ENFORCEMENT OF ARBITRATION AGREEMENTS UNDER THE INTERNATIONAL ARBITRATION ACT 1994*

This paper examines the enforcement of international arbitration agreements under the International Arbitration Act 1994. The issues, which relate to enforceability at the pre-award and post-award stages, are important as many of them relate to the drafting of the arbitration agreement or clause. As the Act is new, reference is made to case law from other jurisdictions for suggestions on interpretation.

INTRODUCTION

This paper will examine some of the issues surrounding the enforcement of arbitration agreements under the International Arbitration Act,[1] under the following headings:

1. Applications for stay of judicial proceedings:
   (a) under section 6 of the Act,
   (b) under Article 8 of the Model Law,
   (c) under the courts inherent jurisdiction, with examples,
   (d) implications of stay being allowed or refused;
2. Public Policy and Arbitrability;
3. Separability; and
4. Enforcement of award where the arbitration agreement is challenged.

The Act defines an arbitration agreement in two ways. Under section 2(1), it means:

> "an agreement in writing referred to in Article 7 of the Model Law and includes an arbitration clause contained or incorporated by reference in a bill of lading".

Article 7 of the Model Law[2] provides:

> "(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which

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1 Act No 23 of 1994 (hereafter, "the Act").

2 The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (hereafter, "the Model Law"), which forms the First Schedule of the Act. Section 3(1) of the Act gives the Model Law (except its Chapter VIII) the force of law in Singapore, subject to the provisions of the Act. For an overview of the Act and the role of the Model Law within it, see my article, "The Adoption of the UNCITRAL Model Law in Singapore" [1994] Dec SJLS 387.

may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing..."

Thus, an arbitration agreement may take the form of a clause embedded in a commercial agreement, or of an agreement separate from the main contract. Whichever form it takes, an arbitration agreement must be capable of enforcement at general law and under the Act.[3]

From the definitions above, it is clear that such an agreement must relate to a dispute in respect of a "defined legal relationship", and be "in writing" to be enforceable under the Act. However, what constitutes such writing,[4] and beyond that, when an arbitration agreement may be unenforceable for other reasons, are issues which may arise from time to time.

It should be noted at the outset that a challenge to the enforceability of an arbitration agreement can occur at more than one stage of the arbitral process, and on various grounds. The challenge may occur at the initial stage of the dispute, where one party seeks arbitration but the other resists it, challenging the validity of the arbitration agreement. In another example, one party may, despite the existence of an arbitration agreement, have commenced judicial proceedings, but the other party seeks a stay of these proceedings in favour of arbitration. The party in favour of judicial proceedings would invite the court to refuse a stay on the ground that the arbitration agreement is unenforceable.

The challenge to the arbitration agreement can also occur at the stage at which the arbitral award is sought to be enforced, where one party resists such enforcement by attacking the validity or enforceability of the arbitration agreement.[5] The grounds on which the challenges can be made would generally depend on the relevant curial law of the arbitration and, where the challenge occurs at the enforcement stage, the law of the place of enforcement.[6] Under the Act, for instance, arbitration agreements are open

3 As was observed in Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1991), at p 5. Under the Act, the arbitration should be an international commercial arbitration: see section 5 of the Act and Article 1 of the Model Law.

4 See Article 7(2) of the Model Law, and *infra*, Part 1(c) of this paper.

5 See *infra, 4. Enforceability of the arbitration agreement in relation to enforcement of an award based on it.*

6 Challenges to the arbitration agreement at the enforcement stage are provided for in section 31(2) of the Act, which relates to the enforcement of arbitration awards made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter "the New York Convention"). Part III of the Act, of which section 31 is part, repeals the Arbitration (Foreign Awards) Act (Cap. 10A, 1985 Ed) and re-enacts most of its provisions incorporating the New York Convention. The Convention now forms the Second Schedule of the Act.

to challenge both at the initial and enforcement stages. If an arbitration agreement is successfully challenged, the dispute would have to be decided by means other than arbitration, probably, by court proceedings. In an appropriate case under the Act, the court may well refuse stay and prefer to hear the matter itself.

One might query why, with the current fervour to promote commercial arbitration as an alternative to litigation, such judicial intervention in arbitral proceedings is allowed under the Act. One argument would be that since arbitration removes disputes from the judicial system into a private forum, the law seeks to ensure that this removal is done only in appropriate cases. Cases which may be inappropriate would be those in which the matter to be decided requires public, not private, resolution, because, perhaps, it concerns public policy, or concerns matters more appropriately decided by a court of law, such as where criminal activity is involved. Another reason would be that the particular arbitration agreement may simply be defective or non-existent, so that it is unenforceable under normal contractual principles.

The Act stipulates the cases in which it would not be appropriate to arbitrate. In these cases, arbitration agreements will not be enforced as the courts are deemed to be the appropriate venue for dispute settlement. What, then, are these cases under the Act? They appear to be clearly defined categories, but several difficult issues can arise in their application. The following discussion will examine some of these issues.

1. Applications for stay of judicial proceedings

(a) Under section 6 of the Act

Under section 6(1) of the Act, where any party to an arbitration agreement institutes legal proceedings against any other party to the agreement, in respect of any matter which is the subject of the agreement, any party to the agreement may apply for a stay of those proceedings. This is provided that the party applying for the stay has done so "at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings". Where such an application is made, section 6(2) requires that the court "shall make an order ... staying the proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed." Such a stay should also be ordered by virtue of Article 11(3) of the New York Convention, which appears in the Second Schedule of the Act.[7]

7 Article II(3) of the New York Convention states:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is *null and void, inoperative or incapable of being performed*." (Emphasis added.)

The mandatory language in section 6(2) requiring the court to order the stay indicates that it has no discretion. Read literally, the only exceptions in which the court may choose to refuse stay are those mentioned in the last part of the sub-section. The corresponding provision in the UNCITRAL Model Law is Article 8. Neither the Act, the Model Law nor the New York Convention defines "null and void, inoperative or incapable of being performed". Although section 4(1) of the Act allows reference to the *travaux préparatories* of the Model Law in its interpretation, there does not appear to be any assistance therein, except that "null and void" agreements would normally include those which refer non-arbitrable matters to arbitration.[8] The terms "null and void", "inoperative" and "incapable of being performed" have deliberately not been defined in the Model Law and in the Act, to allow the adopting jurisdiction to give them such meaning as it thinks fit.

Mustill & Boyd have sought to explain the application of these terms as follows, in the context of their appearance in section 1 of the English Arbitration Act 1975 (which is *not* an adoption of the Model Law):

- the words "null and void" includes cases where the purported arbitration agreement never came into existence and where it came into existence but has become void *ab initio*;
- the term "inoperative", having no accepted meaning in English law, refers to an agreement which has for some reason ceased to have effect for the future — such reason including a court order to the effect that the agreement shall cease to have effect, the existence of circumstances such as frustration, discharge by breach etc, and cessation of the agreement by some further agreement of the parties;
- finally, "incapable of being performed" is taken to mean some obstacle to the performance of the arbitration agreement by the parties, such as the breakdown of the mechanism for constituting the tribunal in a way that is beyond repair by the Court.[9]

It can be expected that where the arbitral process is strongly supported by the courts in a jurisdiction, they will read these terms narrowly so as to give maximum effect to the arbitration agreement. This is illustrated by the cases discussed below.[10]

There is, however, a difference between the wordings of Article 11(3) the New York Convention and Article 8(1) of the Model Law, where the court is to "refer the parties to arbitration", and that of Section 6(2) of the Act, which merely requires the Court to order a stay of judicial proceedings. See discussion in this paper, *infra*, under (ii) *Implications of stay being granted or refused.*

8 See H M Holtzmann & J E Neuhaus, "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" (1989), at pp 302–305.

9 Mustill & Boyd, Commercial Arbitration (1989, 2nd ed) at 464.

10 In addition, courts have been prepared to hold that arbitration agreements have been effectively incorporated into parties' contracts by reference: see *Astel-Peiniger Joint Venture*

In *Kaverit Steel & Crane Ltd* v *Kone Corpn*[11], the Alberta Court of Appeal was of the view that the ground is "an echo of the law about void contracts ('null and void'), unenforceable contracts ('inoperative'), and frustrated contracts ('incapable of being performed')."

In Halsbury's Laws of Australia, these terms are taken to refer to the following situations:

- want of offer and acceptance;
- want of consideration;
- the arbitration agreement is illegal or otherwise void *ab initio*; and
- the arbitration agreement has become void *ab initio* by operation of law or court order.[12]

How have courts elsewhere dealt with this phrase?

In *Overseas Union Insurance Ltd* v *AA Mutual International Insurance Co Ltd*[13], the English court held that it was for the party opposing a stay to prove that the words "null and void ..." etc in section 1 of the English Arbitration Act 1975 applied, once the applicant for stay had proved the existence of what appears to be a relevant arbitration agreement. On the facts, the court held that there was no evidence that the agreements in question "were not valid, or that they were a sham or device or were inoperable in accordance with their terms..."[14]

In *Home & Overseas Insurance Co Ltd* v *Mentor Insurance Co (UK) Ltd*[15], the English Court of Appeal held that whilst a clause which purported to let arbitrators decide without regard to the law and according, for example, to their own notions of fairness would be invalid, the clause in question did no more than to allow the arbitrators latitude to decide in a reasonable or equitable manner, rather than in a strict legal one. The clause was therefore held not to be void.

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v *Argos Engineering & Heavy Industries Co Ltd* (unreported), Cons L No 14 of 1994, 18 Aug 1994, summarised in Aug/Sep HKLD H10.

11 [1993] ADRLJ 108, decision of the Alberta Court of Appeal, Canada, at p 114, following *Paczy* v *Haendler & Natermann GmbH* [1981] 1 L1 Rep 302, CA.

12 Vol 1 (looseleaf), at para 25–235. It also explains that: "inoperative" would include a situation where the arbitral tribunal declines to proceed with the reference or where the court has ordered that the agreement cease to have effect (*Fowler* v *Merrill Lynch*, unrep); proof of mere delay, inconvenience, procedural or time bar would be insufficient to render the agreement "incapable of being performed" (*The Merak* [1964] 3 All ER 638), nor would the fact that a party was unwilling or unable to satisfy an award which might be made (*The Rena K* [1979] QB 377, *The Tuyuti* [1984] QB 838).

13 [1988] 2 Lloyd's Rep. 63.

14 *Ibid*, at p 71.

15 [1989] 1 Lloyd's Rep. 437.

In Hong Kong, the "null and void etc" argument was made in *Lucky-Goldstar International (HK) Ltd* v *Ng Moo Kee Engineering Ltd.*[16] The arbitration clause provided for arbitration "in the 3rd Country, under the rule of the 3rd Country and in accordance with the rules of procedure of the International Commercial Arbitration Association..." This was a non-existent body, but the High Court of Hong Kong held that as long as the parties' intention to arbitrate was clear, as it was here, the arbitration agreement was not null and void, nor was it inoperative. The court also rejected arguments that the arbitration agreement was "incapable of performance", holding that such an agreement was enforceable unless the curial law of the state of where arbitration was taking place had no provisions for the parties, courts or other authorities to appoint substitute arbitrators. In other words, once such alternative appointment was provided for, the agreement was capable of performance despite the initial choice of a non-existent tribunal.

A similar scenario arose in *Circus Productions Inc* v *Rosgoscirc*[17]. The arbitration agreement provided for disputes to be referred to the American Arbitration Association ("AAA") in New York, which was later changed to the "International Arbitration in the Hague (Netherlands)", a non-existent body. The issue was whether this rendered the arbitration agreement "null and void" under Article 11(3) of the New York Convention. It was held that although the phrase "null and void" was to be narrowly construed, the choice of a non-existent forum was a mistake and therefore an exception, so that the court could not compel arbitration at the forum stated. The court nonetheless allowed the arbitration to proceed at the AAA, saying that this best approximated the parties' intent.

In *Star Shipping AS* v *China National Foreign Trade Transportation Corp (The Star Texas)*[18], the English Court of Appeal, although not looking at the matter in the context of the Model Law as UK has not adopted it, held that the arbitration clause which required disputes to be "referred to arbitration in Beijing or London in defendant's option" was not null and void for uncertainty. The clause was held not be uncertain in giving the

16 [1993] 2 HKLR 73.

17 US District Court for the Southern District of New York, 14 July 1993, found in 1993 US Dist LEXIS 9797, and summarised in [1994] 1 SINARB 3.

18 [1993] 2 LI Rep 445, CA. The uncertainty issue also arose in *Guangdong Agriculture Co Ltd* v *Conagra International (Far East) Ltd* [1993] 1 HKLR 113. There, the arbitration clause stated, *inter alia*, that "...In case no settlement can be reached [by amicable negotiations], the case under dispute *can* then be submitted ...for arbitration... The arbitration ... shall be executed in accordance with the *rules of Hong Kong*..." (Emphasis added.) It was argued that the clause was "null and void, inoperative or incapable of being performed", since the word "can", instead of words like "shall" or "will", created no binding obligation to arbitrate. It was also argued that the reference to the "rules of Hong Kong" was so vague and uncertain that there was no valid and binding arbitration agreement. The court rejected these arguments, holding that the parties clearly intended to arbitrate and that was sufficient to establish a binding arbitration agreement.

defendant/respondent an option to litigate or arbitrate respectively.[19] It was also held that even if the wording of the clause amounted to a choice of a floating curial law, it would not invalidate the clause.

In *Mind Star Toys Inc* v *Samsung Co Ltd*[20], an agreement containing both an arbitration clause and a right to sue was upheld as being operative.

Whatever the meaning to be given to these terms, where commercial arbitration is favoured, the courts will interprete "null and void, inoperative or incapable of being performed" narrowly, whether in the context of the Model Law or of the New York Convention, so as to give effect to the parties' agreement to arbitrate.[21] What is required is that the intention to arbitrate is clear.

(b) Under Article 8 of the Model Law

Article 8(1) provides:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Under section 3(1) of the Act, the provisions of the Model Law are to be read subject to the Act. In addition, section 6(1) is to be read "[W]ithout prejudice to Article 8". Since Article 8 is compatible with section 6(2) in that there is no express overriding of the former by the latter, the requirement which appears in the opening line of the Article and not section 6(2) can be an additional ground for refusal of stay. In other words, where an

19 This should be contrasted with *The Dai Yun Shan* [1992] 2 SLR 508, where the arbitration clause gave an option for disputes to be determined either "by Chinese law in the Courts of, or by arbitration in, the People's Republic of China". The Singapore High Court held that the clause did not create an obligation to arbitrate, but stayed the action on another ground, *viz*, that the forum chosen was the PRC and not Singapore.

20 9 Ontario Reports (3d), 374, summarised in UNCITRAL's Case Law on UNCITRAL Texts (CLOUT) A/CN.9/SER.C/ABSTRACTS/2, decision of the Ontario Court, General Division, case 32.

21 See, for instance, *Onex Corp* v *Ball Corp*, unreported, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS 4, case 69, decision of the Ontario Court of Justice, General Division, 24 Jan 1994. The court held that the arbitration clause would be interpreted in a manner that would be conducive to arbitration. Similar remarks cán be found in *Automatic Systems Inc* v *Bracknell Corp*, unreported, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS/4, case 73, decision of the Ontario Court of Appeal, 25 April 1994, where the court held that international comity and the strong commitment of the Ontario legislature in support of international arbitration, demonstrated in the adoption of the Model Law, meant that only very clear language in a statute could preclude international arbitration. (The statute considered there was the Ontario Construction Lien Act which made provision only for *domestic* arbitration in an Ontario lien claim, but the court held that this did not expressly exclude international arbitration.)

action is brought in respect of a matter which is not the subject matter of an arbitration agreement, Article 8 allows the court to likewise refuse a stay and allow judicial proceedings to proceed.

An example of a case applying Article 8 in this fashion is *ODC Exhibit Systems Ltd* v *Lee, Expand International et al*[22], where the plaintiff's action was founded on tort and was held not to fall within the arbitration agreement, as they were committed before the arbitration agreement was made. As a result, the court held that the basic condition precedent for the grant of a stay under Article 8, *viz*, that the court action must relate to a matter agreed to be arbitrated, was not met. The stay application by the defendant therefore failed.

(c) Possible stay cases falling outside section 6(1)

(i) Inherent jurisdiction of the High Court to stay actions

Order 92, Rule 4 of the Rules of the Supreme Court,[23] provides

> "For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of court."

The limits of these inherent powers are not entirely clear. However, there has been a local decision which indicates that where statute expressly limits the powers of the court, its inherent powers would be subject to such statutory limitation.[24] It would otherwise appear that the court has inherent jurisdiction to stay actions which may be frivolous, vexatious, oppressive or an abuse of the process of Court.[25] Since section 6 does not appear to limit the court's inherent powers, it is possible to seek a stay of actions on grounds other than those set out in section 6(2) and Article 8. This would allow the court to stay judicial proceedings in favour of arbitration in other appropriate cases, some of which are discussed below.

A stay on grounds outside of Article 8 was granted in *Gulf Canada Resources Ltd* v *Arochem International Ltd*[26], where the British Columbia Court of Appeal held that, although Article 8 requires the court to grant

22 41 Business Law Reports, 286, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS/4, case 65, decision of the British Columbia Supreme Court.

23 1990 Ed, ON S 274/70.

24 *Chia Ah Sim* v *Ronny Chong & Co* [1993] 2 SLR 564. See, generally, J Pinsler, "Civil Procedure", 1994, at pp 18–9.

25 Mustill & Boyd, *op cit*, at pp 461–2.

26 66 British Columbia Law Reports (2d), 113, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS/2, case 31. For cases falling outside section 6(2) but which may yet be appropriate for the court to stay the action, see Mustill & Boyd, *op cit*, at pp 132–150, dealing with general requirements of validity of an arbitration agreement in relation to the New York Convention, such as the requirement of writing, capacity of the parties etc, some of which are discussed below.

a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed, the court still had some residual jurisdiction to exercise. It would, for instance, grant a stay if it concluded that one of the parties named in the proceeding was not a party to the arbitration agreement, the alleged dispute did not come within the terms of the arbitration agreement or if the application was out of time. In that case, a stay was granted and upheld.

In *Navionics Inc* v *Flota Maritima Mexicana SA et al*[27], it was held that Article 8 was to be given a "fairly strict" interpretation and that its imperative provision was an exceptional departure from the inherent jurisdiction of the court to grant stays. Nonetheless, the court exercised its inherent jurisdiction in that case to grant a stay.

The *Channel Tunnel*[28] case has confirmed the existence of the English court's inherent jurisdiction to grant a stay in grounds other than the arbitration agreement being "null and void, inoperative or incapable of being performed". Mustill LJ confirmed that apart from the mandatory stay under section 1 of the 1975 English Arbitration Act (the rough approximate of section 6(2) of the Act), the court also had an inherent jurisdiction to grant a stay on a discretionary basis.

Examples of cases where discretion to exercise inherent jurisdiction issue may arise (assuming these do not fall under section 6(2))

The following are some possible situations which may call for the exercise of the court's inherent jurisdiction discussed above, and are not exhaustive.

Non-existent arbitration agreement

If there is no arbitration agreement to enforce, the court has to refuse a stay application. In *"The Benja Bhuma"*[29], the Singapore High Court held that on the facts, no binding arbitration agreement between the parties existed. This was because the terms of agreement had not been agreed to,

27 26 Federal Trial Reporter, 148, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS/1, case 15, decision of the Federal Court of Canada, Trial Division.

28 [1993] 2 WLR 262, at pp 275–6. Mustill LJ referred to the discretionary power to grant stay "in a case which comes close to section 1 of the 1975 Act, and yet falls short either because of some special feature of the dispute-resolution clause, or because for some reason an agreement to arbitrate cannot immediately, or effectively, be applied to the dispute in question..." and said that he was "satisfied … that the undoubted power of the court to stay proceedings under the general jurisdiction, where an action is brought in breach of agreement to submit disputes to the adjudication of a foreign court, provides a decisive analogy..." In this respect, he said further that "[i]f it is appropriate to enforce a foreign jurisdiction clause under the general powers of the court by analogy with the discretionary power under what is now section 4(1) of the [Arbitration] Act of 1950 to enforce an arbitration clause by means of a stay, it must surely be legitimate to use the same powers to enforce a dispute-resolution agreement which is nearly an immediately effective agreement to arbitrate, albeit not quite..." This illustrates how far the English courts will now go to enforce an arbitration agreement.

29 [1994] 1 SLR 88.

even though there was agreement in principle to arbitrate. There was no application for a stay under section 6 of the Act or otherwise, but the case illustrates how one party may try to enforce a non-existent arbitration agreement. Such a situation would not fall within the words "null and void, inoperative or incapable of being performed" under section 6(2). The court would therefore have to exercise its inherent jurisdiction to refuse a stay in such case. The same would apply if the arbitration agreement does not meet the requirement of writing, discussed below.

It should be noted, however, that in the light of recent developments in English law, the challenge as to the existence of the arbitration agreement itself may be an issue for the arbitrator, rather than the court, to decide.[30]

Arbitration agreement too uncertain

Like any other agreement, an agreement to arbitrate may fail for uncertainty. However, the extremely supportive judiciary in Hong Kong has leaned on various occasions in favour of finding a valid arbitration agreement, even where there has been room to argue uncertainty in the terms of the arbitration agreement. Choosing a non-existent tribunal, for instance, need not jeopardise the validity of the agreement to arbitrate.[31] What is required is a clear intention to arbitrate. With such a lax criterion, it can hardly be imagined when there might be uncertainty which may defeat the arbitration agreement. Even if such a case were to arise, however, the court would probably find it easy to refuse a stay under section 6(2); no exercise of inherent jurisdiction would be necessary.

Arbitration agreement not in writing

The Act requires that an arbitration agreement be in writing." What amounts to writing is liberally defined in Article 7 of the Model Law and section 2(1) of the Act to include exchanges of facsimile messages and telexes. In other words, the "writing" in some cases need not even be signed. This is borne out by recent Hong Kong and US cases in which the question has arisen as to whether there is such writing as to satisfy Article 7(2). The courts in most of these cases have been able to find that the requirement of writing was satisfied.[32]

30 See *infra*, the accompanying text of note 64 on the *Harbour Assurance* case.

31 See *supra*, accompanying text to notes 16–17.

32 See, for instance, the following Hong Kong decisions: *Gay Constructions Pty Ltd & Anor* v *Caledonian Techmore (Building) Ltd & Hanison Construction Co Ltd (Third Party)*, unrep, Const L No 23 of 1993, 17 November 1994 (HKLD Nov 1994); *OONC Lines Ltd* v *Sino-American Trade Advancement Co Ltd*, [1994] ADRLJ 291; *Pacific International Lines (Pte) Ltd* v *Tsinlien Metals & Minerals Co (HK) Ltd* [1993] 2 HKLR 249; and *William Chu* v *Chu Kong Agency Co Ltd & Anor* [1993] 2 HKC 377 (where the earlier case of *Hissan Trading Co Ltd* v *Orkin Shipping Corpn* [1993] 2 HKLR 360 was not followed on the point as to whether the writing must be signed). In the *OONC* case, at p 292, Kaplan J held that to come within the necessary threshold for the invocation of

What is the consequence if there is no writing? It would appear that the court in such a situation will refuse to grant a stay of the proceedings.[33]

Under the Arbitration Act, which will now govern non-international arbitrations,[34] writing is also required.

Where Order 14 procedure is invoked

If an Order 14 application for summary judgment is made where there is an enforceable arbitration agreement, or pending arbitration proceedings, can the court proceed to hear the application, or must it stay it? The Act does not address this question. There are conflicting concerns here: the need to enforce the arbitration agreement which the parties have freely entered into, and the need for speedy redress if there is clearly no dispute.

In Hong Kong, Article 8 of the Model Law governs international arbitrations.[35] There is likewise no express provision regarding summary judgment applications and stay. For *domestic* arbitrations the stay provision has given rise to applications for summary judgments which may override the existence of an arbitration agreement.[36] An example of such a situation is that in

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Article 7(2), the plaintiff need only put before the court material from which it is "reasonably arguable" that the requirement of writing has been satisfied, but this did not mean that it was appropriate "merely to pay lip-service" to Article 7. In fact, in *H Smal Ltd* v *Goldroyce Garment Ltd* [1994] ADRLJ 298, an application for the court to appoint an arbitrator was dismissed as the writing requirement was not satisfied; there, the purchase order containing an arbitration clause was signed only by the plaintiff but not by the defendant. The court was of the view that there was no basis for arguing that the arbitration agreement could be established by a course of dealing or by conduct of the parties. Under Article 7, it had to be either in writing signed by the parties or contained in a document which provided a record of the arbitration agreement. See also *Marine Towing Inc* v *Sphere Drake Insurance plc* 16 F 3d 666 (1994).

33 See *H Smal Ltd*, *ibid.*

34 Section 2 of the Arbitration Act, Cap 10, 1985 Ed, states that:
" "arbitration agreement" means a *written* agreement to submit present or future differences to arbitration..." (Emphasis added.)

35 By virtue of section 34C(1) of the Hong Kong Arbitration Ordinance (1990 Reprint), Cap 341.

36 Section 6(1) of the Arbitration Ordinance, *ibid*, states:
"s.6(1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, *if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement*, and that applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." (Emphasis added.)
For comments on cases relating to stays under this section, see Chapter 1, "Stay of proceedings", in Kaplan, Spruce and Moser, "Hong Kong and China Arbitration — Cases and Materials", 1994.

Pilecon (Hong Kong) Ltd v *Mightyton Ltd*[37]. There, it was held that since there was no dispute at the time of issue of the writ, a stay was correctly refused. The Order 14 application of the plaintiff was therefore heard. The court explained:

> "Order 14 applications and stay of proceedings applications are usually heard together. Many describe them as the 2 sides of the same coin. In a way, this is correct but not entirely. On the one hand, if the court thinks that there is a *bona fide* dispute and decides to stay the proceedings, judgment will not be entered against the defendant. On the other hand, if the court takes the view that there is no defence and is prepared to give summary judgment, it will refuse the stay application. However, in some cases, even if the court, for some reasons, refuses to stay the proceedings, it may not necessarily give summary judgment if the defendant can raise some triable issues..."[38]

This follows the position in the English decision of *Hayter* v *Nelson & Home Insurance Co*[39], where Saville, J, faced with a non-domestic arbitration to which section 1(1) of the English Arbitration Act 1975 applied, held that the Court could refuse a stay of proceedings and proceed to hear a summary judgment application if there was in fact no dispute.[40]

In the case of international commercial arbitrations in Singapore, the Act and Article 8 do not contain words which give the court a discretion to refuse a stay where it finds no dispute between the parties. In the context of an Order 14 application by the plaintiff, this means that the court must not choose to proceed with the Order 14 application even if it is of the view that there is no dispute in existence, warranting the granting of summary judgment.

37 [1993] 2 HKLR 435.

38 *Ibid*, at pp 440–1. The court then went on to state the questions to be dealt with by the court when the two applications are heard.

39 [1990] 2 Lloyd's Law Reports 265. On the facts, the court found such a dispute to exist and therefore ordered a stay. See also *Tradax International S A* v *Cerrahogullari TAS, The "M Eregli"*, [1981] 2 Lloyd's Law Reports 169, and *S L Sethia Liners Ltd* v *State Trading Corpn of India Ltd* [1986] 1 Lloyd's Law Reports 31.

40 Section 1(1) reads:

"If any party to an Arbitration Agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the Agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any steps in the proceedings, apply to the Court to stay the proceedings; and the Court, unless satisfied that the Arbitration Agreement is null and void, inoperative or incapable of being performed *or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred*, shall make an order staying the proceedings." (Emphasis added.)

This position was confirmed in the remarks of Mustill LJ in *Channel Tunnel Group Ltd* v *Balfour Beatty Ltd* [1993] 2 WLR 262, at pp 270–80.

In deciding whether to allow Order 14 applications to proceed, the remarks of Parker LJ in the English Court of Appeal decision in the *Home & Overseas Insurance* case[41] are noteworthy:

> "... O.14 proceedings should not... be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the Court lends itself to determining on O.14 applications points of law which may take hours or even days... In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. *The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal at first instance, to be free from the intervention of the Courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.*"

The point is that each party is entitled to having the dispute heard by the tribunal chosen, once such a choice is made in an agreement to arbitrate.

In Singapore, the Sub-Committee on Review of Arbitration Laws, a Sub-Committee of the Law Reform Committee, whose proposals were largely adopted to form the Act, supported holding the parties to their agreement. It was of the view that summary judgment applications should not be allowed to prevail in international arbitrations. In contrast, in domestic arbitrations, a stay is not allowed where there is no dispute that needs to be referred to arbitration. The Sub-Committee stated that it had:

> "considered whether this position should be extended to international arbitrations, the principle being that arbitration should be a process of resolving disputes and not an expedient to delay the payment of just debts... The Committee felt however that where foreign parties agree to arbitrate in Singapore, they should be assured that their consent must not be construed as a submission to the jurisdiction of the Singapore courts. To allow one party to insist on proceeding to the Singapore court for the purpose of determining the issue summarily would be totally inconsistent with the agreement to arbitrate in Singapore..."[42]

If this view is adopted, it means that in international arbitrations, the High Court should not entertain applications for summary judgment once it has determined that there is a valid and enforceable arbitration agreement under the Act.

There is, however, authority in more recent Hong Kong cases relating to Article 8 which indicate that the court does have power to refuse a stay in

41 *Supra*, note 15, at p 483. (Emphasis added.)
42 Para 29 of the Sub-Committee's Report dated 31 August 1993.

favour of Order 14 applications where there was clearly no dispute, such as where the defendant admitted the claim unequivocally in both liability and quantum.[43]

In a local case, *Uni-Navigation Pte Ltd* v *Wei Loong Shipping Pte Ltd*[44], where Selvam, JC held that where the claim is undisputed or indisputable, the courts and not the arbitrators have jurisdiction to decide upon the claim, even though there is an arbitration agreement which stipulates for disputes to be referred to arbitration. However, since this case was decided before the coming into effect of the Act, it does not necessarily reflect the position under section 6(2).

If the Act and the Model Law are to be interpreted to minimise judicial interference, and the concerns of the Sub-Committee mentioned above are to be taken into consideration, it would be preferable to take the position that Order 14 applications should not be heard once it is determined that there is a valid enforceable arbitration agreement. Such a stand would obviate the need for the courts to examine when there is a dispute or not. It would also be consistent with a literal reading of section 6(2), which does not contain words which indicate a discretion to refuse stay where there is no dispute.[45]

The counter-argument would be that in truly obvious cases where there has been an admission of the claim, a claimant is prevented from resorting to a speedy summary judgment, and made to proceed to arbitration. It is probably for this reason that the recent Hong Kong decisions mentioned earlier have allowed summary judgment in such cases.

Time-Bar Cases

In some agreements, the party wishing to initiate arbitration proceedings is given a specified time period in which to do so. Failure to act in the time given would mean that the opportunity to arbitrate is lost. In such circumstances, the arbitration agreement may be said to have become "inoperative" under section 6(2). Even if it did not fall within that term,

43 *Joong & Shipping Co Ltd* v *Choi Chong Sick & Anor* [1994] ADRLJ 290, citing *Guangdong Agriculture Co Ltd* v *Conagra International (Far East) Ltd* [1993] 1 HKLR 113 and *Zhan Jiang E & T Dev Area Service Head Co* v *An Hau Co Ltd*, [1994] ADRLJ 307. See also *Big Island Construction (Hong Kong) Ltd* v *Abdoolally Ebrahim & Co (Hong Kong) Ltd*, unreported, HCA No A11313 of 1993, 28 July 1994, appearing in Aug/Sep 1994 HKLD, case H7, for a similar stance. In the *Guangdong* case, Barnett J in fact held that, in view of the trend of judicial reluctance to be involved in disputes of parties to an arbitration agreement, the role of the court in Article 8 should be restricted to a minimum, so that only where there is admission by the party against a claim is made, should the court refuse a stay; in all cases of non-admission, the court is not to look into the merits of the dispute but to order stay, leaving the merit to be decided by the arbitrator.

44 [1993] 1 SLR 876.

45 *Cf supra*, notes 36 and 40.

the High Court should exercise its discretion in its inherent jurisdiction, not grant a stay of judicial proceedings if the time for arbitration has passed. This is because the Act does not allow the court to extend the time given.[46]

(d) Implications of stay being granted or refused

Article 8(1) of the Model Law requires the court to refer parties to arbitration if there is a relevant arbitration agreement. This is not required under section 6(2) of the Act. Since section 3(1) makes the application of the Model Law subject to the Act, it may be argued that section 6 prevails; so that where a stay is ordered thereunder, the court should leave the parties to decide whether to arbitrate. Alternatively, if Article 8(1) is read to be supplementary to section 6, then the court additionally has to (because of the word "shall") refer the parties to arbitration.

The latter interpretation is preferable as the same obligation is imposed on the court to refer the parties to arbitration under Article 11(3) of the New York Convention, and this, too, forms part of the Act.

If a stay is refused under section 6(2) or any of the reasons discussed earlier, the court may then proceed with the judicial proceedings. Such cases should be rare, if the Hong Kong decisions are of any guidance.

2. Public Policy and Arbitrability

(i) Public Policy: Section 11(1)

Section 11(1) of the Act states:

> "Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy."

The language used is curious as the provision presumably aims to cover *matters* for which arbitration would be contrary to public policy. The present wording, however, points to the *arbitration agreement itself as* being contrary to public policy. The contrast may be made between this wording and that relating to the enforceability of awards under Article V(2) of the New York Convention and section 31(4) of the Act. It is also noteworthy that under section 31(4), arbitrability of the *subject-matter of the difference* and the public policy ground are separated. Section 11(1), on the other hand, does not appear to deal with arbitrability in general, leaving that to the mention of section 11(2).

46 See *Tradax International SA* v *Cerrahogullari TAS* [1981] 2 QB 169, *The "M Eregli"*.

Neither the Act nor the Model Law says what the limits of the public policy doctrine are. There have been general judicial comments on the public policy ground for refusing enforcement of international commercial arbitration *awards* under the Model Law and under the New York Convention. The former arose in *Arcata Graphics Buffalo Ltd* v *Movie (Magazine) Corp*[47], where it was held that in order to refuse to enforce an award as contrary to public policy under Article 36(1)(b)(ii) (which has been expressly excluded from the Act in Singapore), the award must be contrary to the morality of the community of the enforcing state.

In relation to the New York Convention, the Hong Kong High Court in *Paklito Investment Ltd* v *Klockner East Asia Ltd*[48] adopted the position in *Parsons & Whittemore* v *RAKTA*[49] that:

> "... the convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice."

An example of a foreign award under the Convention which was not enforced in Hong Kong on this ground is that in J J *Agro Industries (P) Ltd* v *Texuna International Ltd*[50]. The award was allegedly obtained by fraud in that one of the defendant's witnesses had been kidnapped and forced to swear an affidavit contradicting what he had previously said in a letter. The High Court held that, although the public policy ground had been given a narrow meaning by various courts considering the New York Convention, to enforce an award obtained in the circumstances alleged would be in breach of the public policy of Hong Kong.

In the *Home & Overseas Insurance* case[51], it was held an arbitration clause allowing the arbitrator to decide according to equitable, rather than strict legal, principles, was not against public policy.

In *Deutsche Schachbtau-und Tiefbohregesellschaft mbh* v *Ras Al Khaimah National Oil Co etc*[52], enforcement of a New York Convention award was held not to have been contrary to public policy. This was despite the fact that the arbitration clause there allowed the arbitrators to determine the proper law governing the parties' substantive obligations, and the arbitrators found it to be "internationally accepted principles of law governing

47 Unreported, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS 2, case 37, decision of the Ontario Court, General Division.
48 [1993] 2 HKLR 39.
49 508 F 2d 969 (2d Cir, 1974).
50 [1994] 1 HKLR 89.
51 *Supra*, note 15, at pp 476–77.
52 [1987] 2 Lloyd's Law Reports 246.

contractual relations." In coming to this conclusion, Sir John Donaldson, MR (as he then was) said:

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary member of the public on whose behalf the powers of the State are exercised."[53]

These remarks, though made in the context of enforcement of an award, can be equally helpful in the present context.

As this ground appears in the Act both in relation to the arbitration agreement (section 11) and to enforcement (section 31(4)(b)), it will be interesting to see what the Singapore High Court will hold as situations to which it applies.

(ii) Arbitrability

Arbitrability could refer to two possible situations; first, where the dispute does not fall within the scope of the arbitration agreement as drafted, in that it was not contemplated as being subject to arbitration by the parties at the time of its making. The second is where, for reasons of public policy or otherwise, it is found that the particular dispute is not suitable to be arbitrated upon. This is closely linked to the discussion in the preceding sub-heading.[54] It is this latter situation which is contemplated here.

Section 11(2) itself indicates that there are disputes which are not capable of determination by arbitration, or are unarbitrable. Although, as observed above, section 11(1) does not appear to deal with the arbitrability of matters in general, the arbitrability issue is closely linked to the issue of whether it would be against public policy to arbitrate on a particular matter. Public policy may determine arbitrability. Examples of matters which may not be arbitrable for this reason are those relating to bankruptcy, anti-trust and corruption.

Federal policy in the United States has been extremely supportive of the international arbitration process, so much so that its courts have read the arbitrability requirement very generously. This has led to many areas being held to be arbitrable. The landmark case in this respect is the *Mitsubishi* case,[55] in which it was held that the claims, which involved allegations of

53 *Ibid.*, at p 254.

54 See the Sub-Committee Report, *supra*, note 42, at para 26, where it is said that the two are "intertwined". As a matter of interest, Article 11(1) of the New York Convention makes arbitrability of the subject matter a prerequisite to an enforceable arbitration agreement. For the reasons behind this not being made a prerequisite in the Model Law, see Holtzmann & Neuhaus, *supra*, note 8, at pp 303–4.

55 *Mitsubishi Motors Corp* v *Soler Chrysler Plymouth Inc* 473 US 614 (1985).

breaches of securities and anti-trust legislation, were arbitrable. Since that decision, US courts have taken the cue and allowed such claims and others to be subject to arbitration.[56]

In Australia, it was held in *IBM Australia Ltd v National Distribution Services Ltd*[57] that claims relating to breaches of the Australian Trade Practices Act were arbitrable. In New Zealand, in *Attorney-General* v *Mobil Oil NZ Ltd*[58], claims relating to the Fair Trading Act were also held to be within the jurisdiction of the arbitrator to decide.

In the Canadian decision of *Kaverit Steel & Crane Ltd* v *Kone Corpn*[59], the Alberta Court of Appeal held that the "mere fact that a claim sounds in tort does not exclude arbitration", as section 2 of the Alberta International Commercial Arbitration Act (which paraphrases the footnote to Article 1(1) of the Model Law) allowed the arbitration of "differences arising out of commercial legal relationships, whether contractual or not." The Court then proceeded with the further step of examining whether the particular dispute, though arbitrable, fell within the terms of the parties' submission to arbitration, saying that "[n]ot all arbitrable issues must be arbitrated."

The limits of the arbitrability argument have not been tested in Singapore, but again, if the policy of ensuring the greatest opportunity to parties to proceed with an international arbitration here is pursued, then arbitrability should be given a generous interpretation.

3. Separability

The main agreement (in which the arbitration clause is found or to which the arbitration agreement relates) may be invalid for a number of reasons, rendering the main agreement unenforceable. Such reasons include misrepresentation, mistake, fraud and illegality. An important question, then, is whether the agreement to arbitrate is equally affected and, therefore, unenforceable. If so, the arbitration agreement would stand or fall with the main agreement.

56 For a summary of the positions in the US, New Zealand and Australia, see the Hon Andrew Rogers QC, "Arbitrability", (1994) 10 Arb Int 263. See also William A Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration" (1989) 63 Tul L Rev 647, esp at pp 699–705; C B Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany under the New York Convention" (1990) 7 J Int Arb 71; Michael Pryles, "Current Issues in International Arbitration in Australia" (1992) 9 J Int Arb 57, esp at pp 63–70; and Duncan Miller, "Public Policy in International Commercial Arbitrations in Australia".

57 (1991) 100 ALR 361.

58 [1989] 2 NZLR 649.

59 *Supra*, note 11, decision of the Alberta Court of Appeal, at p 111.

Even under English law, which has not embraced the Model Law, the doctrine of separability is well established.[60] The acceptance and growth of this doctrine underwent various stages. Initially, the courts merely held that the separateness of the arbitration agreement meant that it would survive rescission (in the sense of repudiation by one party and acceptance thereof by the other),[61] discharge of the main agreement by frustration, fundamental breach, breach of condition and subsequent invalidity.[62]

There was a tendency to recognise the separability of the arbitration agreement as long as the issues to be decided related to voidability of the main contract, as opposed to voidness *ab initio* for reasons such as illegality. In the latter case, there was a holding back, resulting in the courts refusing to grant stay in such cases, reserving the right to hear the issues on *ab initio* invalidity itself.[63] It made no difference whether the arbitration agreement was a clause in the main contract, or embodied in a separate written agreement.

The English Court of Appeal has recently removed even this last barrier in *Harbour Assurance (UK) Co Ltd* v *Kansa General International Insurance Co Ltd*[64], where it was held that the arbitration agreement was a separate contract from the main agreement (even if it were embedded in the latter), and that unless the dispute in question related to a direct impeachment of

60 See, for instance, *Paul Smith Ltd* v *H & S International Holdings Co Inc* [1991] 2 Lloyd's Law Reports 127, and *Harbour Assurance Co (UK) Ltd* v *Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Law Reports 455, which held that the separability doctrine clearly exists in English law. The Court of Appeal in the latter case went further to unanimously establish that under the doctrine, a court should allow an arbitrator to decide issues relating even to the *ab initio* validity of the main contract, including illegality of the contract, as long as the invalidity did not directly impeach or invalidate the arbitration agreement itself; see pp 459, 463 and 469. In a recent Hong Kong case, it was held that the doctrine of separability was "enshrined" in the Model Law and had been "fully accepted" in the case law of England and Hong Kong: *H Smal Ltd* v *Goldroyce Ltd* [1994] ADRLJ 298, at p 300. In an Argentinian case, *Enrique C Wellbers SAIC* v *Extraktionstechnik Gesellschaft etc*, summarised in CLOUT A/CN.9/SER.C/ABSTRACTS 2, case 27 (1988), it was held that the principle of autonomy of the arbitration clause from the main contract was internationally accepted — Argentina, like the UK, had not adopted the Model Law.

61 *Heyman* v *Darwins Ltd* (1942) 72 Lloyd's List Law Reports 65.

62 See *Paul Smith Ltd* v *H & S International Holdings Co Ltd*, *supra*, note 60 and *David Taylor & Sons Ltd* v *Barnett Trading Co Ltd* [1953] 1 Lloyd's Rep 181. See Carl Sverlov, "The Evolution of the Doctrine of Separability in England: Now Virtually Complete?" (1992) 9 J Int Arb L 115 for, *inter alia*, a comment on the case. See also Carl Svernlov, "What Isn't, Ain't" (1991) 8 J Int Arb L 37, Adam Samuel, "Separability in English Law — Should an Arbitration Clause Be Regarded as an Agreement Separate and Collateral to a Contract in Which It Is Contained?" (1986) 3 J Int Arb L 95, and more recently, Prof the Hon Andrew Rogers QC and Rachel Launders, "Separability — the Indestructible Arbitration Clause" (1994) 10 Arb Int 77.

63 See Steyn J's judgment in *Paul Smith* and in the lower court judgment in *Harbour Assurance*, *supra*, note 60. The same stance appears to have been taken by the Alberta Court of Appeal in the *Kaverit* case, *supra*, note 11, at p 114.

64 *Supra*, note 60.

the arbitration agreement itself, then questions as to the validity and legality, and therefore, voidness *ab initio*, of the main agreement could be decided by the arbitrator, and not the court. This is significant as it leaves the arbitrator with the power to hear virtually all disputes relating to the agreement. It should, of course, be remembered that the arbitration clause must be worded sufficiently broadly to include the dispute.

This development has so far not been seen in Australia. In the *IBM* case, a majority of the Supreme Court of New South Wales was of the view that the arbitrator did not have the power to decide or declare that the agreement containing the arbitration clause to be void *ab initio*.

In the United States, federal law clearly accepts the separability doctrine, and with regards to the question of *ab initio* validity of the main agreement, it appears to be a matter which is arbitrable, as long as the complaint, such as fraud on the main contract, does not go to the making of the arbitration agreement itself.[65]

In the Model Law, the doctrine is not expressly so named, but manifests itself in Article 16(1), which states:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision of the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

There are really two doctrines encapsulated in this Article: those of separability, and *kompetenz-kompetenz* (or *competence-competence*). The latter relates to the arbitrator's ability to be the judge of his own competence or jurisdiction, and is quite a separate doctrine from that of separability.[66]

If the Article is read in accordance with *Harbour Assurance*, then the arbitrator's armoury is quite complete, as he would be able to decide on matters relating even to the validity *ab initio* of the main agreement, as well as to determine his own jurisdiction. In fact, if the wording therein, "including any objections with respect to the existence or validity of the

65 See *Prima Paint Corp* v *Flood & Conklin Mfg Co* 388 US 395 (1966). But in *Kyung In Lee* v *Pacific Bullion (New York) Inc* 788 F Supp 155 (1992), it was held that where fraud *infactum* of the entire contract was alleged, the principle in *Prima Paint* was inapplicable.

66 See Carl Svernlov, "What Isn't, Ain't", *supra*, note 62, pp 37–8. In *Fung Sang Trading Ltd* v *Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40, the Hong Kong High Court held at p 50 that Article 16(1) enshrines the doctrine of separability, which English law has partially recognised since *Heyman* v *Darwins* ...". The subsequent remarks therein on the inability of the arbitrator to decide issues relating to the initial validity and illegality must now be read in the light of the Court of Appeal ruling in the *Harbour Assurance* case, *op cit*.

arbitration agreement" were to be given the widest possible interpretation, it may mean that the arbitrator can go beyond the limits set in *Harbour Assurance*, to decide questions relating to the validity of the *arbitration agreement itself*, including allegations of illegality! However, this Article must be read in the light of the fact that the arbitrator derives his authority from the arbitration agreement itself. If such an interpretation is adopted, it would mean the arbitrator can decide even issues surrounding the basis of his own authority. It has been argued that it must be a prerequisite in this Article that the arbitration clause/agreement itself is found valid.[67]

How the Singapore courts will react to this Article remains to be seen. Section 6 of the Act, discussed earlier, does not appear to offer any clue to this question. Perhaps if the trend towards empowerment of arbitrators is followed, the arbitrator will be given the forbidden fruit of deciding the *ab initio* validity of the agreement. Whatever the limits on the arbitrator's powers, the doctrine of separability insulates the arbitration agreement from any defects of the main agreement, and allows arbitrators to decide disputes which would otherwise have fallen to the courts for resolution.

4. Enforceability of the arbitration agreement in relation to enforcement of an award based on it

As mentioned at the outset of this article, the issue of enforceability of the arbitration agreement may also arise at the stage of enforcement of the arbitral award. Specifically, under Part III of the Act, enforcement of New York Convention awards may be challenged in Singapore if:

- a party of the arbitration agreement was under some incapacity under the law applicable to him at the time when the agreement was made — section 31(2)(a);
- the arbitration agreement is not valid under the law to which the parties had subjected it or under the law of the country where the award was made — section 31(2)(b); and
- the subject-matter of the difference between the parties is not capable of settlement by arbitration under the law of Singapore — section 31(4)(a) (in other words, the dispute was non-arbitrable so that the arbitration agreement would not have covered it and should not have been given effect).

67 Svernlov, *supra*, note 62, at p 40, where the author emphatically states that this prerequisite must be also be read into Article 21 of the UNCITRAL Arbitration Rules. He contrasts these two provisions with Article 8 of the Rules of the ICC Court of Arbitration, which states that the arbitrator shall not cease to have juridiction "by reason of a claim that the contract is null and void or allegation that it is inexistent *provided that he upholds the agreement to arbitrate*." (Emphasis added.)

The first two of these grounds are relatively straightforward to apply, and the third has been dealt with earlier. It remains to be noted that the arbitration agreement should be drafted sufficiently widely and interpreted appropriately to give maximum leeway to arbitrators, and to enforcement authorities faced with awards.

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