**Date and Time:** Monday, 25 March 2024 5:33:00PM SGT

**Job Number:** 220293818

## Documents (2)

1. *(1) Form: a Clause or a Separate Document*
   **Client/Matter:** -None-
2. *(2) Effect of an Arbitration Agreement*
   **Client/Matter:** -None-

# *(1) Form: a Clause or a Separate Document*





(4.) THE ARBITRATION AGREEMENT (1) FORM: A CLAUSE OR A SEPARATE DOCUMENT

## [20.014] Entering into an arbitration agreement

An arbitration agreement may be entered into before or after a dispute has arisen. There is no distinction made between a submission (an agreement to submit existing disputes to arbitration) and a pre-dispute arbitration clause in either the Arbitration Act 2001[1] or the International Arbitration Act 1994.[2] It may take the form of an arbitration clause in a contract or a separate document specifically dealing with the reference to arbitration.[3]

[1] Ie the Arbitration Act 2001 (2020 Rev Ed).

[2] See the International Arbitration Act 1994 (2020 Rev Ed)Sch 1art 7(1) (as amended in 2012).

[3] See the Arbitration Act 2001s 4(2) and the International Arbitration Act 1994Sch 1art 7(1). Separate pre-dispute arbitration agreements are relatively rare. Most arbitration agreements are found as a clause in the underlying commercial contract.

## [20.015] Agreement to be in writing

Like any agreement, parties may enter into an arbitration agreement either orally or in writing. However an arbitration agreement which is not in writing is not an agreement contemplated within the statutory laws of arbitration.[1] The requirement of writing under the Arbitration Act 2001 and the International Arbitration Act 1994 has now been harmonised. The definition of 'in writing' has been expanded considerably that the requirement that the agreement to arbitrate itself be in writing is replaced by an agreement to arbitrate whether 'concluded orally, by conduct or by other means'. The writing requirement is considered to be complied with so long as the content of the agreement to arbitrate 'is recorded in any form, whether or not the arbitration agreement has been concluded orally, by conduct or by other means'.[2]

The requirement that an agreement to arbitrate be 'signed' by the parties is not a definitive or exclusive one.[3] In the absence of a signed document containing the arbitration agreement, the arbitration agreement may also be evidenced in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.[4] The relevant agreement referred to in such an instance is the agreement to arbitrate. It is insufficient merely to show that there is a record of the underlying contract in dispute without also a record of the agreement to arbitrate.[5] The 'writing requirement' would be satisfied if one party to the agreement unilaterally records the arbitration agreement in writing.[6]

Whether silence to a stipulation by a party to arbitrate amounts to an agreement to arbitrate is context-dependent, the court may consider both the pre-contract and post-contract position of the parties to ascertain the objective intention.[7] A clear assent to the agreement to arbitrate is illustrated by an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.[8] When parties have, by their conduct, taken necessary steps toward performing their respective obligations under the underlying contract, they are deemed to have concluded a contract and consequently, the arbitration agreement contained therein.[9]

An exception to the strict writing requirement for the arbitration agreement to be 'signed by the parties'[10] or

evidenced by an exchange of documents is specifically made for disputes arising out of bills of lading transactions for shipping cases.[11] An order of court which indicates consent of parties is not sufficient to constitute an agreement in writing to arbitrate.[12]

[1] See the Arbitration Act 2001 (2020 Rev Ed)s 4(3); International Arbitration Act 1994 (2020 Rev Ed)s 2A, and the Model Law art 7. It follows that an oral arbitration agreement may not be enforced in accordance with the provisions of the respective statutes. It is doubtful if such oral agreements not evidenced in writing will be enforceable in the absence of statutory provision. In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd*[2014] 1 SLR 130,[2013] SGCA 55 (CA), the issue was whether the appellant was bound by the arbitration agreement contained in the Cooperation Agreement to which it was not a signatory. However, the appellant did sign the Supplemental Agreements, which made reference to the Cooperation Agreement. Under International Arbitration Acts 2A(7), a valid arbitration agreement could be constituted by way of incorporation by reference where a document containing an arbitration clause was referred to in a contract and the reference was such as to make the arbitration clause part of the contract. The Court of Appeal held that the parties who intend to incorporate the arbitration agreement should refer to it in their contract, to it or to a document containing it. Here, while the Cooperation Agreement had to be read with the Supplemental Agreements to understand the appellant's obligation as a payment agent, the appellant had undertaken no obligation under the Cooperation Agreement; its obligations were limited to those stated in the Supplemental Agreements. As to the Model Law, see [20.001] note 20.

[2] This amendment adopts UNCITRAL Model Law 2006 Option 1 which is an amendment to the Model Law art 7 to extend the meaning of 'in writing'. An alternative formulation (Option 2) which proposes to do away with the need for 'writing' all together failed to receive majority support but was nevertheless put forth for consideration. See document A/CN.9/592 (https://uncitral.un.org/ en/working_groups/2/arbitration).

[3] *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) ('DSK') v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) ('Ultrapolis')*[2010] SGHC 108, [2010] 3 SLR 661.

[4] Such communications may be accomplished by electronic communications. 'Electronic communications' means any communication that the parties make by means of data messages: International Arbitration Act 1994s 2(1).

[5] *Krauss Maffei v Foro Intaliano*Yearbook Com Arb XXVI (2001) p 816 (SC, Germany) where a sales confirmation note accepting offer failed to mention acceptance of buyers' arbitration clause was held not to be sufficient to constitute an agreement to arbitrate. See however *H Smal Ltd v Goldroyce Garment Ltd*[1994] 2 HKC 526, where the purchase order, which contained an arbitration clause, for the goods in dispute was signed only by the purchasers. When a quality dispute arose, the purchasers sought to appoint an arbitrator. The Hong Kong High Court in considering the application of the Model Lawart 7, held that while it was clear that the parties had a binding contract as evidenced by the purchase order and the physical delivery of the goods by the sellers, there was no document which would provide a record of the agreement by the sellers to arbitrate. See also *Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd*[1993] 2 HKLR 249, [1993] 2 HKCU 559, where a proforma charterparty containing an arbitration clause was not signed by any of the parties. The court held that read with the correspondence exchanged between the parties, there was sufficient compliance with the writing requirement under the Model Lawart 7. Where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled. Some meetings between some people in their respective organisations discussing a variety of matters would be insufficient to constitute compliance with the preconditions for arbitration: see *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and anor*[2014] 1 SLR 130,[2013] SGCA 55; *AQZ v ARA*[2015] 2 SLR 972, [2015] SGHC 49 (CA).

[6] See *AQZ v ARA*[2015] 2 SLR 972, [2015] SGHC 49, where the High Court, in upholding the validity of the arbitration agreement therein, said that it would not matter that the written version of the agreement is neither signed nor confirmed by all the parties involved (at [119]).

[7] In *R1 International Pte Ltd v Lonstroff AG*[2015] 1 SLR 521, [2014] SGCA 56 (CA), Sundaresh Menon CJ said to the effect that a party's silence does not, by itself, constitute acceptance of the terms of a contract including the arbitration agreement from another party although a party's positive, negative or even neutral conduct could evince acceptance. The effect of silence is thus context-dependent (at [54]). The court in this case sought to ascertain the 'objective intention' of the parties by considering not only the pre-contract behaviour but also the post-contract exchanges, the parties' performance of the contract, as well as the subsequent transactions. Silence had previously been held to be a refusal of acceptance of the imposition of a term in a contract: see *United Engineers Contractors Pte Ltd v L & M Concrete Specialists Pte Ltd*[1999] 2 SLR(R) 524, [2000] 2 SLR 196, [1999] SGHC 141.

[8] See the Arbitration Act 2001 s 4(6); International Arbitration Act 1994 s 2A(6) and Sch 1 art 7(2). In *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd* [2021] 2 SLR 890, [2021] SGCA 77, the Court of Appeal held at [114] that the 'specific purpose' of s 4(6) 'is to prevent a party who has not denied the existence of the arbitration agreement in circumstances in which the assertion of the existence of an arbitration agreement in a pleading, statement of case or any other document calls for a reply, from arguing that the agreement (whether pre-existing or arising in the course of the assertion and non-denial) is not in writing and is hence formally invalid'. The provision, however, only can operate to deem the existence of an effective agreement if there is a valid arbitration clause in the underlying contract.

(1) Form: a Clause or a Separate Document

[9] In *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd*[2016] 4 SLR 1336, [2016] SGHC 153, it was held that where the 'existence' of an arbitration is put into question, the Singapore courts' approach has been consistently to take the 'objective test', where a court must examine the language used by the parties as can be gleaned from the parties' correspondence, background, industry, character of the relevant documents, and course of dealings between the parties. The fact that one of the parties had not signed the underlying contract did not prevent the formation and execution of such contracts between the parties.

[10] This requirement of the document being signed by the parties also appears in the New York Conventionart II(2). The Mustill Committee criticised the definition saying that: 'In particular, the Model Law requires a signature on the document containing the contract. This could leave most bills of lading, many brokers' notes, contract notes and other important categories of contracts outside the scope of Model Law'. The Arbitration Act 1996 (UK)s 5 has a wider definition.

[11] See the Arbitration Act 2001s 4(5); International Arbitration Act 1994s 2(4). See generally *[220]*SHIPPING (2020 Reissue).

[12] *Lum Chang Building Contractors Pte Ltd v Anderson Land Pte Ltd*[2000] 1 SLR(R) 648, [2000] 2 SLR 261 (CA). This case concerns a court-ordered reference under the repealed Arbitration Act (Cap 10, 2002 Ed)s 22. The question arose as to whether the award made was an arbitration award or a judgment of the court. The court held that although the order of court to which all the parties had agreed to may be evidence in writing of the agreement, it was nevertheless not an agreement in writing to arbitrate. The award made pursuant to that reference was thus a judgment of the court and not an award; the appeal against which would lie to the Court of Appeal.

## [20.015A] Assertion of an arbitration agreement in proceedings

Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply[1] and the assertion is not denied, there is deemed to be an effective arbitration agreement as between the parties to the proceedings.[2]

[1]

The term 'any other document in circumstances in which the assertion calls for a reply' should be interpreted to refer only to documents made by a party pursuant to that party's substantive participation in the arbitral or legal proceeding and which were part of the record of those proceedings, because this interpretation better furthered the purpose of the Arbitration Act 2001 (2020 Rev Ed) *s 4(6)*. Hence, a notice of arbitration could fall within the term 'any other document in circumstances in which the assertion calls for a reply' under the Arbitration Act 2001 *s 4(6)*: *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd* [2022] 3 SLR 502, [2021] SGHC 28.

[2] Arbitration Act 2001 *s 4(6)*.

## [20.016] Wording of the agreement

No specific words or form are required to constitute an arbitration agreement but the intention to arbitrate must be clear and unequivocal.[1] Use of words like 'arbitration' or 'arbitrator' or the naming of an arbitral institution and the formality of appointment of the adjudicator are positive indications of such an intention.[2] The mere reference to a third person or an institution (other than a body known for its role in arbitration) for dispute resolution, without more, could lead to uncertainty as to the intention to arbitrate.[3] Uncertainty could also arise with arbitration clauses which use the term 'may' instead of 'shall'. However most jurisdictions have equated the term 'may' to mean 'shall' such that arbitration clauses which state that parties 'may refer to arbitration' have been interpreted to mean that parties are obliged to do so without any further option.[4]

[1]

Where parties have evinced a real intention to have matters resolved by arbitration, the court ought to give effect to that intention. Minor inconsistencies between clauses could not detract from the parties' agreement to arbitrate. Instead, a generous and harmonious interpretation should be given to the purportedly conflicting clauses such as to give effect to the parties' true intention: *BXH v BXI*[2020] 1 SLR 1043,[2020] SGCA 28 (CA).

[2] This does not mean, however, that the use of such labels is conclusive. See *Geowin Construction Pte Ltd (in liq) v Management Corporation Strata Title Plan No 1256*[2007] 1 SLR(R) 1004,[2007] 1 SLR 1004, where the court said that 'the labeling of an appointment as 'arbitrator' or 'expert' is not, in itself, always conclusive. It is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount' (at [35]). In *KVC Rice Intertrade Co Ltd v*

*Asian Mineral Resources Pte Ltd and anor*[2017] SGHC 32, the court dealt with an arbitration clause that did not set out the procedure for the appointment of arbitrators and did not designate a seat or governing law for the arbitration. In the court's view, a 'bare arbitration clause' is valid so long as the parties have evinced a clear intention to arbitrate.

[3] See *Teck Guan Sdn Bhd v Beow Guan Enterprises Pte Ltd*[2003] 4 SLR(R) 276,[2003] 4 SLR 276, where the clause states that '[a]ny quality dispute would be settle [sic] amicably with reference to an independent surveyor. However, any dispute out of this contract to be governed by the rules of the Cocoa Merchants' Association of America Inc … in force on that date' was considered by the court to express any intention by the parties to resolve their differences by arbitration. In any event, the rules of the Association have no provision for resolution of disputes with non-members and the Association had also confirmed that it does not provide such services for non-members. See however *David Wilson Homes Ltd v Survey Services Ltd (in liq)*[2001] EWCA 34, [2001] All ER (Comm) 449 (CA, Eng), where the court upheld a clause which calls for a reference to 'Queens Counsel of the English Bar to be mutually agreed or in the event of disagreement by the Chairman of the Bar Council' as an agreement to arbitrate.

[4] *Lobb Partnership Ltd v Aintree Racecourse Co Ltd*[2000] BLR 65; *China State Construction Engineering Corp Guangdong Branch v Madiford Ltd[1992] 1 HKC 320*.

## [20.017] Ambiguity or inconsistency

Ambiguity may arise if words such as arbitrator or arbitration are used in the agreement together with phrases which suggest an inconsistent intention, for example, where the agreement indicates that the arbitrator's decision will be persuasive but not binding or that the arbitration process is only a valuation or an assessment. The use of such terms in relation to a particular class of dispute may be interpreted to negative the intention to extend arbitration over other types of disputes which could arise under the agreement.[1] A dispute resolution process which expressly states that the decision made thereunder could not be or is not submitted to an arbitrator is a clear indication that such a process is not itself an arbitration.[2] Where the adjudicator is not bound by any obligation to consider evidence, and could make a determination without due process or regard to natural justice, solely at his discretion, the process would not be arbitration.[3]

An agreement to arbitrate indicates the parties' choice of arbitration as the prescribed alternative to litigation in court. It is therefore generally inconsistent to have a reference to arbitration as well as a choice of juridical forum or an exclusive jurisdiction clause[4] or inconsistent references to arbitration in different seats or under different rules or institutions.[5] Agreements relating to the same transaction, but which provide for litigation in one agreement and arbitration in another may be an indication that the parties prefer to provide for specific resolution mechanisms for the different aspects of the transaction.[6]

Where the agreement provides for alternatives such as one which permits either litigation or arbitration, it may give rise to the preliminary issue of whether the parties had intended arbitration instead of litigation and may lead to inconsistent findings.[7] Uncertainty may also arise where the arbitration clause makes no reference to any specific situs, but the mere absence of a situs[8] or agreed set of rules or choice of arbitral institution does not affect the validity of the agreement to arbitrate. References in an arbitration agreement to non-existent arbitral institutions or rules have generally been held to be insufficient to negative the intention to arbitrate.[9] Where however the intention to arbitrate is expressly subject to some other terms that have yet to be finalised, it may be argued that no agreement had been reached.[10] The court will, in any event, ascertain from the document the intention of the parties and has adopted the 'principle of effective interpretation' under which the arbitration agreement would not be interpreted restrictively or strictly but it would instead be given a commercial, logical and sensible construction over another commercially illogical one to give effect to workable agreed arbitration agreements.[11] Where there is a clear intention to arbitrate, effect will be given to the agreement even if the clause is incomplete or it lacks certain particulars, so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party.[12]

[1] *Transfield Shipping Inc v Sino-Add (Singapore) Pte Ltd*(unreported, Suit No 763/2001, 16 July); *Tritonia Shipping Inc v South Nelson Forest Products Corp*[1996] 1 LLR 114. In both cases, the courts held that the use of the term 'general average and arbitration' referred only to arbitration of general average disputes only and it was not an agreement to refer other disputes to arbitration.

[2] See *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd*[2009] 2 SLR(R) 385, [2009] 2 SLR 385 where the court held that such determination would be more in the nature of 'expert determination: rather than arbitration'.

[3] See *Geowin Construction Pte Ltd (in liq) v Management Corporation Strata Title Plan No 1256*[2007] 1 SLR(R) 1004, [2007] 1 SLR 1004, where the court held that it is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount. 'Is he obliged to act solely on the evidence before him and the submissions made to him or does he have a discretion to adopt an inquisitorial function? Does he have complete discretion over the applicable rules of procedure? If he has the sole discretion to arrive at his determination without being hamstrung by procedural and evidential intricacies or niceties, it is most unlikely that the court will view the proceedings to be arbitration proceedings. An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test.' (at [35]).

[4] See the problems encountered in *Econ Piling Pte Ltd v NCC International AB*[2007] SGHC 17; *Paul Smith Ltd v H & S International Holding Inc*[1991] 2 Lloyd's Rep 127; *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki Bergen*[1983] 1 All ER 382, [1983] 1 Lloyd's Rep 424; *Svenska Handelshankern v Indian Charge Chrome Ltd*[1994] Int Arb Rep Vol 9 #6; *BTY v BUA*[2019] 3 SLR 786, [2018] SGHC 213, where the court assessed the nature of the claims pursued by the plaintiff as to whether such claims falls within the scope of the shareholders' agreement (which contained an arbitration clause) or the joint venture company's memorandum and articles of incorporation (which had no arbitration clause). Vinodh Coomaraswamy J distinguished at length the nature of the two documents. In brief, he said the shareholders' agreement is a private contract that applies to the legal relationship between the parties and the memorandum and articles are components of a company's constitution deriving their contractual force from company law. The stay application was denied on the basis that the plaintiff's claims fall within the scope of the articles that contained no arbitration clause rather than the shareholder's agreement. This approach would work only if the matter in difference falls clearly within one and not the other document. Where there are areas of overlap such as if the matter in difference arose out of accounts of the company in which a different and often higher accountability is expected (as was the case there), it could well be that the document providing for a higher standard ought to be considered as the relevant document from which the differences have arisen.

[5] See for example *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd*[2009] 2 SLR(R) 532, [2009] 2 SLR 532, where a document referred to arbitration in Singapore under the ICC Rules whereas another referred to arbitration in Thailand under the auspices of the Arbitration Institute of the Ministry of Justice. See also *Insigma Technology Co Ltd v Alstom Technology Ltd*[2009] 3 SLR(R) 936, [2009] 3 SLR 936 (CA).

[6] *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp*[2010] 2 SLR 821,[2010] SGHC 31 – Andrew Ang J found that the parties had intentionally carved out the Escrow Agreement from the Drilling Contract and expressly subjected the Escrow Agreement to a non-exclusive jurisdiction clause rather than an arbitration clause thereby evincing a clear intention to subject claims arising from the Escrow Agreement to the dispute resolution clause found within that particular agreement and not the arbitration clause in the Drilling Contract. This case was appealed by the defendants in *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp*[2013] 3 SLR 1017, [2013] SGHC 117. Held, dismissing the appeal, that the losses of profits as a result of the termination of the Drilling Contract were recoverable damages for breach of the Escrow Agreement; they were not too remote. In *Oei Hong Leong v Goldman Sachs International*[2014] 3 SLR 1217, [2014] SGHC 128, the court had to decide whether the relationship between the plaintiff who claimed that the defendant caused him to incur losses on foreign exchange option trades as a result of fraudulent misrepresentations by the defendant's employees, was covered by an 'Account Agreement Pack' containing an arbitration agreement or the 'International Swap Dealers Association Inc Master Agreement' which had a non-exclusive jurisdiction clause in favour of English courts. The High Court examined the plaintiff's business relationship with the defendant and looked into the 'centre of gravity of the dispute' or the 'agreement which [were] at the commercial centre of the transaction'. It held that the allegation of fraudulent misrepresentation was the 'pith and substance' of the dispute and the Account Agreement Pack containing the arbitration clause ought to apply.

[7] Ie this happened in *'The Dai Yun Shan'; Owners of Cargo Lately Laden on Board the Ship or Vessel 'Dai Yun Shan' v Owners of and Other Persons Interested in the Ship or Vessel 'Dai Yun Shan'*[1992] 1 SLR(R) 461, [1992] 2 SLR 508 and in *William Co v Chu Kong Agency Co Ltd*[1993] 2 HKC 377, where in both cases the arbitration clause read: 'All disputes arising under or in connection with this Bill of Lading shall be determined by Chinese law in the courts of, or by arbitration in the People's Republic of China'. In *'The Dai Yun Shan'*, the Singapore court per Goh Joon Seng J held that there was no agreement requiring the parties to proceed to arbitration and so he did not allow a stay of the court proceedings. On the other hand, in *William Co v Chu Kong Agency Co Ltd* (above), the Hong Kong court per Kaplan J, held that the intention to arbitrate was clear and that the clauses operated as an arbitration agreement upon the election by any one party to proceed to arbitration. As one of the parties had in fact elected for arbitration, it was not open to the other party to object to it.

[8] *Woh Hup (Pte) Ltd v Property Development Ltd*[1991] 1 SLR(R) 473, [1991] 1 SLR 652,[1991] 3 MLJ 82.

[9] See *China Agribusiness Development Corp v Balli Trading*[1997] 2 LLR 76; *Lucky-Goldstar International (HK) Ltd v Ng Mook Kee Engineering Ltd*[1993] 2 HKLR 73, [1993] 1 HKC 404; Case III ZR 143/92 [1995] ADRLJ 120 (FC, Germany); *Circus Productions Inc v Rosgosirc*[1994] 1 SINARB 3; *Warnes SA v Harvic International Ltd*[1994] 1 ADRLJ 65; Case 2U 1010/94 [1994] ADRLJ 40 (Dresden Higher Regional Court, Germany).

[10] *The Benja Bhum*[1993] 3 SLR(R) 242, [1994] 1 SLR 88 per LP Thean JA sitting as the High Court judge where, in a claim for salvage remuneration, the parties had exchanged correspondence agreeing to arbitration in London but could not agree on the terms of the security to be provided. As the essential words of the letter of undertaking which was to serve as the security could not be agreed, the court said that: 'Though the parties had agreed in principle to refer the plaintiffs' claim to arbitration, the terms

of the agreement had yet to be agreed at that time. In effect, there was really no binding agreement'. This decision appears to go against the current international judicial trend to enforce arbitration agreements where the intention to arbitrate was clear and unambiguous. From the words of the learned judge, there was clearly an agreement to refer the dispute to arbitration and that intention was not subject to the provision of security. It is questionable whether the court should allow one party to renege on the agreement to arbitrate on the ground that the terms of the security to be provided was not settled. This decision was affirmed in *Star Trans Far East Pte Ltd v Norske-Tech*[1996] 2 SLR(R) 196, [1996] 2 SLR 409 (CA). It appears that the facts of the case differed and it is questionable whether the Court of Appeal should have affirmed or indeed referred to *The Benja Bhum* (above).

[11] *Insigma Technology Co Ltd v Alstom Technology Ltd*[2009] 3 SLR(R) 936, [2009] 3 SLR 936 (CA).

[12] *Lim Su Sang v Teck Guan Construction and Development Co Ltd*[*[1966] 2 MLJ 29*](#) (FC, Mal). See also *Insigma Technology Co Ltd v Alstom Technology Ltd*[2009] 3 SLR(R) 936,[2009] 3 SLR 936 (CA).

## [20.018] Agreement to agree

The agreement to refer disputes to arbitration is essential. An agreement to agree to refer, that is, an agreement deferring agreement to arbitration is not an arbitration agreement.[1] However, an agreement which provides for disputes to be referred to arbitration upon the election by any one of the parties to arbitrate would become a binding arbitration agreement upon such an election.[2]

[1]

*The Benja Bhum*[1993] 3 SLR(R) 242, [1994] 1 SLR 88; *Union of India v Bharat Engineering Corp*(1977) 11 ILR (Delhi) 57; *Kruppa v Benedetti****[2014] EWHC 1887*** (a clause read 'Law of England and Wales'. In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should such a resolution not be forthcoming the courts of England shall have 'non exclusive jurisdiction'; it was held to be an invalid agreement to arbitrate).

[2] *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki Bergen*[*[1983] 1 All ER 382*](#), [1983] 1 Lloyd's Rep 424; *Navigazione Alta Italia SpA v Concordia Maritime Chartering AB, The Stena Pacifica*[1990] 2 Lloyd's Rep 234.

## [20.019] Capacities of parties to the agreement

A party who wishes to enter into an arbitration agreement, like in any commercial contract, must have the capacity to do so. The capacity to enter into an arbitration agreement is governed by the personal law of the parties. In Singapore, any person who has the capacity to enter into a commercial contract will have the capacity to enter into an arbitration agreement. Minors or persons who by reason of mental incapacity or drunkenness are not normally bound by contracts made by them may be bound by contracts for 'necessaries';[1] it is uncertain, however, if this extends to their capacity to agree to arbitration.[2] Bankrupts and companies in liquidation[3] would require leave of their legal representatives[4] and the court to enter into an arbitration agreement and participate in arbitration.

The Singapore Government is bound to any contract so long as it is entered into with proper authority.[5] It is entitled to commence and defend civil proceedings[6] and has participated in numerous arbitrations. The Arbitration Act 2001[7] and the International Arbitration Act 1994[8] expressly provide that it is binding on the Government. This means that the state is bound in the same manner as any other party to an arbitration agreement to which these Acts apply. The Government has never raised the issue of immunity in arbitration proceedings.

[1]

See generally the Children and Young Persons Act 1993 (2020 Rev Ed).

[2] It has been suggested that the agreement to arbitrate by a minor would be binding if the contract related to the supply of 'necessaries'. See *Russell On Arbitration* (1997 Edn) para 3–005. It appears that this suggestion ignores the fact that an arbitration clause in a contract is considered a separate and distinct agreement from the underlying contract. It is questionable whether it would be more appropriate to treat such an agreement by a minor as voidable at the option of the minor but binding on the other party, like in all other contracts with minors. See generally *[80]*CONTRACT (2021 Reissue). See also the case of *BAZ v BBA* [2018] SGHC 275, where the Singapore court set aside the award but only in relation to some of the respondents who were minors – a fact that did not feature or was not raised at all at the arbitral proceedings.

[3] See generally the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed); *[150]*INSOLVENCY (2022 Reissue).

[4] Ie the guardian, the Official Assignee or the Official Receiver as the case maybe.

[5] See generally the Government Contracts Act 1950 (2020 Rev Ed).

[6] See the Government Proceedings Act 1956 (2020 Rev Ed)ss 3, 4. The definition of 'civil proceedings' in the Act however does not appear wide enough to cover arbitral proceedings. The fact that the Government holds itself bound in arbitration proceedings in the same manner as any civil proceedings could be seen from s 29(1) which has reference to arbitration; subject to s 29, in any civil proceedings or arbitration to which the Government or a public officer is a party the court will have power to order costs for or against the Government or the public officer in the same manner and upon the same principles as in proceedings between private persons: s 29(1).

[7] Ie Arbitration Act 2001 (2020 Rev Ed)s 64.

[8] Ie the International Arbitration Act 1994 (2020 Rev Ed)s 34.

## [20.020] Parties to the agreement

The parties to the arbitration agreements would normally be the signatories to those agreements. There are however several situations where non-signatories may be considered a party to the arbitration agreement.[1] Such situations may arise by way of incorporation of an arbitration agreement by reference; or an assumption of rights or liabilities to a contract with an arbitration clause (for example assignment, novation); or where the agreement was entered into by an agent; or the corporate veil-piercing on the basis of alter ego principle;[2] or by the operation of the doctrine of estoppel.[3]

An exception to the principle of privity of contract has also been created to allow third party beneficiaries to pursue claims against a promissor in arbitration.[4]

Any party to the arbitration agreement or any person claiming through or under a party to the agreement may seek to enforce the agreement to arbitrate.[5] A principal, whether disclosed or undisclosed, of a party who merely acted as agent in the agreement or a beneficiary whose interests were represented by a trustee in the agreement have rights as parties to the agreement.[6] Legal representatives of the estate of a deceased and trustees in bankruptcy are similarly entitled to the rights under the arbitration agreement.

The legal assignee of a contract, may upon notice of assignment having been given to the other party[7] be entitled to the rights in the arbitration agreement.[8] The assignment must be an absolute assignment and not by way of charge only.[9] An equitable assignee can only claim the right under the arbitration agreement if notice of assignment has been given and the assignee expressly submits to the jurisdiction of the tribunal.[10] An assignor under an equitable assignment is normally joined in as a party to the arbitration.

Where by a novation agreement, a party to the agreement has been substituted, the substituted party is entitled to all the rights and duties under the contract including the arbitration agreement as if he were the party to the agreement in the first instance. A novation of rights may also arise as a result of the operation of law.[11] Insurers claiming as subrogees of an assured's rights are also bound by the terms of an arbitration clause by which the assured was bound on the basis that the arbitration clause regulates the means by which the rights under the contract are transferred.[12]

[1] *Thomson-CSF v American Arbitration Association*64 F.3d 773 (USCA 2nd Cir, 1995). A party signing the final portion of a contract in his personal capacity - in addition to signing other parts of the contract as a representative of the company-parties - is also a party to the contract and the arbitration clause that had been set out in that contract. In *ST Group Co Ltd v Sanum Investments Limited* [2019] SGCA 65, an individual (Mr. Sithat) signed the Master Agreement four times, once on behalf of the entity, ST Group; twice on behalf of the entity, ST Vegas; and once, under the label 'Sithat Xaysoulivong, as an individual'. The other representatives of the other company parties did not sign the Master Agreement in their personal capacities.

[2] *Aloe Vera America, Inc v Asianic Food (S) Pte Ltd*[2006] 3 SLR(R) 174, [2006] 3 SLR 174; *Carte Blanche (Singapore) Pte Ltd v Diners Club Int'l, Inc*2 F.3d 24, 26 (USCA 2nd Cir, 1993); *HG Estate LLC v Corporation Durango SA De CV*No 2 Civ 10059 (CSH) SD NY; 2003 US DC LEXIS 12554; *Smith/Enron Co-generation Ltd Partnership*[198] F 3d 88 (2nd Cir 1999).

[3] See example: *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd*[2009] 2 SLR(R) 532, [2009] 2 SLR 532; *Bauer (M) Sdn Bhd v Daewoo Corp*[1999] 4 MLJ 545 (CA, Mal). As to privity of contract see [80]CONTRACT (2021 Reissue) at [80.420] and following.

[4] See the Contracts (Rights of Third Parties) Act 2001 (2020 Rev Ed)s 9. A non-statutory example may be seen in *The 'Smaro'*[1999] 1 LLR 225. Ang J in *Jiang Haiying v Tan Lim Hui*[2009] 3 SLR(R) 13,[2009] 3 SLR 13 at [45] stated that outside the Contracts (Right of Third Parties) Act, the third-party beneficiary is not a recognised exception in Singapore. This case illustrates that the Singapore courts, as with common law courts, have thus far been treating contracts almost always as a 'bargain' (a transaction with consideration passing from one to the other). The enactment of the Contracts (Right of Third Parties) Act 1999, the limitations notwithstanding, presents to the courts the opportunity to re-visit and see if contracts ought always to be viewed that way and consider questions such as why promisors ought not to be held to their promises just because the promisee is not a party to the original contract.

[5] See the Arbitration Act 2001 (2020 Rev Ed)s 6(5). In *Yee Hong Pte Ltd v Tan Chye Hee Andrew*[2005] 4 SLR(R) 398, [2005] 4 SLR 398, the court construed this phrase 'claiming through or under' beyond one who is claiming a derivative right to the contract by allowing in that case, the architect, to avail the arbitration clause in the main contract against the contractor for indemnity and contribution. See *Kiyue Co Ltd v Aquagen International Pte Ltd*[2003] 3 SLR(R) 130, [2003] 3 SLR 130 for an unfortunate situation where a minority shareholder of a party was unable to participate in the arbitration even though it would be adversely affected by the outcome of the arbitration. See *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd*[2016] 1 SLR 79, [2015] SGHC 264 on the issue of whether assignees or endorsees to a bill of exchange could be made parties to an arbitration agreement. The case involved a dispute between a buyer and a seller of machines to process cashew nuts arising from a supply agreement that was contained an arbitration clause. Vinodh Coomaraswamy J ruled that while a bank holding a bill of exchange could 'claim through or under' a seller and could thus be made a party to the arbitration agreement within the extended meaning of that phrase in International Arbitration Act (Cap 143A, 2002 Ed)s 6(5) the bank's claim, being confined to its rights as holder of the notes, was not within the scope of the arbitration agreement set out in the supply agreement. The Court of Appeal in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*[2016] 5 SLR 455, [2016] SGCA 53 holding that while Cariparma was a party 'claiming through or under' Oltremare, its disputes arising from the promissory notes were not within the scope of the arbitration agreement set out in the supply agreement. The court did so after examining closely the nature of the promissory notes and the characteristics unique to such notes, that is, their legal title being transferable by delivery or endorsement. A transferee of the notes would be entitled to sue in its own name, and a holder in due course takes the notes 'free from any defect of title of prior parties'. These characteristics clearly show that each note is a contract independent of any underlying contract. This decision cast some doubt over the decision of Belinda Ang Saw Ean J in *Piallo GmbH v Yafriro International Pte Ltd ('Piallo')*[2014] 1 SLR 1028, [2013] SGHC 260 where a dispute over a dishonoured cheque made pursuant to the underlying contract was held to be within the scope of the arbitration agreement in that contract – a question similar to that in *Rals International*. Nevertheless, it could still be argued that the decision could be reconciled on the facts, viz, in *Piallo*, the holder of the dishonoured cheque was an original party to the underlying contract and was, thus, a party to the arbitration agreement. Conversely, in *Rals International*, the bank holder of the notes, Cariparma, was a mere endorsee, and could not have been adequately foreseen to be made a party to the arbitration agreement at the time the supply agreement was entered into.

[6] *Overseas Union Insurance Ltd v Turegum Insurance Co*[2001] 2 SLR(R) 285, [2001] 3 SLR 330; *Roussel-Uclaf v GD Searle & Co Ltd*[1978] 1 Lloyd's Rep 225, [1978] RPC 747. See generally [180]PARTNERSHIP AND AGENCY (2022 Reissue), [110]EQUITY & TRUSTS (2018 Reissue).

[7] Civil Law Act 1909 (2020 Rev Ed).

[8] *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nocolov*[1990] 2 Lloyd's Rep 11. See, however, *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd*[2002] 2 MLJ 71 (CA, Mal), where the court took the position that the assignee of benefits under the contract was not a party. The court ordered the arbitration stayed on *inter alia*, the ground that the assignee and some other relevant parties are not parties to the arbitration agreement.

[9] *L/M International Construction Inc (now Bow International Inc) v The Circle Partnership*(1996) 49 Con LR 12.

[10] *Baytur SA v Finagro Holding SA*[1992] QB 610, [1991] 4 All ER 129 (CA, Eng).

[11] See for eg the Third Parties (Rights Against Insurers) Act 1930 (2002 Rev Ed); Central Provident Fund Act 1953 (2020 Rev Ed). Note also that the Bills of Lading Act 1992 (2020 Rev Ed)s 2 may arguably have this effect. See *Firma C-Trade SA v Newscastle Protection and Indemnity Assoc ('The Fanti')*[1987] 2 LLR 299, where the creditors were allowed to proceed to claim against the third party liability insurers in arbitration. The court's decision was reversed by the House of Lords on the substantive issue that as the assured failed to pay premium calls, the insurers were not liable under the insurance: [1991] 2 AC 1 (HL). As to the tribunal see [20.051] and following.

[12] *Socony Mobil Oil Co Inc v West of England Shipowners Mutual Insurance Association Ltd, The Padre Island (No 2)*[1991] 2 AC 1 (HL) at 33, per Lord Goff; *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH*[1997] 1 Lloyd's Rep 179. See generally [155]INSURANCE (2022 Reissue).

## [20.021] Incorporation by reference

A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.[1] As an arbitration clause in a contract is considered a separate and independent agreement, words of its incorporation must be specific.[2] While general words of inclusion[3] may be sufficient to incorporate terms referred to in another document and which are germane to the underlying contract as part of the contract, an arbitration clause being a collateral agreement cannot be so incorporated.[4] Where related agreements contain discreet dispute resolution provisions, the inference is that the parties contemplated different processes and as such an arbitration clause in one may not be incorporated into the other.[5] Courts have therefore tended to construe words of incorporation restrictively.[6] Where, however, the reference to another document is clearly to adopt all the terms of the document referred to, then the incorporation would include the arbitration clause.[7]

[1] International Arbitration Act 1994 (2020 Rev Ed)Sch 1 art 7(2) provides that 'The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.' The *travaux prparatoires* supports the view that '*no explicit reference to the arbitration clause contained therein is required*': see Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration of 25 March 1985 (A/CN 9/264) at page [23].

[2] Eg 'including the arbitration clause' or 'all the terms, conditions, clauses, and exceptions including cl 31' (being one which contains the arbitration clause). See *The Merak*[1965] P 223, [1965] 1 All ER 230 (CA, Eng). General terms were held to be insufficient in *United Asian Bank Bhd v Owners of the 'Fushi Hoshi Maru'*[1981] 2 MLJ 333 per Vohrah J.

[3] An example of a clear reference can be found in *The 'Hilal I'*[2000] 3 SLR(R) 886, [2001] 1 SLR 387, where the incorporating words stated: 'all terms, conditions, exceptions and clauses [including] arbitration clause as per charterparty dated 7 February 1997'.

[4] *Skips A/S Nordheim v Syrian Petroleum Co Ltd, The Varenna*[1984] QB 599, [1983] 3 All ER 645 (CA, Eng).

[5] The court in *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd*[2011] 3 SLR 386, [2011] SGCA 20 (CA), found that there were two related agreements which had 'entire agreement' provisions and while one contained an arbitration clause and the other provided for the 'non-exclusive jurisdiction of Singapore courts'. In such a case, the arbitration clause in one agreement is not applicable to the other. A more difficult situation involving different parties to different agreements (a cooperation agreement between Lufthansa and Datamat, and a supplemental agreement between Lufthansa, Datamat and International Research Corp plc (IRCP) was the issue in *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd*[2013] 1 SLR 973, [2012] SGHC 226. The High Court judge found that there was a close association between the supplemental agreements and the cooperation agreement as indicated by the preambles in the supplemental agreements stated 'annexed to and made a part of' the cooperation agreement, indicating yet another step toward a more liberal approach to incorporating an arbitration clause. The court proceeded with a restrictive approach, and rightfully so, in *ST Group Co Ltd v Sanum Investments Limited* [2019] SGCA 65 ('*ST Group*'). Incorporation of terms by reference from agreement A to agreement B does not necessarily mean that any dispute that might arise from agreement A also arises from agreement B. In *ST Group*, while there has been incorporation of terms from the Master Agreement to the Participation Agreement (each containing a differently worded arbitration clause), there was no express mention in the Participation Agreement of the 'Thanaleng Slot Club' - the subject matter in dispute arising from the Master Agreement only. Additionally, one of the parties in the Participation Agreement was not a party to the Master Agreement. Judith Prakash JA (delivering the judgment of the court) determined that the Thanaleng Slot Club dispute arose out of the Master Agreement only, and not out of the Participation Agreement, and the arbitration clause from the Master Agreement applies to the subject matter in dispute.

[6] *Star Trans Far East Pte Ltd v Norske-Tech*[1996] 2 SLR(R) 196 (CA); *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd*[1999] 3 SLR(R) 618, [2001] 1 SLR 222 (following *Star Trans Far East Pte Ltd v Norske-Tech* (above)); *L & M Concrete Specialists Pte Ltd v United Engineers Contractors Pte Ltd*[2000] 2 SLR(R) 852, [2000] 4 SLR 441; *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp*[2010] 2 SLR 821,[2010] SGHC 31. For a different approach see *Mancon (BVI) Investment Holdings Co Ltd v Heng Holdings SEA (Pte) Ltd*[1999] 3 SLR(R) 1146, [2000] 3 SLR 220 and *Econ Piling Pte Ltd v NCC International AB*[2007] SGHC 17. In the latter two cases, the courts read the documents as a composite whole to import or extend the application of the arbitration clause in *Star Trans Far East Pte Ltd v Norske-Tech* (above), Karthigesu JA cited the decision of *Aughton Ltd v MF Kent Services Ltd*(1991) 57 BLR 1 (CA, Eng) as representative of the prevailing English view. It should be noted however that Ralph Gibson LJ and Sir John Megaw in *Aughton Ltd v MF Kent Services Ltd* (above) took diametrically different views. Ralph Gibson LJ took the view that it would be perverse to treat two commercial parties as having incorporated all the Press/Kent conditions (suitably modified) except an arbitration clause, the existence of which in such contracts most businessmen are aware. The parties had sufficiently expressed their intention to incorporate the press/Kent conditions, and that included the arbitration clause. Sir John Megaw, however, said that distinct and specific words were required to incorporate an arbitration clause as opposed to these provisions from another contract and there were no such words so that the clause was not incorporated. He followed *TW Thomas & Co Ltd v Portsea Steamship Co*

*Ltd*[1912] AC 1 (HL). Subsequent English decisions tended to follow Sir John Megaw's position. See *Ben Barrett and Son (Brickwork) Ltd v Henry Boot Management Ltd*[1996] ADRLJ 33; *Jardine Birshe Ltd v Cathedral Works Organisation (Chicester) Ltd*[1997] ADRLJ 308. See however *Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd*(1994) 37 Con LR 84 (CA, Eng); *Extrudakerb (Maltby Engineering) Ltd v Whitemountain Quarries Ltd*[1997] ADRLJ 262 (Northern Ireland); *Roche Products Ltd v Freeman Process Systems Ltd*[1997] ADRLJ 48, where the court distinguished between the stricter approach to be made with regard to shipping cases and those which are not. For a similar development in Malaysia see *Bauer (M) Sdn Bhd v Daewoo Corp*[1999] 4 MLJ 545; in Australia see *Ferris v Plaister*(1994) 34 NSWLR 474; *Carob Industries Limited (in liq) v Simto Pty Ltd*(Supreme Court of Western Australia) Scott J (17 April 1996 – unreported). Recent English decisions appear to attempt to differentiate between agreements entered into by the same parties and of the same type of transactions as against those between different parties and different nature of agreement. See eg *'The Athena' (No 2)*[2007] 1 LLR 280 and *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* ***[2010] EWHC 29 (Comm)***. Clarke J held in the latter case, which involved parties who had dealt with each other in several earlier contracts, that the term 'all the rest will be same as our previous contracts' was effective to incorporate the terms of the previous contracts including the London arbitration clause.

[7] *Mancon (BVI) Investment Holdings Co Ltd v Heng Holdings SEA (Pte) Ltd*[1999] 3 SLR(R) 1146, [2000] 3 SLR 220, where Tay JC took the view that an arbitration clause under a head agreement applied to disputes arising out of a supplemental agreement which provided for a rescheduling of payments under a head agreement. He said: 'If the two contractual documents had to be read together, it would be totally illogical to have the arbitration clause apply to one but not the other …'; *Astel-Peiniger Joint Venture v Argos Engineering and Heavy Industries Co Ltd*[1994] 3 HKC 328, [1995] ADRLJ 41, where the reference to a 'back-to-back' to the main contract was held to be sufficient to incorporate the arbitration clause. But the mere fact that there is a series of leases and sub-leases with similar arbitration clauses does not make the sub-lessees a party to the head lease entitling the lessor to lay a claim in arbitration. See *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang*[1988] 1 MLJ 269 per Mohd Dzaiddin J.

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# *(2) Effect of an Arbitration Agreement*

Halsbury's Laws of Singapore - Arbitration (Volume 1(2))



(2) EFFECT OF AN ARBITRATION AGREEMENT

## [20.022] Irrevocable and enforceable

An arbitration agreement, unless a contrary intention is expressed therein, is binding and will be enforced by the court against the party in breach by referring the defaulting party to arbitrate as agreed.[1] The court has no statutory power to revoke an arbitration agreement.[2] The court may stay proceedings which are commenced or prevent steps which are taken in breach of the agreement to arbitrate.[3] Where the defaulting party had failed to appoint or take steps to concur in the appointment of the tribunal, the appointment may be made on its behalf by the appointing authority.[4] The court is no longer the default statutory appointing authority,[5] it may refer the matter to the relevant authority, to take appropriate steps in the constitution of the tribunal.

[1] Model Lawart 8(1). As to the Model Law, see *[20.001]* note 20.

[2] Under the repealed Arbitration Act (Cap 10, 1985 Ed)s 3, an arbitration is said to be 'irrevocable except with leave of court' implying that the court could revoke an arbitration agreement. No such power is given under the Arbitration Act 2001 (2020 Rev Ed) and the International Arbitration Act 1994 (2020 Rev Ed).

[3] See the Arbitration Act 2001s 6; International Arbitration Act 1994s 6 (see *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*[2017] 2 SLR 362, [2017] SGCA 32 (CA); *Takenaka Corp v Tan Chee Chong* [2018] SGHC 51; *Ling Kong Henry v Tanglin Club* [2018] 5 SLR 871). However, the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed)s 12 read with s 34(b) has statutorily altered the position in relation to claims for progress payments in contracts for construction work or services, by mandating that in relation to any such contracts made in writing on or after 1 April 2005, whether or not the contract is expressed to be governed by the law of Singapore, such claims shall be referred to a process of 'adjudication'. Any provision in the contract which may have the effect of 'excluding, modifying, restricting or prejudicing the right' is deemed void: see the Building and Construction Industry Security of Payment Act 2004s 36.

[4] Arbitration Act 2001s 13; International Arbitration Act 1994 ss 9A, 9B; Model Lawart 11. As to the tribunal see *[20.051]* and following.

[5] Prior to the enactment of the Arbitration Act 2001, the default appointing authority for arbitrators in domestic arbitration was the High Court, whereas the statutory appointing authority for 'international' cases was the Chairman of the Singapore International Arbitration Centre. The Arbitration Act 2001 now rationalises this and the default appointing authority for both domestic and international arbitrations is now the President of the Court of Arbitration of the Singapore International Arbitration Centre: see the Arbitration Act 2001s 13(8); International Arbitration Act 1994s 8(2).

## [20.023] Death of a party

An arbitration agreement is not discharged by the death of any of the parties as respects either the deceased or any other party.[1] The personal representatives of the deceased may enforce the agreement or may be required to defend an arbitration commenced by the other party thereto.[2] The authority of an arbitrator having been duly appointed and who had taken up the reference is not affected by the death of any of the parties, even if the deceased is the party who had appointed him.[3]

[1] Arbitration Act 2001 (2020 Rev Ed)s 5(1). This, however, does not have effect on any rule of law or statutory provision which extinguishes a cause of action upon the death of a party, for eg defamation, libel or slander.

[2] See generally *[190]*PROBATE, ADMINISTRATION AND SUCCESSION (2022 Reissue).

[3] Arbitration Act 2001s 5(2).

## [20.024] Bankruptcy

A court may order a stay of action against a person following the filing of a bankruptcy petition.[1] There is no automatic stay of arbitration following the making of a bankruptcy order.[2] A party with a claim against a bankrupt's estate may pursue the same in arbitration if the contract so provides and if the Official Assignee as trustee in bankruptcy adopts the contract. If however the Official Assignee does not adopt the contract, the party may apply to court for the matter to be so referred to arbitration.[3]

[1] Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 325 (previously set out in the Bankruptcy Act (Cap 20, 2009 Ed) (repealed) s 74). See generally *[150]*INSOLVENCY (2022 Reissue). A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management: see *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, [2011] SGCA 21 (CA) at [45].

[2] See the Insolvency, Restructuring and Dissolution Act 2018 s 327 read with s 420 (previously set out in the Bankruptcy Acts 76(1)(c) read with s 148A (repealed) (added in 2001 vide the Arbitration Act (No 37 of 2001)). In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*[2011] 3 SLR 414,[2011] SGCA 21 (CA), the issue was to what extent claims involving an insolvent company is permitted to be resolved through the arbitral process. The Court held that the scope of any arbitration clause was based on the parties' expressed intention; it was conceivable that the parties to a contract may agree that all disputes between them, including disputes arising out of avoidance actions in the event of insolvency, should fall within the scope of the arbitration clause according to its documentary construction. The underlying basis for a generous approach towards construing the scope of an arbitration clause was the assumption that commercial parties, as rational business entities, were likely to prefer a dispute resolution system that could deal with all types of claims in a single forum. This was reasonable in relation to private remedial claims, arising either before or during the period when a company became insolvent. However, this reasoning could not be applied to avoidance claims pursued during insolvency proceedings. The commencement of insolvency proceedings resulted in the company's management being displaced by a liquidator or judicial manager. Since such claims could only be pursued by the liquidators or judicial managers of insolvent companies, there was no reason to objectively believe that a company's pre-insolvency management would ordinarily contemplate including avoidance claims within the scope of an arbitration agreement. Therefore a line should be drawn between private remedial claims (either common law or statutory), and claims that could only be made by a liquidator/judicial manager of an insolvent company. Arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language to the contrary: at [11], [20] and [21]. In *BDG v BDH*[2016] 5 SLR 977, [2016] SGHC 211, the High Court was confronted with an application for injunction by a party to restrain the opposing party from commencing winding-up proceedings when the contract between the parties contained an arbitration agreement. Aedit Abdullah JC granted the injunction. The existence of a genuine or *bona fide* dispute normally requires showing that a triable case has been made out. Applying this requires an inquiry and assessment of a higher threshold than that of making a prima facie case that a dispute exists. The rationale for requiring a *bona fide* dispute is to prevent an insolvent debtor from staving off such proceedings on flimsy or unsubstantiated grounds. A different standard can be justified where an arbitration agreement exists between the parties; the parties ought to be first held to their agreed dispute resolution process, and that the merits of the parties' dispute should be a matter for the arbitral tribunal to determine. In his view, so long as a *prima facie* case is made out on the existence of an agreement to arbitrate then the parties should proceed to arbitrate. Although this case is an injunction restraining winding-up proceedings and not an application for stay of a pending court action, Abdullah JC noted that to apply 'any stricter standard would lead to incongruities with the standard applicable [to] stays in favour of arbitration'. A similar principle under similar factual background was discussed by Valerie Thean J in the case of *BWF v BWG* [2019] SGHC 81.

[3] Insolvency, Restructuring and Dissolution Act 2018 s 420(3) (previously set out in the Bankruptcy Acts 148A(3) (repealed)).

## [20.025] Companies in winding-up

(2) Effect of an Arbitration Agreement

A Singapore company[1] or any of its creditors may upon a winding-up petition being presented and before the order having been made, apply to court for any action or proceeding against the company stayed.[2] The court may stay or restrain such proceedings on terms as it thinks fit.[3]

On the making of a winding-up order or the appointment of a provisional liquidator, no action or proceeding will be commenced or proceeded with except with leave of court.[4] Similarly, where the company is in voluntary liquidation, an automatic stay applies to all pending actions or proceedings.[5] The term 'proceeding' has been held to include proceedings by way of arbitration.[6]

The grant of a winding-up order by a court is an exercise of its specific statutory duty, as opposed to its adjudicatory jurisdiction in resolving matters in dispute arising out of a commercial contract. Thus winding-up proceedings may proceed notwithstanding the existence of an arbitration agreement in the contract between the applicant and the company.[7] The fact that an arbitration is pending in another jurisdiction outside Singapore would not of itself be sufficient to thwart the proper exercise of the statutory right of commencing a winding-up proceeding.[8] Where however a party who is faced with a substantive claim in arbitration attempts to frustrate the arbitral process by applying for the winding-up of the company, the court may nevertheless order a stay of the winding-up proceedings if it is satisfied that the claim pending in arbitration is a genuine cross-claim until the cross-claim by the company has been determined.[9]

[1] Including a foreign company registered under the Companies Act (Cap 50, 2006 Ed). See generally *[70]*COMPANY LAW (2021 Reissue).

[2] In relation to an arbitration under the International Arbitration Act 1994 (2020 Rev Ed), there appears to be a dichotomy between the limit of the court's power given in the Model Lawart 5 (where the court's power of intervention in arbitration is expressed to be only as provided therein) and the power of the court to order stay of arbitration proceedings under the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

[3] See the Insolvency, Restructuring and Dissolution 2018 s 129 (previously set out in the Companies Acts 258).

[4] See the Insolvency, Restructuring and Dissolution Act 2018 s 133(1) (previously set out in the Companies Acts 262(3)). Leave would more likely be given if there are other interests involved, for eg liability insurers or where the arbitration has proceeded to an advance stage, with an award imminent. Note the arbitrations in *American Home Assurance Co v Hong Lam Marine Pte Ltd*[1999] 2 SLR(R) 992, [1999] 3 SLR 682 (CA); *Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd*[1999] 3 SLR(R) 907,[2000] 1 SLR 137 (CA).

[5] See the Insolvency, Restructuring and Dissolution Act 2018 s 170(2) (previously set out in the Companies Acts 299(2)).

[6] *Four Pillars Enterprises Co Ltd v Beierdorf Aktiengesellschaft*[1999] 1 SLR(R) 382, [1999] 1 SLR 737 (CA); *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd*[2006] 3 SLR(R) 133; *Turner (East Asia) Pte Ltd v Builders Federal (HK) Ltd*[1988] 1 SLR(R) 281, [1988] SLR 1037, *[1988] 2 MLJ 280*, where Chan Sek Keong J held that 'proceedings' in the Legal Profession Act (Cap 161, 1985 Ed)s 30(1)(a) is not limited to legal proceedings in court and thus foreign lawyers could then not appear in arbitration proceedings. The provision has since been amended to allow foreign lawyers to appear in all arbitrations in Singapore – see the Legal Profession Act 1966 (2020 Rev Ed)s 35; see also *[20.081]*.

[7] *Re Sanpete Builders (S) Pte Ltd*[1989] 1 SLR(R) 5, [1989] 1 SLR 164.

[8] *S Y Technology Inc v Pacific Recreation Pte Ltd*[2007] 2 SLR(R) 756, [2007] 2 SLR 756, where Prakash J rejected an application to stay a winding-up petition against the company who had guaranteed a debt pending arbitration commenced by the principal debtor in the China International Economic Trade Arbitration Commission ('CIETAC').

[9] *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd*[2006] 3 SLR(R) 133, [2006] 3 SLR 133. The Court of Appeal (see [2007] 2 SLR(R) 268, [2007] 2 SLR 268 (CA)) reversed the view taken by the High Court in *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Chong*[1991] 2 SLR(R) 1, [1992] 2 SLR 1114, which had given prime consideration to the statutory right of a creditor of an undisputed debt and criticised restraining orders against winding-up petitions as having 'the potential of defeating the rights of creditors who may not have the same financial resources as the company, thereby denying them equal access to the court after a pre-emptive strike'. In the Court of Appeal's view, these considerations do not outweigh 'the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it where it has a serious cross-claim based on substantial grounds'.

## [20.026] Unilateral election to arbitrate

## (2) Effect of an Arbitration Agreement

The definition of 'arbitration agreement' in the Arbitration Act 2001[1] and the International Arbitration Act 1994[2] refers to an agreement 'to submit'. A natural reading of this would mean that all the parties agree to submit disputes to arbitration. In practice, arbitration agreements normally give each party to the agreement the mutual right to refer matters to arbitration. Such a practice is consonant with the definitions given in the statutes and consistent with the principle that the arbitral process is consciously chosen and agreed to by the parties as the most appropriate process for the resolution of disputes between them. The right to the arbitral process ought on that principle to be conferred on all the parties to the agreement.[3] This principle of mutuality has been recognised and considered as an essential ingredient in an arbitration agreement.[4]

There are, however, clauses which confer only on one party to the agreement, the right to invoke the arbitral process. Such one-sided clauses, it has been suggested,[5] would equally be considered as arbitration agreements as the parties had agreed to the clause and thus it was still consensual in nature.[6] Its unequal operation does not divest it of the character of an arbitration agreement.[7] There appears to be some judicial support for this view[8] but ambiguity still exists.[9]

[1] Ie under the Arbitration Act 2001 (2020 Rev Ed)s 2 read with s 4.

[2] Ie under the International Arbitration Act 1994 (2020 Rev Ed)s 2 read with Model Lawart 7.

[3] Vinodh Coomaraswamy J, in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*[2016] SGHC 238, eschewed the use of 'unilateral right' and 'mutual right', preferring instead the terms 'asymmetrical' and 'symmetrical'. The arbitration agreement contained the clause, 'at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings … in Singapore'. An agreement to arbitrate may be unconditional or conditional. While upholding the dispute resolution clause as a valid arbitration agreement as it expressed a 'mutual intent to arbitrate', the court concluded that Dyna-Jet's election to commence suit (and thereby opting not to arbitrate) rendered the arbitration agreement 'incapable of being performed'. The stay application was, thus, refused. The Court of Appeal in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*[2017] 2 SLR 362, [2017] SGCA 32 (CA), affirmed the High Court's decision that such a dispute resolution mechanism is a valid arbitration agreement but said the 'optional nature' of the clause meant that unless Dyna-Jet elects to arbitrate, any dispute arising from the contract could not be a matter subject to the arbitration clause. The arbitration agreement did not place the parties under an obligation to arbitrate but would give rise to an arbitration agreement only if and when Dyna-Jet elected to arbitrate a specific dispute in the future.

[4] *Baron v Sunderland Corp*[1966] 2 QB 56 at 64, [1966] 1 All ER 349 (CA, Eng) at 351, per Davies LJ who said in no uncertain terms that 'It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference'; followed in *Tote Bookmakers Ltd v Development and Property Holding Co Ltd*[1985] Ch 261, [1985] 2 All ER 555 (Ch D).

[5] See David Chong 'Agreements to refer Disputes to Arbitration' [1993] SJLS 261–273. The writer based his view on Asquith LJ in *Woolf v Collis Removal Service*[1948] 1 KB 11, [1947] 2 All ER 260 (CA, Eng).

[6] The issue of a unilateral clause should not be confused with the case of a clause permitting election by either party to arbitrate: see *WSG Nimbus Pte Ltd v Board of Control For Cricket In Sri Lanka*[2002] 1 SLR(R) 1088,[2002] 3 SLR 603 where the court said 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 Act'. Some contracts contain arbitration agreements crafted to confer the right to elect to arbitrate only upon one party or which gives a party or any party, an option to arbitrate or to litigate giving rise to the argument whether the nature of an arbitration agreement requires it to confer a mutual right to arbitrate or whether such an agreement that gives a unilateral right to one party to elect to arbitrate is sufficient to constitute a valid arbitration agreement.

[7] *Woolf v Collis Removal Service*[1948] 1 KB 11, [1947] 2 All ER 260 (CA, Eng), per Asquith LJ. See also the recent case of *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267, [2016] SGHC 238, where the plaintiff had a right to elect to arbitrate disputes under the contract but the defendant did not have an equivalent right of election. The court held that an agreement to arbitrate disputes is an 'arbitration agreement' even if arbitration was conditional and even if the agreement lacked mutuality (affirmed on appeal in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*[2017] 2 SLR 362, [2017] SGCA 32 (CA) at [13]).

[8] *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service*184 CLR 301 in which the Court of Appeal's ruling that: 'An agreement which gives one of the parties an option to submit a dispute to arbitration does not readily answer the description of an arbitration agreement as defined' was reversed. The High Court of Australia held that mutuality of reference is not contemplated within the meaning of 'an agreement in writing to refer present or future disputes to arbitration'; *Pittalis v Sherefettin*[1986] QB 868at 874, [1986] 2 All ER 227 (CA, Eng) at 231, per Fox LJ who said: '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'. However the position in *Pittalis v Sherefettin* (above) was followed by the Assistant Registrar in Engineering Team 8 Pte Ltd v SG Industrial Pte Ltd (unreported; Suit No 14 of 1996). The possibility of a 'one way operation' if an arbitration clause was adopted was raised in *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte*

*Ltd*[1999] 3 SLR(R) 618,[2001] 1 SLR 222 but the court dismissed it as irrelevant. In the Brunei case of *Swee Pte Ltd v Lim Kian Chai*[1983] 1 MLJ 353 per Rhind J the court remarked that the arbitration clause permitted only the plaintiffs to invoke the arbitration clause and that recourse was not available to the defendants. Their application for stay failed. The court rejected the argument that such a clause was unfair. The issue of a unilateral clause should not be confused with the case of a clause permitting election by either party to arbitrate: see *WSG Nimbus Pte Ltd v Board of Control For Cricket In Sri Lanka*[2002] 1 SLR(R) 1088, where the court said 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 Act'.

9 In *China Merchants Heavy Industry v JGC Corp*[2001] 3 HKC 580 (CA), the court declared unequivocally that there was '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'. The clause in question gave the plaintiff contractor the right to dispute the defendants' decision to arbitration within 15 days of the defendants' decision. The contractor did not elect to arbitrate and commenced action instead. The court ordered the action stayed in favour of arbitration. By ordering a stay, the court in effect failed to uphold the unilateral right given to the contractor.

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