

Morgan Lewis

**AN INTRODUCTORY
GUIDE TO
ARBITRATION
IN SINGAPORE**

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TABLE OF CONTENTS

ARBITRATION LEGISLATION IN SINGAPORE.....	1
What legislation governs domestic and international arbitration in Singapore?	1
What formalities does the legislation prescribe for arbitration agreements?.....	1
Does Singapore law consider all matters to be arbitrable?	1
PARTIES	2
Can a state be party to an arbitration in Singapore?	2
Is it possible to consolidate different arbitration proceedings in Singapore?.....	2
Can a non-signatory to an arbitration agreement be made a party to an arbitration seated in Singapore?.....	2
ARBITRATION AGREEMENT	3
Are unilateral arbitration clauses enforceable in Singapore?.....	3
Are multi-tiered dispute resolution clauses enforceable in Singapore?	3
In what circumstances will the court stay proceedings in favour of arbitration?	3
How is the arbitration clause affected when the main contract that contains the arbitration clause becomes unenforceable?	3
Is an arbitration clause that does not refer to a set of procedural rules enforceable?	3
ARBITRATORS.....	4
How are appointments of arbitrators and challenges to appointments made?	4
Who appoints the tribunal if the parties do not agree on a procedure?.....	4
PROCEDURE	4
How are arbitrations administered in Singapore?	4
Can arbitral proceedings be expedited? If so, what is the process?	5
May parties apply for frivolous claims and defences to be struck off?	5
May parties seek damages for breach of an arbitration clause?	6
How are offers to settle used in arbitration?	6
Are arbitration proceedings confidential?	6
Can a tribunal grant interim orders or relief?	6
Does a claimant have any remedy against the refusal or failure of a respondent to pay its share of the costs of the arbitration?.....	7
Can an arbitral tribunal award interest?.....	7
How are costs awarded in arbitration?	7

PARTY REPRESENTATIVES	8
Are there any restrictions on who may represent parties in arbitration?	8
What are the rules of ethics for counsel and for arbitrators?.....	8
COURT SUPERVISION OF ARBITRATION.....	8
What is the extent and nature of court supervision of arbitration?	8
How do the courts approach ‘pathological’ clauses?	8
CHALLENGING AND ENFORCING ARBITRAL AWARDS	9
How are arbitral awards enforced in Singapore?	9
How and when may parties challenge arbitral awards made in Singapore?	9
Can foreign arbitral awards be enforced in Singapore?	9
Can the Singapore courts refuse enforcement of foreign arbitral awards?	9
Can state immunity be a defence to the enforcement of an arbitral award?	10
Where can arbitral awards obtained in Singapore be enforced?.....	10

ARBITRATION LEGISLATION IN SINGAPORE

What legislation governs domestic and international arbitration in Singapore?

There are three main pieces of legislation:

- The International Arbitration Act (IAA).
- The Arbitration Act (AA).
- The Arbitration (International Investment Disputes) Act.

The IAA incorporates and gives effect to the Model Law on International Commercial Arbitration (the **Model Law**) adopted by the United Nations Commission on International Trade Law, which aims to harmonise arbitration laws in different states. The IAA incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**). The IAA applies to arbitrations that are international (defined as any arbitration proceeding that contains a cross-border element), but parties may agree for the IAA to apply to an arbitration that would not be considered international if it is clearly stated in the arbitration agreement.

The AA applies to arbitrations that are not considered international, and generally provides for greater supervision by the Singapore courts than the IAA. For example, the Singapore courts have discretion regarding whether to grant a stay in favour of arbitration, whereas, under the IAA, no such discretion exists.

The Arbitration (International Investment Disputes) Act gives effect to the United Nations Convention on the Settlement of Disputes Between States and Nationals of Other States.

What formalities does the legislation prescribe for arbitration agreements?

Article II of the New York Convention provides that each contracting state of the Convention shall recognise an arbitration agreement in writing. The meaning of the phrase agreement in writing, however, has generated considerable debate. In Singapore, an arbitration agreement is considered to satisfy the agreement in writing requirement if its content is recorded in any written form, whether the arbitration agreement has been concluded orally, by conduct, or by other means. It is also sufficient if an arbitration agreement is recorded in any electronic communication so long as the information contained therein is accessible so as to be useable for subsequent reference. What this means, for example, is that an arbitration agreement can be concluded by email.

Does Singapore law consider all matters to be arbitrable?

Section 11(1) of the IAA provides that any dispute may be determined by arbitration unless it is contrary to public policy to do so.

The Court of Appeal decision in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 is the leading case regarding the issue of what types of matters may be considered non-arbitrable. The Court of Appeal's decision in *Larsen Oil* affirmed the Singapore courts' pro-arbitration stance by broadly construing arbitration clauses to include most types of disputes. However, it also confirmed that matters relating purely to a statutory insolvency regime are non-arbitrable. The Court of Appeal did not make broader

policy statements about what other types of matters should be considered non-arbitrable. Despite this lack of broader guidance, the prevailing view (consistent with many common law jurisdictions) is that matters such as those involving matrimonial and criminal issues are not considered to be arbitrable.

PARTIES

Can a state be party to an arbitration in Singapore?

Yes. While state immunity or the 'act of state' doctrine might apply either to prevent a party bringing an action against a state or to subsequently enforce judgments/awards against the assets of the state, the Singapore courts do accept that a state can waive state immunity to arbitration (see the Court of Appeal case of *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] SGCA 16).

Is it possible to consolidate different arbitration proceedings in Singapore?

The Rules of the Singapore International Arbitration Centre (6th edition, 2016) (**SIAC Rules**) contain mechanisms for regulating (i) disputes arising out of multiple contracts and (ii) consolidation of several arbitral proceedings.

SIAC Rule 6 allows a single Notice of Arbitration to be filed in relation to disputes arising out of multiple contracts with the payment of a single filing fee. The Registrar is required to treat such a Notice of Arbitration as a request to consolidate disputes under the relevant arbitration agreements.

SIAC Rule 8 empowers the SIAC Court of Arbitration to determine applications for consolidation prior to the constitution of the tribunal. The SIAC Court of Arbitration may grant the request for consolidation if (i) all parties agree, (ii) the claims are made under the same arbitration agreement, (iii) the claims are made under compatible arbitration agreements, or (iv) the disputes arise out of the same legal relationship or transaction(s). There is no express requirement for the arbitration to be between the same parties.

A party can apply to the SIAC Court of Arbitration to consolidate multiple arbitrations prior to the constitution of any tribunal, without prejudicing its right to be involved in the appointment of the arbitrators. If a consolidation application is made after the constitution of a tribunal, then the tribunal will determine the application in conjunction with the Registrar of the SIAC.

Can a non-signatory to an arbitration agreement be made a party to an arbitration seated in Singapore?

SIAC Rule 7 allows the joinder of an additional party as a claimant or respondent prior to the constitution of the tribunal, provided that (i) the additional party to be joined is prima facie bound by the arbitration agreement; or (ii) all parties, including the additional party to be joined, consent to the joinder.

The SIAC Court of Arbitration shall determine the application for joinder and retains the power to revoke any arbitral appointment made prior to its decision on joinder.

ARBITRATION AGREEMENT

Are unilateral arbitration clauses enforceable in Singapore?

A unilateral arbitration clause is one in which one or more of the parties to a contract have the right to elect to arbitrate a dispute at the time the dispute arises. A properly drafted clause that evinces the parties' intent to permit one or more of them to elect unilaterally to arbitrate is enforceable in Singapore.

Are multi-tiered dispute resolution clauses enforceable in Singapore?

A multi-tiered dispute resolution (or escalation) clause provides for various steps to be taken by parties to resolve a dispute before the dispute is turned over for resolution by arbitration or litigation. For example, parties may agree to conduct working-level negotiations or meetings between executives, or to mediate and only commence arbitration proceedings if all of the applicable tiers of dispute resolution are unsuccessful.

In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and anor* [2014] 1 SLR 130, the Court of Appeal held that if the steps of negotiating or mediating are pre-conditions to arbitration, and those steps are not taken by the parties, a tribunal will lack jurisdiction to determine the dispute. In such a case, the parties must complete those earlier steps to attempt to resolve the dispute before they can commence arbitration.

In what circumstances will the court stay proceedings in favour of arbitration?

A stay of court proceedings in favour of arbitration is mandatory in the case of an international arbitration governed by the IAA unless the court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

For a domestic arbitration proceeding governed by the AA, the court has discretion regarding whether to stay court proceedings in favour of arbitration.

How is the arbitration clause affected when the main contract that contains the arbitration clause becomes unenforceable?

The doctrine of severability (namely, that an arbitration agreement may stand apart from the main contract in which it is contained) is recognised in Singapore. When a contract is found to be void, it does not automatically follow that an arbitration agreement contained within it is also void; it must be shown that the arbitration agreement itself, as a separate agreement, is also void.

Is an arbitration clause that does not refer to a set of procedural rules enforceable?

An arbitration agreement is not rendered unenforceable where parties do not provide for a set of procedural rules. The court will uphold an arbitration agreement so long as it evidences an intention by the parties to resolve their dispute by arbitration. In the absence of procedural rules, the parties will generally be deemed to have agreed to an *ad hoc* arbitration. The procedural rules set out in the Model Law will apply, unless the parties or the tribunal adopts an alternative process.

ARBITRATORS

How are appointments of arbitrators and challenges to appointments made?

The nomination and appointment of arbitrators are typically subject to the procedure to which the parties agreed. There are no restrictions as to whom may be appointed as arbitrators unless the parties have agreed otherwise.

Institutional arbitration rules have similar provisions for the nomination and appointment of arbitral tribunals in the event that the parties have not expressly provided for it. For example, under the SIAC Rules, if the parties are unable to agree on the nomination of a sole arbitrator within 21 days of receipt of a Notice of Arbitration, the President of the SIAC Court of Arbitration will appoint an arbitrator as soon as possible. Similarly, where the tribunal is to consist of three arbitrators and a party fails to make a nomination within 14 days, the President of the SIAC Court of Arbitration will make the appointment instead.

A party may challenge the appointment of an arbitrator. Again, the institutional rules provide a timeline for this process. Under the SIAC Rules, the SIAC Court of Arbitration will issue reasoned decisions on all challenges to arbitrators. The administration fees payable for the challenge of an arbitrator's appointment is fixed at S\$8,000 (excluding Goods and Services Tax).

Where a challenge is made, the other party may agree to the challenge, or the challenged arbitrator may choose to withdraw from the proceedings.

If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the challenge will be ruled upon by the institution administering the arbitration. Such decision is final and cannot be the subject of appeal to the Singapore courts.

Parties can also bring a challenge against the appointment of an arbitrator in court. This is governed by a different procedure under the Rules of Court.

Who appoints the tribunal if the parties do not agree on a procedure?

If the parties fail to designate a procedure or authority for the appointment of arbitrators, the parties may apply to the President of the SIAC Court of Arbitration for the appointment of an arbitrator.

PROCEDURE

How are arbitrations administered in Singapore?

Many arbitral institutions have established offices in Singapore. The SIAC administers its own arbitration rules as well as ad hoc arbitrations. The SIAC recommends the following model arbitration clause:¹

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in

¹ See <http://www.siac.org.sg/model-clauses/siac-model-clause>.

Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (**SIAC Rules**) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].

The Tribunal shall consist of _____ * arbitrator(s). * State an odd number. Either state one, or state three.

The language of the arbitration shall be _____.

The parties should specify the seat of the arbitration of their choice. Under SIAC Rule 21, the seat of the arbitration must be agreed on by the parties. Otherwise, the seat of the arbitration will be determined by the tribunal having regard to all circumstances of the case.

Can arbitral proceedings be expedited? If so, what is the process?

The length of arbitration proceedings varies for many reasons, although arbitrations generally last for at least a year. The SIAC Rules have an expedited procedure for cases in which the value in dispute does not exceed \$6 million, or where the parties agree to such expedited proceedings, or in cases of exceptional urgency. The party applying for the arbitration to be conducted in accordance with the expedited procedure rules of the SIAC (**Expedited Procedure**) must take out an application before the constitution of the Tribunal.

The SIAC Expedited Procedure Rules follow the same process as normal proceedings, except that that the Registrar of the SIAC may shorten timelines and—unless exceptional circumstances dictate otherwise—an award must be made within six months from the date of the tribunal's constitution. The SIAC Rules provide for a sole arbitrator to preside over the expedited proceedings, unless the President of the SIAC Court of Arbitration determines otherwise.

The tribunal has the discretion to decide whether a claim under the Expedited Procedure is to be determined by looking at documentary evidence alone as opposed to a full hearing.

In circumstances where the Expedited Procedure is discontinued, the same tribunal constituted to conduct the Expedited Procedure will continue to preside over the remainder of the arbitration.

In the event of any conflict between the terms of parties' arbitration agreement and the terms of the Expedited Procedure, the latter shall prevail. For example, the President of the SIAC may appoint a sole arbitrator to preside over the expedited arbitration even in cases where the parties have agreed in the arbitration agreement for a panel of three arbitrators to resolve the dispute.

May parties apply for frivolous claims and defences to be struck off?

SIAC Rule 29 provides that a party may, no later than 30 days after the constitution of the tribunal, file an application for the early dismissal of claims or defences on the basis that the claims or defences are (i) without legal merit or (ii) manifestly outside the jurisdiction of the tribunal.

If the tribunal allows the application for early dismissal to proceed, it shall decide whether to grant, in whole or in part, the application for early dismissal after giving the parties the opportunity to be

heard. The tribunal has 60 days from the date of the filing of the application to issue its order or award.

May parties seek damages for breach of an arbitration clause?

This issue has not yet been considered by the Singapore courts. However, the Court of Appeal has indicated that indemnity costs may be awarded where a party is compelled to apply for a stay of proceedings due to another party's breach of the arbitration agreement (see *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732).

How are offers to settle used in arbitration?

'Calderbank' or 'Sealed' offers are commonly used in arbitration where the terms of a settlement offer are made on a without-prejudice basis. If the tribunal subsequently awards the offeree an amount which is less favourable than the Calderbank Offer, the offeror may disclose the existence and terms of the Calderbank Offer to the tribunal for an order that the offeree pays the offeror's costs incurred from the date of the offer on the basis that the offeree should have accepted the Calderbank Offer when it was made. Had the offeree accepted the Calderbank Offer, the costs of the proceedings incurred by the offeror after the date of the Calderbank Offer would have been saved.

Although commonly encountered in arbitration proceedings, the concept of a Calderbank Offer is not formalised in the major sets of arbitration rules, or in the IAA or AA. Arbitral tribunals are generally given the broadest discretion as to costs, subject to any other agreement by the parties. There is no reason in principle why such discretion should not extend to considering whether costs consequences should follow from the fact that a Calderbank Offer was made by one party to the other before or in the course of a proceeding.

Are arbitration proceedings confidential?

Yes. Case law in Singapore has confirmed that arbitration proceedings are confidential. However, such confidentiality has not been placed on a statutory footing.

Where a party seeks to challenge an arbitral award or seeks to enforce an award in court, confidentiality might fall away as court proceedings are a matter of public record. Section 22 of the IAA therefore allows parties to apply for proceedings to remain private and section 23 allows parties to apply for directions from the court that information be sealed or redacted.

Can a tribunal grant interim orders or relief?

Arbitrators have extensive powers to grant interim relief under the IAA and AA. Under section 12 of the IAA, a tribunal may make orders, such as for parties to provide security for costs and discovery of documents.

Pursuant to SIAC Rule 30.1, the tribunal may, at the request of a party, issue an order or award granting an injunction or other interim relief it deems appropriate. The tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

SIAC Rule 30, read with Schedule 1, provides that prior to the constitution of the full tribunal, an emergency arbitrator can be appointed to grant emergency interim relief. The emergency arbitrator will be appointed within one calendar day and, after hearing both parties, is required to issue an interim order or award within 14 days of his or her appointment. The emergency arbitrator's fee is

fixed at S\$25,000 unless the Registrar determines otherwise. SIAC's administration fee for an emergency arbitrator application is fixed at S\$5,000 (excluding GST). These orders are enforceable through the Singapore courts as if they were orders made by a court. The procedure for this is governed by Order 69A Rule 5 of the Rules of Court.

Does a claimant have any remedy against the refusal or failure of a respondent to pay its share of the costs of the arbitration?

SIAC will request initial deposits as an advance for costs as soon as practicable after receipt of the Notice of Arbitration by the respondent. In a circumstance where one of the parties (usually the respondent) refuses to pay its share of the deposit, the tribunal may order a delinquent party to pay that share of the deposit towards the costs of the arbitration. The paying party is not required to shoulder the entire cost of the arbitration unless/until a successful award is rendered in its favour.

Can an arbitral tribunal award interest?

A tribunal may award interest on the whole or any part of any sum which is awarded to any party, or which is in issue in the proceedings but paid prior to an award, for any period up to the date of payment.

A tribunal is empowered to award interest on a simple or compound basis and at such rate as the parties may have agreed to, or in the absence of such agreement, as the tribunal considers appropriate.

How are costs awarded in arbitration?

Unless the parties have agreed otherwise, an arbitral tribunal has the broadest discretion in determining how to apportion costs to parties. Institutional rules do not seek to circumscribe that discretion. Neither the IAA nor the AA makes specific provision for the award of costs beyond confirming that a tribunal has the power to make such an award. The Singapore court has ruled that it will not interfere with a tribunal's discretion in awarding costs on the grounds of proportionality or public policy (see *VV & Anor v VW* [2008] 2 SLR(R) 929).

Despite the tribunal's broad discretion to determine who should pay costs and what amount those costs should be, it is generally understood that costs will 'follow the event'. In practice, this means that the winning party is entitled to be paid its reasonable costs by the losing party. A tribunal may also take into account a party's conduct in considering whether to award costs. For example, a tribunal may consider that unreasonable conduct (such as spurious applications, grossly inflated claims, or excessive document requests) should give rise to adverse cost consequences.

In many arbitration rules, a distinction is drawn between the costs of the arbitration and the costs incurred by the parties. Costs of the arbitration include (1) the tribunal's fees and expenses, (2) the administering institution's administrative fees and expenses, and (3) the cost of expert advice and other assistance required by the tribunal. In contrast, parties' costs typically include the costs of legal representation, the fees of expert witnesses and so on. Absent contrary agreement, a tribunal is empowered under both the SIAC and International Chamber of Commerce rules to award costs of the arbitration and parties' costs.

PARTY REPRESENTATIVES

Are there any restrictions on who may represent parties in arbitration?

There are no restrictions on who may represent a party in arbitration. It need not be a lawyer. The Singapore Legal Profession Act expressly permits foreign lawyers to represent a party in Singapore arbitration proceedings, including those where the governing law of the contract in question is Singapore law.

What are the rules of ethics for counsel and for arbitrators?

There is no single set of guidelines as to how party representatives should conduct themselves in arbitration proceedings. Lawyers may be bound by the professional rules of conduct of their home jurisdictions and the rules of the arbitral seat. This may give rise to a situation where different representatives are subject to different (and possibly conflicting) standards.

The International Bar Association Guidelines on Party Representation provide guidance regarding professional conduct in arbitration, and may be adopted by agreement of the parties.

Many arbitral institutions have developed codes of conduct that apply to arbitrators conducting arbitrations pursuant to those institutions' rules (see, for example, the SIAC Code of Ethics for an Arbitrator). In addition, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration are frequently applied to resolve potential conflicts of interest between or among arbitrators, parties and/or party representatives. It should be noted that these guidelines do not have the force of law. However, they seek to provide guidance to avoid situations giving rise to conflicts of interest or accusations of partiality.

COURT SUPERVISION OF ARBITRATION

What is the extent and nature of court supervision of arbitration?

The Singapore courts adopt a policy of minimal supervision of arbitration proceedings in Singapore. It will intervene to assist in the process, for example, where the mechanism for appointing an arbitrator has failed.

The court can also grant interim relief in support of arbitration under section 12A of the IAA. However, the court will only intervene to the extent that the tribunal has no power or is unable to act effectively. If the matter is not urgent, an application for court-ordered interim relief can only be brought with the permission of the tribunal or the other parties' agreement in writing. Any dispute as to the jurisdiction of the tribunal may be finally determined by the court.

How do the courts approach 'pathological' clauses?

So-called 'pathological' clauses are arbitration clauses that are drafted in a way that makes their effect unclear or uncertain. The court will generally seek to give effect to an arbitration clause so long as it finds that there was an intention to arbitrate, even where the clause may not have been clearly drafted. In *Insignia Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 and, subsequently, *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5, the courts

found that the parties intended to arbitrate their disputes and upheld their clauses, even when they referred to non-existent arbitral institutions or appeared to require one arbitral institution to administer the rules of another.

CHALLENGING AND ENFORCING ARBITRAL AWARDS

How are arbitral awards enforced in Singapore?

An arbitral award is enforced as if it were a judgment or order of the Singapore High Court. Under Order 69A Rule 6 of the Rules of Court, a party may apply to enforce the award. The application must be accompanied by an affidavit exhibiting the arbitration agreement and the award. It should also state the usual or last known place of abode or business of the enforcing party and the party against whom the award is to be enforced. The affidavit must confirm that the award has not been complied with, or the extent to which it has not been complied with, at the date of the application.

The party against whom the award is being enforced will have 14 days to challenge enforcement. If no challenge is made, or if the challenge fails, the enforcing party may proceed to enforce the award as if it were a judgment of the Singapore High Court, and the full remedies for enforcement will be available to it.

How and when may parties challenge arbitral awards made in Singapore?

A party may seek to set aside an arbitral award made in Singapore on any of the grounds set forth in Article 34 of the Model Law or section 24 of the IAA. These grounds relate to jurisdiction, procedural irregularity, public policy, fraud, or breach of natural justice.

If a party wishes to challenge a tribunal's decision in a Singapore-seated arbitration that it has or does not have jurisdiction to hear a dispute, it may apply to court under section 10 of the IAA for a decision.

Can foreign arbitral awards be enforced in Singapore?

The Singapore courts will enforce arbitral awards that were obtained in countries that are contracting states to the New York Convention. This means that arbitral awards from at least 150 states are enforceable in Singapore.

Can the Singapore courts refuse enforcement of foreign arbitral awards?

The Singapore courts may refuse enforcement of foreign arbitral awards under section 31 of the IAA. The grounds for refusal set out in that section are exhaustive:

- A party could not validly enter into the arbitration agreement at the time the agreement was made.
- The arbitration agreement is not valid under its chosen law or under the law of the country where the award was made.
- A party was not given sufficient notice of the appointment of the arbitrator or of the arbitration proceedings, or was unable to present its case at those proceedings (this is generally known as a 'breach of natural justice').

- Generally, where the award dealt with matters that parties did not intend to submit to arbitration.
- The tribunal or the arbitral procedure was not in accordance with the agreement of the parties or in accordance with the law of the country where the arbitration took place.
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, the award was made.
- The subject matter is non-arbitrable under the laws of Singapore (see *Larsen Oil* above).
- The enforcement of the award would be contrary to the public policy of Singapore.

Can state immunity be a defence to the enforcement of an arbitral award?

Under section 15(2) of the State Immunity Act, the property of a state is not to be subject to any process for the enforcement of a judgment or arbitration award. However, this is to be read with sections 5 and 15(3) of the State Immunity Act, which provide for certain exceptions (e.g., where the state has entered into a commercial transaction, or where the state has agreed to arbitration and thus waived state immunity).

Where can arbitral awards obtained in Singapore be enforced?

Arbitral awards obtained in Singapore can generally be enforced in any of the 150 states that are contracting parties to the New York Convention. There are no states that have reserved the right to refuse enforcement of Singapore arbitral awards.

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