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Case Note

RECONSIDERING THE ENFORCEABILITY OF BARE INTENTION TO ARBITRATE

KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd **[2017] SGHC 32**

As arbitration continues to gain popularity as a means of resolving disputes privately, there appears to be an increasing tendency in the courts to recognise, and thereafter, give effect to parties' supposed bare intention to arbitrate, even if the intention can only be tenuously ascertained. It is hoped that the experience in *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* will provoke a reconsideration of the circumstances under which a bare intention to arbitration will be enforced.

Nicholas **POON***
LLB (Singapore Management University);
Senior Associate, Drew & Napier LLC.

I. Introduction

1 Until the High Court's decision in *KVC Rice Intertrade v Asian Mineral Resources Pte Ltd*[1] ("*KVC*"), there was no reported decision of a Singapore court enforcing a bare arbitration clause, that is, a clause which is silent as to the seat of arbitration, number of arbitrators and a method for establishing the arbitral tribunal. *KVC* is, thus, ground-breaking. However, while *KVC* will come to be heralded as yet another example of Singapore's progressive and "pro-arbitration" judicial policy, there are a number of aspects of the court's decision which merit further and more careful consideration. This note limits itself to the aspect concerning the validity of bare arbitration clauses.

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* This note reflects the author's personal views on the topic. The author is also grateful to the anonymous referee for his comment.

1 [2017] SGHC 32.

II. Background

A. Facts

2 There were two almost identical actions involving two sellers which sold rice to the same buyer. The arbitration clauses in both contracts of sale were identical save in one respect (as per the square brackets below):[2]

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per [*Indian Contract Rules/Singapore Contract Rules*]. [emphasis in original]

3 A dispute arose. The sellers individually proposed arbitrating in Singapore and even proposed an arbitrator. This was summarily rejected by the buyer. The sellers then commenced the actions in the Singapore High Court. This was met by an application for a stay of the action on the basis of the arbitration clause.

4 The sellers contended that the arbitration clause was incapable of being performed as "Singapore Contract Rules" and "Indian Contract Rules" did not refer to any existing or known set of procedural rules and the clause did not designate a seat of arbitration. The buyer's position was that the arbitration clause was workable because the details of the arbitration could be agreed between the parties or resolved by the mechanisms provided under the law. Curiously, the sellers did not oppose the stay on the basis that the arbitration clause was invalid.[3]

B. High Court's decision

5 The crux of the court's decision is that the arbitration clauses, although in the nature of a "bare arbitration clause" in that they merely provided for submission of disputes to arbitration without specifying the place of the arbitration, the number of arbitrators or the method for establishing the arbitral tribunal, "remain[ed] a valid and binding arbitration agreement if the parties ha[d] evinced a clear intention to settle any dispute by arbitration".[4]

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2 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [50].

3 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [27].

4 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [29].

6 The court was not unduly troubled by the absence within the arbitration clause of an agreed mechanism to appoint arbitrators.[5] The court held that where the connecting factors "point unequivocally to Singapore as the place of arbitration", the arbitration would be a "domestic arbitration"[6] governed by the Arbitration Act,[7] which would provide for the appointment process. Where the connecting factors point unequivocally to "some other country", the parties "should look to the courts or statutory appointing authority of [that] some other country to assist with the establishment of the arbitral tribunal".[8] When the connecting factors are ambivalent, which the court noted was the situation it was faced with on the facts of the dispute, Art 11 of the Model Law[9] read with s 8 of the International Arbitration Act[10] ("IAA") apply and the president of Singapore International Arbitration Centre "can step in to make the necessary appointment if parties are not able to agree on the sole arbitrator or presiding arbitrator".[11]

III. Analysis

A. Issue of formation and validity of bare arbitration clause was not considered

7 The court did not question the validity of the arbitration agreement, even though it had recognised that the arbitration clauses in question were bare arbitration agreements. While this may seem curious at first blush, it is explicable by the fact that the sellers rested their challenge only on the workability of the arbitration clause, not its formation or validity.[12] As a rule of practice, the court's role is to decide every case before it on the basis of the arguments and case presented. If the sellers were content to challenge only the workability of the arbitration clause, as opposed to its formation or validity, the court would be entitled to approach the dispute on that same basis.

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5 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [31].
6 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [31].
7 Cap 10, 2002 Rev Ed.
8 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [31].
9 UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).
10 Cap 143A, 2002 Rev Ed.
11 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [34].
12 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [27].

8 The question remains, though, whether a bare arbitration clause ought to be enforced. The answer is not so obvious.

B. Enforceability of bare intention to arbitrate

(1) Competing considerations

9 It is true that there is strong judicial support for the enforceability of other types of bare alternative dispute resolution ("ADR") agreements (namely, mediation and negotiation),[13] characterised principally by a firm intention, "expressed in unqualified and mandatory terms", to participate in the ADR process.[14] However, it would be far too simplistic to extend the interpretative approach applicable to ADR agreements to bare arbitration clauses. Particularly in the Singapore context, ADR agreements such as mediation and negotiation agreements are regarded as being consistent with the "cultural value" and "*wider public interest in Singapore*" [emphasis in original] in "promoting consensus" when resolving disputes.[15] It is arguably more difficult to situate such specific public interest and cultural value within the sphere of commercial arbitration.

10 The absence of any strong judicial authority in support of the enforceability of bare arbitration clauses is telling. In fact, the sole judicial precedent cited in *KVC* in support of the enforceability of a bare arbitration clause,[16] *Insigma Technology Co Ltd v Alstom Technology Ltd*[17] ("*Insigma*"), actually involved the enforcement of a substantially more complete arbitration clause. In that case, the arbitration clause contained the following: (a) "arbitration before the Singapore International Arbitration Centre"; (b) "in accordance with the Rules of Arbitration of the International Chamber of Commerce"; and rather importantly, (c) "proceedings shall take place in Singapore". In other words, the arbitration clause referred to an arbitral institution, a set of arbitral institutional rules and the seat of arbitration, respectively. The reference to an arbitral institution and the arbitral institutional rules is especially significant, because they provide the framework for the resolution of any uncertainty or dispute in relation to the constitution of the arbitral tribunal.

13 See generally Keith Han & Nicholas Poon, "The Enforceability of Alternative Dispute Resolution Agreements" (2013) 24 SAcLJ 455.

14 *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] CLC 1319 at 1327.

15 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

16 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [29].

17 [2009] 3 SLR(R) 936.

11 Three other decisions, although mentioned by the court only in passing, deserve further consideration.

12 The first is *HKL Group Co Ltd v Rizq International Holdings Pte Ltd*,[18] a decision of an assistant registrar ("asst registrar") of the Singapore High Court. This case does not offer any direct support because the arbitration clause provided Singapore as the seat of arbitration, and for the arbitration to be conducted under the International Chamber of Commerce Rules.[19] In fact, the asst registrar expressly stated that the clause was "operative and workable" for four cumulative reasons, two of which were that the clause provided for the (a) place of arbitration, and (b) applicable institutional rules.[20]

13 The second case, *Comtec Components Ltd v Interquip Ltd*,[21] is a decision of the Hong Kong High Court. This case, too, is distinguishable as the arbitration clause provided that "any dispute … shall be settled by arbitration in Hong Kong" and that "the arbitrator was to be appointed by the Hong Kong International Arbitration Centre".

14 The third, *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd*[22] ("*Lucky-Goldstar*"), is arguably the strongest authority in favour of the conclusion reached in *KVC*. In that case, the arbitration clause enforced by the Hong Kong High Court provided for arbitration in a "third country", "under the rules of the third country" and in accordance with the rules of procedure of a non-existent institution, the "International Commercial Arbitration Association".[23]

15 Suffice it to say, *Lucky-Goldstar* is a shining example of what is popularly called the "pro-arbitration" approach. Unsurprisingly, therefore, *Lucky-Goldstar* has attracted much controversy, with one respectable commentary describing it as "an extreme case".[24] But, to be fair, *Lucky-Goldstar* is not a complete outlier. There are a fair number of cases and commentaries which are sympathetic to the proposition that a bare intention to arbitrate is enforceable.[25] Nevertheless, for the

18 [2013] SGHCR 5.
19 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 at [25]–[26].
20 *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 at [27].
21 [1998] HKCU 2053.
22 [1993] 1 HKC 404.
23 *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* [1993] 1 HKC 404 at 405.
24 Julian D M Lew, Loukas A Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 7-77.
25 See, *eg*, *Hobbs Padgett & Co (Reinsurance) Ltd v J C Kirkland Ltd* [1969] 2 Lloyd's Rep 547; Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer, 2nd Ed, 2015) at p 766.

reasons below, *Lucky-Goldstar* and the jurisprudence in favour of the enforceability of bare arbitration clauses ought not to be followed.

(2) Arguments from principle against enforcement of bare arbitration clauses

16 The starting position must be that an arbitration agreement is no less and no more a contract than other forms of commercial contracts. Arbitration agreements are therefore, and ought to be, subject to the same body of legal principles and rules that apply to contracts governed by the relevant applicable law. (For convenience, the following shall proceed on the basis that Singapore law is the law governing the arbitration agreement.) Of key relevance in this context is the fundamental and trite principle of contract formation and validity that an agreement lacking the necessary certainty or completeness is void and unenforceable.[26] As a leading commentary on Singapore contract law puts it, "[i]t is axiomatic and commonsensical that before there can be a concluded contract in law, its terms must be certain and the agreement must similarly be complete".[27] For convenience, this rule shall be referred to as the "certainty and completeness rule".

17 There are two ways of approaching cases such as *Lucky-Goldstar* and *KVC*: (a) the certainty and completeness rule does not apply at all to arbitration clauses; or (b) the certainty and completeness rule applies, but the standard of certainty and completeness required is lower than that of ordinary commercial contracts. The first approach is untenable. It is self-evident that an arbitration clause must have a minimum core of content to even be considered an arbitration clause. There is ample Commonwealth authority to the effect that as a matter of principle, arbitration clauses can be void for uncertainty.[28] Thus, cases which have enforced bare arbitration clauses are justifiable on the basis of the second approach, even if they do not expressly say so.

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26 See *Walford v Miles* [1992] 2 AC 128 at 138; *Scandinavian Trading Tank Co AB v Flota Petrolera Ecuatoriana* [1983] QB 529 at 540; *Re Vince, ex parte Baxter* [1892] 2 QB 478. In *Sulamérica Cia Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [35], the English Court of Appeal held "in order for any agreement to be effective in law it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced".

27 *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 03.145.

28 See, *eg*, *Innotec Asia Pacific Sdn Bhd v Innotec GmbH* [2007] 8 CLJ 304; *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] CLC 431; *National Enterprises Ltd v Racal Communications Ltd* [1974] Ch 251; *Rashid v Wipro Ltd* [2015] BCJ No 2599; *Van Dorn Co v Bunge Industrial Steels Pty Ltd* (18 June 1986) (Supreme Court of New South Wales).

18 From these cases, it may be deduced that the standard of certainty and completeness required is merely a bare intention to arbitrate. There is no inquiry into the quality of the intention to arbitrate; the mere reference to arbitration appears to suffice. This standard is extraordinarily low, and renders the certainty and completeness rule largely superfluous. One response to this could be that the certainty and completeness rule has been relaxed by the autonomous body of rules and legal principles applicable to matters concerning arbitration that is to be found in national arbitration legislations[29] and judicial decisions. There is undoubtedly merit to such a contention, but only up to a point.

19 While national arbitration legislations do prescribe formal validity requirements, substantive matters of validity of the arbitration agreement generally continue to be resolved by reference to the generally applicable contract law.[30] And, while there has been a clear judicial trend towards giving effect to arbitration agreements, there is as yet no general consensus, particularly within common law jurisdictions which require contracts to be complete and certain to be enforceable, that a bare arbitration clause is an exception to the general rule. Even in the occasional decisions favouring enforcement of a bare arbitration clause, such as *Lucky-Goldstar*, there is an unfortunate but discernible absence of serious analytical, principled reasoning justifying excepting arbitration agreements from domestic law principles governing contractual formation and validity. Indeed, to say that bare arbitration clauses are by default enforceable would be to dilute the efficacy of the rule under Art 8 of the Model Law and s 6 of the IAA that the courts generally will not stay court proceedings if the arbitration agreement is null and void or incapable of being performed largely superfluous. Words which give a semblance of an arbitration agreement would be sufficient to stave off a stay application.

20 There is, on the other hand, a principled case in favour of rejecting the enforcement of bare arbitration clauses on the ground that such clauses are invalid as they do not satisfy the certainty and completeness rule. It starts from the widely accepted and held premise that the enforcement of arbitration agreements curtails a person's right to access national courts. A far-reaching consequence in and of itself, this restriction is all the more significant in jurisdictions where access to national courts is a constitutional right. Accordingly, arbitration agreements should be subjected to at least the same contractual

29 See, *eg*, s 2A of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

30 Stavros L Brekoulakis, "The Notion of Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?" (2007) 24(4) *Journal of International Arbitration* 341 at 358; see also Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer, 2nd Ed, 2015) §6.03, at para 24 and p 3205.

formation and validity requirements as those applicable to general contracts, if not more. This point was masterfully presented by Prof Brekoulakis in his provocatively titled piece, "The Notion of Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?",[31] as follows:

> [T]he argument for the presumption of the existence of arbitration agreements is in conflict with their exceptional character. The argument that procedural agreements, including arbitration agreements, have an exceptional character should not cause mistrust. It does not imply that arbitration agreements constitute exceptions to the national courts as the natural and lawful forum.
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> National courts are no longer considered the natural forum at least in the context of international business transactions. National courts simply constitute the default forum. Thus, procedural agreements constitute exceptions to the latter, merely because if the parties do not expressly commit themselves to an arbitration agreement, the default forum will assume jurisdiction over their dispute. In fact, the exceptional character of procedural agreements reinforces the role of party autonomy in international commercial trade: *it is for the parties, and only the parties, to decide whether they will elect to depart from the default forum by concluding an arbitration or any other procedural page agreement. It follows that it cannot be the case that the validity or the existence of arbitration agreements is presumed. It defies logic and legal certainty to presume an exception. The presumption must be in favour of the default forum. For the presumption to be rebutted, the existence of the arbitration agreement must first be established.*
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> [emphasis added]

21 Put another way, where an arbitration clause falls short of the requirements for certainty and completeness, it is more likely than not that the parties to the arbitration clause had not applied their minds fully or adequately to the alternative forum that would displace their otherwise fundamental right to access national courts. The inference that had the parties properly considered arbitration as the ADR mechanism they would not have agreed to execute a bare arbitration clause is far more natural, logical and hence attractive, than the alternative that even though the parties had given careful thought to their intention to arbitrate, they were happy to simply encapsulate it in the form of a bare arbitration clause. It is also the safer inference to draw, in light of the gravity of restricting a person's access to national courts.[32]

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31 (2007) 24(4) *Journal of International Arbitration* 341.

32 In this regard, see the recent Court of Appeal's decision in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32 at [23], where the court observed that the default position "that any party can take any dispute arising under any contract to the court, unless there is some agreement to the contrary" was so "well established as to require no further affirmation".

This analysis also has the benefit of consistency with the doctrine of waiver of rights which, under Singapore law at least, is effective only where there is a "voluntary or intentional relinquishment of a known right, claim or privilege", evidenced by "unequivocal conduct".[33]

22 It is not so much that a bare arbitration clause can never amount to unequivocal conduct of the parties' intention to relinquish their right to access national courts. The crux lies in the recognition that if the parties intended to displace national courts in favour of arbitration, it is only reasonable to expect that they would have been more deliberate and express in their choice by also at least providing for a seat of arbitration or an appointment procedure.

23 There could, of course, be exceptional circumstantial and background facts which may support a finding of fact that the bare arbitration clause is more complete and certain than the express language suggests. Whether there are such facts, and how these facts ought to be construed, can only be ascertained on a case-by-case basis. Nevertheless, the general starting position remains that a bare arbitration clause evidences, on balance, the fact that the parties have not applied their minds adequately to the forum by which their disputes are to be resolved.

24 At this juncture, it is important to distinguish the principle being considered here from the *contra proferentum* rule. Unlike the *contra proferentum* rule which applies in the event of ambiguity to the detriment of the drafter, the requirement of certainty and completeness is party-blind. And, it is important that the approach towards the enforceability of bare arbitration clauses is party-blind. If, instead, the *contra proferentum* rule is applied, the non-drafting party can exploit the ambiguity in both directions: to insist on arbitration or refuse to arbitrate, depending on which outcome is more advantageous to it. This is highly uncertain, unsatisfactory and unjustifiable punishment of the drafter for what is essentially a question of whether an arbitration agreement has been concluded, which is in the first place not a question that admits of any interpretative ambiguity.

(3) Arguments from policy against enforcement of bare arbitration clauses

25 Contrary to intuition, there are at least three policy reasons militating against enforcement of bare arbitration clauses.

33 *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [39].

26 The first is that a default rule that bare arbitration clauses are enforceable will hardly reduce the incidence of disputes over the construction and implementation of such clauses. This is because the inherent uncertainty in the clauses will require co-operation and agreement in order for any arbitration to progress. In this regard, parties already embroiled in a disagreement over their substantive contractual rights and obligations are unlikely to readily agree on how the bare arbitration clause is to be effected. Hence, at the minimum, the parties will still need to obtain directions or even an order from the court as to the appropriate appointing authority to constitute the tribunal, especially if the parties are domiciled or based in different jurisdictions. The parties are also likely to have to obtain directions from the court as to the practical steps to perform or give effect to their bare intention to arbitrate. It is also not unlikely that disputes over the construction of the bare arbitration clause can be brought to one or more national courts, or the putative arbitral tribunal, or both simultaneously.

27 The second consequence, which follows closely from the first, is that valuable and limited judicial resources will continue to be expended. That is not necessarily detrimental if the use of judicial resources directly translates to resolution of disputes. However, there is no assurance, even after the court applies the default rule and directs how the intention to arbitrate may be performed, that the dispute is materially closer to resolution. As recognised in *KVC*, the tribunal, after it is constituted by the appropriate appointing authority, has the jurisdiction to determine that the arbitration clause is invalid.[34] The court may even have to deal with the issue again if a challenge is brought against the arbitral tribunal's decision.

28 The third consequence concerns the development of the arbitration ecosystem as a whole. A legal system which bends over backwards to give effect to bare arbitration clauses in a bid to "promote arbitration" reduces, in the long run, the incentive for parties to be specific and precise about their intentions, and to take all necessary steps, including obtaining the relevant legal advice, to ensure that their intentions are properly reduced in writing. Under this system, instead of being "the masters of their contractual fate",[35] the cost of ensuring that contractual bargains are performed is, thus, outsourced by the parties to the court and, by extension, taxpayers. This development is also unhealthy for the overall growth of arbitration as a system of dispute resolution. As commercial parties become more indifferent and complacent in their drafting of arbitration clauses, the propensity for

34 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 at [54].

35 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619.

disputes over the construction and effect of those clauses increases. Quite apart from straining judicial resources further, the very existence of these disputes in court will dampen the confidence that parties will have in the utility of arbitration as a system of dispute resolution. The more the efficacy of arbitration is dependent on court intervention, the less appealing arbitration will be relative to national courts.[36] Therefore, whether enforcing bare arbitration clauses is "pro-arbitration" is more nuanced and multi-dimensional than may appear.

(4) Other observations

29 For completeness, it is apposite to refer to another very recent Singapore High Court decision which is arguably germane, but did not appear to have figured in the court's analysis. In *TMT Co Ltd v The Royal Bank of Scotland plc*[37] ("*TMT*"), the court found that an arbitration agreement, which provided for "arbitration under the arbitration rules of the relevant exchange",[38] was inoperative or incapable of being performed because there was no "relevant exchange" that was involved in the transaction between the parties, only a clearing house.[39] The court rejected a number of arguments by the party seeking to rely on the arbitration agreement, including:

> (a) the words "relevant exchange" should be interpreted to mean "exchange or in the alternative a clearing house". Adopting the suggested interpretation would, in the court's view, amount to a "significant rewriting" of the arbitration agreement, which was impermissible;[40] and
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> (b) the court should focus on the "provision for arbitration" and treat the "rest of the clause as the relevant mechanism, which could be modified or adapted to address the situation at hand". The court drew a wide line in the sand between giving effect to party autonomy (which would be upheld) and rewriting agreements between parties (which is impermissible). Parties, the court stressed, "would have to live with the consequences" of "any slips" in the drafting of their arbitration agreements.[41]

36 See *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at para 958.
37 [2017] SGHC 21.
38 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [65].
39 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [64].
40 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [66].
41 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [66].

30 *TMT* may be critiqued for its indiscriminate treatment of all forms of "slips" in drafting. To some extent, such a firm approach is inconsistent with the principle of "effective interpretation" endorsed by the Court of Appeal in *Insigma*.[42] However, the fundamental premise in *TMT* that the court is not in the business of rewriting contractual bargains is unimpeachable. Effective interpretation does not equate to giving effect to an intention to arbitrate, at all costs, as the Court of Appeal in *Insigma* took pains to caution:[43]

> [W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars … *so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party* … [emphasis added]

IV. Conclusion

31 A cornerstone of commercial law is the time-honoured principle that the courts will not rewrite the parties' bargain, even "in the name of fairness and reasonableness".[44] Neither will the courts improve the contract which the parties have made for themselves, however desirable the improvement may be[45] and even where the modification "makes the contract conform to business common sense".[46] The underlying rationale is simple: because a rewritten bargain is not the parties' bargain.[47] These hallowed principles have endured the test of time not without good and sound reason. They should, therefore, be disregarded only as a last resort, and for an exceptionally worthy cause. For the reasons given above, enforcing a bare arbitration clause is not such a cause.

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42 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [31].

43 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [31].

44 *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 at [38]. See also *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [8].

45 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609.

46 *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97 at 99.

47 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.