IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 238

Suit No 1234 of 2015 (Registrar's Appeal No 43 of 2016)

Between

DYNA-JET PTE LTD

… Plaintiff

And

WILSON TAYLOR ASIA PACIFIC PTE LTD

… Defendant

GROUNDS OF DECISION

[Arbitration] – [Agreement] – [Definition]

[Arbitration] – [Stay of court proceedings] – [Mandatory stay under International Arbitration Act]

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v
Wilson Taylor Asia Pacific Pte Ltd

[2016] SGHC 238

High Court — Suit No 1234 of 2015 (Registrar's Appeal No 43 of 2016)
Vinodh Coomaraswamy J
29 February; 18 April; 25 May 2016

31 October 2016

Vinodh Coomaraswamy J

Introduction

1 The plaintiff and defendant in this action are parties to a dispute-resolution agreement which confers on the plaintiff – and on the plaintiff alone – the right to elect whether to submit their disputes to arbitration. When a dispute arose in 2015, the plaintiff elected not to refer it to arbitration and commenced this action instead. The defendant has applied to stay this action in favour of arbitration. The plaintiff resists the application on the basis that there is no arbitration agreement between the parties; alternatively that any arbitration agreement they may have is "null and void, inoperative or incapable of being performed".

2 The defendant's application raises two issues. First, does a dispute-resolution agreement which gives only one party the right to elect to arbitrate

disputes constitute an "arbitration agreement" within the meaning of our arbitration legislation? Second, what is the meaning of the phrase "null and void, inoperative or incapable of being performed"?

3 I have dismissed the defendant's application to stay this action, holding that: (i) the parties do have an arbitration agreement; but (ii) that their arbitration agreement is incapable of being performed. The result of the plaintiff's election not to arbitrate the dispute which underlies this action is that the contingency which the parties made intrinsic to their arbitration agreement – an election by the plaintiff to arbitrate this dispute – has not been satisfied. Further, on a proper construction of the parties' arbitration agreement, the plaintiff has now bound itself to litigate this dispute. Therefore, the intrinsic contingency in the parties' dispute-resolution agreement can now *never* be satisfied in respect of this dispute. In my view, that makes their arbitration agreement incapable of being performed. I do not, however, think that that makes their arbitration agreement either inoperative or null and void.

4 The result of my decision is that the parties' dispute will now be resolved by a court in Singapore rather than by an arbitrator in Singapore.

5 The defendant has, with my leave, appealed to the Court of Appeal against my decision. I therefore set out my reasons.

Background facts

The parties

6 The plaintiff is Dyna-Jet Pte Ltd ("Dyna-Jet"), a subsidiary of an international group of companies providing specialist engineering services.[1] These engineering services include services carried out underwater by divers.

7 The defendant is Wilson Taylor Asia Pacific Pte Ltd ("Wilson Taylor"), a subsidiary of an international group of companies specialising in what is known as "cathodic protection technology".

8 Both Dyna-Jet and Wilson Taylor are companies incorporated in Singapore and have their place of business in Singapore.[2] It appears from the evidence, however, that they have clients around the region and, accordingly perform their contracts both in and outside Singapore.

The contract and the dispute resolution agreement

9 In April 2015, Wilson Taylor engaged Dyna-Jet to install underwater anodes on the island of Diego Garcia in the Indian Ocean.[3] The terms of the parties' contract are set out in a commercial proposal from Dyna-Jet to Wilson Taylor dated 28 April 2015 which Wilson Taylor accepted by a purchase order dated 29 April 2015.[4]

10 The contract includes Dyna-Jet's *pro forma* standard terms and conditions.[5] One of those standard terms is a dispute-resolution agreement which, in express terms, gives Dyna-Jet a right to elect to arbitrate a dispute:

> **Resolution of Disputes and Complaints**
>
> Dyna-Jet and [Wilson Taylor] agree to cooperate in good faith to resolve any disputes arising in connection with the interpretation, implementation and operation of the Contract. Disputes relating to services performed under the Contract

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1 Statement of claim at paragraph 1.

2 Affidavit of S Uthayakumaran dated 23 December 2015 at paragraph 2.

3 Statement of claim at paragraphs 2 and 3.

4 Defendant's bundle of documents dated 15 April 2016 at pages 4 to 13.

5 Defendant's bundle of documents dated 15 April 2016 at pages 11 and 12.

> shall be noted to Dyna-Jet within three (3) days of the issue arising, thereafter the period for raising such dispute shall expire.
>
> Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, *at the election of Dyna-Jet*, *the dispute may be referred to and personally settled by means of arbitration proceedings*, which will be conducted under English Law; and held in Singapore.
>
> …
>
> [emphasis added]

A dispute leads to this action

11 A dispute arose under the contract in September 2015.[6] As a result of the dispute, Dyna-Jet suspended work and recalled its divers to Singapore.[7] That, in turn, led to Wilson Taylor engaging another contractor to replace Dyna-Jet and complete the installation.[8]

12 In December 2015, after the parties had failed to reach a negotiated settlement of the dispute, Dyna-Jet commenced this action. Dyna-Jet's claim is that Wilson Taylor has committed repudiatory breaches of the contract which Dyna-Jet has accepted.[9] Wilson Taylor in due course applied for an order staying this action permanently and compelling Dyna-Jet to arbitrate the underlying dispute.[10] I have no power, on an application under s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), to order a

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6 Statement of claim at paragraphs 9 to 14.

7 Statement of claim at paragraph 12.

8 Statement of claim at paragraph 15.

9 Statement of claim at paragraphs 14 to 16.

10 SUM6171/2015 at paragraph 2.

plaintiff to arbitrate the dispute underlying the action. Indeed, it is questionable whether I would have that power – which amounts to granting specific performance of an arbitration agreement – even on a claim by Wilson Taylor against Dyna-Jet for contractual relief arising from Dyna-Jet's breach of the arbitration agreement in pursuing this litigation. I therefore treat the application before me as confined to an application for a stay alone, as the arbitration legislation envisages.

13 Both parties argued this application before me on the basis that the IAA was the controlling statute. However, Wilson Taylor's application expressly seeks a stay only under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA").[11] It makes no reference to s 6 of the IAA either alone or in the alternative. Despite that, Wilson Taylor's written submissions suggest that there is a live issue as to whether it is the AA or the IAA which applies to the contract.[12] To the extent that it is necessary for me to make a finding on this issue, I accept Wilson Taylor's submission[13] that it is the IAA which applies. The substantial part of Dyna-Jet's obligations under the contract were to be performed in Diego Garcia. That is also the place with which the subject-matter of the dispute between the parties is most closely connected. Both parties have their place of business in Singapore, not in Diego Garcia. Any arbitration which may arise from the parties' contract would, therefore, be an "international arbitration" within the meaning of s 5(2)(b)(ii) of the IAA. All issues before me are therefore governed by the IAA rather than by the AA.

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11 SUM6171/2015 at paragraph 2.

12 Defendant's skeletal submissions dated 26 February 2016 at paragraphs 17 and 18.

13 Defendant's skeletal submissions dated 26 February 2016 at paragraph 25(a).

14 In any event, to the extent that the AA is relevant at all, it is my view that Dyna-Jet has established "sufficient reason" within the meaning of s 6(2)(*a*) of the AA why the parties' dispute should not be referred to arbitration. "Sufficient reason" exists for the same reasons which have led to my conclusions on s 6 of the IAA and which I set out in more detail in these grounds.

15 I should also note that Dyna-Jet, rightly in my view, did not take the technical point that Wilson Taylor's stay application is defective because the statutory provision cited in it does not match the statutory provision which actually governs its application. The mismatch is a mere irregularity which has caused no prejudice to Dyna-Jet, even in respect of costs. If that technical point were to be taken, I would without hesitation grant Wilson Taylor leave to amend its application in order to cite the correct section, *ie*, s 6 of the IAA.

The assistant registrar's decision

16 Wilson Taylor's application for a stay was heard, in the usual way, first by an assistant registrar. She dismissed the application. She held that the parties' dispute-resolution agreement (see [9] above) was an arbitration agreement within the meaning of the IAA even though only Dyna-Jet had a right to elect arbitration. That is because, once Dyna-Jet exercised its election, Wilson Taylor was bound to arbitrate the relevant dispute.[14] But she held that *this* arbitration agreement, on the facts of *this* case, was "inoperative" or was "incapable of being performed" because Dyna-Jet had elected not to arbitrate the parties' dispute in order to resolve it but had elected instead to litigate it.[15]

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14 Certified Transcript dated 21 January 2016 at page 4 lines 26 to 29.

15 Certified Transcript dated 21 January 2016 at page 4 line 29 to page 5 line 2.

17 The assistant registrar also observed that staying this action would defeat the parties' contractual intent manifested in their dispute-resolution agreement. A stay would compel Dyna-Jet to arbitrate the parties' dispute even though: (i) it had no obligation to do so, being the beneficiary of a contractual right to elect to do so; (ii) had unequivocally indicated its intention not to exercise that right of election; and (iii) had, by commencing this litigation instead, acted positively to crystallise its election not to arbitrate.[16]

18 Dissatisfied with the assistant registrar's decision, Wilson Taylor appealed to a judge in chambers. That appeal came before me.

The issues

The two issues which arise for determination

19 Wilson Taylor's application to stay this action and its appeal against the assistant registrar's decision turns on the proper construction of two key sections of the IAA: s 2A and s 6.

20 Section 2A defines an "arbitration agreement" as follows:

> **Definition and form of arbitration agreement**
>
> 2A.—(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Whenever the phrase "arbitration agreement" appears in this judgment, unless the context otherwise requires, I intend that phrase to mean an "arbitration agreement" within the meaning of s 2A of the IAA.

[16] Certified Transcript dated 21 January 2016 at page 5 lines 5 to 11.

21 This definition of "arbitration agreement" echoes the language of Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). That is the article which imposes an obligation on each of the New York Convention's contracting states to recognise arbitration agreements.

22 Section 6 of the IAA obliges the court to stay litigation between parties to an arbitration agreement:

> **Enforcement of international arbitration agreement**
>
> 6. —(1) … [W]here any party to an arbitration agreement … institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may … apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court … shall make an order … staying the proceedings … unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

23 It is common ground that, if the parties' dispute-resolution agreement is found to be an arbitration agreement, the dispute which is the subject-matter of this action is "the subject of the agreement" within the meaning of s 6(1). In other words, there is no dispute that the subject-matter of this action falls within the meaning of the phrase "Any claim or dispute or breach of terms of the Contract" in the parties' dispute-resolution agreement (see [10] above).

24 Wilson Taylor's stay application therefore turns on only the following two issues:

(a) Whether the parties' dispute-resolution agreement is an "arbitration agreement" within the meaning of s 2A of the IAA; and

(b) Whether their dispute-resolution agreement is "null and void, inoperative or incapable of being performed" within the meaning of the proviso to s 6(2) of the IAA.

The burden and standard of proof

25 As the applicant for the stay, Wilson Taylor bears the burden of persuading me on the first of these issues. Although that burden is unquestionably a real burden, it is undoubtedly a light one: *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53 ("*Rals*") at [20]. At this stage, and for the purposes of this application, all Wilson Taylor need do to succeed on the first issue is to satisfy me that there is a *prima facie* case in its favour on that issue: *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [63].

26 As the party resisting the stay, Dyna-Jet bears the burden of satisfying me (as s 6(2) requires) on the second of these issues: *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong*") at [22]. This accords with the approach in England, where the second issue is a part of English law by virtue of the proviso to s 9(4) of the English Arbitration Act 1996 (c 23) (UK). On this approach, it is for the party resisting the stay to establish that an arbitration agreement *is* within the proviso to s 6(2) rather than for the party applying for the stay to establish that it *is not*: *Downing v Al Tameer Establishment and another* [2002] EWCA Civ 721 ("*Downing*") at [20]. To meet its burden on this issue, the party resisting the stay must establish that no other conclusion on this issue is arguable: *JSC BTA Bank v Mukhtar Ablyazov and others* [2011] 2 Lloyd's Rep 129 at [33].

27 *Tomolugen* (at [63]) appears to say that it is for the *applicant* for a stay to establish a *prima facie* case, amongst other things, that the arbitration agreement is *not* "null and void, inoperative or incapable of being performed". To the extent that there is any inconsistency between the approach suggested by this passage in *Tomolugen* and the approach suggested by *Tjong* at [22], I prefer to adopt the approach suggested in *Tjong*. Casting the burden on the second issue on the party resisting the stay application – as the party asserting that the parties' arbitration agreement is within the proviso to s 6(2) of the IAA – appears to me to be consistent both with our ordinary approach to allocating the burden of proof and also with our ordinary approach to applications under s 6 of the IAA. And casting this burden on the party resisting the stay to the standard which I have set out at [26] above is simply the converse of the standard which the applicant for a stay must achieve on the first issue.

28 Leaving aside the incidence of the burden of proof for the time being, the result of this approach to the standard of proof is to stay an action under s 6 of the IAA whenever there is a *prima facie* case in favour of a stay. That approach leaves it to the arbitral tribunal to come to a final decision on the underlying issues. That approach upholds the principle of non-intervention set out in Article 5 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and accords primacy to the doctrines of separability and *kompetenz-kompetenz* implemented in Article 16: see *Tjong* at [22] to [24]; *Tomolugen* at [57] to [70]; *Malini Ventura v Knight Capital Pte Ltd and others* [2015] 5 SLR 707 at [36]; *cf Nigel Peter Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bhd and another* [2007] 2 All ER 1075 at [13].

The law to be applied to the issues

29 There is also a threshold issue as to which law I should apply in order to determine the two issues before me (see [24] above). I shall treat the parties' dispute-resolution agreement as an arbitration agreement for the time being even though I have not yet explained my reasons for arriving at that conclusion. The application before me is an application for a stay under s 6 of the IAA. That application is obviously governed by Singapore law. In order to determine that application, however, Singapore law requires me to assess whether there is at least a *prima facie* case that the parties have an agreement to arbitrate within the meaning of s 2A and, if so, whether that agreement is "null and void, inoperative or incapable of being performed" within the meaning of the proviso to s 6(2) of the IAA (see [22] above).

30 As I will show, the common thread which underpins the three elements of the proviso to s 6(2) is the existence of circumstances which operate either to prevent the parties from coming under a contractual obligation to arbitrate or to release the parties from a contractual obligation to arbitrate. That is because s 2A and s 6 locate the source of the consent necessary to make arbitration a consensual dispute-resolution procedure in the parties' *contractual* consent to arbitrate (as opposed to their *subjective* consent to arbitrate).

31 It would be unduly parochial, however, to examine the parties' arbitration agreement purely through the lens of Singapore law simply because this application is made under Singapore legislation to a Singapore court. Their arbitration agreement is found in a contract governed by English law. That means that the arbitration agreement is also governed by English law: there is no reason in this case to move beyond the starting assumption that the

parties intended their arbitration agreement to be governed by the proper law of the broader contract in which it is found: *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 at [11] to [14].

32 There is therefore a potential for a conflict – or at the very least a need to distinguish – between Singapore law (as the law of the forum and therefore as the law governing this application) and English law (as the proper law of the parties' arbitration agreement). Happily, it is my view that there is no material difference between Singapore law and English law on the points which are relevant to resolve the only two issues before me. That approach appears to be shared by the parties, who have not sought to argue before me that there is any material difference between the two laws. It is therefore unnecessary for me to specify which law I am applying in arriving at my ultimate decision on Wilson Taylor's application or in arriving at the intermediate decisions necessary for that ultimate decision.

33 I now address the two issues before me (see [24] above) in turn.

"Arbitration agreement"

A reference to arbitration is insufficient to constitute an arbitration agreement

34 Wilson Taylor's first submission is that the dispute-resolution agreement "makes a *clear reference* to refer future disputes to arbitration and/or provided *parties* with the discretion to elect to arbitrate as a means of resolving the dispute" (emphasis added).[17] That, Wilson Taylor says, suffices to establish *prima facie* that it is an arbitration agreement.

35 I cannot accept this submission. I say that for two reasons. First, for a dispute-resolution agreement to be an arbitration agreement, it must do more than merely make a "clear reference" to arbitration. Second, this dispute-resolution agreement does not give *both* parties a right to elect to arbitrate: it gives *only* Dyna-Jet a right to elect to arbitrate.

Fundamental element of an "arbitration agreement"

36 If Wilson Taylor's first submission is correct, a dispute-resolution agreement which merely refers in some way – even in passing – to the parties' submitting future disputes to arbitration would be an "arbitration agreement". That cannot be correct. Although it may appear a tautology to say so, a *sine qua non* of an "arbitration agreement" is that it is an "agreement". A dispute-resolution agreement which merely *refers* to arbitration cannot, contrary to Wilson Taylor's first submission, suffice to constitute an *agreement* to arbitrate.

37 That must be so for a number of reasons. First, arbitration is founded entirely on the parties' consent to arbitrate: *Tomolugen* at [25]. Without that consent, there is no basis to divert the parties' dispute from the state's default procedure for resolving disputes to be resolved privately by arbitration. A mere reference to arbitration in a dispute-resolution agreement cannot suffice to supply the necessary consent. What must be found in the dispute-resolution agreement is the consent of both parties to be *bound* to arbitrate. Having said that, however, my analysis of the cases will show (at [64] to [113] below) that it makes no difference whether that consent to arbitrate is given unconditionally or conditionally, *ie*, subject to a contingency.

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[17] Defendant's skeletal submissions dated 26 February 2016 at paragraph 25(b).

38 Second, the word "agreement" encompasses at the very least a meeting of minds. The word can only mean either: (i) a meeting of minds *simpliciter*, insufficient in itself to create legal rights or to impose legal duties; or (ii) a contract, *ie*, a meeting of minds which satisfies the legal requirements to create enforceable rights and binding duties. On either meaning, the word "agreement" is not apt to encompass a dispute-resolution agreement which does no more than merely refer to arbitration, no matter how clear that mere reference is.

39 Third, both the IAA and the AA permit a defendant to apply for a stay of any action brought contrary to an arbitration agreement. The stay, when granted, amounts to enforcing the arbitration agreement, albeit only in the negative sense. It is the functional equivalent of an injunction restraining the plaintiff from breaching the arbitration agreement. That is clear, at least in relation to international arbitration agreements, from the heading to s 6 of the IAA: "Enforcement of international arbitration agreement" (see [22] above).

40 This statutory right of enforcement makes clear that a mere reference to arbitration is insufficient to turn an ordinary dispute-resolution agreement into an arbitration agreement. Indeed, this point goes much further: it suggests that an agreement to arbitrate which is an agreement *simpliciter – ie*, which is incapable of creating a binding legal obligation to arbitrate, either immediately or upon satisfaction of a contingency – is also insufficient. The alternative would be to recognise that the stay provisions of either Act can deny a party to a contract access to dispute resolution through the courts when that party has no contractual obligation to arbitrate which would suffice to secure an injunction to enforce the arbitration agreement in an action for breach of contract. If that were the case, it could no longer be asserted that arbitration

was founded on consent. The stay in that hypothetical situation would be statute-based and not consent-based. But there is no hint of any legislative intent in either Act to make non-contractual agreements to arbitrate statutorily enforceable (in the negative sense, through a stay) and therefore binding by statute rather that by consent. "Agreement" in this context must therefore mean "contract", the second meaning of "agreement" which I have posited at [38] above.

41 A contract can, of course be either unconditional or conditional, subject to a contingency. This conclusion does not dictate that an arbitration agreement must comprise an unconditional obligation to arbitrate, simply that it must comprise some sort of obligation to arbitrate. To be an arbitration agreement, therefore, a dispute-resolution agreement must comprise a contractual *obligation* to arbitrate, whether unconditional or conditional.

42 For all these reasons, I consider Wilson Taylor's first submission (see [34] above) to be unarguable. A dispute-resolution agreement which merely makes a reference to arbitration – no matter how clear – is not an arbitration agreement.

A discretion to elect to arbitrate

43 The second reason I cannot accept Wilson Taylor's first submission is that that Wilson Taylor is wrong in saying that this dispute-resolution agreement gives "parties" – *ie*, both parties – "the discretion to elect to arbitrate". It is clear from construing the arbitration agreement properly that it confers a right of election only on Dyna-Jet.

44 The general approach to be taken to construing arbitration agreements, unless there is good reason to conclude otherwise, is a generous one (*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 ("*Larsen*") at [13]; *Rals* at [30]). That was said, admittedly, in cases where there was no doubt that the parties' dispute-resolution agreement was an arbitration agreement and the sole issue was the scope of that agreement. However, the weight of recent authority, some of which I shall analyse below, is that the same generous approach to contractual construction should be applied when ascertaining whether a particular dispute-resolution agreement is an arbitration agreement in the first place.

45 There is no good reason in this case not to apply the generous modern approach to construing the parties' dispute-resolution agreement. The parties' contract is an ordinary commercial contract. Neither their contract nor their dispute touches upon specialised areas of the law where countervailing considerations of policy or commerce operate to supply the necessary "good reason", such as the law of insolvency (*cf Larsen*) or the law of negotiable instruments (*cf Rals*).

46 It may be said that choosing at the outset to apply the modern generous approach to construing arbitration agreements in order to ascertain whether a dispute-resolution agreement is indeed an arbitration agreement is to beg the question. That would not be correct. The modern approach to interpreting arbitration clauses championed in cases such as *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 2 All ER (Comm) 1053 and *Rals* is simply, as far as possible, to determine and advance the parties' commercial intention, objectively ascertained from their arbitration agreement:

Rals at [32]. It is intended as an antidote to the traditional suspicion with which the common law traditionally regarded arbitration agreements. The effect of the generous approach is merely to stipulate that arbitration agreements ought now to be interpreted by adopting the same approach by which we construe any other provision of any other contract. In our jurisdiction, that approach is set out in the seminal case of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029. There is therefore nothing circular in applying the modern approach in order to determine whether a dispute-resolution clause ought to be characterised *prima facie* as an arbitration agreement.

47 The parties' dispute-resolution agreement is set out in full at [10] above. I now extract and set out its operative words:

> Any claim or dispute … shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, *at the election of Dyna-Jet*, the dispute may be referred to and personally settled by means of arbitration proceedings ….
>
> [emphasis added]

48 This aspect of Wilson Taylor's first submission depends on reading the phrase "at the election of Dyna-Jet" (italicised above) as modifying the phrase which precedes it in that sentence (*ie*, "If no amicable settlement is reached through discussions, …") rather than the phrase which follows it in that sentence ("the dispute may be referred to … arbitration…"). On Wilson Taylor's reading, therefore, the parties' commercial intent manifested in their dispute-resolution agreement was to grant *both* parties a right to refer a dispute to arbitration if Dyna-Jet elected not to reach an *amicable settlement* of that dispute through discussions.

49 Even applying the most generous of approaches to construction, I consider the reading which Wilson Taylor advances to be unarguably wrong. That reading makes no sense, either as a matter of language or as a matter of commerce.

50 First, as a matter of language, it makes no sense to speak of a party "electing" not to reach an amicable settlement. An election is a choice which one party makes alone, without the involvement or consent of others. Reaching an amicable settlement requires the cooperation of both parties to arrive at a compromise. Reaching a compromise is therefore not typically characterised as the subject of an election. On the other hand, it makes perfect sense to speak of a party "electing" to refer a dispute to arbitration. It is true, however, that breaking off a negotiation and walking away from it is a unilateral act and could conceivably be classified as an election. But if that is what the parties intended to capture in their dispute-resolution agreement, that is the sort of clear and express language they would have needed to use to describe it.

51 Second, as a matter of commerce, the first sentence I have quoted at [47] above imposes on the parties an obligation to resolve disputes amicably by mutual consultation. I leave aside the legal question of whether such an obligation is a mere agreement to agree and is therefore unenforceable. It suffices for the present analysis that there is nothing in the dispute-resolution agreement or in the contract it forms a part of to suggest that the parties did not intend to be bound by that obligation. Wilson Taylor's construction contradicts that intention because it contemplates Dyna-Jet having a right to "elect" not to reach an amicable settlement despite being under an obligation to do so. Further, this construction would mean that the parties intended that if

it was Wilson Taylor, rather than Dyna-Jet, who "elected" not to reach an amicable settlement, the parties' dispute would have to be litigated because there would be no basis on which either party would have a right to elect arbitration. That is a wholly uncommercial construction.

52 In my view, therefore, the dispute-resolution agreement conferred on Dyna-Jet – and upon Dyna-Jet alone – a right to elect to arbitrate disputes. Any other construction is unarguable.

53 That takes me to Wilson Taylor's second and alternative submission on the first issue.

A right to elect to arbitrate is an arbitration agreement

54 Wilson Taylor's alternative submission on the first issue is that a dispute-resolution agreement which confers on only one party a right to elect to arbitrate is nevertheless an arbitration agreement.[18]

55 Dyna-Jet's response is that a dispute-resolution agreement of the type posited by Wilson Taylor cannot be an arbitration agreement.[19] The IAA defines an arbitration agreement as being an agreement "by the parties".[20] That implies that *both* parties must have the right to submit disputes to arbitration. But under this dispute-resolution agreement – and on the construction which I have found to be its proper construction (see [52] above) – only Dyna-Jet has that right. Thus, an essential requirement of the IAA – an agreement "by the

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18 Defendant's skeletal submissions dated 26 February 2016 at paragraph 25(c).

19 Plaintiff's submissions dated 26 February 2016 at paragraph 8.

20 Plaintiff's submissions dated 26 February 2016 at paragraph 7.

parties" to arbitrate – is not satisfied.[21] On this view, the parties' dispute-resolution agreement will give rise to an arbitration agreement when a specific future dispute is actually referred to arbitration. But until then, the dispute-resolution agreement is not an arbitration agreement.[22]

56 Before analysing the parties' submissions, I first make a point about terminology and then disentangle two distinct aspects of Dyna-Jet's submissions.

57 First, the point about terminology. A contractual right to elect – whether to arbitrate or to do anything else – is always a *unilateral* right. It is unilateral because the party holding that right is able to exercise it at will, without the consent or indeed the involvement of the counterparty or of any other party. That election, if exercised in accordance with the parties' contract, will in itself bind the counterparty without more. For that reason, it is a tautology to refer to a right of election under a contract as a unilateral right to elect. And, for that reason also, it is confusing to use the term "unilateral right to elect" to describe a right to elect which only one party to a contract enjoys. It is even more confusing to use the term "bilateral right to elect" to refer to a right of election which both parties to a contract enjoy. For that reason, I shall refer to the former situation as an *asymmetric* right to elect and the latter as a *symmetric* right to elect.

58 I now disentangle two aspects of Dyna-Jet's submission. The first aspect is that the parties' dispute-resolution agreement is not an arbitration agreement because of a lack of mutuality. I shall call this the "mutuality

21 Plaintiff's submissions dated 26 February 2016 at paragraph 7.

22 Plaintiff's submissions dated 26 February 2016 at paragraphs 8 and 19.

argument". It is the mutuality argument which Dyna-Jet raises when it points out that it has the right, by exercising its asymmetric right to elect, to put Wilson Taylor under an obligation to arbitrate a dispute but Wilson Taylor has no right ever to put Dyna-Jet under an obligation to arbitrate a dispute.

59 The second aspect of Dyna-Jet's submission is that an arbitration agreement must create a present obligation to arbitrate, even if the consequences of that obligation will crystallise only in the future, *ie*, when a dispute actually arises. On this submission, a dispute-resolution agreement which makes arbitration of a future dispute entirely optional is, by that fact alone, not an "arbitration agreement". I shall call this the "optionality argument". It is the optionality argument which Dyna-Jet raises when it submits that the parties' dispute-resolution agreement is not an arbitration agreement (because it does not place the parties under a present obligation to arbitrate) but will give rise to an arbitration agreement in the future, if and when Dyna-Jet elects to arbitrate a specific dispute (because the parties will then, and only then, come under an obligation to arbitrate, and even then, only in respect of that specific dispute).

60 The two arguments must be disentangled because they point to two different defects which prevent the parties' dispute-resolution agreement from being an arbitration agreement and to different cures for those defects. On the mutuality argument, the defect is that the right to elect to arbitrate is asymmetric, *ie*, available to only one party. If an arbitration agreement conferred a symmetric right of election, *ie*, if it made the same right of election available to both parties, it would satisfy the requirement of mutuality and would therefore be an arbitration agreement. On the optionality argument, the defect would remain even if the mutuality argument were addressed by

making the right of election symmetric. The optionality defect can be cured only by removing the right of election altogether, *ie*, by making arbitration of future disputes compulsory rather than the subject of an election, whether symmetric or asymmetric.

61 On both aspects of this submission, I hold against Dyna-Jet and in favour of Wilson Taylor. It is my view that the overwhelming weight of modern Commonwealth authority, which I analyse at [64] to [113] below, has established the following five propositions of law:

(a) The mutuality argument is discredited. A contractual dispute-resolution agreement which operates asymmetrically is nevertheless an arbitration agreement.

(b) The optionality argument is also discredited. A contractual dispute-resolution agreement which grants a right to elect whether to arbitrate a future dispute is nevertheless an arbitration agreement.

(c) The combined effect of (a) and (b) is that a contractual dispute-resolution agreement which confers an *asymmetric* right to *elect* whether to arbitrate a future dispute is nevertheless an arbitration agreement.

(d) A contractual dispute-resolution agreement which confers a right to elect to arbitrate a future dispute, whether symmetric or asymmetric, is an arbitration agreement from the moment the parties enter into it contractually. When the right of election is exercised actually to refer a specific dispute to arbitration, the dispute-resolution agreement gives rise to a specific arbitration agreement for that specific dispute. But the underlying dispute-resolution agreement is

nevertheless from the outset an arbitration agreement, and, even after the right of election comprised in it is exercised, continues into the future to be an arbitration agreement, capable of being invoked by election in relation to other disputes.

(e) Where an arbitration agreement confers a right to elect to arbitrate future disputes, whether symmetric or asymmetric, it is a question to be determined on the proper construction of that agreement whether a party who has a right to elect to arbitrate: (i) who *does not* make that election remains entitled to commence litigation against its counterparty; and (ii) who *does* elect to arbitrate can stay litigation brought by the counterparty.

62 I accept these five propositions as correctly stating English law, the governing law of the parties' dispute-resolution agreement, and also Singapore law, the law governing my jurisdiction to stay this action under s 6 of the IAA. Indeed, on the strength of the analysis I am about to undertake, I am prepared to accept that Wilson Taylor has established these propositions on more than the *prima facie* basis which is all that it must meet to succeed on the first issue.

63 I now review the body of Commonwealth authority I have referred to at [61] above. For ease of exposition, I analyse these authorities in chronological order rather than by jurisdiction. I consider that approach to be valid because the core concept of what constitutes an arbitration agreement – particularly as the legal prerequisite for a stay of litigation – is consistent in all the cases which I consider. That is not surprising, given that these cases originate from Commonwealth jurisdictions and have therefore drawn upon a

common conception of an arbitration agreement either from earlier English arbitration legislation, from the New York Convention, or from the Model Law.

Hammond v Wolt (1975)

64 I begin my review with *Hammond v Wolt* [1975] VR 108 ("*Hammond*"). This is a decision at first instance in the Supreme Court of Victoria by Menhennitt J. In *Hammond*, cl 23(a) of a building contract between an owner and a builder set out the following dispute-resolution agreement:

> 23(a) In the event of any dispute arising between the Owner and the Builder … then *either party may give to the other notice in writing of such dispute* and he shall simultaneously therewith notify the President for the time being of the Housing Industry Association (Victorian Division) or his nominee of such dispute and shall lodge with the said President or his nominee the sum of $200 or such other sum as the said President or his nominee may direct with a request to the said President or his nominee to appoint a person (hereinafter called 'the arbitrator'). …
>
> [emphasis added]

65 The owner commenced action against the builder for breach of contract. The builder applied to stay the action pursuant to the Arbitration Act 1958 (Vic). Under that Act, the court had a discretion to stay an action if it was brought by a party to a "submission", defined as "a written agreement to submit present or future differences to arbitration…".

66 The owner raised the optionality argument in *Hammond* because the operative phrase in the dispute-resolution agreement there (italicised above) used the permissive "may" rather than the mandatory "shall". But because this

dispute-resolution agreement was symmetric, the owner could not raise the mutuality argument.

67 Menhennitt J accepted the optionality argument and held that this dispute-resolution agreement was not a "submission". He said (at 117):

> The question remains whether an agreement which gives either party an option to have differences submitted to arbitration is an agreement to submit differences to arbitration within the meaning of … the Act …. In my opinion, it is not. The expression used is "agreement to submit" and the word "to" requires, I think, that the parties have agreed that the differences are to be submitted, not that, at the option of one or other of them, they may be.

68 If this reasoning is correct, Dyna-Jet's optionality argument is well-founded. That would suffice, in itself, to defeat Wilson Taylor's stay application. But history has shown *Hammond* to be very much an outlier. Its reasoning has been discredited in the line of cases which I analyse. That is so even in Victoria, the jurisdiction in which *Hammond* was decided (see [97] below).

The Messiniaki Bergen (1982)

69 The next case is *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki Bergen* [1983] 1 All ER 382 ("*The Messiniaki Bergen*"). This is a decision of Bingham J (as Lord Bingham then was) of the English High Court. Section 32 of the English Arbitration Act 1950 (c 27) defined an "arbitration agreement" as "a written agreement to submit present or future disputes to arbitration…". The question before Bingham J was whether that definition encompassed a dispute-resolution agreement in a charterparty which obliged the parties to submit all disputes to the English courts' jurisdiction subject to a proviso conferring a symmetric right to elect to refer a dispute to

arbitration. The precise wording of the dispute-resolution agreement was as follows:

> Any dispute arising under this charter shall be decided by the English courts … Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London.… Such election shall be made by written notice by one party to the other not later than 21 days after receipt of a notice given by one party to the other of a dispute having arisen under this charter.

The effect of this dispute-resolution agreement was to give each party a right to elect to arbitrate a dispute but also to subject each party to a concomitant obligation to arbitrate a dispute if its counterparty exercised its right of election in respect of that dispute.

70 The question before Bingham J arose in his way. The charterers gave notice pursuant to this dispute-resolution agreement of their wish to arbitrate their disputes with the owners. They then sought an order from the English High Court appointing an arbitrator under s 10 of the Arbitration Act 1950. In opposition to the application, the owners raised *both* the optionality argument *and* the mutuality argument. Bingham J summarised the owners' submissions as follows:

> Here, it was submitted, the parties' primary agreement was for determination of disputes by the English courts. There was no existing and binding agreement to arbitrate, as the 1950 Act required, but at best an agreement to agree (which was no agreement) or a contract of option (which was not a present agreement and which therefore did not satisfy the 1950 Act). In any event, the clause only purported to confer a right to arbitrate on the party to whom notice was given, so that the agreement lacked the mutuality which was a necessary feature of a valid arbitration agreement.

71 Bingham J rejected both of the owner's submissions, holding that this dispute-resolution agreement had indeed given rise to an arbitration agreement.

72 Bingham J held that he did not have to decide whether mutuality was essential for an arbitration agreement because, on its proper construction, this dispute-resolution agreement did not suffer from a lack of mutuality because it was symmetric: it made the same option to refer disputes to arbitration available to both parties (at 386):

> …[T]he editor of *Russell on Arbitration* … has expressed doubt whether, to be valid, an arbitration clause must afford equal rights to both parties. On my construction of the present clause, however, equal rights of recourse to arbitration are afforded to both parties and this question is one which I need not, and accordingly should not, decide.

73 Bingham J rejected the optionality argument, accepting that a right to elect to arbitrate – or an option to arbitrate, as he characterised it – gave rise to an arbitration agreement when the option was exercised. Significantly for Dyna-Jet, however, he appeared to accept that there could be no arbitration agreement *before* the option was exercised: (at 385 to 386):

> I should be very sorry to conclude that these submissions [on the optionality argument] are well founded for to do so would gravely disable a clause meaningful on its face and evidently accepted as effective by parties to agreements in this form. In the event I am satisfied that the objection is not well founded. The proviso is not an agreement to agree because on a valid election to arbitrate (and assuming the clause to be otherwise effective) no further agreement is needed or contemplated. *It is, no doubt, true that by this clause the parties do not bind themselves to refer future disputes for determination by an arbitrator and in no other way.* Instead, the clause confers an option, which may but need not be exercised. *I see force in the contention that until an election is made there is no agreement to arbitrate, but once the election is duly made (and the option exercised) I share the opinion of the High Court of Delhi in the*

> Bharat *case that a binding arbitration agreement comes into existence.* Where the option agreement and the exercise of the option are both, as here, expressed in writing, the statutory requirement of a written agreement is in my view satisfied.
>
> [emphasis added]

74 The words of Bingham J which I have italicised above support the optionality argument which Dyna-Jet makes before me. Bingham J expresses clearly the view in these words that: (i) an arbitration agreement must be one by which parties bind themselves immediately to refer future disputes to arbitration without qualification or contingency; (ii) a dispute-resolution agreement which confers an option to arbitrate is not an arbitration agreement at the time it is entered into; and (iii) that an arbitration agreement arises only when the option is exercised *and not before*.

75 Each of these three propositions is, however, *obiter*. In *The Messiniaki Bergen*, Bingham J did not have to consider whether the dispute-resolution agreement before him was, as a matter of its inherent nature, an arbitration agreement *before* the charterers exercised their option to arbitrate. That is because the charterers had already exercised their option to arbitrate by the time their application came before Bingham J. In the case before me, of course, Dyna-Jet has never exercised its option to arbitrate. That raises before me the very question with Bingham J did not have to consider.

76 In my view, *The Messiniaki Bergen* is weak support for Dyna-Jet's argument. That is because: (i) what Bingham J said on the effect of the optionality argument before an option was exercised was *obiter*; and (ii) he assumed that the mutuality argument was valid without deciding that it was. *The Messiniaki Bergen* is not, for these reasons, on all fours with the present case.

Pittalis (1986)

77 The optionality argument and the mutuality argument arose squarely for decision in *Pittalis and others v Sherefettin* [1986] 2 All ER 227 ("*Pittalis*"), a decision of the English Court of Appeal. In *Pittalis*, a rent-review clause in a lease provided as follows:

> The … open market rental value shall be determined … in the following manner … (ii) at the election of the Lessee by notice in writing to the Lessor not later than three months after the Lessor's notification … it shall be determined … by an independent surveyor appointed for that purpose by the Lessors and Lessee by agreement in writing...

78 The tenant failed to make an election to have the revised rent determined by an independent surveyor within the three-month period stipulated by this clause. He therefore applied to the court under s 27 of the English Arbitration Act 1950 to extend the time in which he could make that election. The question for the court was whether this clause was an arbitration agreement, *ie*, "an agreement to refer future disputes to arbitration", within the meaning of s 27 of the English Act.

79 Fox LJ held that the rent-review clause was an arbitration agreement because it comprised within it a contractual mechanism by which both parties could become bound to arbitrate a future dispute. He rejected the optionality argument on the basis that a present obligation to refer a future dispute to arbitration upon a contingency, *ie*, at the tenant's election, was nevertheless an arbitration agreement (at 231):

> … in my opinion the lease did contain an agreement to refer a future dispute to arbitration. That agreement was in no sense an agreement to agree. It was contractual. It is true that there would be no reference to the independent surveyor unless the tenant elected. *But an agreement to arbitrate in future if a party so elects can, in my opinion, correctly be described as an*

> *agreement to refer a future dispute to arbitration; if there is an election, both parties are bound.* Looking at the matter at the point of time when the lease was made, there was an agreement to refer a future dispute to arbitration, and not the less so because the reference was on a contingency (ie election).
>
> [emphasis added]

80 Fox LJ also rejected the mutuality argument. He noted that the English authorities which stood for the mutuality argument had been powerfully criticised in the two leading texts on arbitration: Francis Russell, Anthony Walton, and Mary Victoria, *Russell on Arbitration* (Stevens, 20th Ed. 1982) and Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration* (Butterworths, 1982). He held, in effect, that the parties' bilateral agreement to the dispute-resolution agreement at the point in time at which it was entered into sufficed to satisfy the requirement of mutuality, even if that bilateral agreement was for an asymmetric right to arbitrate a future dispute (at 231):

> Looking at the matter apart from authority, I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. *There is a fully bilateral agreement which constitutes a contract to refer.* The fact that the option is exercisable by only one of the parties seems to me to be irrelevant. …

Dillon LJ and Neill LJ agreed with Fox LJ.

81 Wilson Taylor relies heavily on the reasoning in *Pittalis*. I accept that Fox LJ's reasoning in that case is highly persuasive and entirely consistent with the approach our courts have taken generally to arbitration and specifically to allowing contractual parties the widest autonomy in agreeing how they are to have access to arbitration in the event of a dispute. It appears to me also that, with one small caveat, *Pittalis* is on all fours with the present

case. The clause in question comprised a right to elect to refer a question to arbitration. The right of election was asymmetric. The English Court of Appeal had to consider whether that right was "an agreement to refer future disputes to arbitration". The court had to consider that question at a time before any election had been made. The court held that it was an arbitration agreement and, as part of its *ratio*, rejected both the optionality argument and the mutuality argument.

82 Dyna-Jet submits that *Pittalis* is authority only for the proposition that where a dispute-resolution agreement gives a party a right to elect to refer a future dispute to arbitration *and that party wishes to exercise that option*, albeit out of time,[23] an arbitration agreement between the parties within the meaning of the IAA exists. But, says Dyna-Jet, that situation is distinguishable from a case, such as the present, in which the party given the option to arbitrate (*ie*, Dyna-Jet) has never elected to arbitrate and, indeed, has absolutely no intention of doing so.[24]

83 I reject this distinction. The tenant in *Pittalis* had not exercised its option to arbitrate when the court considered its application. The court therefore had to consider whether the clause in question was, by its inherent nature, an arbitration agreement. The court had to undertake that consideration without the benefit of having a crystallised reference to arbitration to rely on. Whether an election has actually been made to arbitrate or not cannot affect the question whether a dispute-resolution agreement is by its inherent nature an arbitration agreement. That question is assessed by looking at the dispute-

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[23] Plaintiff's submissions dated 26 February 2016 at paragraph 16.

[24] Plaintiff's submissions dated 26 February 2016 at paragraph 18.

resolution agreement at the time the parties consent to it contractually and examining whether it comprises within it a mechanism by which the parties could become bound to arbitrate future disputes. Whether or not a party who has a right to elect to arbitrate under the clause does or does not choose to exercise that right at some later point is irrelevant to the analysis under s 6(1) of the IAA. It may, however, relevant to the analysis under s 6(2) of the IAA (see [152] to [174] below).

84 The one small caveat which I have mentioned at [81] above, and the only conceivable point of distinction – which Dyna-Jet has not raised – is that *Pittalis* did not involve a right to elect between arbitration and litigation. *Pittalis* concerned a rent-review clause and not a dispute-resolution agreement. The purpose of the rent-review clause in *Pittalis* was to provide the tenant an alternative contractual means of fixing the open-market rent. Its purpose was not to specify how a dispute arising from a breach of contract should be resolved. Litigation was not an option under the rent-review clause in *Pittalis* simply because there would be no breach of contract for the parties to litigate when the tenant invoked that clause.

85 This, to my mind, is a distinction without a difference. The issues which both the mutuality argument and the optionality argument raise are internal to arbitration and relate to the fundamental issue of what constitutes an arbitration agreement. The points underlying those issues are not made by reference to breach of contract or by counterpoint with litigation or its availability as an alternative to arbitration to resolve the dispute arising from that breach of contract. I therefore accept that *Pittalis* correctly states English law – and indeed Singapore law – on both the optionality point and the mutuality point.

The Stena Pacifica (1990)

86 The next case I analyse is *Navigazione Alta Italia S.p.A. v Concordia Maritime Chartering A.B. (The "Stena Pacifica")* [1990] 2 Lloyd's Rep 234 ("*The Stena Pacifica*"). This is a decision of Evans J sitting in the English High Court. The *Stena Pacifica* was a dispute between charterers and owners arising from a later version of the same standard-form charterparty as was before Bingham J in *The Messiniaki Bergen*. It therefore included a similar dispute-resolution agreement to that which Bingham J had considered earlier (see [69] above). In *The Stena Pacifica*, however, the charterers had not exercised their option to arbitrate. In fact, just like the tenant in *Pittalis*, the charterers found themselves out of time to exercise their option and sought an extension of time to do so under s 27 of the English Arbitration Act 1950.

87 The question before Evans J was the same question which arose in *Pittalis*: whether a dispute-resolution agreement was "an agreement to refer future disputes to arbitration" within the meaning of s 27 of the English Act at a point in time before a right of election had been exercised. The charterers argued that even an *option* to refer future disputes to arbitration was "an *agreement* to refer future disputes to arbitration" within the meaning of s 27. This is the argument which found favour with the Court of Appeal in *Pittalis* (see [79] above).

88 Evans J accepted the argument. He held that a dispute-resolution agreement was "an agreement to refer future disputes to arbitration" even if it contained a condition – such as the exercise of an option – which had to be satisfied before a binding obligation to arbitrate a specific dispute could arise (at 239):

> … I prefer to rest my judgment on [the plaintiff's] second and wider contention, that *even a conditional (or optional) agreement to refer future disputes to arbitration, is nevertheless "an agreement to refer future disputes"* within the clause. *It is a binding agreement (cf. Mr. Justice Bingham quoted above* [in *The Messiniaki Bergen*]*)* and it requires the parties to refer a future dispute to arbitration whenever a valid election is made. True, there is no reference of any particular dispute until such an agreement does come into existence, but there never can be an actual reference until after the dispute has arisen. Before that, there can only be an agreement that future disputes will be referred, and *in my judgment the fact that such an agreement depends upon the exercise of an option, even by the party claiming arbitration, does not prevent this from being "an agreement to refer future disputes"* within the [section].
>
> [emphasis added]

89 In *The Stena Pacifica*, therefore, the question on the optionality argument which Bingham J did not have to consider in *The Messiniaki Bergen* arose squarely for Evans J's decision. Evans J reached the opposite

conclusion. Further, unlike *Pittalis*, the question arose before Evans J in the context of an outright dispute-resolution agreement, *ie*, where litigation was the alternative to arbitration if the condition was not satisfied.

PMT Partners (1995)

90 The High Court of Australia considered both the optionality argument and the mutuality argument in *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 131 ALR 377 ("*PMT Partners*"). It accepted expressly the reasoning in *Pittalis* in preference to that in *Hammond*, while expressly acknowledging that *Pittalis* did not involve a choice between litigation and arbitration.

91 In *PMT Partners*, cl 45 of the contract between a principal and a contractor provided as follows:

> All disputes or differences arising out of the Contract … shall be decided as follows:
>
> …
>
> (b) … If the Contractor is dissatisfied with the decision given by the Principal …, he *may* … give notice in writing to the Principal requiring that the matter at issue be referred to arbitration … and thereupon the matter at issue shall be determined by arbitration. If, however, the Contractor does not … give such a notice to the Principal …, the decision given by the Principal … shall not be subject to arbitration.
>
> …
>
> [emphasis added]

92 Like the tenant in *Pittalis* and the charterer in *The Stena Pacifica*, the contractor in *PMT Partners* found itself out of time to take a step which was an essential prerequisite for it to be entitled to refer a dispute to arbitration under cl 45. It therefore applied to the courts of the Northern Territory for the

necessary extension of time under s 48 of the Commercial Arbitration Act 1985 (NT). *PMT Partners* therefore involved the same question, arising on an application of the same type, as in *Pittalis* and *The Stena Pacifica*.

93 To secure an extension of time, the contractor had to establish that cl 45 was an "agreement in writing to refer present or future disputes to arbitration" within the meaning of s 4 of the Commercial Arbitration Act 1985 (NT). The principal relied on *Hammond* to make two points in opposition to the application. The first point was that because cl 45, like cl 23(a) in *Hammond* (see [64] above), used the permissive "may" rather than the mandatory "shall", cl 45 preserved the contractor's existing right to sue at law and therefore was an option to arbitrate rather than an obligation to arbitrate. The second point was that this optionality took the dispute-resolution agreement outside the statutory definition of "arbitration agreement".

94 On the facts of the case, the High Court held unanimously that cl 45 did not on its proper construction confer on the contractor an option to arbitrate. Instead, cl 45 made arbitration the contractor's exclusive mode of resolving all disputes. *Obiter*, the High Court also held that, even if cl 45 did confer an asymmetric option to arbitrate, it would nevertheless be an arbitration agreement. The High Court thereby rejected both the optionality argument and the mutuality argument.

95 Brennan CJ, Gaudron and McHugh JJ, gave the majority judgment of the High Court. They observed (at 381) that the intermediate appellate court had proceeded on the view that the definition of "arbitration agreement" required "that both parties be bound, then and there, to refer their disputes to arbitration". This view, of course, contains within it an acceptance of both the

mutuality argument and the optionality argument. The majority in the High Court rejected both optionality and mutuality as being unwarranted glosses on the statutory definition of an "arbitration agreement". They held that the natural and ordinary meaning of the definition did not require mutuality and did not preclude optionality (at 383):

> It is of fundamental importance that statutory definitions are construed according to their natural and ordinary meaning unless some other course is clearly required. It is also of fundamental importance that limitations and qualifications are not read into a statutory definition unless clearly required by its terms or its context, as for example if it is necessary to give effect to the evident purpose of the Act. *The words "agreement ... to refer present or future disputes to arbitration" in s 4 of the Act are, in their natural and ordinary meaning, quite wide enough to encompass agreements by which the parties are bound to have their dispute arbitrated if an election is made or some event occurs or some condition is satisfied, even if only one party has the right to elect or is in a position to control the event or satisfy the condition. … [T]here is nothing in the Act which requires that the natural and ordinary meaning of the words used in the definition be qualified in any way.* And when it is given its natural and ordinary meaning, the definition is clearly satisfied by cl 45, even if, as was held by the Court of Appeal, cl 45 does not preclude the Contractor from pursuing its claim in the courts.
>
> [emphasis added]

96 Toohey and Gummow JJ delivered a concurring judgment. They too rejected mutuality and optionality in the following terms (at 393):

> …the terms of the definition of "arbitration agreement" in s 4 of the Act extend to an agreement whereby the parties are obliged *if an election is made*, particular event occurs, step is taken or condition is satisfied (*whether by either or both parties*) to have their dispute referred to arbitration. This result is within the ordinary and natural meaning of the terms of the definition and there is no sufficient reason to cut down that meaning.
>
> [emphasis added]

Manningham City Council (1999)

97 The retreat from *Hammond* was complete in 1999. That was the year the Victorian Court of Appeal unanimously overruled *Hammond* in *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13 ("*Manningham City Council*"), adopting instead the reasoning in *PMT Partners* and *Pittalis.*

98 *Manningham City Council* involved a building contract between a proprietor and a builder. The first phase of the contract's dispute-resolution procedure required each party, upon receiving notice of a dispute from the counterparty, to try and resolve the dispute by negotiation. If the negotiations failed, the dispute-resolution agreement permitted each party to serve a further notice referring the dispute either to arbitration or litigation in the following terms:

> **13.03 FURTHER NOTICE BEFORE ARBITRATION OR LITIGATION**
>
> … [E]ither party may by … notice in writing … to the other party refer such dispute to arbitration or litigation. The service of such further notice under this Clause 13.03 shall … be a condition precedent to the commencement of any arbitration or litigation proceedings in respect of such dispute.
>
> **13.04 REFERENCE OF DISPUTES**
>
> At the time of giving the notice referred to in Clause 13.03 the party who wishes the dispute to be referred to arbitration shall provide to the other party evidence that he has deposited … security for costs of the arbitration proceedings. Subject to compliance with … Clause 13.03 and … Clause 13.04 *such dispute or difference … shall be and is hereby referred to arbitration ….*
>
> [emphasis added]

99 A dispute arose between the proprietor and the builder. The parties duly attempted to resolve the dispute by negotiation. When the negotiations

broke down, the proprietor issued a notice of dispute under cl 13.03 (see [98] above) referring their dispute to litigation. An hour later, the builder issued a notice of dispute under the same clause referring the same dispute to arbitration. The proprietor then commenced action against the builder seeking damages for breach of contract. In response, the builder applied to stay the action under s 53 of the Victorian Commercial Arbitration Act 1984 (Vic). That section is *in pari materia* with s 6 of the AA. It gives the court a discretion to stay an action which has been commenced by a party to an "arbitration agreement" against another party to that agreement. Section 4 of the Victorian Act defines an "arbitration agreement" as "an agreement in writing to refer present or future disputes to arbitration".

100 The question before the Victorian Court of Appeal, therefore, was whether the parties' dispute-resolution agreement was also an arbitration agreement. The proprietor contended that it was not, relying on *Hammond* and on the optionality argument which found favour there. The Victorian Court of Appeal rejected that argument and upheld the stay which had been granted by the judge at first instance.

101 Buchanan JA, delivering the leading judgment of the court at the invitation of Winneke P, held (at [27]) that a dispute-resolution agreement was an arbitration agreement even if it contemplated the parties becoming bound to arbitrate their disputes only upon certain conditions being fulfilled:

> The agreement in the present case requires resolution of a dispute by arbitration once a notice of referral to arbitration has been given under cl. 13.03 and provision has been made for the security required by cl. 13.04. Thereupon, according to cl. 13.04, the dispute "shall be and is hereby referred to arbitration". The agreement in terms contemplates that a dispute may be resolved by litigation, thereby making express that which was implicit in the agreement considered by the

> High Court in [*PMT Partners*]. However, it remains an agreement by which the parties are bound to have their disputes arbitrated if certain conditions are fulfilled. If a notice is properly given under cl. 13.03 referring the dispute to arbitration and security for costs is provided, the dispute is referred to arbitration because the parties have already agreed that the dispute will be resolved by arbitration upon the occurrence of those events.

102 He held, further, that on its proper construction, the arbitration agreement did not become spent and cease to be an "arbitration agreement" in relation to the parties' dispute simply because the proprietor had served a notice referring the parties' dispute to litigation. There was nothing in the arbitration agreement which foreclosed the builder's contractual right to serve a notice referring their dispute to arbitration simply because the proprietor had exercised its contractual right to serve a notice referring the same dispute to litigation. The builder having actually served that notice, it was effective as a matter of contract to bind both parties to arbitrate their dispute. On the proper construction of the arbitration agreement, that was so even though the builder's notice referring the dispute to arbitration had come after the proprietor's notice referring the same dispute to litigation.

103 Phillips JA delivered a judgment concurring with Buchanan JA. He noted (at [8]) that the optionality argument which found favour with Menhennitt J in *Hammond* had since been authoritatively rejected. Phillips JA also rejected the mutuality argument *sub silentio*. In my view, he did not reject it explicitly because the mutuality argument had, by this time of his judgment, been so thoroughly discredited that it no longer required explicit rejection.

104 Phillips JA therefore held that a dispute-resolution agreement may be an arbitration agreement notwithstanding that the reference of a particular

dispute to arbitration will depend upon the exercise of an option, and even if that option is asymmetric. At [10], Phillips JA held as follows:

> …[I]t has now been authoritatively established that *an agreement to refer present or future disputes to arbitration may be found to reside in the parties' contract, notwithstanding that proceeding to arbitration in a given situation depends according to the contract upon one party or the other electing to that end – or indeed even if it depends only upon one party but not the other so electing*: *P.M.T. Partners* …. That is consistent with the decision of the Court of Appeal in England in [*Pittalis*] …: see also the criticism of the contrary view in *Russell on Arbitration*, 20th ed., (1982), pp. 38ff. It is of course common enough to find that the arbitration agreement, once identified, is called into operation only if certain conditions are fulfilled: for instance, if there is a dispute, if notice identifying the dispute is given, and so on. To add notice of election as a further condition is consistent with this pattern; and for present purposes *there seems no significant difference between a right to elect which is conferred in terms of proceeding to arbitration and a right to elect to proceed to arbitration or to litigation*. Indeed, each would seem to mean much the same, given that the contract between the parties cannot nowadays be so expressed as, in effect, to exclude litigation.
>
> [emphasis added]

China Merchants (2001)

105 The next case is *China Merchants Heavy Industry Co Ltd v JGC Corp* [2001] 3 HKC 580 ("*China Merchants*"), a 2001 decision of the Hong Kong Court of Appeal. China Merchants was a dispute between a main contractor and a sub-contractor. Their dispute-resolution agreement read as follows:

> SETTLEMENT OF DISPUTES
>
> If any dispute … shall arise between [the main contractor] and [the sub-contractor] in connection with … the contract …which cannot be settled by mutual agreement, [the main contractor] shall state its decision in writing and give notice of the same to [the sub-contractor].
>
> …

> … [I]f, within fifteen (15) calendar days after the date of the above decision in writing made by [the main contractor], [the sub-contractor] shall by written notice to [the main contractor] so request specifying such dispute …, then the matter shall be referred to a single arbitrator….

106 The optionality argument did not arise in *China Merchants*, because the dispute-resolution agreement did not on its proper construction give the sub-contractor a right to choose between arbitration and litigation. Like the dispute-resolution agreement in *PMT Partners*, it gave the sub-contractor only the choice between referring a dispute to arbitration and accepting that it was bound by the main contractor's decision in writing on that dispute.

107 The sub-contractor argued that, in the events which had happened in that case, it was entitled to pursue the litigation against the main contractor because the parties' arbitration agreement was inoperative. I discuss this aspect of the decision in greater detail below (at [167] to [169]) when I consider the second issue in this case (see [24(b)] above). For present purposes, it suffices to note that the Hong Kong Court of Appeal relied on *Pittalis* to hold that the dispute-resolution agreement was an arbitration agreement, thereby rejecting the mutuality argument (at 585):

> There is, we think, no doubt that a clause in an agreement which gives only one of the parties the right to refer any dispute or difference to arbitration is an arbitration agreement within the meaning of art 8(1) [of the Model Law]. That is in effect what the Court of appeal in England held in *Pittalis*…. Accordingly, [the judge at first instance] had to stay the proceedings unless the agreement conferring on the plaintiff the right to refer any dispute to arbitration was 'null and void, inoperative or incapable of being performed'.

WSG Nimbus (2002)

108 The only Singapore case in which the optionality argument has been considered is *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri*

Lanka [2002] 1 SLR(R) 1088 ("*WSG Nimbus")*. In that case, the parties' dispute-resolution agreement permitted either party to submit a dispute to arbitration (at [19]):

> … In the event that the parties have a dispute … they shall use their best endeavours to resolve it …. In the event that they fail to do so after 14 days then either party may elect to submit such matter to arbitration in Singapore ….

109 Lee Seiu Kin JC (as he then was) had to decide whether this dispute-resolution agreement was an arbitration agreement so as to found the court's jurisdiction to grant an injunction in aid of a Singapore-seat arbitration under s 12(6) of the IAA. He observed (at [21]) that the effect of the dispute-resolution agreement was that, once *either* party elected to arbitrate, the other party was bound to arbitrate. He then proceeded to analyse *The Messiniaki Bergen*, *Hammond*, and *Manningham City Council*. He concluded that the optionality argument was incompatible with these authorities and with the policy of the IAA:

> 30 In the light of these authorities, it is clear that *an agreement in which the parties have the option to elect for arbitration which, if made, binds the other parties to submit to arbitration is an arbitration agreement within the meaning of the [IAA].* This is plainly in accord with the policy behind the [IAA] which is to promote the resolution of disputes by arbitration where the parties have agreed to achieve it by this method. I would therefore hold that [the dispute-resolution agreement] is an arbitration agreement for the purpose of this application and accordingly this Court has jurisdiction to make orders under s 12(6) in respect of this arbitration.
>
> [emphasis added]

110 Dyna-Jet attempts to distinguish *WSG Nimbus* on the basis that it involved a symmetrical option to arbitrate.[25] To make that argument is simply

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[25] Plaintiff's submissions dated 26 February 2016 at paragraph 11.

to revive the mutuality argument. I have demonstrated above that this argument has been thoroughly discredited. Whether a dispute-resolution agreement confers a symmetric or an asymmetric right of election to arbitrate is no longer a difference of any conceptual relevance to whether it is also an arbitration agreement. I refer once again to the observation of Fox LJ in *Pittalis* which I have set out at [80] above, and which I again accept. The only mutuality required to establish that a dispute-resolution agreement is an arbitration agreement is the mutual consent of the parties when they entered contractually into the dispute-resolution agreement.

NB Three Shipping (2005)

111 The penultimate case which I consider is *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 Lloyd's Rep 509 ("*NB Three Shipping*"). In that case, the dispute-resolution agreement in a charterparty provided as follows:

> The Courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the owner shall have the option of bringing any dispute hereunder to arbitration.

112 When a dispute arose, the charterers commenced action against the owners. Eight days later, the owners claimed to exercise their right to refer the dispute to arbitration and applied to stay the charterer's action under s 9 of the English Arbitration Act 1996. The owners' case was that the dispute-resolution agreement was also an arbitration agreement within the meaning of English Arbitration Act 1996. The charterers submitted that, on the proper construction of the dispute-resolution agreement, there was no arbitration agreement because the owner's option to arbitrate was extinguished once the

charterers commenced action in England, as the dispute-resolution agreement expressly permitted them to do.

113 Morison J rejected the charterer's argument. He held (at [11]) that the dispute-resolution agreement, on its proper construction, was designed to give better rights to the owners rather than to the charterers. Therefore, the charterers' conduct in commencing action, even though not a breach of their obligations under the agreement, did not operate to extinguish the owners' option to arbitrate. That option would remain available to the owners unless they did something to lead the charterers to believe that the option would not be exercised, whether by taking a step in the charterers' action or in some other way. To hold otherwise would allow the charterer to obtain and retain an advantage from "jumping the starting gun". Morison J concluded as follows (at [12]):

> 12. …Apart from anything else, one of the fundamental objectives of the 1996 Act is to give the parties' autonomy over their choice of forum. On my view of the contract, once owners exercise their option the parties have agreed that the disputes should be arbitrated. By refusing a stay the court would not be according to them their autonomy.

114 Once again, Morison J's manner of expressing his conclusion in this paragraph should not be read as suggesting that the dispute-resolution agreement before him was not an arbitration agreement until the owners exercised their option to arbitrate. To read his *dictum* in that sense would fail to distinguish between: (i) a dispute-resolution agreement which is by its inherent nature also an arbitration agreement in relation to future disputes; and (ii) an arbitration agreement in respect of a specific, existing dispute. The two are not mutually or necessarily inconsistent because the latter does not necessarily exclude the former.

Law Debenture (2005)

115 The final decision which I consider is the decision of Mann J in *Law Debenture Trust Corporation Plc v Elektrim Finance BV and others* [2005] EWHC 1412 (Ch) ("*Law Debenture*").

116 In *Law Debenture*, four disputes arose between a trustee (representing the holders of bonds), the issuer, and the guarantor of those bonds. The guarantor referred three of those disputes to arbitration. The trustee deliberately declined to participate in that reference. Instead, it opted to commence action against the issuer and guarantor in respect of all four disputes. The trustee then applied to the English court for a declaration that it had no arbitration agreement with the guarantor and for an injunction to restrain the guarantor from pursuing its reference to arbitration. The trustee applied for that relief under s 72 of the English Arbitration Act 1996. That section gives a person who is alleged to be a party to an arbitration the express right to seek a declaration that it has no valid arbitration agreement in relation to that arbitration and to seek consequential injunctive relief. The issuer and guarantor cross-applied to stay the litigation under s 9 of the English Arbitration Act 1996.

117 The dispute-resolution agreement in *Law Debenture* read as follows:

> 29.2 Any dispute arising out of or in connection with these presents…may be submitted by any party to arbitration….
>
> …
>
> 29.7 Notwithstanding Clause 29.2, for the exclusive benefit of the Trustee and each of the Bondholders, [the issuer and guarantor] hereby agree that the Trustee and each of the Bondholders shall have exclusive right, at their option, to apply to the courts of England, who shall have non-exclusive

> jurisdiction to settle any dispute which may arise out of or in connection with these presents….

118 Mann J held (at [16] and [36]) that, on an application under s 72 of the English Arbitration Act 1996, it was for the court to determine finally and on the merits the question of whether there was an arbitration agreement between the parties, rather than to leave that question to the arbitral tribunal to determine. Mann J also felt that the outcome of the s 72 application dictated the outcome of the trustee's application for an injunction to halt the arbitration and of the guarantor's and issuer's application to stay the action. If he determined the question under s 72 *in favour* of the trustee, it was self-evident that the trustee's action should continue and the guarantor's arbitration be halted. On the other hand, if he determined the question under s72 *against* the trustee, it was equally self-evident that the guarantor's arbitration should continue and the trustee's action be halted (at [32]). He did not, therefore, analyse separately either the trustee's injunction application or the issuer's and guarantor's stay application.

119 Having considered the parties' submissions on the trustee's s 72 application, Mann J concluded that the trustee and the guarantor had no arbitration agreement in respect of the three disputes which the guarantor had referred to arbitration. He held that the parties' dispute-resolution agreement created a dual dispute-resolution regime (at [40]) under which all the parties had the right to refer disputes to arbitration but only the trustee and the bondholders had the right to litigation as an alternative. He concluded (at [47]) that the trustee had a contractual right to commence and maintain the litigation, and no case was advanced that it had waived that right. Thus he halted the guarantor's arbitration and allowed the trustee's action to continue.

120 At first glance, *Law Debenture* appears to be an authority in Dyna-Jet's favour. Mann J's decision not to stay the trustee's action resulted from his conclusion that there was no arbitration agreement between the trustee and the guarantor. Mann J did not find – and indeed the trustee did not allege (see [10]) – that there was an arbitration agreement between the parties but that it was somehow null and void, inoperative or incapable of being performed.

121 On closer examination, however, *Law Debenture* supports my rejection of Dyna-Jet's submissions. Mann J did not determine in *Law Debenture* that the dispute-resolution agreement before him (see [117] above) was not an arbitration agreement. What he determined was that the guarantor's reference of three specific disputes to arbitration pursuant to the dispute-resolution agreement did not give rise to an arbitration agreement in respect of those three disputes. It is important to note that in arriving at that determination, Mann J accepted the trustee's submission that the dispute-resolution agreement did not amount to an arbitration agreement "in the events which have happened" (at [11]), *ie*, in light of the guarantor's reference of three specific disputes to arbitration. Also for that reason, Mann J characterised the question before him as "whether there is an arbitration agreement which, *as events now stand*, agrees to submit the *current dispute* to arbitration" (emphasis added, at [20]).

122 Mann J's focus in *Law Debenture* therefore narrowed from a consideration of the inherent nature of the dispute-resolution agreement in a general sense to a consideration of the nature of the particular reference to arbitration of the three specific disputes in question. That narrowing occurred for two reasons.

123 First, the application came before Mann J after the guarantor had actually referred three specific disputes to arbitration. So Mann J was not required to determine whether the dispute-resolution agreement was, by its inherent nature, an arbitration agreement, *ie*, in relation to hypothetical future disputes. He was not even considering – as I have to consider on the facts before me – whether the dispute-resolution agreement was an arbitration agreement in relation to a specific dispute which had actually arisen, but which had not actually been referred to arbitration. In the circumstances before him, therefore, it is entirely natural that Mann J should focus on whether the dispute-resolution agreement had given rise to an arbitration agreement in respect of the three specific disputes which the guarantor had actually referred to arbitration.

124 Second, s 72 of the English Arbitration Act 1996 by its very nature focuses the court's attention on whether there is an arbitration agreement in respect of an actual dispute which has been referred to an arbitral tribunal. That section has no equivalent in the IAA or the AA and is a uniquely English provision. An applicant for declaratory or injunctive relief under that section can invoke it only after it has been named as an alleged party in a reference to arbitration. There is therefore no need to consider on a s 72 application whether a dispute-resolution agreement is, by is inherent nature, an arbitration agreement.

125 If Mann J in *Law Debenture* had been required to consider the inherent nature of the dispute-resolution agreement before him, there is an indication in his judgment that he would have held that it was an arbitration agreement. That is because, in arriving at his finding that there was no arbitration agreement in relation to the three disputes actually referred to arbitration, he

expressed *obiter* a preference for the view (at [18]) that the guarantor's reference to arbitration when made had at that time given rise to a valid arbitration which ceased to be valid as soon as the trustee exercised its contractual option to litigate the disputes. A valid arbitration could have arisen upon the guarantors' reference only if the dispute-resolution agreement was, by it inherent nature, an arbitration agreement.

Conclusion on the first issue

126 In analysing this body of authority, I have drawn no distinction between:

(a) An arbitration agreement which makes arbitration optional, but where litigation is not an available alternative either because there is no dispute to litigate (*Pittalis*) or because the arbitration agreement on its proper construction manifests the parties' intention that arbitration should be the exclusive dispute-resolution procedure (*PMT Partners*, *China Merchants*);

(b) An arbitration agreement which makes arbitration optional without expressly stipulating that litigation is an alternative (*Hammond*, *WSG Nimbus*);

(c) An arbitration agreement which makes arbitration and litigation equal alternatives (*Manningham City Council*);

(d) An arbitration agreement which makes litigation mandatory subject to an express right to opt for arbitration (*The Messiniaki Bergen*, *The Stena Pacifica*, and *NB Three Shipping*); and

(e) An arbitration agreement which makes arbitration mandatory subject to an express right to opt for litigation (*Law Debenture*).

127 The cases I have analysed show that these differences of expression make no difference of principle. All these dispute-resolution agreements manifest a mutual intent to have resort to arbitration, in the sense that both parties envisage that they could, in certain circumstances operating in the future, come under an obligation to arbitrate a dispute. That suffices to characterise a dispute-resolution agreement as an arbitration agreement. That is so whether that manifest mutual intent is expressed to be unconditional or to be subject to one or more contingencies. That is also so whether that manifest intent to arbitrate is expressed positively as the dispute-resolution rule or negatively as the dispute-resolution exception.

128 Quite apart from authority, this must be the correct position. This approach advances party autonomy and freedom of contract. It is entirely consistent with the current trend towards assimilating the rules applicable to arbitration agreements to the rules applicable to all other provisions in a commercial contract (see *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [30] and *Downing* at [25]).

129 In addition, the five propositions which I have extracted from this body of authority (see [61] above) are completely consistent with s 2A of the IAA. Section 2A does not require an arbitration agreement to refer *all* future disputes to arbitration or to do so *unconditionally*. Quite the contrary: s 2A expressly accommodates within its definition an arbitration agreement which deals only with "certain disputes". That captures within the statutory definition agreements – such as the present one – in which the "certain disputes" which

are to be referred to arbitration in the future are only those disputes which a party having a right of election chooses to refer to arbitration.

130 The foregoing analysis shows that the dispute-resolution agreement in the case before me is indeed an arbitration agreement within the meaning of s 2A and s 6 of the IAA. That is the case even though it makes arbitration subject to a contingency, *ie*, Dyna-Jet's exercise of a right of election. That is also the case despite the fact that it confers that right of election only upon Dyna-Jet.

131 As a result, s 6(1) obliges me to stay this action unless Dyna-Jet is able to make out an unarguable case (see [26] above) that the arbitration agreement is "null and void", is "inoperative" or is "incapable of being performed" within the meaning of the proviso to s 6(2) of the IAA.

132 It is to the proviso that I now turn.

The proviso to s 6(2) of the IAA

133 It is first important to tease out with more precision the consequences of my holding that the parties' arbitration agreement gives Dyna-Jet a right to elect whether to arbitrate its current dispute with Wilson Taylor rather than an obligation to do so. I return to the operative words of the parties' arbitration agreement:

> Any claim or dispute … shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings …

I make three points about these operative words.

134 First, as I have held (see [52] above), these words give Dyna-Jet a right to elect arbitration as the method of resolving a specific dispute. Although these words makes no express reference to litigation, there is nothing to suggest that Dyna-Jet's choice was between resolving the dispute through arbitration and not resolving the dispute at all (*cf PMT Partners* at [94] above and *China Merchants* at [106] above), whether in the arbitration agreement, in the contract as a whole or in the wider contractual context. So, although this arbitration agreement makes no express reference to litigation, its effect is to confer on Dyna-Jet an unfettered right to elect arbitration and also to decline to elect arbitration with respect to any specific dispute, thereby leaving it contractually free to resolve that dispute through litigation. And, in keeping with the unilateral character of a right of election, Wilson Taylor has no contractual right to reject or avoid the consequences of Dyna-Jet's election to resolve a dispute through arbitration or its election not to do so.

135 The second point is that Dyna-Jet's right to elect arbitration, though unfettered, may be exercised once, and only once in respect of a specific dispute. The parties' arbitration agreement does not permit Dyna-Jet, for example, to elect against arbitration by commencing litigation in respect of a specific dispute and, after exchanging pleadings, later to elect to arbitrate the same dispute; and yet later, being dissatisfied with the progress of the arbitration, to reverse its election and once again litigate the same dispute, (see *Law Debenture* at [42]). It was no doubt possible for Dyna-Jet, by suitable drafting, to create contractually just such a reversible right of election and re-election for itself, to permit it to drag Wilson Taylor in this way back and forth between arbitration and litigation. But such a right would be so unusual and so

uncommercial that it would require very clear contractual words indeed to create it. The words of the parties' arbitration agreement are nowhere near clear enough. And in any event, Dyna-Jet does not suggest that it had any such reversible right of election.

136 Therefore, the contractual effect of the parties' arbitration agreement properly construed is that once Dyna-Jet exercises its right to elect arbitration in respect of any particular dispute, that right is spent and cannot be exercised again. So too, if Dyna-Jet declines to elect arbitration and takes a step manifestly inconsistent with an election to arbitrate – for example, by commencing action over a dispute – its right to elect to arbitrate that dispute will be extinguished and cannot thereafter be exercised.

137 The third point, which follows from the second point, is that once Dyna-Jet exercises its right of election in respect of a specific dispute or loses that right in the manner I have set out at [136] above, Dyna-Jet is just as much bound by the result as Wilson Taylor is. Thus, if Dyna-Jet elects to arbitrate a specific dispute, it is thereafter bound to arbitrate that dispute even if it later decides that it would prefer to elect litigation. So too, if Dyna-Jet elects not to arbitrate a particular dispute and commences litigation instead, it is bound to litigate that dispute and cannot later claim to elect to arbitrate that dispute, no matter how much it may regret its choice of litigation. That is so even though the parties bargained in their contract that Dyna-Jet should have the "better rights" under the parties' arbitration agreement (to echo the words of Morison J in *NB Three Shipping* (see [113] above).

138 The result of this analysis is that the parties are in litigation *pursuant to*, and not despite, the contractual operation of their arbitration agreement.

Dyna-Jet's election not to arbitrate coupled with its act in commencing this action is not a breach of the parties' arbitration agreement. On the contrary, it is entirely consistent with their arbitration agreement. That exclusion is permanent and binds both parties. Dyna-Jet cannot now change its mind. And the parties' arbitration agreement gives Wilson Taylor no contractual right of access to arbitration independent of Dyna-Jet's election. That outcome is within the spectrum of outcomes which the parties bargained for.

139 With those important points in mind, I now turn to consider the meaning of the proviso to s 6(2).

Overview of the proviso

140 The proviso to s 6(2) permits Dyna-Jet to avoid a stay of this action only if it can show that the parties' arbitration agreement is "null and void, inoperative or incapable of being performed". This proviso is adopted from Art 8(1) of the Model Law:

> *Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> …

141 Article 8(1) of the Model Law adopts this proviso, in turn, from the obligation which Art II(3) of the New York Convention imposes on the courts of each contracting state to refer litigants to arbitration when they are parties to an arbitration agreement:

> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an

> agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

142 The result of the widespread ratification of the New York Convention and adoption of the Model Law is that this proviso is a part of the arbitration legislation of a large number of countries. Despite that, there has been surprisingly little judicial consensus on its meaning, whether taken as a whole or deconstructed into its three component terms.

143 A convenient starting point in approaching the proviso as a whole is found in the chapter by Prof Albert Jan van den Berg, a widely-respected commentator on the New York Convention, entitled "The New York Convention of 1958: an Overview" in *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (E Gaillard and D Di Pietro eds) (Cameron May, 2008). In the Professor's opinion: (i) "null and void" covers arbitration agreements which suffer from invalidity from the outset; (ii) "inoperative" covers arbitration agreements which have ceased to have effect; and (iii) "incapable of being performed" covers arbitration agreements under which the arbitration cannot be set in motion. These three points emerge from the Professor's following succinct exposition on the meaning of these terms:

> *"Null and void, inoperative, or incapable of being performed"*
>
> According to the terminal words of Article II(3), a court can refuse to refer the parties to arbitration if it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed". Neither the text of the Convention nor its legislative history gives much guidance as to how these words should be interpreted.
>
> Several courts have held that, having regard to the "pro-enforcement-bias" of the Convention, the words should be

> construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only.
>
> The words "null and void" may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.
>
> The word "inoperative" can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.
>
> The words "incapable of being performed" would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration.

144 I accept the professor's point that these terms should be construed narrowly. I accept also that it would be contrary to the New York Convention, to the IAA and the Model Law, and to our well-established approach to arbitration to accept that any of these terms apply otherwise than in manifest cases. That is the reason for the very high burden which I have placed on Dyna-Jet (see [26] above) to show that there is no arguable case against its position on this issue.

145 The roots of the circumstances which will trigger the proviso lie quite clearly in contract, as that is the legal vehicle which supplies the necessary consent for arbitration. Thus, Francis Xavier SC and Tng Sheng Rong in their chapter entitled "Role of the Court" in *Arbitration in Singapore: A Practical Guide* (S Menon CJ Editor-in-Chief, D Brock gen ed) (Sweet & Maxwell, 2014) say the following (at §2.027, page 45), relying on the decision of the Court of Appeal of Alberta in *Kaverit Steel and Crane Ltd v Kone Corp* (1992) 87 DLR (4th) 129:

> The phrase "null and void, inoperative or incapable of being performed" has been described in other jurisdictions as "an echo of the law about void contracts (null and void), unenforceable contracts (inoperative), and frustrated contracts (incapable of being enforced)". Though the Singapore courts have not yet directly ruled on the scope of the phrase, the general willingness of courts in Model Law jurisdictions to order a stay of court proceedings in favour of arbitration lends considerable weight to a narrow reading of the phrase …

146 The only Singapore case in which the outcome has turned on the meaning of the proviso is the decision of the assistant registrar Nathanael Khng in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229 ("*Sembawang*"). In that case, the dispute-resolution agreement in a contract between a main contractor and a sub-contractor provided for the parties to resolve their disputes by arbitration, subject to the main contractor having the asymmetric right to resolve disputes by litigation. The main contractor commenced litigation against the sub-contractor claiming liquidated damages. The sub-contractor in response brought a counterclaim in in the main contractor's litigation seeking damages for breach of contract. The main contractor applied to stay the counterclaim, relying on the parties' dispute-resolution agreement as an arbitration agreement.

147 The assistant registrar held that: (i) the parties' dispute-resolution agreement was an arbitration agreement, following *WSG Nimbus* (at [12]); (ii) the main contractor's stay application was governed by the IAA and not the AA (at [34]); (iii) the parties' arbitration agreement gave the main contractor alone an option to commence litigation to resolve a dispute (at [48]); (iv) while the parties' arbitration agreement entitled the sub-contractor by implication to raise disputes arising under the parties' contract by way of *defence* to the main contractor's claim in the action, including by way of set-off, the parties' arbitration agreement did not confer on the sub-contractor the

right to resolve disputes with the main contractor by way of *counterclaim* in litigation rather than by way of arbitration (at [50] to [52]); (v) the plaintiff had not lost the right to insist that the sub-contractor resolve the disputes comprised in its counterclaim by arbitration simply by exercising its contractual right to commence litigation for liquidated damages (at [53]); (vi) as a result of the preceding proposition, the parties' arbitration agreement was *not* null and void, not inoperative and was not incapable of being performed within the meaning of the proviso to s 6(2) of the IAA with respect to the disputes comprised in the sub-contractor's counterclaim (at [58]). The sub-contractor's counterclaim was therefore stayed under s 6 of the IAA, and thereby diverted to arbitration, with the main contractor at liberty to continue its action for liquidated damages.

148 *Sembawang* therefore stands for the proposition that, where an arbitration agreement confers on one party an option to litigate disputes, and where that party exercises that option by commencing litigation with respect to a specific dispute against its contractual counterparty, that exercise will not in itself preclude that party from insisting that the counterparty refer to arbitration disputes which are unrelated to the litigation, *ie*, disputes which go beyond merely advancing the counterparty's defence to the litigation, and the arbitration agreement will not therefore be within the proviso to s 6(2) of the IAA with respect to those unrelated disputes. I accept that proposition as correct.

149 *Sembawang* endorsed, albeit in *dicta* (see [49]), the converse proposition: that where an arbitration agreement confers on one party an option to litigate disputes, and where that party exercises that option by commencing litigation with respect to a specific dispute against its contractual

counterparty, that exercise will in itself preclude that party from thereafter referring the same dispute to arbitration.

150 The proposition which Dyna-Jet must satisfy me on in order to succeed on the second issue is the mirror image of this last proposition: that where an arbitration agreement confers on one party an asymmetric option to *arbitrate* disputes, and where that party declines to exercise that option with respect to a specific dispute and acts upon that decision by commencing litigation on that dispute against its contractual counterparty, that decision will in itself preclude that party from thereafter referring the same dispute to arbitration, and because the other party has no independent right to refer that dispute to arbitration (the option to arbitrate being asymmetric), the arbitration agreement will be within the proviso to s 6(2) of the IAA with respect to that dispute.

151 I accept that proposition as being correct beyond argument and will now demonstrate why. That demonstration will require examining individually the three components of the proviso. As I have foreshadowed (see [3] above), I have found that the parties' arbitration agreement is "incapable of being performed". I shall therefore consider these terms in the reverse sequence in which they appear in the proviso, starting with "incapable of being performed".

Incapable of being performed

152 An arbitration agreement is incapable of being performed when there is an obstacle which cannot be overcome which prevents the arbitration from being set in motion. Lord Mustill and Stewart Boyd QC, in Commercial Arbitration (Butterworths, 2nd Ed, 1989) ("*Mustill and Boyd*") at 465 (cited in *Sembawang* at [41]) take the view that "incapable of being performed":

> …connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. There must be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement: for example, where the mechanism for constituting the tribunal breaks down in a way which the Court has no ability to repair, or where a sole arbitrator named in the agreement cannot or will not act.

153 Prof Gary Born in his seminal text *International Commercial Arbitration* Vol 1 (Wolters Kluwer, 2nd Ed, 2014) ("*International Commercial Arbitration*") opines (at p 844) that it is "relatively clear" that arbitration agreements that are "incapable of being performed":

> …include cases where the parties have agreed upon a procedure that is physically or legally impossible to follow (for example, because a named arbitrator has died, and it is clear that no replacement was permitted by the parties). It also arguably includes cases of arbitration provisions that are unenforceable because they are vague, indefinite or internally contradictory (although strictly speaking, these cases are better regarded as instances where no agreement exists or an agreement is "null and void".

154 The list of circumstances in which an arbitration agreement will be incapable of being performed is not closed. Margaret L Moses in *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2nd Ed, 2012) at page 34 (first edition of 2008 cited in *Sembawang* at [42]) provides the following examples of these circumstances which could, in any given case, prevent an arbitration from taking place:

> … An arbitration agreement could be incapable of being performed if, for example, there was contradictory language in the main contract indicating the parties intended to litigate. Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated unless, of course, the parties could agree on a new arbitrator. … In addition, if the place of arbitration was no longer available because of political upheaval, this could render that arbitration agreement incapable of being

> performed. If the arbitration agreement was itself too vague, confusing, or contradictory, it could prevent the arbitration from taking place.

155 In his chapter titled "The 'Incapable of Being Performed' Exception in article II(3) of the New York Convention" in *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (E Gaillard and D Di Pietro eds) (Cameron May, 2008), Prof Stefan Kröll expresses the view (at 326) that: "the test for the non-obstructing party must be whether the arbitration proceedings can be effectively set into motion even without the cooperation of the other party. In light of this test, the 'incapable of being performed' defence should also not be equated with the English doctrine of frustration, as was done in some decisions."

156 A useful survey of the way in which international courts have interpreted the proviso is found in the UNCITRAL Guide on the New York Convention (the "UNCITRAL Guide"), prepared by the UNCITRAL Secretariat in conjunction with Profs Emmanuel Gaillard and George Bermann and was most recently updated on 18 July 2016.[26] The UNCITRAL Guide adopts (at [112]) Prof Kröll's definition of "incapable of being performed" and indicates that the term "is generally understood as relating to situations where the arbitration cannot effectively be set in motion". But, departing from Prof Kröll's definition, the UNCITRAL Guide appears to accept the analogy with frustration drawn by the court in *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce* (A.No. 2670/2008, A.No.1236/2008, O.A.No.277/2008 and A.No.2671/2008 in C.S.No.257/2008) ("*Ramasamy Athappan*") (at [22]):

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[26] Available at http://newyorkconvention1958.org.

> The phrase incapable of being performed signifies, in effect, frustration and the consequent discharge. If, after the making of the contract, the promise becomes incapable of being fulfilled or performed, due to unforeseen contingencies, the contract is frustrated.

157 The phrase "incapable of being performed" undoubtedly comprises the doctrine of frustration within it. On its natural and ordinary meaning, the phrase does comprise an arbitration agreement that cannot be fulfilled or performed by reason of supervening contingencies which the parties did not foresee or bargain for. However, I have difficulty in accepting that that phrase is synonymous with the doctrine of frustration. Frustration is a common law doctrine. But the phrase, originating as it does from an international convention, must be capable of being applied beyond just the common law. In my view, the phrase is also capable of comprising an arbitration agreement that cannot be fulfilled or performed, even if that is by reason of contingencies which the parties did foresee and cater for in their arbitration agreement. The core concept that this phrase seeks to capture is that, when a specific dispute arises between the parties, a contingency prevents the arbitration from being set in motion, whether that contingency is foreseen and bargained for or unforeseen and not bargained for.

158 It therefore appears to me that characterising the parties' arbitration agreement as one that is "incapable of being performed" is the most appropriate characterisation of the situation in which the parties now find themselves. It is true that none of the commentaries I have summarised in this section consider the meaning of the phrase "incapable of being performed" in relation to bargained-for contingencies. But that is because all of these commentaries have considered the meaning of this phase only in the context of

an arbitration agreement in the typical form: a present and unconditional obligation to arbitrate all future disputes.

159 Dyna-Jet's and Wilson Taylor's arbitration agreement is not in the typical form because it is not unconditional. It is expressly made subject to a condition: Dyna-Jet must elect to arbitrate. That contingency has not been satisfied: Dyna-Jet did not elect to arbitrate. That contingency will never be satisfied: Dyna-Jet has put it out of its power ever to revisit the issue and to elect to arbitrate this dispute.

160 In those circumstances, it seems to me entirely accurate to say that the parties' arbitration agreement is incapable of being performed. It is incapable of being performed because it is subject to a contingency which can never now be fulfilled. To paraphrase Professor Kröll (see [156] above), an arbitration of the specific dispute between the parties which forms the subject-matter of this action is one which Wilson Taylor cannot set into motion without the cooperation of Dyna-Jet. And, although it is true that Dyna-Jet is withholding its cooperation, it is also true that it has the contractual right to do so.

161 That conclusion does not, of course, mean that the parties' arbitration agreement is *entirely* incapable of being performed. If a dispute which is distinct from that which forms the subject-matter of this action arises, and if Dyna-Jet elects to arbitrate that dispute, both parties will then find themselves bound to arbitrate that dispute. In relation to that hypothetical and distinct dispute, the parties' arbitration agreement will be entirely capable of being performed simply because the intrinsic contingency in their arbitration agreement has been satisfied.

Inoperative

162 An arbitration agreement is inoperative, at the very least, when it ceases to have contractual effect under the general law of contract. That can occur as a result of a number of doctrines of the law of contract such as discharge by breach, by agreement or by reason of waiver, estoppel, election or abandonment.

163 David St John Sutton, Judith Gill, and Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) (cited in *Sembawang* at [39]) accept at §7-046 on page 370 that an arbitration agreement will be inoperative "where [it] has been repudiated or abandoned or contains such an inherent contradiction that it cannot be given effect". *Mustill and Boyd* at page 464 notes that the term "inoperative" has "no accepted meaning in English law", but proposes that it "would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future". They include in this category situations where an arbitration agreement ceases to have effect by virtue of a declaration to that effect by a court of competent jurisdiction or by virtue of common law doctrines such as termination by acceptance of repudiatory breach or frustration, or by agreement of the parties.

164 Prof Born in *International Commercial Arbitration* (at §5.06(d) on pages 842 to 843) defines an "inoperative" arbitration agreement as one which has ceased to have effect:

> It … appears reasonably clear that Article II(3) [of the New York Convention], which permits non-enforcement of "inoperative" agreements, refers to agreements that were at one time valid, but which thereafter ceased to have effect (or ceased to be "operative") In one commentator's words, "the word 'inoperative' refers to an arbitration agreement which has ceased to have effect." That would include cases of waiver,

> revocation, repudiation, or termination of the arbitration agreement, or failure to comply with jurisdictional time limits prescribed by the arbitration agreement.
>
> Thus, an arbitration agreement would be "inoperative" where the parties actively pursued litigation, rather than arbitration, resulting in a waiver of the right to arbitrate under applicable law. An arbitration agreement would also be "inoperative" if the parties mutually agree to litigate their dispute (or submit it to a different form of dispute resolution), or where a party repudiated the agreement.

165 Similarly, David Joseph QC in *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2010) ("*Jurisdiction and Arbitration Agreements*") observes (at §11.49 on page 353) that an arbitration agreement will be inoperative when it is discharged and comes to an end:

> An arbitration agreement therefore can come to an end by repudiation, frustration, waiver or election but it is necessary to distinguish between repudiation of the substantive contract and repudiation of the arbitration agreement.

166 The following are examples of circumstances in which an arbitration agreement would be inoperative:

(a) Where a party has waived a contractual right to arbitrate or finds itself estopped from relying on that right: *Tjong* at [53]; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 238 ALR 457 at [65]; *Ramasamy Athappan* cited in the UNCITRAL Guide at [106], [109], and [112].

(b) Where a party has abandoned its right to seek a stay under a particular jurisdiction's equivalent of s 6 of the IAA: *Eisenwerk Hensel Bayreuth Dipl-ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461 at [15]; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002]

NSWSC 896 at [53]; *La Donna Pty Ltd v Wolford AG* [2005] VSC 359 at [21] to [22]; and

(c) Where a party has committed a repudiatory breach of the arbitration agreement and that repudiation has been accepted by the innocent counterparty: *Downing* at [34] to [35].

167 An example of circumstances which do *not* render an arbitration agreement inoperative can be found in the decision of the Hong Kong Court of Appeal in *China Merchants*. I have already referred to an aspect of this case on the first issue (see [105] to [106] above). In *China Merchants*, a dispute arose between the main contractor and the sub-contractor. In accordance with the parties' dispute-resolution agreement (see [105] above), the main contractor stated its decision in writing and gave notice of it to the sub-contractor. The sub-contractor failed to issue a notice to the defendant requesting that the dispute be referred to arbitration within the stipulated 15-day period. Instead, outside that 15-day period, the sub-contractor commenced action against the main contractor. The main contractor applied to stay the action under Art 8(1) of the Model Law read with s 6 of the Hong Kong Arbitration Ordinance (Cap 341), which *in pari materia* with s 6 of the IAA.

168 The sub-contractor resisted the stay, arguing that the arbitration agreement was inoperative because: (i) it had no contractual obligation to refer the dispute underlying the litigation to arbitration; (ii) it had not referred that dispute to arbitration; and (ii) it could no longer refer the dispute to arbitration because the 15-day period for it to do so had elapsed. Since no arbitration of the specific dispute comprised in the litigation could now take place, it argued,

the arbitration agreement was inoperative in respect of that dispute and the litigation ought not to be stayed.

169 Keith JA, giving the decision of the Hong Kong Court of Appeal, found (at 585) that it was "stretching the language of art 8(1) unduly to call an agreement conferring a right on a party to refer a dispute to arbitration 'inoperative' merely because the party chooses not to exercise that right". He rejected the sub-contractor's submission that an arbitration agreement was inoperative because a failure to refer a specific dispute to arbitration had the result that no arbitration could take place with respect to that dispute. He held also that a particular case cited by the sub-contractor, which spoke of an arbitration agreement coming into effect when a specific dispute was actually referred to arbitration, did not support the sub-contractor's submission that the parties' arbitration agreement was inoperative *before* such a reference. Keith JA therefore upheld the first instance judge's decision to stay the sub-contractor's litigation.

170 Wilson Taylor relies on *China Merchants* to submit that its arbitration agreement with Dyna-Jet is *not* inoperative. I accept that submission. I agree also with Keith JA that the word "inoperative" was not apt to cover the situation before him in *China Merchants*. And I consider that situation to be analogous to the situation before me. I do not consider the fact that the sub-contractor in *China Merchants* had no choice between arbitration and litigation (see [106] above) to be a material point of distinction. What makes the word inoperative inapt to cover this situation is that it contemplates, based on the analysis at [163] to [166] above, the parties' contractual obligation to arbitrate their disputes ceasing to have effect or being discharged by events or circumstances arising outside the contract.

171 That is not at all what happened in *China Merchants* or has happened in the case before me. The parties' arbitration agreement has not at all ceased to have effect and has not at all been discharged. It has operated precisely as the parties' agreement contemplated that it would. The dispute underlying this action has not been referred to arbitration and is the subject-matter of this action because of the operation of the parties' arbitration agreement and not because that agreement is inoperative.

172 The assistant registrar in this case accepted that the parties' arbitration agreement is inoperative. She held it is inoperative because the only party who has the right to elect to arbitrate (*ie*, Dyna-Jet) has waived its right to arbitrate and elected instead to litigate. In my view, while it is accurate to say that Dyna-Jet has waived its right to *elect* to arbitrate, it is not accurate to say that Dyna-Jet has waived its right to arbitrate. To make this point, I draw a distinction between a right to arbitrate and a right to *elect* to arbitrate. A right to *elect* to arbitrate is always an unqualified benefit. It gives a party a choice which it would not otherwise have. It is therefore a benefit regardless of one's perspective on arbitration itself. But a "right" to arbitrate is always capable of being seen both as a benefit and as a burden. It all depends on one's perspective. It is a benefit for the party who wishes to arbitrate. It is a burden for the party who does not wish to arbitrate. Wilson Taylor sees arbitration as a benefit. That is why it has applied for a stay. But Dyna-Jet sees arbitration as a burden. That is why it has commenced this action and resists Wilson Taylor's application for a stay.

173 In those circumstances, it appears to me to be inaccurate to say that Dyna-Jet has *waived* a right to arbitration. What Dyna-Jet has done is to decline to exercise its right to *elect* what it considers to be a burden. It is

accurate to say that Dyna-Jet has waived the right to *elect* arbitration because a right of election is always a benefit. But it is inaccurate to say that Dyna-Jet has waived its right to arbitrate because, to Dyna-Jet, arbitration is not a benefit or a right.

174 For these reasons, I prefer not to rest my decision to permit this action to continue on the parties' arbitration agreement being inoperative. I therefore hold that the arbitration agreement between Wilson Taylor and Dyna-Jet is not inoperative with respect to the dispute comprised in this litigation.

Null and void

175 Dyna-Jet submits only that the parties' arbitration agreement is either "inoperative" or "incapable of being performed".[27] By necessary implication, therefore, it concedes that the parties' arbitration agreement is not "null and void". In my view that concession is rightly made.

176 An arbitration agreement is null and void only if it is devoid of legal effect: *Albon v Naza Motor Trading Sdn Bhd (No 3)* [2007] 2 Lloyd's Rep 1 ("*Albon v Naza*") at [18] per Lightman J. *Albon v Naza* cited with approval the American decision of the 3rd Circuit Court of Appeals in *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Achille Lauro* 712 F.2d 50 (3d Cir. 1983) ("*Rhone*"). In *Rhone*, the court held that an arbitration agreement is "null and void" only if it is subject to an internationally-recognised defence such as duress, mistake, fraud or waiver, or if it contravenes fundamental policies of the forum. The court held, further, that the words "null and void" must be read narrowly in light of the general policy

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27 Plaintiff's submissions dated 26 February 2016 at paragraph 20.

of upholding the enforceability of arbitration agreements to which all New York Convention contracting states have subscribed.

177 Vitiating factors recognised under the proper law of the arbitration agreement, or its putative proper law, will render an arbitration agreement devoid of legal effect. Prof Gary Born in *International Commercial Arbitration* at p 841 observes that typical examples of defences rendering an arbitration agreement "null and void" include fraud or fraudulent inducement, unconscionability, illegality, and mistake. A controversial issue is whether the term "null and void" encompasses a putative arbitration agreement which never in fact came into existence as a result of defects in formation or consent, as opposed to an actual arbitration agreement which did come into existence but for some other reason is vitiated or vulnerable to vitiation. I need say nothing further on that controversy since it does not arise in the case before me.

178 The parties' arbitration agreement is not null and void. There is no suggestion in the facts before me that the arbitration agreement was devoid of legal effect when it was entered into or that it has, by reason of supervening events, become vulnerable now to being held to be devoid of legal effect on any grounds whatsoever.

Conclusion on the second issue

179 For the foregoing reasons, I find that the parties' arbitration agreement is inarguably incapable of being performed, but is arguably not inoperative and is certainly not null and void. The result is that the parties are in a position where, contractually, no obligation to arbitrate *this* dispute can *ever* arise. The parties find themselves in this position not because their consent to arbitrate

future disputes was somehow defective when they entered into their arbitration agreement (null and void) or because their consent was somehow vitiated, undermined or compromised by supervening events which have occurred after they entered into their arbitration agreement and have led to it ceasing to have legal effect and to its discharge (inoperative). The parties find themselves in this position precisely because their consent to arbitrate – as manifested in the arbitration agreement in their contract – contemplated it. They intended their consent to arbitrate to be contingent and asymmetric. Their contract placed the fulfilment of that contingency within the control only of Dyna-Jet. Dyna-Jet has, as is its right, elected not to fulfil the contingency. And the contingency can now never be satisfied, at least in respect of this dispute.

180 For the foregoing reasons, I consider that Dyna-Jet has succeeded in establishing that there is no arguable case that can be made against its submission that the parties' arbitration agreement is within the proviso to s 6(2) of the IAA.

181 I agree with the assistant registrar that this is a commercial result because it advances the parties' commercial intent in entering into their arbitration agreement. Granting Wilson Taylor a stay of this action would have the practical effect of compelling Dyna-Jet to arbitrate its claims. That would be contrary to the parties' clear intention, as expressed in their arbitration agreement, to give Dyna-Jet the freedom to decide whether to arbitrate. In *Jurisdiction and Arbitration Agreements*, David Joseph QC opines (at p 149) that "[a]s a general principle an agreement to resolve disputes in a particular manner, and in particular to arbitrate in a private way, ought to be construed in such a manner so it will be upheld, given force and not struck down (*ut res magis valeat quam pereat*)". This is an accurate statement of principle. The

inclination embodied in this maxim, however, is an inclination to give effect to the parties' commercial intent, not to divert parties to arbitration despite that intent. A stay of Dyna-Jet's action is unwarranted, not only as being outside s 6(2) of the IAA, but also because it would defeat the parties' commercial intent manifested in their arbitration agreement.

182 For that reason, I would not have been minded to grant a stay of this action in my inherent jurisdiction or as part of my powers of case management, even if Wilson Taylor had sought such a stay. For that reason also, I would have found "sufficient reason" to decline a stay if this matter were governed by s 6 of the AA rather than s 6 of the IAA.

183 I have therefore dismissed Wilson Taylor's appeal against the assistant registrar's decision to refuse a stay under s 6(2) and have ordered Wilson Taylor to pay to Dyna-Jet the costs of and incidental to the appeal, such costs fixed at $2,000 including disbursements.

Leave to appeal and stay pending appeal

184 Shortly after my decision, and within the time permitted, Wilson Taylor sought leave to appeal against my decision. It relies on the three limbs that Yong Pung How CJ identified in *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 at [16]: (i) a *prima facie* case of error; (ii) a question of general principle decided for the first time; and (iii) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

185 Wilson Taylor submits that I have committed a *prima facie* error of law in refusing to stay Dyna-Jet's action. It also submits that its intended

appeal will raise important questions of law which have not been clarified by the Singapore courts, in particular the meaning of the words "null and void, inoperative or incapable of being performed" in s 6(2) of the IAA. Finally, it submits that it would be in the public interest for the Court of Appeal to give a determination of the meaning of this phrase.

186 I have granted Wilson Taylor leave to appeal on the second and third grounds advanced. In my view, there is both a question of general principle and a question of importance for the Court of Appeal to consider on the two issues underlying Wilson Taylor's application for a stay. These two issues are novel not just for Singapore law but for international arbitration in general. On both issues, therefore the Court of Appeal's views would be welcome to the arbitration community in Singapore and internationally.

187 In addition, again on Wilson Taylor's application, I have stayed this action until the disposal of its appeal. I have done so to ensure that Wilson Taylor is not required to deliver a pleading or to take a step in these proceedings, thereby breaching one of the prerequisites for a permanent stay of these proceedings under s 6(2): *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [33] to [34].

188 I have therefore granted Wilson Taylor leave to appeal to the Court of Appeal with a stay of action until the appeal is determined. I have also reserved the costs of and incidental to the leave application and the stay application to the Court of Appeal.

Vinodh Coomaraswamy
Judge

Tan Yew Cheng (Leong Partnership) for the plaintiff;
S Magintharan and Vineetha Gunasekaran (Essex LLC) for the defendant.
