at least three subsequent Malaysian High Court judgments that reached a different outcome from the Court of Appeal. In the Lao series of cases, a disagreement emerged between the applicant (Laotian Government) and the respondent (Thai mining corporations). The Government of Laos filed an application with the Kuala Lumpur High Court to set aside an arbitral judgment against it nine months after the award was rendered and a request to extend the SATP.

In the High Court, Hamid Sultan Abu Backer (later elevated to the Malaysian Court of Appeal) held the language of Section 37(4) of the Malaysian Arbitration Act 2005. It is identical to Article 34(3) of the Model Law except that the SATP is fixed at ninety days rather than three months, conferring discretion on the court to extend the SATP. However, Hamid Sultan declined to exercise that discretion, stating that the court's decision had to be made in light of two additional factors. First is the spirit of minimal court intervention in matters governed by the Malaysian Arbitration Act 2005. Second is the need to harmonize the interpretation of Article 34(3) with decisions from other jurisdictions, namely Singapore

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[12] *Bloomberry Resorts and Hotels Inc v. Global Gaming Philippines LLC,* [2021] SGCA 9 (Bloomberry SGCA). *Bloomberry Resorts and Hotels Inc v. Global Gaming Philippines LLC,* [2020] SGHC 1.

[13] *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co. Ltd.* (Lao Court of Appeal), Civil Appeal No. W-02(NCC)-1287-2011. *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co. Ltd.* (Lao High Court), [2012] 10 CLJ 399.

and New Zealand.[14] Having considered these factors and the circumstances of the case, the High Court concluded that there was no justification for the plaintiff's delay in filing the setting aside motion. It declined to use its power to grant an extension of time.

On appeal in 2011, the Malaysian Court of Appeal comprised Ramly Haji Ali, Jeffrey Tan Kok Wha, and Zaharah Ibrahim. The court confirmed that the Malaysian courts possessed jurisdiction to grant an extension of time to set aside an arbitral award based on the language of Section 37(4) of the Malaysian Arbitration Act 2005. However, it disagreed with the limiting considerations accounted by the High Court judge. Additionally, it expressed disagreement with Hamid Sultan's notion that Malaysian courts should adopt a general attitude of minimum curial interference.[15] Accordingly, the Malaysian Court of Appeal decided that the court had unrestricted authority to prolong the SATP and that the overriding principle was that justice must be done. On the issue of whether the court should exercise its discretion, the Malaysian Court of Appeal determined that the court should exercise its discretion in favor of the appellant. It allowed the appellant to apply to set aside the award and remand the case to the High Court for consideration by a different judge. The Malaysian Court of Appeal was willing to provide broad discretion in cases where the delayed party was a foreign sovereign, stating that procedural delay inherent in the decision-making process of a state was inherent in its functioning.[16] However, three Malaysian High Court judgments after the Lao Court of Appeal doubt the Court of Appeal's rationale and findings.

The first is *J.H.W. Reels Sdn. Bhd. v. Syarikat Borcos Shipping Sdn. Bhd.*, a 2013 decision.[17] The facts of the case are unremarkable, though they are notable for the plaintiff's brief delay in bringing the application to set aside – the plaintiff was only six days late under the ninety-day SATP specified in Section 37(4) of the Malaysian Arbitration Act 2005. Mohamad Ariff

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[14] *Ibid* 13-15.
[15] *Ibid* 30-31.
[16] *Ibid* at 21.
[17] *J.H.W. Reels Sdn. Bhd. v. Syarikat Borcos Shipping Sdn. Bhd.* (JHW), [2013] 7 CLJ 249.

Yusof followed customary legislative interpretation principles and determined that the Required SATP was mandatory and could not be extended by the courts.[18] Yusof disagreed with Hamid Sultan's interpretation of Section 37(4) but did not refer to the Lao Court of Appeal ruling, implying that he was unaware.

Subsequently, in the 2016 case of *Kembang Serantau Sdn. Bhd. v. Jeks Engineering Sdn. Bhd.*, the identical issue was raised for consideration.[19] The facts of this case are also irrelevant to the issue. However, they may serve as an even starker illustration of the SATP's strictness–the plaintiff filed its setting-aside application one day late due to an oversight on the part of its solicitors (a paralegal allegedly made the unfortunate error).[20] After conducting a thorough textual examination, High Court Judge Mary Lim (who has since been promoted to the Federal Court) determined that the word 'may' in Section 37(4) of the Malaysian Arbitration Act 2005 required a mandatory interpretation.[21] Citing Section 8 of the same Act, Mary Lim concluded that courts lacked the authority to extend the SATP in any circumstance other than those specifically allowed for in the Malaysian Arbitration Act 2005. Finally, in *Triumph City Development Sdn. Bhd. v. Selangor State Government,* it was undisputed that the plaintiff's setting-aside motion was submitted late. The only question was whether the court had the authority to extend the SATP and whether it should do so.[22] Mohd Yazid bin Mustaffa concurred thoroughly with Mary Lim in *Kembang Serantau* and found that the SATP was rigid, with no discretion for the courts to extend it.[23] Appeals against the last two High Court judgments have been denied by the Malaysian Court of Appeal, albeit unpublished and without written grounds.[24] Consequently, at least two

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[18] *Ibid* at 19.

[19] *Kembang Serantau Sdn. Bhd. v. Jeks Engineering Sdn. Bhd.* (Kembang Serantau), [2016] 2 CLJ 427.

[20] *Ibid* at 29.

[21] *Ibid.*

[22] *Triumph City Development Sdn. Bhd. v. Selangor State Government* (Triumph City), [2017] 8 AMR 411.

[23] *Ibid* at 5-6.

[24] *Kembang Serantau Sdn. Bhd. v. Jeks Engineering Sdn. Bhd.* (Court of Appeal Civil Appeal No. W-02(IM)(c)-1769-10/2015) (unreported), and *Selangor State*

Malaysian Court of Appeal judgments contradicts the *Lao case's* findings. As of the time of writing, the matter remains ripe for clarification by the Malaysian Federal Court.

C. Hong Kong

In the 2016 case of *Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd.*, the Court of First Instance of Hong Kong found that the court can extend the deadline for filing a motion to set aside an award.[25] The plaintiff and defendant were parties to an arrangement in which the defendant committed to acquire the plaintiff's firm stock. The agreement was controlled by Hong Kong law, and disagreements were to be addressed by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Rules (HKIAC Rules). The defendant was required to pay in three tranches under the agreement, but a disagreement ensued, and the defendant refused to pay the third and final tranche. On 3 August 2005, the defendant notified the plaintiff in writing of its intention to withhold the payment. On 11 August 2005, Mainland public security officers arrested the plaintiff in Shenzhen on suspicion of deception, providing false capital, misappropriation, and bribery. The complainant was detained until 6 March 2012, about six years and seven months. According to the lawsuit, he was jailed during that time while awaiting trial.

While the plaintiff was detained (and thus incommunicado), the defendant initiated arbitration on 18 November 2005. It served the Notice of Arbitration on the plaintiff at four different addresses, three in Hong Kong one in Mainland China. It included the agreement's 'communication address' and the address of another individual (identified as 'Du') who was alleged to be the plaintiff's agent for purposes of the agreement. The defendant was aware that the plaintiff had been arrested and could not participate in the arbitration. Du had explicitly disclaimed and disowned

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Government v. Triumph City Development Sdn. Bhd. (Court of Appeal Civil Appeal No. B-01(IM)(NCC)-48-02/2017) (unreported).

[25] *Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd.* (Sun Tian Gang), [2016] HKCFI 1611.

any capacity or power to represent or present the plaintiff's case in the arbitration. Despite this, an arbitral tribunal was established. They kept serving the letters on behalf of the plaintiff to Du. The arbitral tribunal rendered a decision against the plaintiff on 15 March 2007. In light of these facts, the plaintiff moved to vacate the award on 16 October 2015, almost eight years after it was given.

The Hong Kong Court of First Instance decided, among other things, that it has jurisdiction and authority to extend the deadline for applying to vacate an award. Mimmie Chan did not cite any specific Hong Kong procedural law provision to justify the court's discretion to extend time. Her Ladyship noted that the Hong Kong Court of Final Appeal had previously interpreted the word 'may' in Article 34(2) of the Model Law to confer on courts a similar discretion in the earlier case of *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd*.[26] Mimmie Chan used this reasoning to analogize linguistically that the word 'may not' in Article 34(3) conferred a similar discretion on the court, and thus that the phrase 'an application for setting aside may not be made after three months' meant that the court had the discretion to allow or deny an application for setting aside made after the SATP.[27] The court determined compelling grounds for the time extension and granted the motion. In the following recent case of *A. and others v. D.,* the similar question of extending the SATP came before Mimmie Chan in the Hong Kong Court of First Instance.[28] In contrast to Sun Tian Gang, the circumstances of this case are not especially extraordinary. The applicant filed its motion to set aside the contested arbitral decision one month late and requested a retroactive extension of the SATP.

Chan observed that this case did not allow the parties to make complete representations on whether the Hong Kong courts had jurisdiction to extend the SATP in the first place.[29] On the other hand, Her Ladyship was content to proceed, assuming that the courts did have such jurisdiction and

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[26] *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.,* [1999] HKCFA 40.
[27] *Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd., supra* note 25 at 90.
[28] *A. and others v. D.,* [2020] HKCFI 2887.
[29] *Ibid* at 10.

that the issue. This case was whether the applicants met the admittedly high factual threshold necessary to convince the court on compelling reasons to exercise its discretion.[30] Mimmie Chan determined that the applicants failed to provide a sufficient explanation for their late filing of their motion to set aside. Therefore, there was no justification for the court to exercise its power to extend the SATP.[31] Hong Kong's situation seems that courts have the discretion to extend the SATP. However, the late applicant must present a compelling basis for the court to do so.

D. Australia

Australia maintains a rigorous interpretation of the SATP. The matter seems to have been addressed only in the Federal Court of Australia in the first instance obliquely. The question in both *Emerald Grain Australia v. Agrocorp International* and *Hebei Jikai Industrial Group v. Martin* was whether the SATP precludes a party from relying on reasons for setting aside that were not satisfactorily stated in the first motion for set aside.[32] The Federal Court accepted in both cases that allow a party to rely on insufficiently pleaded grounds after the SATP expired would frustrate the policy of upholding arbitral awards that underpinned the SATP.[33]

The Federal Court of Australia recently used *Sharma v. Military Ceramics Corp.* to express its views on whether Australian courts have the authority to extend the SATP or not.[34] Although these remarks were offered obiter since the court was not obligated to determine the matter, they seem to be the most exhaustive articulation of curial opinions on the strictness of the SATP under Australian law. According to Angus Stewart, the weight of authority strongly favored the conclusion that the court could not extend

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[30] *Ibid* at 11.

[31] *Ibid* at 12.

[32] *Emerald Grain Australia v. Agrocorp International*, [2014] FCA 414. *Hebei Jikai Industrial Group v. Martin*, [2015] FCA 228.

[33] *Emerald Grain Australia v. Agrocorp International*, *supra* note 32, at 8. *Hebei Jikai Industrial Group v. Martin*, *supra* note 32 at 61.

[34] *Sharma v. Military Ceramics Corp.,* [2020] FCA 216.

the SATP. The presence of such a power would be contrary to the Model Law's framework and underlying policy.[35]

E. New Zealand

The New Zealand courts have taken it for granted that the courts do not have the authority to extend the SATP. The problem does not seem to have been tackled straight on yet. TThe strictness of the SATP was never in question between the parties in any relevant instances. The primary issue in the 2003 case of *Opotiki Packing & Coolstorage v. Opotiki Fruitgrowers Co-operative* was when the SATP would begin to run if one party filed a request to rectify an award according to Article 33 of the Model Law.[36] However, the parties agreed in the High Court that the court lacked the authority to prolong the SATP. Additionally, there was no indication on appeal that the Court of Appeal had the authority to prolong the SATP. In *Downer-Hill Joint Venture v. Fijian Government*, the New Zealand High Court referenced Opotiki favorably and said that the SATP constituted a 'limiting period.'[37] The court and the parties agreed that beyond the SATP, no new 'cause of action' may be introduced.[38] The circumstances of this case are noteworthy for various reasons, and it is sufficient to notice that no allegation was made that the court had the authority to extend the SATP.

In the 2014 case of *Todd Petroleum Mining v. Shell (Petroleum Mining)*, the court considered how the power of an aggrieved arbitral party to obtain a supplemental award related to the SATP.[39] According to the New Zealand Court of Appeal, the three-month SATP begins to run on the day the arbitral panel decides on any request for an extra award.[40] However, it is sufficient to know that the New Zealand Court of Appeal said unequivocally that the SATP in Section 34(3) was solid because there is no

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35 *Ibid* at 49-50.

36 *Opotiki Packing & Coolstorage v. Opotiki Fruitgrowers Co-operative,* [2003] 1 NZLR 205.

37 *Downer-Hill Joint Venture v. Fijian Government,* [2005] 1 NZLR 554 at 31.

38 *Ibid* at 40.

39 *Todd Petroleum Mining v. Shell (Petroleum Mining),* [2014] NZCA 507.

40 *Ibid* at 36.

discretion to prolong them.[41] Finally, in the 2015 case of *Kyburn Investments v. Beca Corporate Holdings*, one of the questions before the New Zealand Court of Appeal was whether Kyburn's motion to set aside an arbitral judgment was made in good faith.[42] The critical aspect to emphasize is that the parties and the court agreed that the setting-aside application would be out of time unless it could be designated as a fresh 'cause of action' within the three-month SATP.[43]

F. Ireland

The Irish perspective implies that the SATP is rigid, and the courts cannot extend it. In *Moohan, et al. v. S&R Motors (Donegal)*,[44] the Irish High Court read Article 34(3) as establishing a 'strict three-month limit in respect of which no possibility exists for an extension of time.'[45]

G. Canada

The little Canadian case law on the subject indicates that courts do not have the authority to prolong the SATP. The Ontario Superior Court was not necessary to determine the question in *Ontario Inc. v. Lakeside Produce* since the parties agreed that the court lacked the authority to extend the SATP.[46]

H. India

Even though many observers do not consider India a Model Law country, the Model Law influenced a large portion of the Indian Arbitration and Conciliation Act, 1996.[47] Thus, India is considered a Model Law country

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41 *Ibid* at 57.
42 *Kyburn Investments v. Beca Corporate Holdings,* [2015] NZCA 290.
43 *Ibid* at 62.
44 *Moohan, et al. v. S&R Motors (Donegal),* [2009] IEHC 391.
45 *Ibid* at 3.4.
46 *Ontario Inc. v. Lakeside Produce,* [2017] ONSC 4933 at 18.
47 Harisankar K Sathyapalan & Aakanksha Kumar, "The 1985 Model Law and the 1996 Act: A Survey of the Indian Arbitration Landscape from Part I - Jurisdictions That Have

for the scope of this paper. The Indian legislative provision defining the SATP is within Section 34(3) of the Indian Arbitration and Conciliation Act 1996, which states that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award.[48] This portion of the legislative provision is comparable to Model Law Article 34(3). This Article has an additional provision that permits Indian courts to hear a setting aside application that is not more than thirty days late if the applicant was precluded from filing a timely application due to sufficient cause, which is irrelevant.[49]

The Indian locus classicus is the 2001 decision *Union of India v. Popular Construction Co.* The Indian Supreme Court held – even before Prakash's 2003 decision in *ABC v. XYZ* – the Indian Arbitration and Conciliation Act 1996 impliedly excluded the court's statutory general discretion to extend limitation periods. That recourse to the court against an arbitral award could not be made beyond the period.[50] Recently, the Indian Supreme Court ruled in *P. Radha Bai v. P. Ashok Kumar* that India's SATP is rigid and that Indian courts lack the authority to extend it.[51]

Adopted the Model Law: Implementation and Comparisons" in Gary F Bell, *The UNCITRAL Model Law and Asian Arbitration Laws Implementation and Comparisons* (Cambridge University Press, 2018); Arjit Oswal & Balaji Sai Krishnan, "Public policy as a ground to set aside arbitral award in India" (2016) 32:4 Arbitration International at 651–658; Puneeth Ganapathy, "Court Discretion in Indian Setting-aside Proceedings: Modification v. Doing 'Complete Justice'", *Kluwer Arbitr Blog* (15 September 2021), online: <http://arbitrationblog.kluwerarbitration.com/2021/09/15/court-discretion-in-indian-setting-aside-proceedings-modification-v-doing-complete-justice/>.; Aditya Metha, Tanya Singh, & Ria Lulla, "This Is the End: What Now? The Aftermath of an Award being Set Aside", *Amarchand Mangaldas India Corp Law* (5 May 2021), online: <https://corporate.cyrilamarchandblogs.com/2021/05/this-is-the-end-what-now-the-aftermath-of-an-award-being-set-aside/>.; Rupal Panganti, "Setting Aside of Domestic Arbitral Award in Conflict with Public Policy of India", *SCC* (28 July 2021), online: <https://www.scconline.com/blog/post/2021/07/28/domestic-arbitral-award/>.

48 Arbitration and Conciliation Act 1996, Section (s.) 34(3).

49 The proviso reads as follows: 'Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of thirty days, but not thereafter.'

50 *Union of India v. Popular Construction Co.,* (2001) AIR SC 4010 at 4.

51 *P. Radha Bai v. P. Ashok Kumar,* Civil Appeal No. 7710-7713 of 2013.

IV. FACTORS CONSIDERED BY THE JUDICIARY

There are three major factors or justifications prevalent in the relevant judgments. They are statutory interpretation, the Model Law's Article 5 and its relationship with extrinsic powers, the restriction provision, the analysis of the significance of this provision, and other policy considerations. While *dicta* in case law seldom show which (if any) of these elements were important in the court reaching its judgment, these three variables are likely to have some persuasive weight when arguing before any court in a major arbitration jurisdiction.

A. Interpretation of Statutes

Most courts adhere to the clear language of the applicable legislative provision codifying the SATP, whether that provision is Article 34 (3) of the Model Law or its local counterpart. The critical words are 'may not' in Article 34(3). The courts must determine whether the language expression 'may not' has a discretionary or obligatory consequence. In other words, does the term 'may not' appropriately imply that the courts have the authority to extend the SATP? This ostensibly straightforward phrase has created some interpretive difficulties.

1. Malaysia

Malaysian courts have gratuitously dealt with textual interpretation at best. There was no extensive textual examination of the many shades of meaning that the phrase 'may not' may have in the Malaysian High Court and Court of Appeal judgments in the Lao cases. The Malaysian High Court's opinion, in that case, has the closest approach to a discussion of how Article 34(3) might be understood. Malaysia's local counterpart to Article 34(3) of the Model Law is included in Section 37(4) of the Arbitration Act 2005. It is outlined that an application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or if a request has been made under

Section 35, from the date on which the arbitral tribunal had disposed of that request.[52]

Hamid Sultan concluded that the wording of Section 37(4) of the Arbitration Act was a guideline rather than a requirement but did not explain how he arrived at that result.[53] The Court of Appeal also resolved the textual issue by agreeing with the High Court that Malaysian courts had jurisdiction to extend the SATP based on Section 37(4) of the Arbitration Act 2005 and declined to explain why and how they concluded it.[54] Unfortunately, the High Court and Court of Appeal did not conduct a textual examination of the phrase 'may not' as it occurs in Article 34 (3) of the Model Law. It is worth noting that the Singaporean case of *ABC v. XYZ*, which directly addresses this textual issue, was not cited in the Court of Appeal's conclusion.[55] It is perplexing because the lawyers presented ABC v. XYZ at the High Court stage.[56] This case was not brought to the notice of the Court of Appeal. Since even if it were, it is unlikely that it would have convinced the court in any case since the Court of Appeal seems to have rejected the notion that foreign judgments interpreting the Model Law's text should be persuasive on Malaysian courts.

In contrast to the *Lao cases*, Yusof cited *ABC v. XYZ* favorably in his *J.H.W. Reels judgment*.[57] Yusof decided that the word 'may' in Section 37(4) of the Malaysian Arbitration Act has to interpret as 'must' or 'shall' since the clause could not fairly be interpreted as a pure directory.[58] Yusof said that he '[did] not see why the Malaysian approach to the same broad issue should be different [from the Singapore position].'[59] Although Yusof addressed and opposed Hamid Sultan's competing interpretation of Section 37(4), His Lordship did not refer to the *Lao Court of Appeal ruling* that

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52 Arbitration Act 2005, s. 37(4).
53 Lao High Court, *supra* note 13 at 15.
54 Lao Court of Appeal, *supra* note 13 at 14.
55 In contrast, the Indian Supreme Court cited *ABC v. XYZ* favorably in *P. Radha Bai v. P. Ashok Kumar.*
56 Lao High Court, *supra* note 13 at 13.
57 JHW, *supra* note 17 at 21.
58 *Ibid* at 23.
59 *Ibid.*

supported Hamid Sultan's reading. While this is not confirmed, the Lao Court of Appeal ruling was probably not presented to Yusof.

On the other hand, *ABC* had a minor influence on Yusof's study. His Lordship relied heavily on the legislative interpretation principle of *expressio unius est exclusio alterius* to establish that the SATP was rigid and could not be extended by the courts. While the canon of *expressio unius est exclusio alterius* may be invoked in various circumstances, Yusof noted that Article 34 of the Model Law made no exceptions to the SATP. In contrast, Section 37(4) of the Malaysian Arbitration Act 2005 created two express exceptions for fraud and corruption.[60] While it was not stated directly, Yusof's rationale was undoubtedly that, since the domestic Malaysian Act had apparent exceptions to the SATP, all other plausible reasons for exceptions had to be impliedly prohibited. Although this was an elegant solution to the problem, it would apply only to countries that made local adjustments to the Model Law and not to jurisdictions that accepted it.

Finally, Mary Lim used a different method in her *Kembang Serantau decision*, doing a deep linguistic examination. Lim highlighted that the term 'may' might be interpreted to 'connote the difference between the concept of mandatory and directory requirements.'[61] However, considering the purpose of Section 37(4) of the Malaysian Arbitration Act 2005, Her Ladyship construed the word 'may' in that provision as a requirement, saying that the provision's sentence structure did not allow the use of the more precise word 'shall.'[62] The Malaysian Court of Appeal maintained the *Kembang Serantau verdict* in an unreported judgment with no written reasons.[63] It is unclear how much impact it will have on the evolution of Malaysian law. The author proposes that clarification from the Malaysian Federal Court would clarify the proper interpretation of the term 'may not' in Section 37(4) of the Malaysian Arbitration Act 2005.

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60 *Ibid* at 19; Joseph Klingler, Yuri Parkhomenko, & Constantinos Salonidis, *Between the lines of the Vienna Convention?: canons and other principles of interpretation in public international law* (Alphen Aan Den Rijn: Kluwer Law International, 2019).

61 Kembang Serantau, *supra* note 19 at 29.

62 *Ibid.*

63 *Kembang Serantau Sdn Bhd v. Jeks Engineering Sdn Bhd* (Court of Appeal Civil Appeal No. W-02(IM)(c)-1769-10/2015) (unreported).

2. Hong Kong

In Sun Tian Gang, the Hong Kong Court of First Instance specifically analyzed this matter and concluded that the phrase 'may not' placed discretion on the court to prolong the SATP. Section 81(3) of the Hong Kong Arbitration Ordinance is the appropriate provision for adopting Article 34(3) of the Model Law since it explicitly reproduces the content of Article 34. (3). The following is a summary of Section 81(3) of the Hong Kong Arbitration Ordinance for convenience:

> 'No application for reversal may be submitted after three months have passed from the date the party making the application received the award or if a request under Article 33 was made, from the date on which the arbitral tribunal decided on that request.'[64]

Mimmie Chan concurred with counsel's argument that the word 'may' in Article 34(2) of the Model Law placed discretion on the court, reasoning that the discretionary element in Article 34(2) was 'retained in and extended to' Article 34. (3).[65] Article 34(3)'s statement 'an application for setting aside may not be submitted after three months' meant that such an application could not be made only if the court did not use its authority to grant an extension of the SATP.[66] However, the right interpretation of 'may not' was not reviewed in Chan's subsequent ruling in *A. and others v. D.* Her Ladyship essentially reiterated her position in *Sun Tian Gang* that Hong Kong courts have the discretion to prolong the SATP.[67]

3. Singapore

In contrast to Hong Kong and Malaysia, the Singapore courts have consistently held that the phrase 'may not' in Article 34(3) must be understood as having a statutory effect, thereby eliminating any choice over the extension of the SATP. In *ABC v. XYZ*, Prakash said unequivocally that the term 'may not' must be understood as 'cannot' to give effect to the

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[64] Hong Kong Arbitration Ordinance, s. 81(3).
[65] Sun Tian Gang, *supra* note 25 at 90.
[66] *Ibid.*
[67] *Ibid.*

evident aim to restrict the time within which an award may be appealed.[68] Prakash's remarks were cited with approval by Lee Seiu Kin in *PT Pukuafu*, who agreed that while the word 'may' frequently conveys some degree of discretion in contrast to the mandatory 'shall,' 'may not' is mandatory and imposes a time bar in the context of Article 34 of the Model Law.[69] In *BXS v. BXT*, Reyes said, 'it is hard to read "may not" as anything other than a mandatory restriction.'[70] Roger Giles (a former judge of the New South Wales Court of Appeal) referred favorably to the textual analysis in *BXS v. BXT* and its conclusion that 'may not' must be interpreted as imposing a mandatory time limit in the subsequent case of *BXY v. BXT* (also in the Singapore International Commercial Court). Finally, in *Bloomberry SGCA*, the Singapore Court of Appeal resolved the issue. It held that 'the position taken in Singapore has consistently been Article 34(3) prevents a court from entertaining applications brought under Article 34 after the expiry of the [SATP].' Also, it reaffirmed a string of Singaporean decisions that had strictly interpreted Article 34(3y).[71] The Singapore Court of Appeal acknowledged that the Model Law's *travaux préparatoires* supported a rigorous construction of Article 34(3).[72]

4. New Zealand

The New Zealand courts have not had the chance to conduct a detailed textual examination of the meaning of 'may not' in Section 34(3) of Arbitration Act 1996, because the question of the strictness of the SATP has not yet been the principal subject of a judicial case. However, given the New Zealand Court of Appeal's declaration that the SATP is 'firm in the sense that there is no discretion to extend it,' it may be reasonable to conclude that a New Zealand court would take the same stance as the Singapore courts.[73]

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[68] *ABC Co. v. XYZ Co. Ltd.*, *supra* note 7 at 9.
[69] *PT Pukuafu Indah v. Newmont Indonesia Ltd.*, *supra* note 9 at 30.
[70] *BXS v. BXT, supra* note 11 at 37.
[71] Bloomberry SGCA, *supra* note 12 at 81.
[72] *Ibid.*
[73] *Todd Petroleum Mining v. Shell (Petroleum Mining), supra* note 39 at 57.

5. Australia

The proper interpretation of 'may not' does not figure prominently in the reasoning of the Australian courts in the relevant case law. Whether the SATP exists has never been a point of contention in Australian case law.[74] Although Stewart noted (obiter) in the *Sharma case* that courts may not extend the SATP, the court reached this result without conducting a textual examination of Article 34(3) of the Model Law.[75]

6. India

In 2001, the Indian Supreme Court declared in *Union of India v. Popular Construction Co*. that the SATP specified in Section 34(3) of the Indian Arbitration and Conciliation Act 1996 is 'absolute and non-extendable outside of the circumstances specified in the Indian Act.[76] In 2018, the Indian Supreme Court case *P. Radha Bai v. P. Ashok Kumar* (99) referenced the Singapore decision *ABC v. XYZ* (100), supporting the understanding that 'may not' must be interpreted to imply 'cannot be made.'[77]

Additionally, the Indian Supreme Court applied a holistic interpretation to Section 34(3) of the Indian Arbitration and Conciliation Act 1996. Section 34(3) of the Indian Act specifies that a court may hear a late application 'but not afterward' thirty days after the SATP. In *P. Radha Bai*, the Indian Supreme Court concluded that it could not accept an appeal to vacate an award beyond the additional thirty days explicitly granted, as doing so would make the statutory term 'but not subsequently' meaningless. This court has repeatedly held that the words 'but not thereafter' in Section 34(3) of the Arbitration Act's proviso are required and written in negative terms, leaving no room for mistake.[78]

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[74] *Sharma v. Military Ceramics Corp., supra* note 34 at 48.
[75] *Ibid* at 49.
[76] *Union of India v. Popular Construction Co., supra* note 50 at 63.
[77] *P. Radha Bai v. P. Ashok Kumar, supra* Note 51 at 34(c); *Union of India v. Popular Construction Co*., Civil Appeal No. 7710-7713 of 2013.
[78] *P. Radha Bai v. P. Ashok Kumar, supra* note 51 at 34(c), 36-37.

B. Analysis of Interpretation of Statutes

While the majority of the jurisdictions examined above accept that the phrase 'may not' is mandatory and precludes courts from extending the SATP (Singapore, New Zealand, Australia, and India), a minority of jurisdictions have interpreted 'may not' as conferring discretion on the court to extend the SATP. Academics seem to have a different grammatical interpretation of the word 'may not' in Article 34 (3). Lew, Mistelis, and Kröll, as well as Margaret Moses, seem to argue that the word 'may' in Article 34(3) means that the courts have discretion.[79] On the other hand, Gary Born asserts that the term is necessary and that an application must be submitted within three months.[80] Peter Binder adopts a similar position, stating that 'any grounds for setting aside the award that emerges after the three-month time limit has expired cannot be raised,'[81] simplifying issues further by focusing on the context of the provision. It is reasonable to assert that the phrase 'may not' may be interpreted as either discretionary or necessary, depending on the context in which it occurs.[82] For instance, in the line 'he may not be able to join us for lunch,' the context demonstrates that 'may not' has a speculative, not an obligatory, meaning. When a senior partner instructs his student that he 'may not' leave the office until he delivers his draught memorandum, one would think that the trainee is astute enough to see that the command goes him with no option but to comply. Similarly, the Singapore courts have repeatedly held that the plain sense of the phrase 'may not' is a required prohibition.

This paper argues that Reyes's critique of the rationale in *Sun Tian Gang*, found in *BXS v. BXT,* is convincing.[83] In the latter instance, Chan

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[79] Margaret L Moses, *Principles and practice of international commercial arbitration*, 3rd ed. (Cambridge University Press, 2017) at 222; Julian D M Lew, Loukas A Mistelis, & Stefan Kröll, *Comparative international commercial arbitration* (The Hague; New York; Frederick, Md: Kluwer Law International, 2003) at 25–26.

[80] Gary B Born, *International commercial arbitration / Volume III, International arbitral awards* (Alphen Aan Den Rijn: Kluwer Law International, 2014) at 25.08[A].

[81] Peter Binder, *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions* (Alphen Aan Den Rijn, Netherlands: Kluwer Law International, 2019) at 451–452.

[82] Kembang Serantau, *supra* note 19 at 24; Sun Tian Gang, *supra* note 25 at 32.

[83] *BXS v. BXT, supra* note 11 at 31.

determined that the discretion provided by Article 34(2)'s word 'may' should be 'retained in and extended to' Article 34(3)'s word 'may not.'[84] As Reyes points out, Article 34(2) and (3) allude to distinct powers the court has (or does not have) under Article 34. Article 34(2) of the Model Law specifies the grounds for the annulment of an award. They include incapacity, invalidity, failure to provide adequate notice, the inability of a party to present its case, and exceeding the scope of the arbitration agreement. In addition, they also cover procedural deviation from the arbitration agreement, non-arbitrability of subject matter, and public policy. The term 'may' in Article 34(2) refers to the court's discretion not to set aside an award notwithstanding the fulfillment of one or more of the applicable circumstances. The term 'may not' in Article 34(3) relates to when a court may or may not consider an application to extend the SATP. These are two distinct concerns. It is respectfully argued that the meaning of the word 'may' in Article 34(2) cannot logically affect the interpretation of the word 'may not' in Article 34(3).

It is also worth noting that the Singapore Court of Appeal concurred totally with Reyes in its recent *Bloomberry SGCA decision*.[85] Additionally, Article 2A of the Model Law has legal effect in Hong Kong due to its incorporation into Section 9 of the Arbitration Ordinance (Cap. 609).[86] For convenience, Article 2A is reproduced below:

> 'In the interpretation of this law, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith. Questions concerning matters governed by this law which are not expressly settled in it are to be settled in conformity with the general principles on which this law is based.'[87]

Mimmie Chan did not examine the impact of this clause, which may have added the desire of general interpretation harmonization to the list of reasons weighing on her ultimate conclusion on the meaning of 'may not.'

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84 Sun Tian Gang, *supra* note 25 at 90.

85 Bloomberry SGCA, *supra* note 12 at 88.

86 Hong Kong Arbitration Ordinance, s. 9 provides that Article 2A of the Model Law has the force of law in Hong Kong.

87 Hong Kong Arbitration Ordinance, Article 2A.

Chan was not constrained by local precedent on this issue. *Hebei Import & Export Corp.*'s earlier Hong Kong litigation involved interpreting a different part of the Model Law (specifically, Article 34(2)). It is contended that Chan may have found that the Hong Kong courts lack the discretion to extend the Article 34(3) SATP on balance.

Mimmie Chan addressed *Sun Tian Gang* in three consecutive judgments in writing, including *A. and others* discussed above.[88] Although she separates *Sun Tian Gang* from the immediate fact pattern in all three circumstances, Her Ladyship does not regret her Sun Tian Gang choice. Indeed, in *A. and others*, Mimmie Chan explicitly stated that courts do have the option to extend the SATP. Her Ladyship did accept that whether Hong Kong courts had the authority to prolong the Setting-Aside Moment Period would need to be resolved 'in another case at an opportune time,' hinting that the situation had not been resolved definitively.[89] In suitable cases, a higher court may evaluate whether Article 34(3) of the Model Law vests Hong Kong courts with broad power to prolong the SATP.

In the case of Malaysia, as previously shown, the Malaysian perspective on the proper textual reading of 'may not' is ambiguous at the time of writing. While the Lao Court of Appeal ruling indicates that Malaysian courts have the authority to extend the Window Time, the court did not conduct a thorough textual examination in that instance. Additionally, at least three written High Court decisions contradict the Lao Court of Appeal's ruling yet were effectively authorized by the Court of Appeal. In the future, the Lao judgment will be limited to its peculiar circumstances, and subsequent cases will err on the side of the rigorous application of the SATP.

Finally, apart from its linguistic merits, the view that domestic courts lack the authority to prolong the SATP is reinforced by the Model Law's *travauax préparatoires*. When drafting Article 34 of the Model Law, UNCITRAL's Eighteenth Session decided against allowing parties to agree on a different amount of time for the SATP.[90] It may be deduced

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[88] The other two cases are *AB v. CD,* [2021] HKCFI 327, and *U. v. S.,* [2018] HKCFI 2086.

[89] *A. and others v. D., supra* note 28 at 10.

[90] UNCITRAL, *supra* note 5 at 304.

that commercial certainty was prioritized above party autonomy in this instance. It would be absurd for UNCITRAL to consider that domestic courts (and the myriad of domestic procedural procedures that accompany them) should be capable of modifying the SATP, notwithstanding the parties' inability to do so. Therefore, the most convincing linguistic reading of 'may not' is that it has an obligatory effect and does not confer power on the courts to extend the SATP. However, the paper does not stop here to indicate that statutory interpretation may not be the primary determining element in determining whether or not the SATP is eventually extended in any individual instance. The situation in England and Wales serves as an instructive case study.

An application to set aside an award must be brought within 28 days after the award's date under Section 70(3) of the English Arbitration Act 1996. 'Must' is more explicit in its obligatory consequence than 'may not.' At the risk of overstating the case, a linguistic definition of 'must' that attempted to confer any degree of choice would be highly strained. However, it is accurate only on an isolated reading of Section 70(3). The English courts are statutorily compelled to use the domestic rules of the Court of England and Wales about the time restrictions outlined in Part I of the English Arbitration Act 1996, including the SATP. Whether the wording of the SATP is required or discretionary vanishes in the light of the duty to follow domestic court regulations.

This example demonstrates that, depending on how the Model Law is implemented in individual jurisdictions, there is a complex relationship between the statutory interpretation of 'may not' and the question of whether courts are permitted to seek extrinsic sources of authority to extend the SATP. While courts interpret 'may not' as bestowing discretion on them, they are not having to look for a provision of domestic law authorizing an extension of the SATP. If, however, they interpret 'may not' as generally stringent, they may then evaluate whether, in the alternative, there are extrinsic sources of authority that might bestow discretion on them, notwithstanding their interpretation of Article 34(3) of the Model Law. Alternatively, if a court determines that a domestic source of authority is appropriate, it may conclude that no textual interpretation of

'may not' is necessary. The correct link between the Model Law and other domestic sources of curial authority is critical in determining whether a court has the discretion to prolong the SATP.

C. Restricting Provision

One factor that some courts consider in determining whether they have the authority to extend the SATP is the effect of either Article 5 of the Model Law. Otherwise, it is an equivalent domestic provision limiting the court's power to intervene in arbitrations to only those matters expressly provided for in the arbitration statute (restricting provision). Every jurisdiction governed by the Model Law has some kind of a Restricting Provision.[91] The Restricting Provision is the legal manifestation of the Model Law's idea of limited judicial action. Countries are, of course, free to add caveats and exceptions to the general Restricting Provision, and many do, particularly where doing so makes sense in light of the Model Law's adoption process. Singapore, for example, adopts the Model Law by adding the complete language of the Model Law as an Annex to its International Arbitration Act, which includes a clause declaring that the Model Law has the effect of law subject to the provisions of that Act. Other jurisdictions, by contrast, have just their national arbitration legislation, the aim of which is directly inspired by the Model Law.

Nevertheless, even if there are no such caveats to the Restricting Provision, it is a statutory provision (in the Model Law jurisdiction). Generally, the legal view is that a Restricting Provision applies to the degree that the national arbitration legislation does not explicitly allow for other avenues for judicial intervention in arbitration proceedings. However, none of the nations examined in this Article have an explicit provision in their national arbitration statutes for judges to prolong the SATP. It is sufficient for the reader to accept that an extrinsic source of law to the national arbitration statute and/or Model Law that grants the Court broad discretion to extend procedural time limits conflicts with the effect of a Restricting Provision.

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[91] Richard Garnett, "Article 5 of the Model Law: Protector of the Arbitral Process?" (2021) 38:2 Journal of International Arbitration 127–146.

When courts interpret the wording of the SATP as generally stringent but yet find themselves with authority to extend it, they must do so following another provision of domestic law. Its rationale is that the Model Law does not allow for such a power in Article 34 (nor does any equivalent arbitration statute). Typically, national courts are afforded the extensive procedural authority to extend time constraints to administer justice in specific instances. The astute reader will see that discretion provided by domestic legislative provisions (which are not inherent in the arbitration law or Model Law) is typically incompatible with any Restricting Provision. According to UNCITRAL's 1985 Report on its Eighteenth Session, Article 5 of the Model Law aims to achieve the maximum extent of judicial intervention in international commercial arbitration by compelling the drafters to list all instances of court intervention in the Model Law.[92]

Accepting the implies above that the impact of a Restricting Provision should bear considerable, if not critical, weight in determining whether courts have authority to extend the SATP. However, the courts in most of the countries covered in this Article did not give this matter considerable thought. Consequently, many of them extended the SATP by relying on domestic statute provisions and/or procedural court rules.

1. Malaysia

Malaysia adopted the Model Law through what Peter Binder refers to as 'direct adoption.'[93] It indicates that Malaysia has adopted local law, the content of which is strongly influenced by the Model Law. Malaysia's interpretation of Article 5 of the Model Law is included in Section 8 of the Malaysian Arbitration Act 2005, which states that no court shall intervene in matters governed by this Act, except where so provided in this Act.[94] Before the 2011 modifications to the Malaysian Arbitration Act 2005, Section 8 of

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[92] UNCITRAL, *supra* note 5 at 63.
[93] Peter Binder, *supra* note 82 at 25.
[94] Malaysian Arbitration Act 2005, s. 8.

that Act outlines, 'unless otherwise stipulated, no court shall interfere in any matters governed by this Act.'[95]

Binder argues that 'direct adoption' of the Model Law promotes additions and changes to the legislative language, supported by the disparities between the wording of the deleted version of Section 8 and Article 5 of the Model Law.[96] This textual change may have been significant, as an objectively reasonable person could reasonably have interpreted the pre-2011 Section 8 of the Malaysian Arbitration Act 2005 to mean that courts may intervene in matters governed by that Act if expressly provided for elsewhere outside the Act.

It seems to have been a central premise in both the *Lao High Court* and *Lao Court of Appeal verdicts*. Hamid Sultan said in the Malaysian High Court that 'limited discretion [to amend the SATP] is vested [in the courts] under various statute [sic] and/or rules of court.'[97] Similarly, the Court of Appeal upheld the High Court's conclusion that Malaysian courts had the authority to extend the SATP. The Court of Appeal relied on Item 8 of the Schedule to the Malaysian Courts of Judicature Act 1964, as well as Order 3 Rule 5(1) and (2) of the domestic Rules of the High Court 1980, which both empower Malaysian courts to extend or shorten time restrictions set by 'any written law.'[98] The Malaysian Court of Appeal determined that the Malaysian Arbitration Act 2005 did not limit the court's broad authority to consider requests for extensions of time.[99]

Additionally, the Court of Appeal defended its discretion to extend the SATP by pointing out that neither the Model Law nor Section 37 of the Malaysian Arbitration Act 2005 expressly prohibited extending the SATP.[100] The dicta in the *Lao cases* imply that the Restricting Provision's (Section 8 of the Malaysian Arbitration Act 2005) implications were not

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[95] These amendments were effected by the Malaysian Arbitration (Amendment) Act 2011.
[96] Peter Binder, *supra* note 82 at 26.
[97] Lao High Court, *supra* note 13 at 15.
[98] Lao Court of Appeal, *supra* note 13 at 14.
[99] *Ibid* at 31.
[100] *Ibid.*

fully explored.[101] With due respect, this stance contradicts the intent of Article 5. Rather than beginning with the assumption that the court has a general power to extend time derived from domestic law, searching for prohibitions in the Model Law, it is submitted that the proper line of reasoning must begin with the assumption that the court has no power to intervene. Unless and until such power is found in the Model Law or relevant statute adopting the Model Law.

In comparison, Section 8 of the Malaysian Arbitration Act 2005 played a significant role in the rationale for the three Malaysian judgments that seem to contradict the *Lao case*. Yusof concluded in *J.H.W. Reels* that Section 8 included the idea of limited judicial participation in arbitral proceedings, which supported his conclusion that the SATP was stringent.[102] Mary Lim's reasoning in *Kembang Serantau* was also influenced by Section 8 of the Malaysian Arbitration Act 2005. Lim said that the 'significance of s. 8 [sic] could not be overstated,' and the court 'ought to decline intervention even if the court would treat the matter differently if it were a non-arbitration matter.'[103] Lim noted that Section 8 might have been overlooked by the Court of Appeal in *Lao* and if it had been, it would have had a significant impact on the conclusion.[104] Her Ladyship further called attention to the fact that Section 8 had been revised in 2011 to more closely match the wording of Article 5 of the Model Law and that these adjustments may not have been in effect when the *Court of Appeal resolved the Lao case*.[105] In the judgment of Lim, these two elements were sufficient reasons to reverse the Court of Appeal's ruling in Lao. Lim's other comments may doubt whether Her Ladyship believed that Section 8 of the Malaysian Arbitration Act 2005 required the court to refrain from intervening or whether it was simply inappropriate for the court to intervene. Her Ladyship's resounding recognition of the importance of Section 8 is already a step in the right direction in comparison to the Court of Appeal's judgment in Lao.

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[101] *Ibid* at 15.
[102] JHW, *supra* note 17 at 18.
[103] Kembang Serantau, *supra* note 19 at 30.
[104] *Ibid* at 23.
[105] Peter Binder, *supra* note 82 at 26.

Mohd Yazid bin Mustaffa made a more conclusive ruling in *Triumph City*. He concluded that Section 8 of the Malaysian Arbitration Act 2005 did not permit the court to intervene in any of the matters governed by the Act unless it provides otherwise,' and that the court's inherent jurisdiction could not be used to intervene in any matter covered by the Act.[106] The Malaysian Court of Appeal sustained Mustaffa's ruling in an unpublished judgment without providing written reasons.[107] The same reasons applied when the Malaysian Court of Appeal affirmed the High Court's ruling in *Kembang Serantau*.

2. Singapore

Under the Singapore International Arbitration Act, Article 5 of the Model Law has legal effect in Singapore.[108] The significance of Article 5 was infrequent in the earlier Singapore trials. However, this changed when Reyes examined the ramifications of Article 5 in his *BXS v. BXT decision*. According to Reyes, Article 5 implied that the Model Law, which had the force of law in Singapore, was intended to be self-contained. Therefore, he had no authority to interfere by extending the SATP by using a power not included in the Model Law.[109] While the paper concurs with Reyes's actual conclusion, a minor difficulty arises that Reyes focused on whether a statutory power unrelated to the Singapore International Arbitration Act/Model Law was applicable, implying the possibility that an unrelated power could be relevant to the analysis. It is no doubt because counsel made such arguments in their submissions.

To summarise, one of the arguments advanced, in this case, was that the Singapore Supreme Court of Judicature Act (Cap. 322) empowered Singapore courts to:

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[106] Triumph City, *supra* note 22 at 4.
[107] *Selangor State Government v. Triumph City Development Sdn Bhd*, (Court of Appeal Civil Appeal No. B-01(IM)(NCC)-48-02/2017) (unreported).
[108] Singapore International Arbitration Act (Cap. 143A), s. 3(1).
[109] *BXS v. BXT, supra* note 11 at 40.

> 'extend or shorten the time prescribed by any written law for performing any act or initiating any proceeding, whether the application is made before or after the time prescribed has expired, but this provision shall be without prejudice to any written law relating to limitation.'[110]

For Reyes, the issue was whether Article 34(3) constituted a 'written law related to limitation.' If it were the case, the court's broad authority to extend time under the Supreme Court of Judicature Act would be null and void. After a thorough examination, Reyes determined that Article 34(3) constituted a 'written law on limitation' and came inside the legislative exemption to the court's broad jurisdiction to extend time.[111]

While a Restricting Provision has the force of law and applies to the circumstances, there is logically no need to conduct a detailed examination of whether an extraneous authority may be used to allow courts to interfere in arbitrations. Assuming *arguendo*, the issue indeed turned on the language of the statutory provision granting Singapore (and Malaysian) courts their general power to extend time. It would mean that absent the 'written law without limitation' exception, curial intervention in arbitration would be justified, despite a Restricting Provision with legal force. With all due respect, that cannot be the case.

Whether or not the courts may interfere in arbitration cannot be determined on the whims of domestic statute wording. Indeed, this kind of circumstance was meant to be avoided by Article 5 of the Model Law. As previously stated, Article 5 precisely defined the events under which a national court may interfere in an arbitration. The objective of attaining certainty is thwarted to the degree that the range of circumstances in which courts may interfere in arbitrations is contingent on domestic statutory laws' survey (and statutory interpretation of the meaning).

While concurring with Reyes's conclusion, Article 5 of the Model Law precluded him from invoking an extraneous power to extend the SATP. It respectfully suggests that Article 5 considerations should have preceded the

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[110] Singapore Supreme Court of Judicature Act (Cap. 322), First Schedule, para. 7.
[111] *BXS v. BXT, supra* note 11 at 39.

analysis of the Singapore Supreme Court of Judicature Act, as the former would have obviated the latter. As an aside, the Singapore Court of Appeal in *Bloomberry* did not seem eager to use a Restricting Provision approach when confronted with arguments based on domestic law requirements. On appeal, the appellants in *Bloomberry* contended that Section 29(1) of the Singapore Limitation Act (Cap. 163) applied, which allowed suspension of a limitation period when a cause of action was disguised via deception.[112] The Singapore Court of Appeal rejected this argument without referring to Article 5 of the Model Law's Restricting Provision. Rather than that, the court elected to confront those arguments directly in the domestic law arena, as it were, and rejected the Limitation Act's application based on its clear language.[113] While acknowledging that courts are typically limited to considering arguments advanced by counsel, the success or failure of arguments seeking to expand the court's powers to intervene in arbitration cannot be determined by the language of domestic statutory provisions. Rather than that, such claims must be rejected based on a clear interpretation of the applicable Restricting Provision. The inescapable conclusion is that there can be no source of legal authority outside of the Model Law authorizing courts to interfere in arbitrations.

3. Hong Kong

Article 5 of the Model Law has legal effect in Hong Kong under Section 12 of the Hong Kong Arbitration Ordinance. Unfortunately, Mimmie Chan did not evaluate this clause in *Sun Tian Gang*. Chan relied extensively on the Hong Kong High Court Rules in her analysis. Her Ladyship concluded, somewhat ambiguously, that while Order 73 Rule 5 of the Hong Kong Rules of the High Court did not directly relate to a SATP, the only appropriate SATP was the one set out in Article 34(3) of the Model Law as enacted by Hong Kong.[114] According to Chan, the only reason the Hong Kong Rules of the High Court did not supersede the

[112] Bloomberry SGCA, *supra* note 12 at 83.
[113] *Ibid.*
[114] Sun Tian Gang, *supra* note 25 at 91.

Model Law was a linguistic quirk, namely the absence of an explicit reference to the SATP in the Hong Kong Rules of the High Court.[115] It is again contended that, if correctly accounted for, Section 12 of the Hong Kong Arbitration Ordinance would have barred any study of domestic court procedures. Additionally, Chan tried to separate the current case from an earlier Singapore case, *ABC v. XYZ*, because the Hong Kong Rules of the High Court did not specifically refer to a SATP, but the Singapore Rules of Court did. Apart from the argument above that the Restricting Provision makes it unsuitable for assessing the significance of domestic court norms, the reasoning of Chan is dubious for a variety of other reasons.

Prakash did not base her finding on the proper reading of 'may not' in Article 34(3) on the Singapore Rules of Court.[116] Then, after Prakash's judgment, the Singapore Rules of Court revised to reconcile the wording of the provision alluded to by Chan with the language of Model Law Article 34(3), and no one has contended that Prakash's decision is now bad law.[117] Third, it is unclear whether subsidiary law may impact the interpretation of or supersede provisions in primary legislation.[118] For the reasons mentioned above, this paper contends that the *Sun Tian Gang judgment* did not fully evaluate the consequences of Section 12 of the Hong Kong Arbitration Ordinance. Much too much emphasis was put on the wording of domestic court procedures that were irrelevant in any case.

4. India

The case law in India indicates that the Indian courts are cognizant of the ramifications of Section 5 of the Indian Arbitration and Conciliation Act 1996, which is a Restricting Provision. The text of Section 5 states:

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[115] *Ibid.*
[116] *ABC Co. v. XYZ Co. Ltd.*, *supra* note 7 at 9.
[117] *Ibid.*
[118] *BXS v. BXT, supra* note 11 at 31; Bloomberry SGCA, *supra* note 12 at 24.

> 'Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'[119]

In *Popular Construction Co*., the Supreme Court considered whether it could exercise its broad procedural authority to grant an extension of time to allow for the filing of a setting-aside application made outside the SATP prescribed by the Indian Arbitration and Conciliation Act 1996.[120] The Supreme Court concluded that Section 5 of the Indian Arbitration and Conciliation Act 1996 clearly defined the scope of permissible judicial involvement, concluding that judicial review of an arbitral judgment could not be brought beyond the time frame in Section 34 of the Indian Act.[121]

D. Analysis of Restricting Provision

After considering two critical considerations in determining whether the SATP should be prolonged by curial discretion, this paper believes that Article 5 of the Model Law is the more critical. When a jurisdiction has passed a Restricting Provision, the courts should consider themselves excluded from establishing a legal basis for intervening in arbitrations governed by the Model Law and/or national arbitration legislation. With that avenue closed to the courts, a judge desiring to prolong the SATP would have to locate a clause in the Model Law or national arbitration legislation conferring such authority on them. A jurisdiction that does adopt a legislative provision providing for a discretionary extension of the SATP is unlikely to be called a Model Law jurisdiction.

As previously stated, the bulk of case law makes only a cursory examination (if at all) of the impact and significance of a Restricting Provision. It is regrettable since a Restricting Provision enables courts to prohibit arguments based on legal sources other than the Model Law or local arbitration legislation, such as domestic court norms or procedural law.

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[119] Arbitration and Conciliation Act, 1996, s. 5.
[120] *Union of India v. Popular Construction Co., supra* note 50 at 5.
[121] *Ibid.*

This line of analysis resolves all questions regarding whether any particular domestic statutory provision or procedural rule that is not covered by the Model Law or domestic arbitration legislation would be applicable to confer on courts the discretion to extend the SATP. It would simplify the matter by limiting the courts' considerations to interpretive and policy concerns, which should be welcomed.

E. Policy Implications

Finally, courts may consider policy factors when determining whether or not to use their authority to prolong the SATP. In some cases, courts have used policy reasons as a rationale for their judgment, either as a major or secondary cause. It moves to a short examination of the two policy issues that have dominated the case law and the findings reached by the courts.

1. Restraining the judiciary

New Zealand and Australian judgments reflect policy concerns about judicial restraint. In *Opotiki*, the New Zealand Court of Appeal said that 'the whole scheme of the [Model Law] rules [was] to restrict Court review of arbitration awards both to grounds and time.'[122] In the subsequent case of *Downer-Hill*, the New Zealand High Court determined that allowing an amendment that created new grounds for the challenge would be contrary to the spirit of the *Opotiki judgment*.[123] In *Emerald Grain*, the Federal Court of Australia said that if parties were not precluded from relying on setting-aside reasons that they had not fully argued within the SATP, the policy of maintaining arbitral awards would be jeopardized.[124] Finally, in *Sharma*, the Federal Court of Australia referenced *Opotiki's* explanation of the Model Law's underlying principle favorably, concluding that it 'support[ed] the proposition that the Court lacks the power to extend the time in [Article

[122] *Opotiki Packing & Coolstorage v. Opotiki Fruitgrowers Co-operative, supra* note 36 at 19, 220.
[123] *Downer-Hill Joint Venture v. Fijian Government, supra* note 37 at 31, 62.
[124] *Emerald Grain Australia v. Agrocorp International*, *supra* note 32 at 8.

34(3)]'.[125] Turning to Malaysia, Mary Lim in *Kembang Serantau* likewise recognized the concept of limited curial interference in arbitration proceedings.[126] Her Ladyship alluded favorably to Hamid Sultan's observation in a *Lao High Court judgment* that judicial opinion should be slanted toward minimal court interference in cases regulated by the Arbitration Act 2005.[127] Lim seemed to approach the problem from a policy perspective since Her Ladyship reasoned that the court did not lack jurisdiction to interfere. Rather, the court chose to reject jurisdiction to respect the concept of party autonomy.[128]

Finally, Mustaffa made the following observations in *Triumph City* on the concepts behind the parties' choice of arbitration as a dispute settlement procedure (165):

> 'The idea of undergoing arbitration process [sic] is to cut costs and time. The parties will not be undergoing lengthy court trials [sic], which certainly consumes a great amount of money as well as a lengthy process [sic]. If the parties are allowed to go to court to challenge arbitration awards even if it is made out of time [sic], then there is no point for the parties to have undergone arbitration process [sic].'

However, in its *Lao Court of Appeal judgment*, the Malaysian Court of Appeal evaluated and rejected the concept of minimal court interference.[129] Although the Malaysian Arbitration Act 2005 seems to have 'recognized' the Model Law, the Act in no way diminishes the court's authority to deal with any application for extension of time.[130] As a result, it is unclear whether Malaysian courts favor or oppose a policy of judicial restraint.

Finally, the Indian matter of *P. Radha Bai v. P. Ashok Kumar* in 2018 indicates that Indian courts put a high premium on policy considerations.[131] The Indian Supreme Court concluded that excluding a provision of Indian limitation law was necessarily implied when one [looked] at the scheme

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[125] *Sharma v. Military Ceramics Corp., supra* note 34 at 50.
[126] Kembang Serantau, *supra* note 19 at 29.
[127] *Ibid.*; Lao High Court, *supra* note 13 at 13.
[128] Lao High Court, *supra* note 13 at 13.
[129] Lao Court of Appeal, *supra* note 13 at 31.
[130] *Ibid.*
[131] *P. Radha Bai v. P. Ashok Kumar, supra* note 51.

and object of the Arbitration Act.[132] Among the grounds for its decision, the Supreme Court noted that the Indian Arbitration and Conciliation Act 1996's overarching purpose of expeditious settlement of disputes weighed against the use of the broad procedural authority to extend time.[133] Additionally, the court determined that adopting the Indian Limitation Act 1963 would create ambiguity about the execution of arbitral judgments, which would go against the scheme and purpose of the Indian Arbitration and Conciliation Act 1996.[134] Finally, the court emphasized that enabling the Indian Limitation Act 1963, would violate the Model Law's requirement that the SATP be absolute.[135]

2. Justice

On the other hand, one policy issue that can encourage a court toward exercising discretion and extending the SATP is that the factual circumstances surrounding particular instances may beg for justice. Justice is a vague idea that seldom appears explicitly as a basis for extending the SATP since it is not a source of law. However, courts may demonstrate their intention to do justice in specific situations overtly or implicitly in their reasoning. When the term 'justice' appears in case law, it typically means that a court has already relied on other legal rules to determine that it does have the authority to extend the SATP and is now depending on the amorphous concept of justice to justify exercising the discretion it has already decided it has. It was the situation in the Malaysian *Lao Court of Appeal verdict*. The Malaysian Court of Appeal determined no constraints on its general power to extend the time for procedural concerns. It had 'the broadest measure of discretion when deciding whether to prolong the SATP. The court indicated that it would 'recognize the overriding principle that justice must be done in exercising its discretion in favor of the petitioner.'[136]

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[132] *Ibid* at 38.
[133] *Ibid* at 39.
[134] *Ibid* at 40.
[135] *Ibid* at 41-42.
[136] Lao Court of Appeal, *supra* note 13 at 18.

While not explicitly mentioned in the ruling section analyzing the court's authority to prolong the SATP, doing justice was probably on Mimmie Chan's mind in *Sun Tian Gang*. The details of the case have been discussed in-depth above. They suggest a suitable candidate for an extension of the SATP, if nothing else. To be precise, Chan evaluated the plaintiff's condition solely as a secondary consideration in determining whether to utilize her curial discretion to prolong the SATP. However, for such discretion to exist, she would have first to discover that she had such power, which she did. As a counter-example, the Singapore Court of Appeal *in Bloomberry SCGA* rejected the idea that not extending the SATP in fraud and/or corruption situations would be unreasonable.[137] The Singapore Court of Appeal held that an applicant who failed to apply within the SATP to set aside a fraudulent judgment was not without recourse; such a party might petition to prevent implementation of the award, as was done in *Bloomberry SCGA*. (176).

3. Analysis of policy considerations

Commercial certainty and fairness have long been acknowledged as conflicting purposes in the common law. The contradiction between these two admirable objectives is evident in the judicial reasoning about the SATP. Numerous Model Law countries incorporate the Model Law's policy concerns into the broader problem of a provision's correct construction. Singapore, Australia, and New Zealand all have clear provisions in their arbitration statutes that allow (but do not require) judges to consider the Model Law's drafting history when interpreting the Model Law.[138] Hong Kong has adopted a nearly identical provision, requiring its courts to resolve 'questions concerning matters governed by [the Model Law] which are not expressly settled in it in conformity with the general

[137] Bloomberry SGCA, *supra* note 12 at 97.

[138] *See* Singapore's International Arbitration Act (Cap. 143A), s. 4(1); Australia's International Arbitration Act, 1974, s. 17(1); New Zealand's Arbitration Act, 1996, s. 3.

principles on which [the Model Law] is based.'[139] It eliminates the possibility of free-form policy reasoning and imposes some legal structure on judicial decisions in these jurisdictions. It may also provide judges with a particular policy agenda to advance that agenda by searching for appropriate justification in the Model Law's vast works.

V. CONCLUSION

In some common law nations, including Model Law jurisdictions, the courts have assigned that the time restriction for applying to set aside an arbitral award (referred to as the SATP) is approximately three months. Courts have also concluded that the phrase 'may not' gives them the discretion to extend the SATP, and they have overlooked the implication of Article 5 of the Model Law (or an equivalent domestic provision), which limits the curial power to intervene in arbitrations to that expressly provided for in the arbitration statute. Behind these legal arguments, fairness and commercial certainty notions played a significant role in judges' minds. Additionally, courts have adopted various responses to frequently seen arguments advanced by parties seeking to set aside an award after the SATP has expired.

Arbitration parties would be wise to at least for arbitrations seated in Singapore, Australia, New Zealand, Ireland, Canada, and India. Prospective plaintiffs will almost certainly be barred from bringing a setting-aside application three months after the arbitral award is rendered, regardless of how deserving their particular circumstances may be. In many jurisdictions, the term 'may not' really means 'cannot.' However, opposing enforcement's 'consolation prize' may still be available to a delayed aggrieved party, depending on each jurisdiction's domestic procedural rule and (almost likely) on whether they have a legitimate justification for the delay.

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[139] Hong Kong Arbitration Ordinance, s. 9.

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COMPETING INTERESTS

The author declared that he has no conflict of interests.

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