CHAPTER 1

Background to the Singapore Legislation

Structure of the arbitration system in Singapore[1]

Singapore has two parallel arbitral systems. One is for domestic arbitration, the Arbitration Act 2001 (Cap. 37), published in revised form in 2002 (Cap. 10), referred to in this work as AA. The other is for international arbitrations, enshrined in the International Arbitration Act 1994, Act 23 of 1994, referred to in this work as the IAA. Singapore has, since 1986, been a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958. Accordingly, Singapore has a legal system fully equipped to allow it to take its place as a leading forum for hosting international arbitrations.

The IAA was revised in 1995 and amended by the International Arbitration (Amendment) Act 2001 (Cap. 38) and the International Arbitration (Amendment) Act 2002 (Cap. 28),[2] and then published in revised form in 2002 (Cap. 143A). It was subsequently amended in 2010 to allow the court to grant interim measures in support of arbitration. More significant amendments were introduced by the International Arbitration (Amendment) Act 2012 (No. 12 of 2012), with effect from 1 June 2012, in part the consequence of a Report of the Law Reform Committee of the Singapore Academy of Law published in 2011. The effects of the 2012 amendments are: to extend the power of arbitrators to award interest; to extend the definition of arbitration agreement so as to include oral agreements later recorded in writing; to recognise the use of emergency arbitrators who can act before the tribunal itself has been constituted; and to give a right of appeal against a ruling by arbitrators that they do not have jurisdiction to hear a matter.

Transitional provisions for the 2012 Act are set out in s. 12, as follows:

> **12.**—(1) This Act shall apply to arbitral proceedings commenced on or after the date of commencement of this Act but the parties may in writing agree that this Act shall apply to arbitral proceedings commenced before that date.
>
> (2) Notwithstanding subsection (1), where the arbitral proceedings were commenced before the date of commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been enacted.

1 See generally: Leslie K.H. Chew, *Law and Practice of Arbitration in Singapore*, LexisNexis 2010; Chan Leng Sun, *Singapore Law on Arbitral Awards*, Academy Publishing 2012; David Joseph and David Foxton, *Singapore International Arbitration Law and Practice*, LexisNexis 2014.

2 To bring it into line with the domestic legislation passed in 2001.

(3) For the purposes of this section, arbitral proceedings are to be taken as having commenced on the date of the receipt by the respondent of a request for the dispute to be referred to arbitration, or where the parties have agreed in writing that any other date is to be taken as the date of commencement of the arbitral proceedings, then on that date.

It was held in *AQZ* v. *ARA*[3] that s. 12(1) extends the operation of the amending legislation to arbitration agreements entered into before 1 June 2012 if the arbitral proceedings themselves are commended on or after that date.

There is detailed commentary on the adoption of the Model Law in the Law Reform Committee's Review of Arbitration Laws, August 1993, available online at: www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/Attachments/1/review_of_arbitration_laws.pdf. There is detailed commentary on the AA in the Attorney-General's Chambers Review of Arbitration Laws, published in 2001, LRRD No. 3/2001, available online at www.asianlii.org/sg/other/SGLRC/report/R3/3.pdf.[4] All arbitrations with a seat (referred to as "place" in the legislation) in Singapore are subject to one or other of these regimes.[5] IAA is governed by the Singapore Rules of Court, Ord. 69A, and AA is governed by the Singapore Rules of Court, Ord. 69.[6] Singapore, like many other jurisdictions, has adopted the distinction between international and domestic arbitration in order to make itself more attractive as an international arbitral forum. IAA implements into Singapore law the Model Law 1985. As was said in the 1993 Review, para. 8: "If Singapore aims to be an international arbitration centre it must adopt a world view of international arbitration."[7]

The Model Law was drafted by UNCITRAL, the international trade law committee of the United Nations, as a measure laying down minimum standards for an arbitration regime. The Model Law is a succinct code of arbitration law, designed by its terms for international commercial arbitration but capable of adaptation for a domestic code. The principal features of the Model Law are party autonomy over the arbitration proceedings, the absence of any appeal procedure, the restriction of judicial intervention in the proceedings to default powers, and the free enforceability of the award other than in cases of want of jurisdiction or clear unfairness in the procedure. The IAA both supplements and modifies the Model Law, so it is necessary to read the two measures together: see the Notes to IAA, s. 3. The Model Law was modified in 2006 to provide alternative definitions of "arbitration agreement" and to allow interim measures: although Singapore has not adopted those modifications verbatim, the changes to the IAA by the 2012 Amendment Act to some extent reflect them.

3 [2015] SGHC 49.

4 This document is also the basis for the amendments to the IAA which brought it into line with the AA in certain respects. Although LRRD No. 3/2001 was only of domestic law, and relates to the AA only, in the present work there are references to LRRD No. 3/2001 at relevant points in the annotations to the IAA and to the Model Law where the provisions are identical.

5 LRRD No. 3/2001, para. 2.1.1. Delocalised arbitrations are not recognised by the law: *Bank Mellat* v. *Helliniki Techniki SA* [1984] 1 QB 291.

6 For explanation of Ords 69 and 69A, see the Attorney-General's Chambers Review of Rules of Court Relating to Arbitration 2002, LRRD No. 2/2002, and Attorney-General's Chambers Review of Rules of Court Relating to Arbitration, Supplementary Report, LRRD No. 6/2002.

7 Both IAA and AA use "claimant" rather than "plaintiff" while the Rules of Court use "plaintiff"—in this work "claimant" is preferred for uniformity, except where dictated by the circumstances.

The parties to an international arbitration may contract out of the IAA and the Model Law: see the Notes to IAA, s. 15. Adoption of standard rules ousts the IAA and the Model Law only insofar as the rules are inconsistent with those legislative measures: see the Notes to IAA, s. 15A. Equally, the parties to a domestic arbitration may agree to adopt the IAA and the Model Law.[8]

The two systems

The Model Law, by reason of its non-interventionist approach, was thought not to be fully appropriate to domestic arbitrations which may involve smaller businesses and indeed consumers. The 1993 Review, paras 10–13, thus rejected a uniform system of the type subsequently adopted in England by the Arbitration Act 1996 (AA 1996 (Eng)). There is accordingly separate legislation, AA, which permits intervention by the courts in a number of ways precluded by IAA and the Model Law. There is no legislation in Singapore which protects consumers or small businesses from "unreasonable" contract terms, and partly for that reason AA permits judicial intervention, e.g., by permitting refusal of a stay of judicial proceedings and by allowing an extension of contractual time limits for the commencement of arbitral proceedings. That said, much of the AA is based on the Model Law, and many of the provisions of the latter have been adopted more or less verbatim (albeit with some structural or drafting differences).

An important feature of the AA is that it has also adopted a number of the principles enshrined in the AA 1996 (Eng)[9] and also the New Zealand Arbitration Act 1996. Those responsible for the drafting of the AA 1996 (Eng) considered at length whether the Model Law was appropriate for adoption in England. The Departmental Advisory Committee on Arbitration Law chaired by Lord Mustill, reporting in 1989, rejected calls for the adoption of the Model Law into English law. Instead the Committee recommended that there should be a new Arbitration Act, incorporating the best features of existing law but redrafted in more user-friendly terms, filling in the many gaps in the legislation which had been resolved, if at all, by case law. The DAC felt that, wherever possible, the new Act should reflect the Model Law, but that wholesale adoption would be detrimental. However, by the time that legislation was finally adopted, following two further important reports by the DAC in 1995 and 1996, latterly under the chairmanship of Saville LJ, the measure had moved English law far closer to the Model Law than had initially been contemplated in 1989, and there are relatively few differences between the two measures.[10]

8 Based on the recommendation of the 1993 Review, para. 16. See *NCC International AB* v. *Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565.

9 The Arbitration Act 1996 is an act of the UK Parliament. It applies in its entirety to England and Wales, and applies with certain exceptions to Northern Ireland. Only selected parts apply to Scotland, which has its own Arbitration Act. Setting aside the finer constitutional points, it is referred to in this work as AA 1996 (Eng).

10 (a) the 1996 Act applies to all classes of arbitration, whereas the Model Law (arts 1 and 2) is confined to international commercial arbitration; (b) Model Law, art. 7(2) requires an arbitration agreement to be signed: there is no equivalent provision in the Arbitration Act 1996. However, the Model Law was amended in 2006 by the addition of an alternative version of art. 7 which does not require signature;

Accordingly, while it is the case that Singapore has two entirely separate arbitral regimes governed by different rules of court, many of the provisions of the two regimes are identical in effect if not always identical in wording. There is a general presumption that the two measures should be construed consistently.[11] In this work the provisions of the IAA and the Model Law are set out first, followed by the provisions of the AA.

It may be helpful at this point to highlight the most important differences between the international and domestic codes, as follows:

(a) The courts may intervene in an international arbitration only where the Model Law or IAA so permits (Model Law, art. 5), whereas the court appears to retain its general residual powers in respect of domestic arbitrations.
(b) The waiver principle is statutory in the Model Law (art. 4) and is not referred to in the AA, although the common law probably has the same effect.
(c) The death of a party terminates a domestic arbitration (AA, s. 5) but the effect in an international arbitration is not specified.
(d) A stay of judicial proceedings is mandatory in an international arbitration (Model Law, art. 8) but discretionary in a domestic arbitration (AA, s. 6).
(e) The court has power to extend contractual time limits for the commencement of arbitration (AA, s. 10), but there is no equivalent power in respect of international arbitrations.
(f) The AA makes no reference to the language of the arbitration or the power of the arbitrators to adopt an inquisitorial process, whereas both matters are provided for in respect of international arbitrations (respectively, Model Law, art. 22 and IAA, s. 12(3)).
(g) In the case of an international arbitration the arbitrators have a range of interlocutory powers, and if for any reason those powers cannot be exercised then the court has a more limited range of fallback powers (IAA, ss 12 and 12A). In the case of a domestic arbitration the arbitrators and the courts have concurrent interlocutory powers, in which case the courts must have regard to what has been done by the arbitrators (AA, s. 31(1)–(3)), although only the courts can secure the amount in dispute, grant a freezing order or grant an interim injunction (AA, s. 31(2)).
(h) Domestic arbitrators, but not international arbitrators, have the power to issue an award striking out a claim if the applicant has allowed the claim to become stale (AA, s. 29(3)).
(i) A point of law can be referred to the court for a preliminary ruling under the AA, s. 45, but there is no equivalent provision in the IAA or the Model Law.
(j) There is no provision for the consolidation of proceedings where an international arbitration is taking place, although the parties may agree on consolidation in the case of two or more domestic arbitrations (AA, s. 26).
(k) Where there is a time limit for the making of an award, the court may extend that time limit in the case of a domestic arbitration only (AA, s. 36).
(l) The traditional power of arbitrators to withhold their award by way of security for payment of their fees is retained by the AA, s. 41, but is not replicated for international arbitrations.
(m) There is provision for an appeal against a domestic award for error of law (AA, s. 49), but an international award cannot be challenged on this basis.

(c) where an action is brought in the English courts in respect of a matter which is the subject of a valid and subsisting arbitration clause, the English court can only stay its own proceedings; Model Law, art. 8(2), requires the court to refer the matter to arbitration; (d) the 1996 Act provides that, in default of agreement, there is to be a sole arbitrator: Model Law, art. 10(1) specifies a tribunal of three arbitrators as the default panel; (e) where each party is required to appoint an arbitrator, English law has retained the power of a party to treat his arbitrator as the sole arbitrator where the other party has failed to make an appointment: there is no equivalent provision in the appointment rules in Model Law, art. 11; (f) Model Law, art. 13 requires a party who wishes to oppose the appointment of an arbitrator to do so within 15 days: under the 1996 Act, a challenge can be made at any time, subject to general principles of waiver; (g) Model Law, art. 19 allows the parties to choose the procedure for the arbitration, with the arbitrators having default powers in the absence of agreement. Under the 1996 Act, the arbitrators have this right subject only to contrary agreement by the parties; (h) Model Law, art. 23 lays down strict rules for the exchange of pleadings: there is no equivalent provision in the Arbitration Act 1996, which permits the arbitrators to decide how to proceed; (i) the Model Law does not contain any provision for the extension of agreed time limits for the commencement of proceedings; (j) the Model Law does not contain any mechanism for summary enforcement of awards. These objections were thought not to be weighty by the 1993 Review, para. 8.

11 *Tjong Very Sumito* v. *Antig Instruments Pte Ltd* [2009] 4 SLR(R) 732; *Drydocks World-Singapore Pte Ltd* v. *Jurong Port Pte Ltd* [2010] SGHC 185.

Structure of the present work

In this work the provisions of IAA and the Model Law are set out, followed by the provisions of the AA. All of these measures are annotated, but where the AA repeats what is found in IAA or the Model Law there is in most cases simply a cross-reference. It will be appreciated that, alongside the decisions of the Singaporean courts, the bulk of the annotations consists of decisions of the English courts under AA 1996 (Eng). This is so for three reasons: England is by far the most bountiful source of case law on arbitration legislation, in the past twenty years producing over 1,500 judicial authorities; many of the provisions of the Model Law have been incorporated into the AA 1996 (Eng) so that problems arising under the Model Law have been heavily litigated; and parts of the AA can be traced directly back to the AA 1996 (Eng).

The Rules of the Singapore International Arbitration Centre (SIAC) have been included in this work. Those Rules are regularly adopted in international arbitrations governed by the IAA and there are some important decisions on the relationship between SIAC and the legislation. SIAC was founded in 1991 and has issued its own Arbitration Rules. The most recent version of the SIAC Rules is 2013, effective 1 April 2013.[12] If the seat of the arbitration is Singapore, and the parties adopt SIAC Rules, the IAA will govern the arbitration (r. 32): SIAC's Domestic Arbitration Rules were abolished in 2007. There is a presumption that the rules in

12 In the absence of express provision to the contrary, the version of the chosen arbitration rules in force at the time of the dispute are to prevail: *China Agribusiness Development Corporation* v. *Balli Trading* [1998] 2 Lloyd's Rep 76; *Sonatrach* v. *Statoil Natural Gas LLC* [2014] EWHC 875 (Comm).

force and applicable at the commencement of arbitration apply to a dispute.[13] The SIAC Rules 2013 have made significant changes to the structure of the organisation, in particular by establishing a SIAC Court of Arbitration along the lines of the ICC International Court of Arbitration. In addition there is a new power conferred upon the Registrar, by r. 2.5, to extend any of the time limits established under the SIAC Rules.

One particular feature of the 2013 Rules is the introduction, in r. 5, of an expedited procedure under which, prior to the full constitution of the Tribunal, a party may apply to the Registrar for the conduct of the arbitration under the expedited procedure where either: (a) the amount does not exceed S$5,000,000; or (b) the parties so agree; or (c) there is exceptional urgency. If the President grants the application, a number of modifications are made: the Registrar may reduce time limits; the case shall be referred to a sole arbitrator; the parties may agree that the arbitration can be on documents only, but if not then a hearing is to be held for the examination of witnesses and for argument; the award is to be made within six months unless time is extended by the Registrar; and reasons are to be given in summary form.

Under art. 36 of the SIAC Rules, also added in 2013, decisions of SIAC other than on jurisdiction are binding on the parties.

Reception of the Model Law

A large and increasing number of countries or states have adopted the Model Law verbatim as their arbitration law,[14] at least as regards international commercial arbitration.[15] As yet, only a small number have adopted the 2006 amendments. A number of jurisdictions have taken the same line as Singapore and adopted two parallel arbitration laws, Model Law rules for international arbitrations and more interventionist rules for domestic arbitrations.

The annotations in the present work incorporate the leading relevant cases from Australia, Hong Kong, Malaysia and New Zealand, and the structure of the law in each of those jurisdictions is worthy of brief comment.

Australia adopted the Model Law in 1989, by means of amendments to the International Arbitration Act 1974, a Federal measure. The Act conforms to the Model Law, but contains additional provisions which the parties are free to adopt and which reflect the position in a domestic arbitration.[16] The parties are free to exclude the operation of the Model Law. If they do so the 1974 Act confers curial powers on the court, although the procedure of the arbitration is governed by the law of the state in which the arbitration is held.[17] The 1974 Act was amended by the International Arbitration Amendment Act 2010, in particular to introduce

13 *Black & Veatch Singapore Pte Ltd* v. *Jurong Engineering Ltd* [2004] 4 SLR 19.

14 UNCITRAL publishes a global digest of case law on the Model Law. See http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.

15 The countries or states which have adopted the Model Law are listed on the UNCITRAL website: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

16 S. 24—consolidation of arbitrations, equivalent to AA, s. 26; s. 29—legal representation, no equivalent in AA.

17 *Aerospatiale Holdings Australia* v. *Elspan International Ltd* (1992) 28 NSWLR 321.

provisions on the confidentiality of arbitration awards and proceedings. As far as domestic arbitrations are concerned, each Australian state has its own Commercial Arbitration Act, which provides for judicial intervention over and above that permitted by the Model Law. The state legislation is uniform and is to be construed consistently in each state. The State measures were revised in 2010 to bring them into line with Federal legislation and international developments in arbitration law.

The governing provision in Hong Kong is the Arbitration Ordinance 2011, Chapter 609, which came into force in June 2011. It replaced the Arbitration Ordinance 1963, Chapter 341, which set out separate regimes for international and domestic arbitration, the latter being far more interventionist than the former. The 2011 Ordinance follows England in providing a unified arbitration regime for both international and domestic arbitrations, and the 1963 regime was amended in significant respects in order to bring Hong Kong law into line with modern standards. Specific features of the 2011 Ordinance are: the introduction of specific rules on the confidentiality of arbitration awards and arbitration procedures; a regime for recognising interim measures in support of foreign arbitrations; and removal of court intervention other than in exceptional circumstances.[18]

An arbitration with its seat in Malaysia is governed by the Arbitration Act 2005, which implements the Model Law. There is a single code for domestic and international arbitrations, set out in Parts I, II and IV of the Act, but a distinction between the two is drawn in Part III: the provisions of Part III apply by default in a domestic arbitration unless the parties agree otherwise, but the provisions of Part III apply to an international arbitration only if the parties agree to incorporate them (s. 3).[19] The legislation was amended by the Arbitration Act 2011, the main features of which are: to remove the possibility of judicial intervention where the court was dissatisfied with the substantive outcome of the arbitration;[20] to extend the duty to stay judicial proceedings, following England in removing the right of the court to determine whether there was a dispute between the parties; restriction on the right of appeal on point of law; and to give effect to choice of substantive law other than that of Malaysia.

In New Zealand, the basic structure is similar to that of Malaysia. The Arbitration Act 1996 sets out a common code for all arbitrations, consisting of basic principles in the Act itself[21] and then the Model Law (Sched. 1 to the 1996 Act). There are additional provisions in Sched. 2 which extend the powers of the court to

18 S. 2GD—power to extend time for commencement of arbitration (which applies to both domestic and international arbitrations, equivalent to AA, s. 10; s. 4—death of party, equivalent to AA, s. 5; s. 6B—consolidation of arbitrations, equivalent to AA, s. 26; s. 9—appointment of party arbitrator as sole arbitrator where there is default, no equivalent in AA; s. 15—extension of time for making award, equivalent to AA, s. 36; s. 23A—determination of preliminary point of law, equivalent to AA, s. 45.

19 These provisions are: s. 40—consolidation of proceedings, equivalent to AA, s. 26; s. 41—determination of preliminary point of law, equivalent to AA, s. 45; s. 42—reference on question of law, equivalent to AA, s. 45; s. 43—appeal on point of law, equivalent to AA, s. 49; s. 44—costs and expenses of an arbitration, equivalent to AA, ss. 39–41; s. 45—extension of time for commencing proceedings, equivalent to AA, s. 10; and s. 46—extension of time for making award, equivalent to AA, s. 36.

20 As had been suggested in *Taman Bandar Baru Masai Sdn Bhd* v. *Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83 and *Albilt Resources Sdn Bhd* v. *Casaria Construction Sdn Bhd* [2010] 7 CLJ 785.

21 Special protection for consumers; evidential and interlocutory powers; immunity of arbitrators; and confidentiality.

agreement" in s. 2A, which is far more thorough. Article 7 of the Model Law has thus been disapplied: IAA, s. 2A(9). It was held in *AQZ* v. *ARA*[12] that the extended definition applies where the arbitration proceedings are commenced on or after 1 June 2012 (the commencement date of the 2012 Act) even though the agreement itself was entered into before that date.

Agreement

As an initial point, there must be a binding "agreement" in accordance with the general law.[13] In particular, an agreement which is "subject to contract" is not binding,[14] the parties must have gone beyond agreeing in principle to arbitrate,[15] the parties must be of full capacity[16] and the arbitration agreement itself must be one not vitiated by misrepresentation, mistake or undue influence.[17] Further, the arbitration obligation must not have been brought to an end by agreement (including the acceptance of a repudiatory breach of the clause),[18] variation,[19] frustration or the operation of a statutory insolvency procedure. Those points aside, as long as there is an intention to arbitrate, a reference to arbitration in the contract, however slight or opaque, will suffice.[20]

12 [2015] SGHC 49.

13 See, e.g., *Gurney Consulting Engineers* v. *Pearson Pension Property Fund Ltd* [2004] EWHC 1916 (TCC); *Glidepath Holdings BV* v. *Thompson* [2005] 2 Lloyd's Rep 549. See also *Glaxosmithkline UK Ltd* v. *Department of Health* [2007] EWHC 1470 (Comm) where the suggestion that participation in arbitration was "voluntary" was rejected.

14 *Jarvis & Sons plc* v. *Galliard Homes Ltd* [2000] BLR 33. Thus, an agreement that there can be arbitration if both parties subsequently concur in a reference is a mere agreement to agree and not a binding arbitration clause: *Badrick* v. *British Judo Association* [2004] EWHC 1891 (Ch); but see *Joel Passlow* v. *Butmac Pty Ltd* [2012] NSWSC 225.

15 *The Benja Bhum* [1994] 1 SLR 88; *Star-Trans Far East Pte Ltd* v. *Norske-Tech Ltd* [1996] 2 SLR 409; *Pacific International Lines (Pte) Ltd* v. *Tsinlien Metals and Minerals Co (HK) Ltd* [1993] 2 HKLR 249; *Cathay Pacific Airways Ltd* v. *Hong Kong Air Cargo Terminals Ltd* [2002] 2 HKC 193; *Carrier Hong Kong Ltd* v. *Dickson Construction Co Ltd* [2005] 4 HKC 142. A clause that the parties "may" by notice to the other party refer the dispute for resolution by arbitration was a sufficient agreement in*providing that the parties*" *Cape Lambert Resources Ltd* v. *MCC Australia Sanjin Mining Pty Ltd* [2012] WASC 228. In *Robotunits Pty Ltd* v. *Mennel* [2015] VSC 268, the parties "irrevocably and unconditionally" submitted to "arbitration in accordance with the arbitration guidelines of the Law Institute of Victoria". The clause was pathological because such guidelines did not exist. The Supreme Court of Victoria held that the words irrevocably and unconditionally demonstrated a clear intention to submit disputes to arbitration and that the agreement was therefore operable.

16 A company which has been removed from the register of companies ceases to be a party to an arbitration agreement, but if it is restored to the register any arbitration agreement to which it was a party prior to dissolution is revived: *Union Trans-Pacific Co Ltd* v. *Orient Shipping Rotterdam BV* [2002] EWHC 1451 (Comm).

17 *Irvani* v. *Irvani* [2000] 1 Lloyd's Rep 412.

18 *The Leonidas D* [1985] 1 WLR 925; *Bremer Vulkan Schiffbau und Maschinenfabrik* v. *South India Shipping Corporation Ltd* [1981] AC 909; *Villa Denizcilik Sanayi ve Ticaret AS* v. *Longen SA, The Villa* [1998] 1 Lloyd's Rep 195; *Huyton SA* v. *Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620; *Traube* v. *Perelman* [2003] EWHC 2822 (Ch); *Downing* v. *Al Taneer Establishment* [2002] 2 All ER (Comm) 545; *Indescon Ltd* v. *Ogden* [2005] 1 Lloyd's Rep 31; *BEA Hotels NV* v. *Bellway LLC* [2007] 2 Lloyd's Rep 493.

19 *PT Tugu Pratama Indonesia* v. *Magma Nusantara Ltd* [2003] 4 SLR 257, where no variation was found. An arbitration clause cannot be varied unilaterally: *Downing* v. *Al Tameer Establishment* [2002] EWCA Civ 721. If the main agreement is varied, it is a matter of the construction of the variation and indeed of the arbitration clause itself whether the arbitration clause applies to the agreement as varied: *Oriental Maritime (Pte) Ltd* v. *Ministry of Food, Government of Bangladesh* [1989] 2 Lloyd's Rep 371; *El Nasharty* v. *J Sainsbury plc* [2004] 1 Lloyd's Rep 309.

20 *The ICL Raja Mahendra* [1999] 1 SLR 329; *Insigma Technology Co Ltd* v. *Alstom Technology Ltd*

There can be an arbitration agreement even though only one of the parties is obliged[21] or entitled[22] to submit disputes to arbitration. An option to submit to arbitration, once exercised, takes effect as a binding arbitration agreement,[23] although if the option to arbitrate must be exercised within a fixed period and no notice of arbitration is served, then there is no arbitration agreement.[24] If the contract is entered into by an agent on behalf of one of the parties, he must have the requisite authority.[25] Arbitration clauses may also be limited to particular disputes arising between the parties, e.g., quantum where liability is admitted or established, or disputes which can be remedied only in ways open to the arbitrators.[26]

Although most arbitrations are the result of contractual arbitration clauses, an agreement to arbitrate can also arise in an ad hoc fashion after the dispute between the parties has arisen.[27] An obligation to arbitrate cannot, however, be unilaterally imposed.[28]

[2009] SGCA 24; *Tritonia Shipping Inc* v. *South Nelson Forest Products Corporation* [1966] 1 Lloyd's Rep 114; *Hobbs, Padgett Co (Reinsurance) Ltd* v. *J C Kirkland Ltd* [1969] 2 Lloyd's Rep 547; *Swiss Banking Corporation* v. *Novorossiysk Shipping, The Petr Schmidt* [1995] 1 Lloyd's Rep 202; *Paul Smith Ltd* v. *H & S International Holdings Inc* [1991] 2 Lloyd's Rep 127; *Mangistaumunaigaz Oil Production Association* v. *United World Trading Inc* [1995] 1 Lloyd's Rep 66; *Alec Lobb Partnership* v. *Aintree Racecourse Co Ltd* [2000] BLR 65; *McNicholas plc* v. *AEI Cables* 1999, unreported (EWHC, TCC). Contrast *Frota Oceanica Brasileira SA* v. *Steamship Mutual Underwriting Association (Bermuda) Ltd, The Frotanorte* [1996] 2 Lloyd's Rep 461; *Cott* v. *Barber* [1997] 3 All ER 540; *Sonatrach Petroleum Corporation* v. *Ferrell International Ltd* [2002] 1 All ER (Comm) 627; *Atlanska Plovidba* v. *Consigaciones Asturianas SA* [2004] 2 Lloyd's Rep 109; *Aitken* v. *Ishimaru Ltd* [2007] NZHC 1133. Contrast *Teck Guan SDN BHD* v. *Beow Guan Enterprises Pte Ltd* [2003] 4 SLR 276, where it was held that the words "any dispute out of this contract to be governed by the rules of the Cocoa Merchants' Association of America" did not amount to an arbitration clause. See also *MH Alshaya Co WLL* v. *Retek Information Systems Inc* [2001] Masons CLR 99, where, wholly exceptionally (and, arguably, incorrectly), an arbitration provision was found to be incompatible with the contractual arrangements entered into by the parties.

21 *Pittalis* v. *Sherefettin* [1986] 2 All ER 227; *Nine Gladys Road Ltd* v. *Kersh* [2004] EWHC 1080 (Ch); *China Merchants Heavy Industry Co Ltd* v. *JGC Corporation* [2001] 3 HKC 580; *PMT Partners Pty Ltd* v. *Australian National Parks and Wildlife Service* (1995) 131 ALR 377.

22 *NB Three Shipping Ltd* v. *Harebell Shipping Ltd* [2005] 1 Lloyd's Rep 509; *Deutsche Bank AG* v. *Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (Comm).

23 *The Dai Yun Shan* [1992] 2 SLR 508; *WSG Nimbus Pte Ltd* v. *Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603; *The Messiniaki Bergen* [1983] 1 Lloyd's Rep 424; *The Stena Pacifica* [1990] 2 Lloyd's Rep 234; *Law Debenture Trust Corp plc* v. *Elektrim Finance BV* [2005] EWHC 1412; *William Co* v. *Chu Kong Agency Co Ltd* [1993] 2 HKC 377; *Whiting* v. *Halverson* [2003] EWCA Civ 403; *Mi-Space (UK) Ltd* v. *Lend Lease Construction (EMEA) Ltd* [2013] EWH 2001 (TCC); *China State Construction Engineering Corporation Guangdong Branch* v. *Madiford* [1992] 1 HKC 320; *Tianjin Medicine & Health Products Import & Export Corporation* v. *JA Moeller (Hong Kong) Ltd* [1994] HKC 545; *PCCW Global Ltd* v. *Interactive Communications Service Ltd* [2007] 1 HKC 327; *PMT Partners Pty Ltd (In Liq)* v. *Australian National Parks and Wildlife Service* (1995) 184 CLR 301; *Manningham City Council* v. *Dura (Aust) Constructions Pty Ltd* [1999] 3 VR 13; *Savcor Pty Ltd* v. *State of New South Wales* (2001) 52 NSWLR 587; *Liverpool City Council* v. *Casbee Pty Ltd* [2005] NSWSC 590.

24 *Thorn Security (Hong Kong) Ltd* v. *Cheung Kee Fung Cheung Construction Co Ltd* [2005] 1 HKC 252.

25 *Overseas Union Insurance Ltd* v. *Turegum Insurance Co* [2001] 3 SLR 330; *The Vasiliy Golovnin* [2008] SGCA 39.

26 *Vertex Data Science Ltd* v. *Powergen Retail Ltd* [2006] 2 Lloyd's Rep 591.

27 *Allied Vision* v. *VPS Film Entertainment GmbH* [1991] 1 Lloyd's Rep 392; *LG Caltex Co Ltd* v. *China National Petroleum Technology and Development Corporation* [2001] BLR 325; *Humphrey* v. *Dua Contractors & Co Ltd* [1997] 3 HKC 368; *Bintulu Development Authority* v. *Pilecon Engineering Bhd* [2007] 2 MLJ 610. Contrast *Hi-Fert Pty Ltd* v. *United Shipping Adriatic Inc* (1998) 165 ALR 265. No distinction is drawn between arbitration clauses and submission agreements by the IAA, although the distinction does matter for the purposes of AA, s. 10: see the Notes to that section.

28 *Hall* v. *Bank of New Zealand* [2008] NZHC 1132.

Scope of arbitration clause

Section 2A(1), as does art. 7(1) of the Model Law, refers to disputes arising from a defined legal relationship, whether or not contractual. There are indeed many cases in which other forms of dispute have been held to be within the scope of arbitration agreements, e.g., restitutionary actions[29] and claims in tort.[30] Section 2A(2), again reflecting art. 7(1) of the Model Law, states that the agreement may be in the form of an arbitration clause in the contract or in a separate agreement.

In the New Zealand case *Bidois* v. *Leef* [2015] NZCA 176, a question arose as to the words "in respect of a defined legal relationship" appearing in the definition of arbitration agreement in art. 7 of the Model Law. The dispute was in respect of traditional land rights between local peoples dating back to the 1840s, affecting (but not determining) compensation rights. The trial judge held that the dispute was not in respect of a defined legal relationship but purely a historical, cultural dispute. Therefore what had taken place was not an arbitration but something similar such as an expert determination. While there were financial implications of the decisions in terms of compensation rights for land deprivation, the panel itself could not have decided on such allocation. The Court of Appeal relied on authority (*Methanex Motunui Ltd* v. *Spellman* [2004] 1 NZLR 95 (HC)) to the effect that while to avoid redundancy of the words in the Model Law a "defined legal relationship" could not be a merely historic, cultural, academic or social one, the expression should be given a particularly broad meaning and was able to encompass any dispute as long as the arbitration agreement was not contrary to public policy or incapable of determination by arbitration. The Court of Appeal added that the lack of authority worldwide as to the meaning of the words "defined legal relationship" implied that a permissive interpretation was warranted and noted that an arbitration needed not determine all issues between the parties. The court also noted that the arbitration had initiated a process that was determinative of the wider fiscal issue.

It is possible for a series of contracts to be read as a composite whole, so that an arbitration clause in any one of them is to be treated as applicable to disputes arising under all of the contracts.[31] Such a construction may also be appropriate where there are different parties to the various contracts, so that all of the relationships are governed by the arbitration clause.[32]

29 *Government of Gibraltar* v. *Kenney* [1956] 2 QB 410; *Tommy CP Sze & Co* v. *Li & Fung (Trading) Ltd & Ors* [2003] 1 HKC 418; *O'Connor* v. *Leaw Pty* [1997] 42 NSWLR 285; *Vasp Group Pty Ltd* v. *Service Stream Ltd* [2008] NSWSC 1182.

30 *Woolf* v. *Collis Removal Service* [1948] 1 KB 11; *Almare Societa di Navigazione SpA* v. *Derby Co, The Almare Prima* [1989] 2 Lloyd's Rep 376; *Aggeliki Charis Compania Maritima* v. *Pagnan SpA, The Angelic Grace* [1994] 1 Lloyd's Rep 168; *Fahem Co* v. *Mareb Yemen Insurance Co* [1997] 2 Lloyd's Rep 738; *Asghar & Co* v. *The Legal Services Commission and the Law Society* [2004] EWHC 1803 (QB). Whether an arbitration clause does extend to a claim in tort will depend upon its proper construction: *Chimimport plc* v. *G D'Alesio SAS, The Paola D'Alesio* [1994] 2 Lloyd's Rep 366; *Domansa* v. *Derin Shipping and Trading Co, The Sleatral* [2001] 1 Lloyd's Rep 362; *National Insurance and Guarantee Corporation Ltd* v. *M Young Legal Services Ltd* [2005] 2 Lloyd's Rep 46; *Steamship Mutual Underwriting Association (Bermuda) Ltd* v. *Sulpicio Lines Inc* [2008] EWHC 914 (Comm); *CMA CGM SA* v. *Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm); *Xu Yi Hong* v. *Chen Ming Han* [2006] 4 HKC 633; *Hi-Fert Pty Ltd* v. *Kiukiang Maritime Carriers Inc* (1998) 159 ALR 142; *BTR Engineering (Aust)* v. *Dana Corp* [2000] VSC 2045.

31 *Emmott* v. *Michael Wilson & Partners Ltd (No 2)* [2009] EWHC 1 (Comm).

32 *International Research Corporation plc* v. *Lufthansa Systems Asia Pacific Pte Ltd* [2012] SGHC 226;

Agreement in writing

Section 2A(3), following art.7(2) of the Model Law, goes on to require the agreement to be in writing. There is no longer any requirement for a signature.[33] The concept of writing is expanded in a number of respects by the following subsections.

First, under s. 2A(4) there is an agreement in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means. This provision deals with the situation where there have been pre-existing oral or written negotiations which together can be taken as forming a single arbitration agreement.[34] The provision is satisfied if one party to the agreement unilaterally records it in writing, whether or not it is signed or confirmed by all the parties involved.[35]As regards joinder of documents, s. 2A(4) is effectively a clarification of earlier decisions,[36] and the real extension relates to oral discussions which are subsequently recorded in that the pre-existing law did not recognise purely oral agreements even though subsequently evidenced by writing.[37] It remains the case that a purely oral agreement is outside the IAA.[38]

Secondly, by s. 2A(5) an electronic communication is to be treated as writing as long as its content is accessible for future reference. The elements of electronic communication are defined by s. 2A(10).

Thirdly, by s. 2A(6), the assertion of the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, is deemed to be an effective arbitration agreement as between the parties to the proceedings. This confirms the position under the now repealed version of s. 2 of the IAA.[39]

Svenska Petroleum Exploration AB v. *Government of the Republic of Lithuania (No 2)* [2007] 1 Lloyd's Rep 193.

33 For the earlier position, see *Vix Marketing Pte Ltd* v. *Technogym SpA* [2008] 4 SLR 256, deciding that signature on every page is not necessary.

34 See *Midgulf International Ltd* v. *Groupe Chimique Tunisien* [2010] EWCA Civ 66.

35 *AQZ* v. *ARA* [2015] SGHC 49.

36 *Zambia Steel & Building Supplies Ltd* v. *James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225; *Comandate Marine Corporation* v. *Pan Australia Shipping Pty Ltd* (2006) 238 ALR 457; *Jiangxi Provincial Metal & Mineral Import and Export Corp* v. *Sulanser Co Ltd* [1995] 2 HKC 373; *Welex AG* v. *Rosa Maritime Ltd* [2003] 2 Lloyd's Rep 509. But even with such joinder there may be insufficient evidence of an arbitration agreement: *Cigna Life Insurance Co of Europe NV* v. *Intercaser SA de Seguros y Reaseguros* [2001] Lloyd's Rep IR 821; *Stanstead Shipping Co Ltd* v. *Shenzen Nantian Oil Mills Co Ltd*, 2000, unreported; *American International Speciality Lines Insurance Co* v. *Abbott Laboratories* [2004] Lloyd's Rep IR 815; *Guangdong New Technology Import & Export Corporation Jiangmen Branch* v. *Chiu Shing* [1991] 2 HKC 459.

37 Thus where there was already an oral contract and agreement by conduct in place, a "letter of award" incorporating by reference an unenclosed document containing an arbitration clause and unsigned by the recipient did not constitute a written agreement to arbitrate, and silence did not signify acquiescence; *United Eng Contractors Pte Ltd* v. *L & M Concrete Specialists Pte Ltd* [2000] 2 SLR 196. See also *L & M Concrete Specialists* v. *United Eng Contractors* [2000] 4 SLR 441, a separate dispute between the same parties, where a letter of award was signed on each page and referred to standard conditions which had not been supplied. It was held that an arbitration clause in those conditions was not binding for want of sufficient notice. A purely oral agreement was held not to suffice, even if it had been embodied in a judgment: *Lum Chang Building Contractors Pte Ltd* v. *Anderson Land Pte Ltd* [2000] 2 SLR 261.

38 *H Smal Ltd* v. *Goldroyce Garment Ltd* [1994] 2 HKC 526 is an illustration of the situation in which there was no written evidence of an agreement to go to arbitration.

39 These words are not confined to formal pleadings: *Gay Constructions Ltd Pty Ltd* v. *Caledonian Techmore (Building) Ltd* [1994] HKC 562.

Incorporation

Fourthly, under s. 2A(7), a reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the contract. A specific illustration of this point, in relation to bills of lading, is discussed below. The wording of s. 2A(7) implies that a mere reference in the contract to an arbitration clause in another document is sufficient to incorporate the clause.[40] However, the English courts have held under AA 1996 (Eng), s. 6(2) that the common law is unchanged.[41] The common law position is that: (a) a reference in a contract to an arbitration clause in another document, e.g., rules of an association,[42] may have incorporating effect;[43] but (b) where there is a contract between X and Y containing an arbitration clause, and the terms of that contract are incorporated en bloc into a contract between Y and Z, the incorporating words do not extend to the arbitration clause unless there is an express reference to it[44] or some other agreement that it should apply.[45] A mere statement that the two contracts are "back to back" will not suffice.[46] The cases are largely derived from bills of lading, construction and reinsurance disputes.[47] On this

40 In a Malaysian case, in the context of a provision identical to s. 2A(7), the court held that the words "All other terms, conditions and rules not in contradiction with the above, as per [respondent's] terms and conditions" were effective in incorporating into the agreement between the parties the arbitration clause contained in the standard terms and conditions of the respondent: *AJWA for Food Industries Co (MIGOP), Egypt* v. *Pacific Inter-Link Sdn Bhd* (2013) 5 MLJ 625.

41 *Sea Trade Maritime Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd, The Athena (No. 2)* [2007] 1 Lloyd's Rep 280; *Trygg Hansa Insurance Co Ltd* v. *Equitas* [1998] 2 Lloyd's Rep 439l *Lisnave Estaleiros Navias SA* v. *Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm). A different view has been adopted in Hong Kong: *Astel-Peininger Joint Venture* v. *Argos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328; *PT Wearwell International* v. *VF Asia Ltd* [1994] 3 HKC 344; *Hercules Data Comm Co Ltd* v. *Koywa Communications Ltd* [2001] 2 HKC 75; *Ching* v. *Fu Shing Rush Door Joint Venture Co Ltd* [2003] HKCU 1084. Compare *An Feng International Trading Ltd* v. *Honour Link International* [1999] 3 HKC 116 where there was found to be no intention to incorporate.

42 *Ng Kin Kenneth* v. *HK Football Association Ltd* [1994] 1 HKC 734.

43 *Roche Products* v. *Freeman Process Systems* (1996) 80 BLR 102; *Secretary of State for Foreign and Commonwealth Affairs* v. *Percy Thomas* (1998) 65 Con LR 11; *Axa Re* v. *Ace Global Markets Ltd* [2006] Lloyd's Rep IR 683; *Sea Trade Maritime Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd, The Athena (No. 2)* [2007] 1 Lloyd's Rep 280; *Heifer International Inc* v. *Christiansen* [2007] EWHC 3015 (TCC); *Kallang Shipping SA Panama* v. *Axa Assurance Senegal* [2008] EWHC 2761 (Comm); *Sotrade Denizcilik Sanayi ve Tikaret AS* v. *Amadou Lo, The Duden* [2008] EWHC 2762 (Comm); *Nanhai West Shipping Co* v. *Hong Kong United Dockyards Ltd* [1996] 2 HKC 639; *IGC Chemical Corporation* v. *Zhuhai Minmetals International Non-Ferrous Metals Trading Co* [1996] 2 HKC 64; *Ho Fat Sing* v. *Hop Tai Construction Co Ltd* [2008] HKCU 2022; *Bina Puri Sdn Bhd* v. *EP Engineering Sdn Bhd* [2008] 3 MLJ 564. Insofar as *Ben Barrett* v. *Henry Boot* [1995] CILL 1026 suggests a stricter approach, it is probably no longer good authority.

44 *Star-Trans Far East Pte Ltd* v. *Norske-Tech Ltd* [1996] 2 SLR 409; *Concordia Agritrading Pte Ltd* v. *Cornelder Hoogewerff (Singapore) Pte Ltd* [2001] 1 SLR 222; *Hi-Fert Pty Ltd* v. *United Shipping Adriatic Inc* (1998) 165 ALR 265; *Construction Diving Services (Queensland) Pty Ltd* v. *Van Oord ACZ BV* [1998] VSC 2936.

45 *Koninklijke Bunge NV* v. *Sinitrada Co Ltd* [1972–1974] 1 SLR 453. A course of dealing may also give rise to incorporation: *R1 International Pte Ltd* v. *Lonstroff AG* [2014] SGHC 69 (rejected on the facts); *Capes (Hatherden) Ltd* v. *Western Arable Services Ltd* [2009] EWHC 3065 (Comm); *Habas Sinai VE Tibbi Gazlar Isthisal Endustri AS* v. *Sometal SAL* [2010] EWHC 29 (Comm); *AJWA for Food Industries Co (MIGOP), Egypt* v. *Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625.

46 *Teambo Engineering Ltd* v. *Hong Kong Construction (Holdings) Ltd* [2005] HKEC 1241; *WH-SGC JV Ltd* v. *Hong Kong Construction (Holdings) Ltd* [2006] HKEC 1492.

47 The leading bills of lading authorities are: *Thomas Co* v. *Portsea Steamship Co Ltd, The Portsmouth*

principle, the wording of the arbitration clause itself is relevant only in a negative sense: an arbitration clause which contemplates that it may be incorporated from contract A into contract B will not operate to effect incorporation into contract B as this is a matter for contract B itself[48] although if contract B does purport to incorporate the arbitration clause then the wording of the arbitration clause may prevent its incorporation where it makes no sense in contract B unless it can be "manipulated" to be given effect. The narrow English approach to incorporation was rejected in *International Research Corporation Plc* v. *Lufthansa Systems Asia Pacific Pte*,[49] in favour of an interpretation of the contract based upon its commercial purpose and context, Chan Seng Onn J recognising that his analysis potentially undermined the strict rule that express words are required for the incorporation of an arbitration clause. The court noted that the strict rule lost force if the third party contracted with knowledge of the arbitration agreement.

In addition, it has been held by a Malaysian court faced with construction of a national provision implementing art. 7(6) of Model Law, and thus virtually identical to IAA, s. 2A(7), that the separate document containing the arbitration clause does not have to be attached to the purported agreement or otherwise published. It is sufficient that the incorporation is by notice.[50]

Bills of lading cases

As far as bills of lading are concerned, IAA, s. 2A(8), repeating the repealed words of s. 2, states that a reference in a bill of lading to a charterparty or other document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the bill of lading. As seen above, the English cases have adopted a narrow approach to incorporation in bills of lading cases. That approach does not apply in Singapore following *International Research Corporation Plc* v. *Lufthansa Systems Asia Pacific Pte*.[51] It may be noted that

[1912] AC 1; *The Elizabeth H* [1962] 1 Lloyd's Rep 172; *The Merak* [1964] 2 Lloyd's Rep 527; *The Annefield* [1971] 1 All ER 394; *The Rena K* [1979] 1 All ER 397; *The Varenna* [1983] 2 Lloyd's Rep 592; *The Federal Bulker* [1989] 1 Lloyd's Rep 103; *The Nerano* [1994] 2 Lloyd's Rep 50; *The Heidberg* [1994] 2 Lloyd's Rep 287; *The Delos* [2001] 1 Lloyd's Rep 703; *Michael S Evryalos Maritime SA* v. *China Pacific Insurance Co Ltd, The MV Michael S* [2001] All ER (D) 325 (Dec). The leading construction decisions are: *Modern Buildings Wales Ltd* v. *Limmer and Trinidad Co Ltd* [1975] 2 All ER 549; *Aughton* v. *M F Kent Services Ltd* [1992] ADRLJ 83; *Giffen* v. *Drake and Scull* (1993) 37 Con LR 84; *Laxair Ltd* v. *Edward W Taylor* (1993) 65 Build LR 87; *Alfred McAlpine Construction Ltd* v. *RMG Electrical Ltd* [1998] ADRLJ 53; *Jardine Birshe Ltd* v. *Cathedral Works Organisation (Chichester) Ltd* [1996] ADRLN 14; *Behmer and Wright Pty Ltd* v. *Tom Tsiros Constructions Pty Ltd* [1996] VSC 7560. The reinsurance authorities are: *Pine Top Insurance Co Ltd* v. *Unione Italiana Anglo-Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476; *Excess Insurance Co* v. *Mander* [1995] LRLR 583; *Trygg Hansa Insurance Co Ltd* v. *Equitas* [1998] 2 Lloyd's Rep 439. See also: *American Design Associates* v. *Donald Insall Associates*, QBD (TCC) November 2000, unreported, HHJ Bowsher QC; *AIG Europe SA* v. *QBE Insurance International Ltd* [2001] 2 Lloyd's Rep 268; *American International Speciality Lines Insurance Co* v. *Abbott Laboratories* [2004] Lloyd's Rep IR 815.

48 See *Siboti K/S* v. *BP France SA* [2003] 2 Lloyd's Rep 364, distinguishing *The Merak* [1964] 2 Lloyd's Rep 527 and applying *The Federal Bulker* [1989] 1 Lloyd's Rep 103 and *The Varenna* [1983] 2 Lloyd's Rep 692.

49 [2012] SGHC 226.

50 *AJWA for Food Industries Co (MIGOP), Egypt* v. *Pacific Inter-Link Sdn Bhd* (2013) 5 MLJ 625.

51 [2012] SGHC 226. See also *The Titan Unity* [2013] SGHCR 28, where there was express reference to the charterparty arbitration clause in the bill of lading.

IAA, s. 2A(8) specifically provides that the reference must be such as to make the arbitration clause a part of the bill of lading, a provision originally introduced to relax the rules on incorporation in shipping cases, to meet the needs of the shipping community.[52]

Where specific words of incorporation have been used in a bill of lading to incorporate the arbitration clause in a charterparty, incorporation may be effective notwithstanding that there is a typographical error (the wrong date) in the reference to the charterparty.[53]

Variations and settlements

Where the parties have entered into a contract containing an arbitration clause, and that contract has been varied or replaced by another which does not contain an arbitration clause, it is a question of construction as to whether the latter is itself subject to arbitration: if the latter is entirely distinct, e.g., because it is a settlement of disputes arising under the earlier contract, then there is probably no basis for the extension of the arbitration clause. However, all turns on the proper construction of the arbitration clause and the settlement,[54] and if proceedings are brought on the settlement agreement then it is generally appropriate for the court to stay its proceedings so that the scope of the arbitration clause can be determined by the arbitrators under the *Kompetenz-Kompetenz* principle.[55] A party may also be estopped from denying the existence of an arbitration agreement if he has represented that arbitration is to take place on particular terms and that representation has been relied upon by the other.[56] It is not clear whether variations must be in writing, and it would seem that an agreement to terminate an arbitration clause need not be in writing.

Conflicting clauses

It is an unfortunate feature of contract drafting that contradictory clauses are not infrequently found side by side. One illustration is the conjunction of an arbitration clause accompanied by an exclusive or non-exclusive jurisdiction clause nominating the courts of an identified jurisdiction. The general view is that it is necessary to give effect to both clauses wherever possible, and that typically means that the arbitration clause applies to the resolution of the dispute, and that the jurisdiction provisions relate purely to curial issues[57] unless it is clear that the parties intended different

52 LRRD No. 3/2001, para. 2.2.5.

53 *Hyosung (HK) Ltd* v. *Owners of the Hilal I* [2001] 1 SLR 387.

54 *Coop International Pte Ltd* v. *Ebel SA* [1998] 3 SLR 670; *New Sound Industries Ltd* v. *Meliga (HK) Ltd* [2005] 1 HKC 41; *Paquito Lima Buton* v. *Rainbow Joy Shipping Ltd* [2008] 4 HKC 14; *Sun United Maritime Ltd* v. *Kasteli Marine Inc* [2014] EWHC 1476 (Comm); *Monde Petroleum SA* v. *Westernzagros Ltd* [2015] EWHC 67 (Comm). Contrast: *Emmott* v. *Michael Wilson & Partners Ltd* [2009] EWHC 1 (Comm), where disputes arising out of an agreement made in 2005 and modifying an agreement made in 2001 were held to fall within the arbitration clause in the earlier agreement; *Dawes* v. *Treasure and Sons Ltd* [2010] EWHC 3218 (TCC); *Interserve Industrial Services Ltd* v. *ZRE Katowice* [2012] EWHC 3205.

55 *Doshion Ltd* v. *Sembawang Engineers and Constructors Pte Ltd* [2011] SGHC 46.

56 *Yokogawa Engineering Asia Pte Ltd* v. *Transtel Engineering Pte Ltd* [2009] SGHC 1.

57 *Tri-MG Intra Asia Airlines* v. *Norse Air Charter Ltd* [2009] SGHC 13; *Paul Smith Ltd* v. *H & S International Holding Inc* [1991] 2 Lloyd's Rep 127; *Shell International Petroleum Co Ltd* v. *Coral Oil Co*

issues to be resolved in different ways.[58] Similarly, where there is an arbitration clause in conjunction with a service of suit clause under which the insurers agree to submit to the jurisdiction of any court of competent jurisdiction, the service of suit clause is to be regarded as confined to providing a forum for enforcement which cannot be denied by the defendant.[59] It is also possible to regard the two clauses as providing alternative dispute resolution mechanisms, although if one party opts for arbitration then his decision is binding on the other.[60]

Arbitration and other dispute resolution mechanisms

Not every agreement which provides for dispute resolution by a third party amounts to arbitration, although tiered clauses which provide for other dispute resolution mechanisms prior to arbitration are nevertheless arbitration clauses.[61] A distinction has to be drawn between arbitration and expert determination (requiring determination of a particular factual matter, e.g., the quality of goods or the amount of a loss),[62] between arbitration and mediation[63] (a process with a non-binding outcome), between arbitration and voluntary non-binding discussion[64] and between arbitration and a judicial process.[65] The rules of an association which lay down a procedure for resolving internal disputes may or may not amount to arbitration,

[illegible] [1999] 1 Lloyd's Rep 72; *Axa Re* v. *Ace Global Markets Ltd* [2006] 1 Lloyd's Rep 682; *McConnell Dowell Constructors (Aust) Pty Ltd* v. *National Grid Gas plc* [2006] EWHC 2551 (TCC); *Habbas Sinai Ve Tibbi Gazlar Isthisal Endustri AS* v. *Sometal SARL* [2010] EWHC 29 (Comm); *SulAmerica Cia Nacional De Seguros SA* v. *Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671; *Interserve Industrial Services Ltd* v. *ZRE Katowice* [2012] EWHC 3205; *British-America Insurance (Kenya)* v. *Matalec SAL* [2013] EWHC 3278 (Comm); *Arta Properties Ltd* v. *Li Fu Yat Tso* [1998] HKCU 721; *PCCW Global Ltd* v. *Interactive Communications Service Ltd* [2007] 1 HKC 327. The contrary decisions in *Indian Oil Corporation* v. *Vanol Inc* [1992] 2 Lloyd's Rep 563, *MH Alshaya Company WLL* v. *Retek Information Systems Inc* [2001] Masons CLR 99 and *Beyond the Network Ltd* v. *Vectone Ltd* [2005] HKEC 2075 are to be regarded with some caution.

58 *Econ Piling Pte Ltd* v. *NCC International AB* [2007] SGHC 17; *Astrata (Singapore) Pte Ltd* v. *Portcullis Escrow Pte Ltd* [2011] 3 SLR 386.

59 *Ace Capital Ltd* v. *CMS Energy Corporation* [2008] 1 Lloyd's Rep 93. But contrast *HIH Casualty and General Insurance Ltd* v. *R J Wallace* [2006] NSWSC 1150.

60 *William Co* v. *Chu Kong Agency Co Ltd* [1993] 2 HKC 377.

61 *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334; *Guandong Overseas Shenzhen Co Ltd* v. *Yao Shun Group International Ltd* [1998] 1 HKC 451; *Ho Fat Sing* v. *Hop Tai Construction Co Ltd* [2008] HKCU 2022; *Aitken* v. *Ishimaru Ltd* [2007] NZHC 1133; *PMT Partners Pty Ltd* v. *Australian National Parks and Wildlife Service* (1995) 131 ALR 377.

62 For the distinction, see *Mayers* v. *Dlugash* [1994] 1 HKC 755. An expert determination can be overturned only if the expert has exceeded his jurisdiction or if there is manifest error: *Evergreat Construction Co Pte Ltd* v. *Presscrete Engineering Pte Ltd* [2006] 1 SLR 634; *Geowin Construction Pte Ltd* v. *Management Corporation Strata Title No. 1256* [2007] 1 SLR 1004 *Jones* v. *Sherwood Services Ltd* [1992] 1 WLR 277; *Cott UK Ltd* v. *Barber* [1997] 3 All ER 540; *Veba Oil Supply and Trading GmbH* v. *Petrotrade Inc* [2002] 1 Lloyd's Rep 295; *Macro* v. *Thompson (No. 3)* [2002] BCLC 36; *Bernhard Schulte* v. *Nile Holdings Ltd* [2004] 2 Lloyd's Rep 352; *Halifax Life Ltd* v. *Equitable Life Assurance Society* [2007] 1 Lloyd's Rep 528; *AIC Ltd* v. *ITS Testing Services (UK) Ltd, The Kriti Palm* [2007] 1 Lloyd's Rep 555; *Owen Pell Ltd* v. *Bindi (London) Ltd* [2008] EWHC 1420 (TCC); *Turville Heath Inc* v. *Chartis Insurance UK Ltd* [2012] EWHC 3019 (TCC).

63 *Flight Training International* v. *International Fire Training Equipment Ltd* [2004] 2 All ER (Comm) 568.

64 *Kruppa* v. *Benedetti* [2014] EWHC 1887 (Comm).

65 *Al Midani* v. *Al Midani* [1999] 1 Lloyd's Rep 923.

depending upon the substance of the agreed procedure.[66] A clause may be one for arbitration even though that word is not used,[67] and equally the description of a clause as one providing for arbitration is not conclusive if the procedure does not have the characteristics of arbitration.[68] The primary characteristics of arbitration are: a tribunal selected by the parties and required to operate impartially; a procedure whereby each party can state its case; an obligation on the tribunal to resolve the dispute according to the law; and a procedure designed to determine the substantive rights of the parties by means of a binding decision.[69]

Model Law to have force of law

3.—(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

(2) In the Model Law—

"State" means Singapore and any country other than Singapore;

"this State" means Singapore.

NOTES

Relationship between Model Law and IAA

The Model Law is by this provision incorporated into the law of Singapore. Section 3 excludes Chapter VIII of the Model Law: that Part regulates the recognition and enforcement of awards and is based on the New York Convention. In its place, s. 19 provides for summary enforcement of domestic awards, and summary enforcement is extended to foreign awards by s. 19. Other provisions of the Model Law are nevertheless expressly modified at points by the IAA, including: s. 5, modifying art. 1 on the scope of application; s. 9, modifying art. 10(2) on the number of arbitrators; s. 9A modifying art. 11(3), consequential on the modification of the number of arbitrators; and s. 10 modifying art. 16(3) on the right of appeal against a jurisdictional ruling. The IAA also remedies certain of the deficiencies in the Model Law, e.g., by authorising the courts to grant interim protective measures (now provided for in the 2006 amendments to the Model Law). The parties may contract out of either the IAA or the Model Law, or both (s. 15(1)), although an agreement to use standard arbitration rules is not to amount to such an agreement (s. 15(2)). In the latter situation the IAA and the Model Law (as the case may be) will continue to apply to those parts of the arbitration which are not inconsistent with the adopted arbitration rules (see the Notes to s. 15A). An important feature of the Model Law is art. 5, which precludes court intervention unless there is express provision in the Model Law to the contrary. As will be seen from the annotations to the Model Law, judicial intervention is available only with regard to: the grant of interim measures

66 *Walkinshaw* v. *Diniz* [2000] 2 Lloyd's Rep 165 (arbitration); *Exeter City AFC* v. *Football Conference Ltd* [2004] 4 All ER 1179 (dispute resolution mechanism not amounting to arbitration); *England and Wales Cricket Board* v. *Kaneria* [2013] EWHC 1074 (Comm).

67 *David Wilson Homes Ltd* v. *Survey Services Ltd* [2001] BLR 267.

68 *AIG Europe SA* v. *QBE International Insurance Ltd* [2001] 2 Lloyd's Rep 268; *Kruppa* v. *Benedetti* [2014] EWHC 1887 (Comm).

69 *Walkinshaw* v. *Diniz* [2000] 2 Lloyd's Rep 165.

(art. 9); assistance with the appointment of the tribunal (art. 11); assistance with the taking of evidence (art. 27); recourse against the award (art. 34); and recognition and enforcement of an award (art. 35). However, s. 12A of the IAA does permit the court to make various orders in respect of the arbitral procedure in addition to the matters listed in the Model Law.

"Place" of the arbitration

It is important to draw a distinction between the juridical base of the arbitration, i.e., the "seat", and the physical location of the arbitration.[70] It is only where the arbitration has its juridical seat in Singapore that the IAA and the Model Law apply in full (see Model Law, art. 1), although both instruments do extend the jurisdiction of the Singaporean courts to particular aspects of arbitrations seated in another jurisdiction, e.g., in the grant of a stay (IAA, s. 6; Model Law, art. 8), the grant of interlocutory measures (IAA, s. 12A), the taking of evidence (IAA, s. 13), protective interim measures (Model Law, arts 17H–17J) and the taking of evidence from a person within the territory of Singapore (Model Law, art. 27). Unfortunately, the IAA and the Model Law—and indeed the AA—somewhat confusingly use the word "place" to refer to both concepts, and it is necessary to exercise care to determine in which context the word is being used, although there is a presumption that words denoting the physical location agreed by the parties, such as "place" and "venue", are intended also to provide the juridical seat.[71] The "seat" of the arbitration is to be agreed between the parties, failing which it is to be determined by the arbitrators.[72] The arbitrators may nevertheless, and subject to the agreement of the parties, agree to meet at any physical location which they consider appropriate for the hearing of witnesses or experts, or for inspections.[73] If the parties' agreement is disregarded, the award is in theory capable of being set aside under Model Law s. 34(2)(a)(iv) for non-compliance with the agreed procedure, but it might be thought that the court would be reluctant to act in the absence of proof of serious injustice as opposed to mere inconvenience.[74]

Interpretation of Model Law by use of extrinsic material

4.—(1) For the purposes of interpreting the Model Law, reference may be made to the documents of—

(a) the United Nations Commission on International Trade Law; and

(b) its working group for the preparation of the Model Law, relating to the Model Law.

70 See LRRD No. 3/2001, para. 2.1.2.

71 *Union of India* v. *McDonnell* [1993] 2 Lloyd's Rep 48; *ABB Lummus Global Ltd* v. *Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24; *Shashoua* v. *Sharma* [2009] 2 Lloyd's Rep 376; *Enercon GmbH* v. *Enercon (India) Ltd* [2012] 1 Lloyd's Rep 519; *U & M Mining Zambia Ltd* v. *Konkola* [2013] 2 Lloyd's Rep 218; *Shagang South Asia (Hong Kong) Trading Co Ltd* v. *Daewoo Logistics* [2015] EWHC 194 (Comm). The sole authority reaching a different conclusion is *Braes of Doune Wind Farm (Scotland) Ltd* v. *Alfred McAlpine Business Services Ltd* [2008] 1 Lloyd's Rep 608.

72 Model Law, art. 20(1). See the Note to that provision.

73 Model Law, art. 20(2).

74 *Tongyuan (USA) International Trading Group* v. *Uni-Clan Ltd*, 2001, unreported.

does not apply to an allegation that the arbitrators have failed to apply the correct substantive law to the main agreement,[621] but it will apply to an award on interest and costs which the arbitrator was not empowered to make.[622] By virtue of s. 31(4), when a foreign award contains decisions on matters not submitted to arbitration but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted.[623] The fact that enforcement of an award regarding the duties of a Formula One racing team to permit a particular driver to race also affected the racing opportunities of other drivers in the team, who were not parties to the arbitration, did not give rise to the conclusion that the award was beyond the scope of the submission to arbitration and therefore unenforceable.[624] It has been suggested that the provision extends to a failure to consider matters which were put to the arbitrators.[625] If no objection has been taken to the jurisdiction of the arbitrators in the arbitration itself, the applicant is estopped from relying upon this ground of challenge.[626]

As discussed in the notes to IAA, s. 10, in determining jurisdiction, the court is required to look at the matter afresh, so that the award is no more than guidance.

Breach of agreed procedure

Section 31(2)(e) deals with a breach in agreed composition or procedure.[627] Such a breach may be disregarded if it is not the fault of the arbitrators,[628] if it is trivial in the sense that no prejudice has been suffered[629] or if it has been waived by the defendant by failing to object at the appropriate time.[630] It was suggested in *PT Central Investindo* v. *Franciscus Wongso*[631] that proof of actual or potential bias on the part of the arbitrator justifies the setting aside of the award under this provision.

621 *Quarella Spa* v. *Scelta Marble Australia Pty Ltd* [2012] SGHC 166; *Karaha Bodas Co LLC* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (No. 2)* [2003] 4 HKC 488. The allegation is not that the arbitrators have exceeded their jurisdiction, but that they have erred in law in their choice, a matter beyond review under the IAA.

622 *Parts & Services Ltd* v. *Brooks* [2005] NZHC 293; *Grant Thornton International Ltd* v. *JBPB & Co* [2013] HKCFI 523.

623 *AKN* v. *ALC* [2015] SGCA 18.

624 *Giedo van der Garde BV* v. *Sauber Motorsport AG* [2015] VSC 80.

625 *Sapura-Schulz Hydroforming Sdn Bhd* v. *Schulz Export GMBH* [2013] SGHC 196.

626 *Galsworthy Ltd of the Republic of Liberia* v. *Glory Wealth Shipping Pte Ltd* [2010] SGHC 304; *Jiangxi Provincial Metal & Mineral Import and Export Corp* v. *Sulanser Co Ltd* [1995] 2 HKC 373; *Wuzhou Port Foreign Trade Development Corporation* v. *New Chemic Ltd* [2001] 3 HKC 395; *Sam Ming Forestry Economic Co* v. *Lam Pun Hung* [2001] 3 HKC 573.

627 *Denmark Skibstekniske Konsulenter A/S I Likvidation* v. *Ultrapolis 3000 Investments Ltd* [2010] SGHC 108 (allegation that tribunal was not constituted in accordance with the parties' agreement—dismissed on the facts); *Triulzi Cesare SRL* v. *Xinyi Group (Glass) Co Ltd* [2014] SGHC 220 (alleged agreement to dispense with expert evidence, not shown on the facts). Issues as to the applicable law are not procedural: *Brunswick Bowling & Billiards Corporation* v. *Shanghai Zhonglu Industrial Co Ltd* [2009] HKCU 211.

628 *Triulzi Cesare SRL* v. *Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

629 *China Agribusiness Development Corporation* v. *Balli Trading* [1998] 2 Lloyd's Rep 76; *Tongyuan (US) International Trading Group* v. *Uni-Clan Ltd*, 2001, unreported, but a full summary is available at (2001) 26 *Yearbook of Commercial Arbitration* 886; *Triulzi Cesare SRL* v. *Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

630 *Galsworthy Ltd of the Republic of Liberia* v. *Glory Wealth Shipping Pte Ltd* [2010] SGHC 304; *Minmetals Germany GmbH* v. *Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

631 [2014] SGHC 190.

Appeal against award pending

Section 31(2)(f)— the award has not become binding or as been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made order to set aside/suspend award made or pending—deals with three different possibilities: (a) the award is not yet binding; (b) the award has been set aside by a competent authority of the country in which the award was made; and (c) the award has been set aside by a competent authority of the country under whose law the award was made.

As regards (a), it has been held in England that there is no reference in the New York Convention to the law of place where the award was made, so that the sole issue is whether, as a matter of the law of the enforcing court, the award has become binding. The principle of "double exequatur", whereby the award had to be regarded as binding under both the law of the seat and the law of the enforcing court had been removed by the New York Convention.[632]

The Supreme Court of India held in *Bharat Aluminium Co* v. *Kaiser Aluminium Technical Service Inc*[633] that possibility (c) arose only where the court of (b) had no power to set aside an award, so that it had not been intended by the drafters of the New York Convention that an award could be set aside by the courts of any country other than those of the seat of the arbitration. Accordingly, s. 31(2)(f) is concerned with an order which has been made or an appeal which is pending under the curial law[634] when enforcement is sought.[635]

If the award is under curial review at the time of the hearing of the application for recognition or enforcement, the court may, in accordance with s. 31(5),[636] adjourn any decision on the recognition or enforcement of the award,[637] although it may order the respondent to provide security for the award.[638] Enforcement may also be granted of those parts of the award that are either unchallenged or in respect

632 *Rosseel NV* v. *Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625; *Dowans Holding SA* v. *Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm).

633 November 2012.

634 See *Diag Human Se* v. *Czech Republic* [2014] EWHC 1639 (Comm), where it was held that the nature of the process had to be determined by reference to the curial law, and that a ruling on the point by the curial court created an issue estoppel.

635 In *Société Nationale d'Operatoins Petrolières de la Côte d'Ivoire-Holding* v. *Keen Lloyd Resources Ltd* [2004] 3 HKC 452 it was held that award is binding if it is not open to review on substantive grounds but merely capable of being challenged on technical grounds (including want of due process and lack of jurisdiction).

636 See generally: *Soleh Boneh International* v. *Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208; *Minmetals Germany GmbH* v. *Ferco Steel Ltd* [1999] 1 All ER (Comm) 315; *IPCO (Nigeria) Ltd* v. *Nigerian National Petroleum Corp* [2005] 2 Lloyd's Rep 326 (and see the later proceedings, *IPCO (Nigeria) Ltd* v. *Nigerian National Petroleum Corp (No 3)* [2014] EWHC 576 (Comm), where the court refused to vary its order in the light of alleged changed circumstances); *Dowans Holding SA* v. *Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm); *Travis Coal Restructured Holdings Llc* v. *Essar Global Fund Ltd* [2014] EWHC 2510 (Comm). The court has no jurisdiction under s. 103(5) to order security for any reason other than that the enforcement proceedings have been adjourned: *Yukos Oil Co* v. *Dardana Ltd* [2002] 2 Lloyd's Rep 326.

637 Based upon: the bona fides of the challenge in the curial courts; whether the challenge has a realistic prospect of success; and prejudice caused by delay. An award is not suspended in the curial courts for this purpose if execution has been stayed pending an appeal against the award: *Sonatrach* v. *Statoil Natural Gas LLC* [2014] EWHC 875 (Comm).

638 Based upon the strength of the argument that the award is invalid and effect of any delay on

of which there is no realistic prospect of challenge in the supervisory courts of the arbitral seat.[639] Relevant considerations in a decision on the adjournment of the proceedings and on the grant of security will include the likelihood of the award being overturned, the manner in which the respondent has pursued his application to challenge the award and the risk that the respondent may dissipate his assets in the absence of an order for security.[640] The applicant may also be ordered to provide security for the respondent's future costs, as there is a risk that the applicant may discontinue the enforcement proceedings if the award is successfully challenged.[641]

Section 31(5) does not deal with the unlikely situation in which an enforcement order has been made by the Singapore courts and thereafter a curial challenge against the award is brought. This situation is not dealt with by the New York Convention, and it can be dealt with only by a stay of enforcement under the Rules of Court. In *Continental Transfert Technique Ltd* v. *Nigeria*[642] the English High Court regarded the matter as one to be treated by analogy with s. 31(5), and that if there is a real prospect of a successful challenge then a stay may be granted, albeit subject to an order for security for the amount of the award.

Public policy

Section 31(4) sets out two defences, arbitrability and public policy. Arbitrability is discussed in the note to s. 11, above. It is incumbent on the arbitrators to raise public policy issues themselves, even if they have not been argued, given that such issues may go to the enforcement of the award.[643] However, if they have failed to do so, the question becomes one for the enforcing court.

The public policy defence refers to the public policy of Singapore,[644] so that failure to raise a public policy issue before the curial court will not preclude the respondent from opposing enforcement in Singapore.[645] It is important to emphasise, however, that the worldwide jurisprudence on the Model Law has confirmed that "public policy" for the purposes of the New York Convention has an international focus, and is really concerned with the most serious forms of transgression. As a matter of principle, considerations of public policy can never be exhaustively defined.[646] The phrase "contrary to public policy" is to be narrowly construed.[647]

enforcement: *Cruz City I Mauritius Holdings* v. *Unitech Ltd* [2013] EWCA Civ 1512. See also *ESCO Corporation* v. *Bradken Resources Pty Ltd* [2011] FCA 905

639 *IPCO (Nigeria) Ltd* v. *Nigerian National Petroleum Corp (No. 2)* [2008] EWCA Civ 1157; *Dowans Holding SA* v. *Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm); *Xiamen Xinjingdi Group Ltd* v. *Eton Properties Ltd* [2008] 6 HKC 287.

640 *Yukos Oil Co* v. *Dardana Ltd* [2002] 2 Lloyd's Rep 326.

641 *Yukos Oil Co* v. *Dardana Ltd* [2002] 2 Lloyd's Rep 326.

642 [2010] EWHC 780 (Comm).

643 *PT Prima International Development* v. *Kempinski Hotels SA* [2012] SGCA 35.

644 The 1993 Review, para. 28, recommended that it would be preferable not to seek to define public policy by legislation and to leave the matter to the courts.

645 So held in Hong Kong: *Paklito Investment Ltd* v. *Klockner East Asia Ltd* [1993] 2 HKLR 39; *Hebei Import & Export Corp* v. *Polytek Engineering Co Ltd* [1999] 2 HKC 205.

646 *Deutsche Schachtbau und Tiefbohr-Gesellschaft mbH* v. *Shell Petroleum Ltd* [1990] 1 AC 295; *Profilati Italia SRL* v. *Painewebber Inc* [2001] 1 All ER (Comm) 1065; *Hong Kong Golden Source Ltd* v. *New Elegant Investment Ltd* [2014] HKCFI.

647 *Shanghai Fusheng Soya Food Co Ltd* v. *Pulmuone Holdings Co Ltd* [2014] HKCFI.

It is not intended to be a "catch-all" provision to be used whenever convenient; it is meant to be limited in scope and applied sparingly, in exceptional cases only.[648] As has been said on a number of occasions by the Singapore courts, echoed by numerous others, the phrase implies "something more in the nature of sovereign importance—that the award threatens a state's welfare or is truly injurious to the public good or its enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[649] The leading authority is now *AJU* v. *AJT*,[650] where the arbitrators had concluded that the agreement between the parties—which involved the discontinuance of a criminal complaint in Thailand—did not infringe public policy.

The cases recognise public policy issues in the following situations. The burden of proof is on the party contesting enforcement and the standard of proof that enforcement would be contrary to public policy is, by reason of the words "if [the court] finds", the balance of probabilities,[651] although very rarely has the allegation of infringement of public policy been made out.

(a) The award has been obtained by[652] perjury or fraud.[653] This ground is made out where the applicant can show that the evidence of perjury or fraud

648 See, for instance, *PT Asuransi Jasa Indonesia (Persero)* v. *Dexia Bank SA* [2006] SGCA 41; *Parsons and Whittemore Overseas Co Inc* v. *Société General de Industrie du Papier (RAKTA)* (1974) 508 F 2d 969; *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH* v. *Ras al-Khaimah National Oil Co* [1987] 2 Lloyd's Rep 246; *Qinhuangdao Tongda Enterprise Development Co* v. *Million Basic Co Ltd* [1993] 1 HKLR 173; *Zimbabwe Electricity Supply Authority* v. *Genius Joel Maposa* (2000) 25 *Yearbook of Commercial Arbitration* 548; *Desputeaux* v. *Éditions Chouette (1987) Inc* [2003] 1 SCR 178; *Amaltal Corp Ltd* v. *Maruha (NZ) Corp Ltd* [2003] 2 NZLR 92; *Kimberley Construction Ltd* v. *Mermaid Holdings Ltd* [2004] 1 NZLR 386; *IPCO (Nigeria) Ltd* v. *Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm); *Shanghai Fusheng Soya Food Co Ltd* v. *Pulmuone Holdings Co Ltd* [2014] HKCFI; and *Traxys Europe SA* v. *Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276.

649 *In Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd* [1996] 1 SLR 34. See also LRRD No. 3/2001, para. 2.37.18; *Aloe Vera of America Inc* v. *Asianic Food (S) Pte Ltd* [2006] 3 SLR 174; *PT Asuransi Jasa Indonesia (Persero)* v. *Dexia Bank SA* [2007] 1 SLR 597; *Galsworthy Ltd of the Republic of Liberia* v. *Glory Wealth Shipping Pte Ltd* [2010] SGHC 304; *Beijing Sinozonto Mining Investment Co Ltd* v. *Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248; *Harris Adacom Corporation* v. *Percom Sdn* [1991] 3 MLJ 504; *Open Type Joint Stock Company Efirnoye (EFKO)* v. *Alfa Trading Ltd* [2012] 1 CLJ 323; *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH* v. *Shell Petroleum Ltd* [1987] 2 Lloyd's Rep 246, 354, *per* Lord Donaldson MR. See also: *Amaltal Corporation Ltd* v. *Maruha (NZ) Corporation Ltd* [2003] NZLR 92; *Theatrelight Electronic Control & Audio Systems Ltd* v. *Xinyu Charlie Zheng* [2005] NZHC 329; *Kumar and Kumar* v. *MF Astley* [2006] NZHC 1604; *Boardwalk Regency Corporation* v. *Maalouf* (1992) OR (3d) 737; *Zhejiang Province Garment Import and Export Co* v. *Siemssen & Co (HK) Trading Ltd* [1992] ADRLJ 183; *China Nanhai Oil Joint Service Corp Shenzhen Branch* v. *Gee Tai Holdings Co Ltd* [1994] 3 HKC 375; *Hebei Import & Export Corp* v. *Polytek Engineering Co Ltd* [1999] 2 HKC 205; *Karaha Bodas Co LLC* v. *Pertamina* [2008] HKCU 1902; *Granton Natural Resources Co Ltd* v. *Armco Metals International Ltd* [2012] HKCFI 1938; *Shanghai Fusheng Soya Food Co Ltd* v. *Pulmuone Holdings Co Ltd* [2014] HKCFI; *X Chartering* v. *Y* [2014] HKCFI 494.

650 [2011] SGCA 41.

651 *Beijing Sinozonto Mining Investment Co Ltd* v. *Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248. Although the burden remains the same in fraud cases, and does not change to the criminal standard of beyond all reasonable doubt, the evidence of fraud must be sufficiently cogent to match the seriousness of the allegation. See the discussion in *Beijing Sinozonto*.

652 See *Swiss Singapore Overseas Enterprises Pte Ltd* v. *Exim Rajathi India Pvt Ltd* [2009] SGHC 231.

653 *Dongwoo Mann & Hummel Co Ltd* v. *Mann & Hummel Gmbh* [2008] 3 SLR 871; *Beijing Sinozonto Mining Investment Co Ltd* v. *Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248; *Westacre Investments Inc* v. *Jugoimport-SDPR Holding Co Ltd* [1999] 2 Lloyd's Rep 65; *Tamil Nadu Electricity Board* v. *ST-CMS Electric Company Private Ltd* [2008] 1 Lloyd's Rep 93.

was not available with the exercise of reasonable diligence at the date of the hearing, and the evidence is decisive in that it would have affected the outcome. Mere negligence does not suffice.

(b) The losing party is at risk of having to make payment in some other jurisdiction as well as in Singapore.[654]

(c) The award is tainted by illegality.[655] If the arbitrators have jurisdiction under the arbitration clause to determine the legality of the underlying contract,[656] and have concluded that the contract is valid under its applicable law, the award is generally enforceable[657] even though the contract was illegal in the place of its performance, although in exceptional circumstances the court may go behind the award and apply overriding principles of public policy, e.g., the prevention of corruption,[658] or to save the law of the place of performance from being flouted.[659] Equally, if the arbitrators have ignored "palpable and indisputable illegality" the award will not be enforced.[660] It is not open to the court to go behind the arbitrators' findings of fact.[661] By contrast, if illegality under the applicable law has not been raised before the arbitrators, the court may consider whether the underlying contract was illegal under its applicable law although the presumption is in favour of enforcement.[662]

(d) The award was obtained in breach of the rules of natural justice. This is a limited defence, requiring something far removed from what is required of the arbitral process is required,[663] e.g., bias.[664]

654 *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH* v. *Shell Petroleum Ltd* [1990] 1 AC 295; *Soinco SACI* v. *Novokuznetsk Aluminium Plant (No. 2)* [1998] 2 Lloyd's Rep 346 (where enforcement was granted).

655 The applicable principles were set out by Colman J at first instance in *Westacre*, a judgment which was, with minor modifications suggested by Waller LJ, approved by the Court of Appeal in *Westacre* itself and also in *Soleimany* v. *Soleimany* [1998] 3 WLR 811. If the alleged illegality is not causally linked to the contract, it may be disregarded: *Sonatrach* v. *Statoil Natural Gas LLC* [2014] EWHC 875 (Comm).

656 Public policy does not object to such jurisdiction if there is some overriding principle of domestic law involved: *Westacre Investments*, principles (ii) and (iii).

657 *Westacre Investments*, principle (v): *Soinco SACI* v. *Novokuznetsk Aluminium Plant (No. 1)* [1998] 2 Lloyd's Rep 337; *Omnium de Traitement et de Valorisation SA* v. *Hilmarton Ltd* [1999] 2 Lloyd's Rep 222; *R* v. *V* [2008] EWHC 1531 (Comm); *Wu Shun Foods Co Ltd* v. *Ken Ken Food Manufacturing Pte Ltd* [2002] 4 SLR 877.

658 *Westacre Investments*, principle (i), as modified by Waller LJ in *Westacre* and in *Soleimany*. In the Court of Appeal in *Westacre* Mantell LJ and Sir David Hirst were of the view that the decision of arbitrators as to legality under the applicable law was not to be reopened in the absence of negligence or collusion on the part of the arbitrators. That generous approach will not be relevant in the case of a foreign judgment: *Lemenda Trading* v. *AMEPC* [1998] 1 Lloyd's Rep 361; *Tekron Resources Ltd* v. *Guinea Investment Co Ltd* [2004] 2 Lloyd's Rep 26. It was in any event rejected by the Singapore Court of Appeal in *AJU* v. *AJT* [2011] SGCA 41 as being inconsistent with *Kompetenz-Kompetenz*, so that the arbitrators' own views are not to be disregarded.

659 *Lemenda Trading* v. *AMEPC* [1998] 1 Lloyd's Rep 361.

660 *AJU* v. *AJT* [2011] SGCA 41; *Westacre Investments*, principle (iv); *Soleimany* v. *Soleimany* [1998] 3 WLR 811. The fact that the rule against penalties may have been infringed is not enough: *Amaltal Corporation* v. *Maruha (NZ) Corporation Ltd* [2004] NZCA 17.

661 *AJU* v. *AJT* [2011] SGCA 41, overruling *Rockeby Biomed Ltd* v. *Alpha Advisory Pte Ltd* [2011] SGHC 155.

662 *Westacre Investments*, principle (vi); *Sonatrach* v. *Statoil Natural Gas LLC* [2014] EWHC 875 (Comm).

663 *Hebei Import & Export Corp* v. *Polytek Engineering Co Ltd* [1999] 2 HKC 205; *Shady Express Ltd* v. *South Star Freightliner Ltd* [2008] NZHC 336.

664 *PT Central Investindo* v. *Franciscus Wongso* [2014] SGHC 190.

(f) The award is unclear as to the obligations imposed on the parties and is accordingly incapable of enforcement.[665]

It is not enough that an award contains an error of law,[666] including an error of law relating to an international convention to which Singapore is a signatory.[667] The fact that circumstances have altered after the award, rendering enforcement potentially unfair, is not a valid public policy ground upon which enforcement can be refused. Equally, it has been held that an assertion that it is impossible to perform the award is not sufficient justification for the court to go behind the award.[668] Delay by the arbitrators in producing the award is not a ground of public policy.[669] The mere fact that there are non-parties interested in the outcome of the arbitration does not make it any less arbitrable or cause the enforcement of a resulting award to be against public policy.[670]

It would seem that the court has a general discretion to stay the execution of a judgment enforcing an award on the ground of expediency, e.g. when an appeal is pending.[671] This discretion is exercisable in exceptional circumstances only.[672]

Convention countries

32.—(1) Where the Minister by an order published in the *Gazette* declares that any State specified in the order is a Convention country, the order, while in force, shall be evidence of that fact.

(2) For the purposes of this Part, a certificate signed by the Minister stating that a State specified in the certificate but not specified in any order made under subsection (1) which is in force is, or was at a time specified in the certificate, a Convention country shall, upon mere production, be *prima facie* evidence of that fact.

NOTES

The list of New York Convention countries is to be found on the UNCITRAL website, www.uncitral.org.

665 *Margulies Brothers Ltd* v. *Dafnis Thomaides and Co (UK) Ltd* [1958] 1 WLR 398; *Tonguyan (USA) International Trading Group* v. *Uni-Clan Ltd*, 2001, unreported, but a full summary is available at (2001) 26 *Yearbook of Commercial Arbitration* 886.

666 *John Holland Pty Ltd (Fka John Holland Construction & Engineering Pty Ltd)* v. *Toyo Engineering Corp (Japan)* [2001] 2 SLR 262; *PT Asuransi Jasa Indonesia (Persero)* v. *Dexia Bank SA* [2007] 1 SLR 597; *Sui Southern Gas Co Ltd* v. *Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62; *Downer-Hill Joint Venture* v. *Government of Fiji* [2005] 1 NZLR 554; *JJ Agro Industries (P) Ltd* v. *Texuna International Ltd* [1994] 1 HKLR 89; *Karaha Bodas Co LLC* v. *Pertamina* [2008] HKCU 1902.

667 *Triulzi Cesare SRL* v. *Xinyi Group (Glass) Co Ltd* [2014] SGHC 220

668 *Xiamen Xinjingdi Group Ltd* v. *Eton Properties Ltd* [2008] 6 HKC 287.

669 *Coal and Oil Co LLC* v. *GHCL Ltd* [2015] SGHC 65.

670 *Giedo van der Garde BV* v. *Sauber Motorsport AG* [2015] VSC 80; endorsed upon appeal.

671 *Far Eastern Shipping Co* v. *AKP Sovcomflot* [1995] 1 Lloyd's Rep 520; *Strandore Invest A/S* v. *Soh Kim Wat* [2010] SGHC 174.

672 *Air India* v. *Caribjet Inc* [2002] 1 Lloyd's Rep 314; .

Enforcement of awards under other provisions of law

33.—(1) Nothing in this Part shall affect the right of any person to enforce an arbitral award otherwise than as is provided for in this Part.

(2) Notwithstanding section 3(5) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264), where a foreign award is both enforceable under this Part and registrable as a judgment under that Act, proceedings to enforce the award under this Part may be commenced without any disentitlement to recover any costs of the proceedings, unless otherwise ordered by the court.

(3) Notwithstanding section 7 of the Reciprocal Enforcement of Foreign Judgments Act (Cap. 265), proceedings to enforce a foreign award under this Part may be commenced where the award is both enforceable under this Part and registrable as a judgment under that Act.

PART IV GENERAL

Act to bind Government

34.—This Act shall bind the Government.

Rules of Court

35.—The Rules Committee constituted under section 80 of the Supreme Court of Judicature Act (Cap. 322) may make Rules of Court regulating the practice and procedure of any court in respect of any matter under this Act.

NOTES

The relevant rules are RC, Ord. 69A. The Order is set out in full in this work and referred to at appropriate places in the annotations to the IAA.

FIRST SCHEDULE
UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

CHAPTER I—GENERAL PROVISIONS[673]

Article 1. Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

673 There is guidance on the Model Law prepared by the UNCITRAL Secretariat, published on the UNCITRAL website as an appendix to the Model Law, www.uncitral.org. Reference may also be

(2) The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this Article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

NOTES

The IAA applies if the arbitration is international: there is no requirement that it also be commercial: IAA, s. 5. Article 1(2) makes it clear that the Model Law applies only where the place of the arbitration is in Singapore,[674] subject to the exceptions relating to stay, the grant of interim measures (although see the Notes to Model Law, art. 9 on this point), and enforcement. It may be noted that the revised version of art. 1(2), adopted in 2006 by UNCITRAL but not yet by Singapore, extends the exceptions to the provisions added in 2006 in arts 17H–17J relating to court-ordered interim measures. The revised version of art. 1(2) reads:

(2) The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

made to the UNCITRAL Commentary on the Model Law, published 25 March 1985 on what was then the draft Model Law. The relevant parts of the Commentary are reproduced in the annotations to the Model Law.

674 Similarly, under the AA 1996 (Eng) the court can, subject to statutory exceptions, intervene only where the seat of the arbitration is in England: *Weissfisch* v. *Julius* [2006] 1 Lloyd's Rep 716; *C* v. *D* [2008] 1 Lloyd's Rep 239; *Braes of Doune Wind Farm (Scotland) Ltd* v. *Alfred McAlpine Business Services Ltd* [2008] 1 Lloyd's Rep 608.

has, by his earlier conduct in relation to the arbitration (in particular delay or want of co-operation), demonstrated an intention not to go to arbitration.[25] The applicant does not fall foul of this condition merely by participating in initial mediation proceedings, although delay in initiating those proceedings may amount to evidence that the applicant is not ready and willing to go to arbitration.[26]

The court has power to impose conditions upon the grant of a stay. It was held in *Drydocks World-Singapore Pte Ltd* v. *Jurong Port Pte Ltd*[27] that the same approach should prevail under each of the AA and the IAA despite the fact that stays under the former are discretionary and under the latter stays are mandatory. The principle is that a stay should be unconditional other than in exceptional circumstances, e.g., where there is a risk that the defendant will have a limitation defence in the arbitration proceedings.

Section 6(3) permits the court to make a supplementary order preserving the property which is the subject of the dispute pending the outcome of the arbitration.

Section 6(4) permits the court to bring the judicial proceedings to an end after two years following the stay, on the basis that the arbitration will have by that time been completed or the parties would otherwise have settled the dispute.[28] Any such order is not final: it is open for an application for the reinstatement of the proceedings to be made. Such an order plainly cannot be made if the arbitration has led to an award. Any application must be made to a judge or registrar: RC, Ord. 69, r. 3(1). If the action is pending, the application is to be made by summons in the action, and in other cases it is to be made by originating summons: RC, Ord. 69, r. 3(2). Where the case is one of urgency, the application can be made *ex parte* on such terms as may be ordered by the court: RC, Ord. 69, r. 3(1).

For the meaning of "claiming through or under" in s. 6(5), see the Notes to IAA, s. 6(5).

Court's powers on stay of proceedings

7.—(1) Where a court stays proceedings under section 6, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, order that:

(a) the property arrested be retained as security for the satisfaction of any award made on the arbitration; or

(b) the stay be conditional on the provision of equivalent security for the satisfaction of any such award.

(2) Subject to the Rules of Court and to any necessary modification, the same law and practice shall apply in relation to property retained in pursuance of an order under this section as would apply if it were held for the purposes of proceedings in the court which made the order.

25 *Bell* v. *Sun Insurance Office* (1927) 29 Ll L Rep 236; *Euro-America Insurance Ltd* v. *Lite Best Co Ltd* [1993] 1 HKC 333, although contrast *Hodgson* v. *Railway Passengers Assurance Co* [1904] 2 KB 833.

26 *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334, adopting the ruling in *Enco Civil Engineering* v. *Zeus International Development Ltd* (1991) 28 Con LR 25.

27 [2010] SGHC 185.

28 LRRD No. 3/2001, para. 2.4.3.

NOTES

Section 7 is in more or less identical terms to IAA, s. 7: see the Notes to that section. The power is not restricted to admiralty proceedings,[29] and also it is not confined to the High Court, but is extended to the court seised of the proceedings which are to be stayed under s. 6.[30]

Reference of interpleader issue to arbitration

8.—Where in proceedings before any court relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief may direct the issue between the claimants to be determined in accordance with the agreement.

NOTES

Section 8 is identical to IAA, s. 11A: see the Notes to that section.

PART IV—COMMENCEMENT OF LEGAL PROCEEDINGS

Commencement of arbitration proceedings

9.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

NOTES

Section 9 is identical to Model Law, art. 21. The provision, which requires actual receipt, is significant in that it is the trigger for the running of time for any statutory or contractual limitation period: see the Notes to AA, s. 11.

Powers of Court to extend time for beginning of arbitration proceedings

10.—(1) Where the terms of an arbitration agreement to refer future disputes to arbitration provide that a claim to which the arbitration agreement applies shall be barred unless:

(a) some step has been taken to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun;

(b) notice to appoint an arbitrator is given;

(c) an arbitrator is appointed; or

(d) some other step is taken to commence arbitral proceedings,

within a time fixed by the agreement and a dispute to which the agreement applies has arisen, the Court may, if it is of the opinion that in the circumstances of the case

29 Although, probably by way of oversight, references to "arrest" remain in place.

30 LRRD No. 3/2001, para. 2.4.8.

undue hardship would otherwise be caused, extend the time for such period and on such terms as the Court thinks fit.

(2) An order of extension of time made by the Court under subsection (1):

(a) may be made only after any available arbitral process for obtaining an extension of time has been exhausted;

(b) may be made notwithstanding that the time so fixed has expired; and

(c) shall not affect the operation of section 9 or 11 or any other written law relating to the limitation of actions.

NOTES

Section 10 empowers the court to extend contractual time limits for the commencement of arbitrations. Its purpose is to ensure that a party to a standard form arbitration agreement is not caught out by time limits in a document which, in the ordinary course of business, would not be read by him or to which he was in some way induced to agree. There is no equivalent power for international arbitrations under IAA or the Model Law, presumably on the basis that party autonomy is paramount.[31] The power to extend time applies only to arbitration agreements[32] and not to submission agreements, so that if the parties agree to go to arbitration after a dispute has arisen there is no jurisdiction to extend time. Also, by virtue of s. 10(2)(c), it is confined to contractual limitation periods and does not authorise the enlargement of time for statutory limitation periods. The application may be made at any time, and is commonly made after the contractual period has expired (expressly permitted by s. 10(2)(b)), often coupled with a request for the court to appoint an arbitrator.

Time may be extended where the arbitration agreement requires any of the steps in s. 10(1) to be taken within a given period. The nature of the step depends upon the type of arbitration clause employed. Section 10(1)(a) deals with tiered dispute resolution clauses under which arbitration may be the last resort. Section 10(1)(b) is appropriate where there is to be a sole arbitrator. Section 10(1)(c) applies to the case where each party is to appoint their own arbitrator. Section 10(1)(d) is a catch-all provision, picking up other possibilities. The authorities draw a sometimes difficult distinction between steps to commence proceedings (normally to appoint an arbitrator) and steps to establish the existence of a dispute between the parties, e.g., giving written notice of a claim. In a number of cases it has been held that steps of the latter type are not sufficiently proximate to the commencement of proceedings to be protected by s. 10.[33]

The test for intervention is undue hardship to the claimant if an extension is

31 By contrast, AA 1996 (Eng), s. 12 extends that power to all forms of arbitration, albeit in terms less generous than those laid down by AA, s. 10.

32 An agreement which confers an option to arbitrate remains an agreement to refer future disputes: *Navigazione Alta Italia SpA* v. *Concordia Maritime Chartering AC, The Stena Pacifica* [1990] 2 Lloyd's Rep 234.

33 *Babanaft International Co SA* v. *Avant Petroleum Inc, The Oltenia* [1982] 3 All ER 244; *Mariana Islands Steamship Corporation* v. *Marimpex Mineraloel-Handelsgesellschaft mbH Co KG, The Medusa* [1986] 2 Lloyd's Rep 328. Contrast *Pittalis* v. *Sherefettin* [1986] 2 All ER 227 and *Jadranska Slobodna Plovidba* v. *Oleagine SA, The Luka Botic* [1983] 3 All ER 602, in each of which the various steps were closely interrelated and could not be distinguished.

refused.[34] The large number of authorities on the phrase "undue hardship" illustrates a very liberal view of the power. In *Moscow V/O Exportkhleb* v. *Helmville Ltd, The Jocelyne*[35] and *The Aspen Trader*[36] Brandon LJ laid down the principles as follows: "(1) The words 'undue hardship' should not be construed too narrowly. (2) 'Undue hardship' means excessive hardship and, whether hardship is due to the fault of the claimant, it means hardship the consequences of which are out of all proportion to such fault. (3) In deciding whether to extend the time or not, the court should look at all the relevant circumstances of the particular case. (4) In particular, the following matter should be considered; (a) the length of the delay; (b) the amount at stake; (c) whether the delay was due to the fault of the claimant or to circumstances outside his control; (d) if it was due to the fault of the claimant, the degree of such fault; (e) whether the claimant was misled by the other party; (f) whether the other party has been prejudiced by the delay, and, if so, the degree of such prejudice."[37]

Clauses which confer upon the arbitrators the right to extend time do not preclude reliance upon s. 10 in the event that the arbitrators refuse to extend time,[38] although it is all but inconceivable that the court would reverse the decision of the arbitrators in this regard.[39] Whether or not such a clause exists, the question of whether proceedings have been commenced in time is generally one for the arbitrators, so that if the arbitrators have yet to resolve the question any application to the court will be premature. Guidelines to overcome this problem were laid down by Mance J in *Grimaldi Compagnia di Navigazione SpA* v. *Sekihyo Lines*.[40] If the respondent agrees that the time bar issue can be resolved by the court, no problem arises. However, if the respondent objects, two alternative possibilities arise: either

34 AA 1996 (Eng), s. 12 has laid down a more limited test, namely: "(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question". LRRD No. 3/2001, para. 2.5.4 shows that the decision to retain the older, more interventionist approach, was a considered one, in that AA applies only to domestic arbitrations whereas AA 1996 (Eng) applies to all arbitrations including international arbitrations, so that a less interventionist approach is thereby justified.

35 [1977] 2 Lloyd's Rep 121.

36 [1981] 1 Lloyd's Rep 273.

37 *The Jocelyne* [1977] 2 Lloyd's Rep 121. Of the many cases illustrating a generous approach, see: *Tradax Internacional SA* v. *Cerrahogullari TAS, The M Eregli* [1981] 2 Lloyd's Rep 169; *Garrick Shipping Co* v. *Euro-Frachtkontor GmbH, The World Agamemnon* [1989] 2 Lloyd's Rep 316 (size of claim); *Unitramp SA* v. *Jenson Nicholson Pte Ltd, The Baiona* [1991] 2 Lloyd's Rep 121 (fault of claimant's legal advisers); *Phoenix Shipping (Pty) Ltd* v. *General Feeds Inc* [1997] 2 Lloyd's Rep 703 (fault of claimant's legal advisers). The same provision, governed by the same principles, exists in Hong Kong: *Ching Yick Manufactory* v. *Tai Ping Insurance* [1987] 3 HKC 583; *Dragages* v. *Preservatrice Fonciere* [1988] HKC 735; *Guandong Water Conservancy & Hydro-Power Engineering Development Co Ltd* v. *Ming An Insurance Co (HK) Ltd* default [1990] 2 HKLR 557; *Wenden Engineering Service Co Ltd* v. *Wing Hong Contractors Ltd* [1992] 2 HKC 380; *TS Wong & Co Ltd* v. *Compagnie Européene d'Assurances Industrielles SA* [1993] 1 HKC 397; *Sky Mount Investment Ltd* v. *East West-Umi Insurance Ltd* [1995] 1 HKC 342; *Hyundai Engineering and Construction Co Ltd* v. *Shun Shing Construction and Engineering Co Ltd* [1996] 2 HKC 395; *Varnsdorf Pty Ltd* v. *Fletcher Constructions Australia Ltd* [1998] VSC 8125.

38 *Comdel Commodities Ltd* v. *Siporex Trade SA* [1990] 2 All ER 552. See also the same provision, and the same approach, in New Zealand: *Fifield* v. *W & R Jack Ltd* [2000] UKPC 27; *Madill & Smeed Ltd* v. *Ebert Construction Ltd* [2006] NZHC 929.

39 *Marc Rich Agriculture Trading Co* v. *Agrimex Ltd* [2000] 1 All ER (Comm) 951. *Cf* Australia: *Boral Resources (Victoria) Pty Ltd* v. *Greater Bendigo City* [2001] VSC 8769.

40 [1998] 2 Lloyd's Rep 638.

(a) the claimant can agree to the arbitrators determining the time bar issue, with the arbitration application being stayed pending the outcome; or (b) the claimant can request the court to proceed to decide the arbitration application concurrently with the arbitrators resolving the time bar issue itself, and the court may decide to do so on the assumption that the time bar is applicable.

Any application for an extension of time must be made to a judge or registrar: RC, Ord. 69, r. 3(1). If the action is pending, the application is to be made by summons in the action, and in other cases it is to be made by originating summons: RC, Ord. 69, r. 3(2). Where the case is one of urgency, the application can be made *ex parte* on such terms as may be ordered by the court: RC, Ord. 69, r. 3(1). An application for an extension of time may include, as an alternative, an application for a declaration that such an order is not needed: RC, Ord. 69, r. 9. This permits the applicant to seek a determination on the proper construction of the time limit and to apply for an extension only if the court has ruled that time has run against him.

Application of Limitation Act and Foreign Limitation Periods Act 2012

11.—(1) The Limitation Act (Cap. 163) and the Foreign Limitation Periods Act 2012 shall apply to arbitration proceedings as they apply to proceedings before any court and a reference in both Acts to the commencement of any action shall be construed as a reference to the commencement of arbitral proceedings.

(2) The Court may order that in computing the time prescribed by the Limitation Act or the Foreign Limitation Periods Act 2012 for the commencement of proceedings (including arbitration proceedings) in respect of a dispute which was the subject-matter of:

(a) an award which the Court orders to be set aside or declares to be of no effect; or

(b) the affected part of an award which the Court orders to be set aside in part or declares to be in part of no effect,

the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.

(3) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, the cause of action shall, for the purposes of the Limitation Act and the Foreign Limitation Periods Act 2012, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

NOTES

Section 11 is identical to IAA, s. 8A: see the Notes to that section.

PART V—ARBITRAL TRIBUNAL

Number of arbitrators

12.—(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, there shall be a single arbitrator.

NOTES

The default position under s. 12 in the absence of agreement is that there is to be a sole arbitrator.[41] The suggestion that there should be a sole arbitrator even where the parties had agreed on a larger tribunal, unless the agreement for three arbitrators was made after the dispute had arisen: the suggestion, designed to ensure that the tribunal was not unnecessarily large, was ultimately rejected on grounds of party autonomy.[42]

Appointment of arbitrators

13.—(1) Unless otherwise agreed by the parties, no person shall be precluded by reason of his nationality from acting as an arbitrator.

(2) The parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Where the parties fail to agree on a procedure for appointing the arbitrator or arbitrators:

(a) in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the parties shall by agreement appoint the third arbitrator; or

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, the arbitrator shall be appointed, upon the request of a party, by the appointing authority.

(4) Where subsection (3)(a) applies:

(a) if a party fails to appoint an arbitrator within 30 days of receipt of a first request to do so from the other party; or

(b) if the 2 parties fail to agree on the appointment of the third arbitrator within 30 days of the receipt of the first request by either party to do so,

the appointment shall be made, upon the request of a party, by the appointing authority.

(5) If, under an appointment procedure agreed upon by the parties:

(a) a party fails to act as required under such procedure;

(b) the parties are unable to reach an agreement expected of them under such procedure; or

(c) a third party, including an arbitral institution, fails to perform any function entrusted to it under such procedure,

41 *Cf* AA 1996 (Eng), s. 15.

42 LRRD No. 3/2001, paras 2.6.4–2.6.5.

any party may apply to the appointing authority to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

(6) Where a party makes a request or makes an application to the appointing authority under subsection (3), (4) or (5), the appointing authority shall, in appointing an arbitrator, have regard to the following:

(a) the nature of the subject-matter of the arbitration;
(b) the availability of any arbitrator;
(c) the identities of the parties to the arbitration;
(d) any suggestion made by any of the parties regarding the appointment of any arbitrator;
(e) any qualifications required of the arbitrator by the arbitration agreement; and
(f) such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(7) No appointment by the appointing authority shall be challenged except in accordance with this Act.

(8) For the purposes of this Act, the appointing authority shall be the Chairman of the Singapore International Arbitration Centre.

(9) The Chief Justice may, if he thinks fit, by notification published in the *Gazette*, appoint any other person to exercise the powers of the appointing authority under this section.

NOTES

Section 13 is fashioned on Model Law, art. 11 as modified by IAA, s. 9A. Section 13(1)–(4) more or less re-enact Model Law, art. 11(1)–(3) and IAA, s. 9A, by providing that: no person is to be precluded from acting as an arbitrator by reason of nationality (unless the parties have agreed otherwise, e.g., for reasons of impartiality); the parties may agree on an appointment procedure; and if they fail to do so the default position is that for a three-person tribunal each party is to appoint an arbitrator and they are then to agree on a third, and if there is to be a sole arbitrator then they are required to agree on his identity. In the event that the parties fail to agree on a sole arbitrator an appointment is to be made by the appointing authority (not the court, but the Chairman of SIAC—see s. 13(8)–(9)).[43] In the event that there are to be three arbitrators and one party fails to appoint his arbitrator, or the parties cannot agree on the third arbitrator, then the appointment is to be made by the Chairman of SIAC. In all other cases, if there is a failure of the appointment procedure, the appointment is to be made as a matter of last resort by the Chairman of SIAC (s. 13(6), adopting Model Law, art. 11(4)). It was commented in the Notes to Model Law, art. 11, that the English rule, which was shared by earlier Singapore legislation, that if one party fails to appoint his arbitrator then the other can treat his appointee as the sole arbitrator, has been rejected, on the ground that it threatens to compromise the independence and impartiality of the tribunal.[44]

In making an appointment, the Chairman of SIAC must have regard to the

43 See LRRD No. 3/2001, para. 2.6.7.
44 LRRD No. 3/2001, paras 2.6.2–2.6.3.

criteria listed in s. 13(6): (a) the nature of the subject matter of the arbitration; (b) the availability of any arbitrator; (c) the identities of the parties to the arbitration; (d) any suggestion made by any of the parties regarding the appointment of any arbitrator; (e) any qualifications required of the arbitrator by the arbitration agreement; and (f) such considerations as are likely to secure the appointment of an independent and impartial arbitrator. By contrast, under Model Law, art. 11(5), the Chairman of SIAC is to have regard only to agreed qualifications, independence and impartiality. Where the Chairman of SIAC has made an appointment, the only permissible challenge is on the ground of lack of independence, impartiality or agreed qualifications under AA, ss 14 and 15: by contrast, under Model Law, art. 11(5), there is no possible appeal at all.

Grounds for challenge

14.—(1) Where any person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence.

(2) An arbitrator shall, from the time of his appointment and throughout the arbitral proceedings, without delay disclose any such circumstance as is referred to in subsection (1) to the parties unless they have already been so informed by him.

(3) Subject to subsection (4), an arbitrator may be challenged only if:

(a) circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or
(b) he does not possess the qualifications agreed to by the parties.

(4) A party who has appointed or participated in the appointment of any arbitrator may challenge such arbitrator only if he becomes aware of any of the grounds of challenge set out in subsection (3) as may be applicable to the arbitrator after the arbitrator has been appointed.

NOTES

Section 14 reproduces verbatim, but with a slightly different structure, Model Law, art. 12: see the Notes to that provision. Attention is drawn to the phrase "impartiality or independence" and to the fact that AA 1996 (Eng) is concerned only with impartiality rather than independence. These concepts are quite different, the latter reflecting the fact that many commercial markets are quite small and that finding an independent arbitrator may be difficult, hence the only need being impartiality. That reasoning has been specifically rejected in Singapore.[45]

Challenge procedure

15.—(1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

(2) If the parties have not agreed on a procedure for challenge, a party who intends to challenge an arbitrator shall:

45 LRRD No. 3/2001, paras 2.7.2.

(a) within 15 days after becoming aware of the constitution of the arbitral tribunal; or

(b) after becoming aware of any circumstance referred to in section 14(3),

send a written statement of the grounds for the challenge to the arbitral tribunal.

(3) The arbitral tribunal shall, unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, decide on the challenge.

(4) If a challenge before the arbitral tribunal is unsuccessful, the aggrieved party may, within 30 days after receiving notice of the decision rejecting the challenge, apply to the Court to decide on the challenge and the Court may make such order as it thinks fit.

(5) No appeal shall lie against the decision of the Court under subsection (4).

(6) While an application to the Court under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

NOTES

Section 15 reproduces verbatim, but with a slightly different structure, Model Law, art. 13: see the Notes to that provision. An application to the judge under s. 15(4) must be made by originating summons: RC, Ord. 69, r. 2(1).

Failure or impossibility to act

16.—(1) A party may request the Court to remove an arbitrator:

(a) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his capacity to do so; or

(b) who has refused or failed

(i) to properly conduct the proceedings; or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and where substantial injustice has been or will be caused to that party.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the Court shall not exercise its power of removal unless it is satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) While an application to the Court under this section is pending, the arbitral tribunal, including the arbitrator concerned may continue the arbitral proceedings and make an award.

(4) Where the Court removes an arbitrator, the Court may make such order as it thinks fit with respect to his entitlement, if any, to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the Court before it makes any order under this section.

(6) No appeal shall lie against the decision of the Court made under subsection (4).

NOTES

Section 16 is modelled upon AA 1996 (Eng), s. 24 and Model Law, art. 14. The grounds for removal under s. 16 are incapacity and failure to conduct the proceedings properly or with reasonable despatch. "Reasonable despatch" is a matter of degree to be determined according to the particular facts of the case and the contentious nature of the dispute.[46] Mere procedural error does not suffice, and what is required is that the arbitrator's conduct undermines the arbitration.[47] As is the case under the Model Law, a different regime exists for problems arising from lack of independence, lack of impartiality or lack of agreed qualifications: that is set out in AA, ss 14 and 15, namely the Model Law challenge procedure whereby a complaint is to be made initially to the arbitrators themselves before the court can become involved. For the meanings of delay and incapacity, see the Notes to Model Law, art. 14.

Section 16(2) places a restriction on the right of a party to apply to the court under s. 16(1) where there is an arbitration body empowered to remove an arbitrator: the procedure involving recourse to that body has to be exhausted before an application may be made. However, as was pointed out by the DAC in its drafting of the AA 1996 (Eng), "it is likely to be a very rare case indeed where the court will remove an arbitrator notwithstanding that that process has reached a different conclusion".[48]

Section 16(3) allows the arbitration to continue even though there is a pending application for removal. In the event that the application is dismissed, the arbitration will not have been delayed: the existence of this provision removes the ability of a party to seek removal for purely tactical reasons, thereby delaying the arbitration.

Section 16(4) provides that the question of fees and expenses is a general one, relevant to all cases of removal, and adopts the rule that the court may make an order in respect of this matter. Removal by the court does not, therefore, operate as an automatic disentitlement to fees. Doubtless, in taking into account its discretion under s. 16(4), the contract and the reason for removal will be crucial to the court.[49] There is no appeal against any decision under this subsection: s. 16(6).

Section 16(5), in the interests of justice, entitles an arbitrator to be heard by the court in an application against him for his removal.

An application to the judge under this section must be made by originating summons: RC, Ord. 69, r. 2(1).

Arbitrator ceasing to hold office

17.—(1) The authority of an arbitrator shall cease upon his death.

(2) An arbitrator shall cease to hold office if:

(a) he withdraws from office under section 15(3);

46 *Anwar Siraj* v. *Ting Kang Chung* [2003] 2 SLR 287.

47 LRRD No. 3/2001, para. 2.8.3. The case for misconduct was not made out in *Tan Tong Meng (Pte) Ltd* v. *Artic Builders & Co (Pte) Ltd* (PC) [1986] 1 SLR 7, where the arbitrator had misinterpreted the rules on showing the parties his notes, but had acted even-handedly.

48 Echoed by LRRD No. 3/2001, para. 2.8.4

49 See *Wicketts and Sterndale* v. *Brine Builders* [2001] CILL 1805 and the Notes to Model Law, art. 14.

(b) an order is made under section 15(4) for the termination of his mandate or his removal;
(c) he is removed by the Court under section 16 or by an institution referred to in section 16(2); or
(d) the parties agree on the termination of his mandate.

(3) The withdrawal of an arbitrator or the termination of an arbitrator's mandate by the parties shall not imply acceptance of the validity of any ground referred to in section 14(3) or 16(1).

NOTES

Section 17 is also based on Model Law, art. 14. It provides that an arbitrator ceases to hold office: on death (AA, s. 17(1)); by withdrawal from office under the challenge procedure in AA, s. 15 in respect of independence, impartiality or qualifications (AA, ss 15(3) and 17(2)(a)); by reason of his removal from office under a court order following the challenge procedure (AA, ss 15(4) and 17(2)(b)); or following the agreement of the parties (AA, s. 17(2)(d)). There is no provision for unilateral resignation, on the basis that if an arbitrator really wishes to leave then he should be able to reach agreement with the parties failing which he can be removed.[50]

Section 17(2), echoing Model Law, art. 14(2), safeguards the arbitrator by providing that the withdrawal of an arbitrator or the termination of his mandate by the parties does not imply acceptance of any allegation of lack of independence, impartiality or qualifications, inability to act or failure to conduct the proceedings properly or with reasonable despatch.

Appointment of substitute arbitrator

18.—(1) Where an arbitrator ceases to hold office, the parties are free to agree:
(a) whether and if so how the vacancy is to be filled;
(b) whether and if so to what extent the previous proceedings should stand; and
(c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

(2) If or to the extent that there is no such agreement, the following subsections shall apply.

(3) Section 13 (appointment of arbitrators) shall apply in relation to the filling of the vacancy as in relation to an original appointment.

(4) The arbitral tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.

(5) The reconstitution of the arbitral tribunal shall not affect any right of a party to challenge the previous proceedings on any ground which had arisen before the arbitrator ceased to hold office.

(6) The ceasing to hold office by the arbitrator shall not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a presiding arbitrator.

50 LRRD No. 3/2001, paras 2.8.7–2.8.8.

NOTES

Section 18 closely follows AA 1996 (Eng), s. 27, which is itself based on Model Law, art. 15. It was decided to adopt the English model on the ground that the provisions of the Model Law were "an uneasy mixture of rules".[51] In the case of a casual vacancy or judicial removal of an arbitrator, s. 18(1) states that the parties are free to set out a procedure for replacement, or to agree on non-replacement, whether the proceedings are to stand and what the effect is of his removal of any appointment made by him. It is relatively unusual for arbitration clauses to deal with the appointment of replacement arbitrators, and in *Federal Insurance Co* v. *Transamerica Occidental Life Insurance Co Ltd*[52] Rix J held that wherever possible it was necessary to extend the agreement between the parties for the appointment of the first arbitrators to the appointment of replacement arbitrators, even if that meant some manipulation of the wording of the arbitration clause. In the absence of express agreement, s. 18(2) introduces fallback provisions.

Section 18(3) refers back to AA, s. 13 for the appointment of replacement arbitrators and for the default procedure in the event that no appointment is made. The original procedures apply even where an arbitrator has been removed by the court under AA, s. 17. In *Federal Insurance Co* v. *Transamerica Occidental Life Insurance Co Ltd* Rix J construed s. 18(3) as requiring the court to look at the agreement between the parties for the appointment of the original arbitrators, and that it was legitimate to import whatever aspects of the default provisions in the equivalent of AA 1996 (Eng) to AA, s. 13 as were necessary to render the arbitration clause applicable to the appointment of a replacement. It was there decided that a clause which required each party to make an appointment within 30 days of the other requesting arbitration could be given effect by importing AA, s. 13(3)(a)—a request for an appointment to be made—as the trigger for the running of the 30-day appointment period for a replacement.

Section 18(4) is a logical statement of the position where the tribunal has been reconstituted.

The purpose of s. 18(5) is to preserve the right of a party to challenge those aspects of the arbitration which the newly constituted panel has allowed to stand. Accordingly, the fact that the arbitrators have been replaced does not prevent the applicant from challenging the final award.

Section 18(6) is a saving provision, protecting the validity of the appointment of any arbitrator or umpire made by the arbitrator in question prior to his ceasing to hold office.

Decision by panel of arbitrators

19.—(1) In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by all or a majority of all its members.

51 LRRD No. 3/2001, para. 2.9.
52 [1999] 2 Lloyd's Rep 286.