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Navigating International Commercial Arbitration

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and to Anthony Neoh SC for providing the foreword. Their contributions have been invaluable in making this book a reality.

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difficult to satisfied. It will be satisfied if, cumulatively, the evidence is cogent and arguable, and not dubious or fanciful.[8] Unless the point is clear, the court should not resolve the issue and the matter should be stayed in favour of arbitration. It is for the arbitral tribunal to rule on its own jurisdiction pursuant to Art 16 of the *Model Law*.[9]

B. A Binding Arbitration Agreement or Clause

4.006 Option I of Art 7 of the *Model Law*, enshrined in s 19 of the *Arbitration Ordinance*, provides for the definition of an arbitration agreement. "Arbitration Agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[10] The arbitration agreement also has to be in writing. As to what constitutes "in writing", Art 7(3) to (6) of the *Model Law* and s 19(2) to (3) of the *Arbitration Ordinance* (Cap 609) provide for a wide-ranging scenarios. The inclusion of all these scenarios as provided thereunder is to broaden the meaning of a "written" arbitration agreement. Again, this is consistent with the "pro-arbitration" approach as well as to cope with the evolving commercial needs.

4.007 The arbitration agreement is a distinct and separable agreement from the underlying or principal contract.[11] The validity or existence or effectiveness of the arbitration agreement is not affected by the invalidity of the underlying or principal contract, for example when the same is voidable for misrepresentation or discharged by breach

8 *Pacific Crown Engineering Ltd v. Hyundai Engineering & Construction Co Ltd* [2003] HKCFI 924, §16. See also: *PCCW Global Ltd v. Interactive Communications Service Ltd* [2006] HKCA 434, §§50-51.

9 See also: *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd & Ors* [2017] HKCFI 2088, §10.

10 Section 19 of the *Arbitration Ordinance* (Cap 609).

11 *Lesotho Highlands v. Impreglio SpA* [2005] 3 WLR 129, §21.

or void for illegality.[12] However, where there was no contract in existence in the first place, it would necessarily follow that there was never any agreement to arbitrate. In *Cathay Pacific Airways Ltd v. Hong Kong Air Cargo Terminals Ltd*[13], it was held that there was no meeting of minds as there had only been an offer and a counter-offer but no acceptance and thus no contract. Despite the fact that each offer contained an arbitration clause, the parties could not be bound by these terms when they were free to walk away from the negotiating table.

4.008 This is a matter of contractual interpretation which is inevitably fact sensitive although the courts are likely to lean in favour of deferring to the arbitral tribunal if possible. A question arose in *Tommy CP Sze & Co v. Li & Fung (Trading) Ltd & Ors*[14] as to whether the arbitration clause only provided for an option to have their disputes or differences resolved by arbitration. If it merely provided for such an option as opposed to compelling the parties to arbitration, the requirement for a binding arbitration agreement would not be satisfied. On the facts, it was held that the clause was clearly an arbitration agreement and nothing in the clause mentioned an option as such.[15] More recently, it has been held that a valid arbitration agreement can be expressed in permissive terms, as by use of "may" in the arbitration clause.[16]

4.009 In *Tai-ao Aluminum (Taishan) Co Ltd v. Maze Aluminum Engineering Co*[17], the clauses in question read "合約未盡事宜按《中華人民共和國合同法》之規定執行" ("clause 1"); and "本合約的仲裁權屬賣

12 *Cathay Pacific Airways Ltd v. Hong Kong Air Cargo Terminals Ltd* [2002] HKCFI 9, §26.

13 *Ibid.*

14 *Supra* note 6, §§29-34.

15 *Ibid.*

16 *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd* [2017] HKCFI 604, §45; following *Hermes One v. Everbread Holdings Ltd & Ors* [2016] 1 WLR 4098 (UK Privy Council, appeal from Eastern Caribbean Supreme Court), §§33-36.

17 *Tai-Ao Aluminium (Taishan) Co Ltd v. Maze Aluminium Engineering Co Ltd & Anor* [2006] HKCFI 220.

方所在地方法院" ("clause 2"). The Hong Kong Court dismissed an application for stay in favour of arbitration on the ground that Clause 2 was so uncertain and one could not tell whether it required the parties to settle their difference by private arbitration in the Taishan courts (which could not be done), or arbitration at certain arbitration institute in Taishan or litigation in the Taishan courts.[18] However, in *William Co v. Chu Kong Agency Ltd*[19], a dispute resolution clause which provided for litigation or arbitration in the PRC was held not to be void for uncertainty. On the assumption that the choice to arbitrate was made by the defendant validly, i.e., by applying for stay, this created a binding choice on the plaintiff who had chosen to litigate in Hong Kong which was not an agreed choice or method of dispute resolution.

4.010 On the other hand, it has been held that an exclusive jurisdiction clause which compelled the parties to submit to the exclusive jurisdiction of local courts was not inconsistent with the arbitration clause in the same agreement.[20] The courts have construed and harmonized these two co-existing clauses by giving effect to the arbitration clause while the exclusive jurisdiction clause merely provides that the local courts are the supervisory courts over the arbitration.[21]

4.011 In principle, it is not a requirement that an arbitration agreement must exist in the same underlying or principal contract. In such a situation, whether the court will stay the court proceedings in favour of arbitration will depend on whether there is reference to the arbitration agreement in the contract which does not contain the arbitration

18 *Ibid*, §§8-10.
19 *William Co v. Chu Kong Agency Co Ltd & Anor* [1993] HKCFI 215.
20 *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd & Ors* [2017] HKCFI 2088, §19.
21 *Paul Smith Ltd v. H & S International Holdings Inc.* [1991] 2 Lloyd's Rep. 127; *Axa Re v. Ace Global Markets* [2006] Lloyd's Rep. 683; *Lee Cheong Construction & Building Materials Ltd v. The Incorporated Owners of the Arcadia* [2012] HKCFI 473; *Bluegold Investment Holdings Ltd v. Kwan Chun Fun Calvin* [2016] HKCFI 415; *PCCW Global Ltd v. Interactive Communications Service Ltd* [2006] HKCA 434.

agreement.[22] This is again a matter of contractual construction. However, mere reference to the contract with an arbitration agreement is not sufficient reference to make the terms of that contract (and in particular the arbitration agreement) part of the other contract which does not contain an arbitration agreement.[23]

4.012 Where there are two agreements and the first agreement has an arbitration agreement or clause whilst the second agreement – being either a settlement agreement or supplemental agreement – is silent on how disputes are to be resolved, the courts will generally give effect to the arbitration clause in the first agreement and construe a dispute arising under the second agreement as also arising under the first agreement. It is immaterial whether or not new or third parties who are not privy to the first agreements are involved in the second agreement.[24] The determining factor appears to be whether the agreement which contains no arbitration clause can be clearly said to be a stand-alone agreement or one which has superseded or cancelled the first one or they should be read as a composite agreement.[25]

C. Null and Void, Inoperative or Incapable of Being Performed

4.013 The applicant for a stay has the burden to prove the existence of the arbitration agreement. Once a *prima facie* case of existence is demonstrated, the respondent to a stay application has the onus to prove that the arbitration agreement is in fact null and void, inoperative

22 Article 7(6) of the *Model Law*.
23 *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd* [2017] HKCFI 604, §58.
24 *New Sound Industries Ltd v. Meliga (HK) Ltd* [2005] HKCA 7; *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd* [2017] HKCFI 604, §58.
25 *Ibid*. See also: *Xu Yi Hong .v Chen Ming Han & Ors* [2006] HKCFI 1136, §§18-19 & 29, 31 & 34. *Cf. Hannice Industries Ltd v. Elite Union (Hong Kong) Ltd & Anor* [2012] HKCFI 413, §11; *Link Wide International Investment (Hong Kong) Ltd v. Devi Trading Co Ltd* [2010] HKDC 299; *Sunglow Supplies & Engineering Ltd v. Shing Hing Construction Co Ltd* [2014] HKDC 58, §40.

or incapable of being performed.[26] Again, the Court will usually take a generous approach to support the parties in their intention where possible.

4.014 An arbitration clause may be null and void because the parties had not agreed to it or that it otherwise falls foul of the requirements under s 19 of the *Arbitration Ordinance* (Cap 609). It may also be void for uncertainty. Other examples also included where there is an initial supervening illegality directing to the arbitration clause itself. [27] An arbitration clause is however not void for uncertainty simply because a non-existent arbitration institution was named. [28]

4.015 The Court may find an arbitration clause inoperative where a matter does not fall within the scope of the clause.[29] A party may also be estopped from seeking a stay of proceedings where he refused to proceed with arbitration or has otherwise made an election to abandon such right. This is of course fact sensitive. In *Polytech Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd*,[30] it was held that the conduct on the part of the applicants, namely, by commencing civil proceedings in the High People's Court of Hunan Province in the PRC was not sufficiently unequivocal to be estopped from having the claim to be arbitrated. It was unclear whether the Hunan Proceedings were commenced before or after the application to stay the Hong Kong proceedings or whether the respondents were

26 *Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep. 63, §70.

27 See the discussion and authorities above. See also *Fiona Trust & Holding Corp. & Ors v. Yuri Privalov & Ors* (HL) [2007] Bus LR 1719.

28 *Lucky-Goldstar International (HK) Ltd v. Ng Moo Kee Engineering Ltd* [1993] HKCFI 14, §§77-78.

29 *York Airconditioning & Refrigeration Inc. v. Lam Kwai Hung t/a North Sea A/C elect Eng Co* [1994] HKCFI 166; *Al-Naimi v. Islamic Press Agency* (CA) [2000] 1 Lloyd's Rep. 522.

30 *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd & Ors* [2017] HKCFI 604, §§50-55.

served with the Hunan Proceedings. The applicant had also applied to the Hunan Court for leave to withdraw the Hunan Proceedings.[31]

4.016 The phrase "incapable of being performed" would seem to apply to a case where the arbitration cannot be effectively set in motion, e.g., the clause may be too vague or other terms in the contract contradict the parties' intention to arbitrate.[32] However, an arbitration clause will not be considered as incapable of being performed simply because a non-existent arbitration institution is named.[33] The expression does not appear to encompass the situation where a contractual limitation period barring a claim has expired. In such circumstances, arbitration can proceed, only that the claim is at risk of being dismissed.[34] A party to an arbitration agreement may apply to an arbitral tribunal for an extension of time under s 58 of the *Arbitration Ordinance* (Cap 609).

D. Dispute Between the Parties

4.017 The threshold for concluding there is in reality a dispute between the parties is easy to meet. Where there is a matter being a subject of an arbitration agreement and provided there is no clear or unequivocal admission of liability and quantum, a dispute is said to exist.[35] The Court will not investigate into the merits of the dispute as the same is a matter for the arbitral tribunal.

31 *Cf. "Thor Scan"* [1998] HKCA 420 where the applicant had commenced proceedings in the Netherlands, and pursued it to judgment being handed down whereby it was held that such conducts amounted to clear and unequivocal abandonment of their right to arbitrate.

32 *Lucky-Goldstar International (HK) Ltd v. Ng Moo Kee Engineering Ltd* [1993] HKCFI 14.

33 *Ibid.* However, see the recent position in Singapore to be discussed below.

34 *Supra* note 6, §42.

35 *Ibid*, §51.

E. Dispute Within Ambit of Arbitration Agreement or Clause

4.018 This part of the inquiry requires the court to construe the arbitration agreement to identify what matters are required to be referred to arbitration. It has been held that words like "in connection with" or "connected therewith" are wide in nature and will cover all disputes other than those entirely unrelated to the transaction covered by the contract in question. These words are wide enough to cover claims in constructive trust as long as they are related to the transaction covered by the arbitration agreement.[36] These words are also wide enough to include tortuous claim if the same was closely connected with the contractual claim.[37] Where the wordings of the arbitration agreement clearly intended to cover the tortuous claim, it is not necessary to refer to the "close connection test".[38] This is consistent with the wide construction approach adopted by the Court.[39]

F. Exceptions to Stay

4.019 In Hong Kong, legal proceedings in respect of claims within the exclusive jurisdiction of the Labour Tribunal[40] yet being the subject of an arbitration agreement are exempted from a mandatory stay under Art 8 of the *Model Law*. Rather, s 20(2) of the *Arbitration Ordinance* (Cap 609) confers a discretion on the court before which an action has been brought, to stay those proceedings and refer the parties to arbitration. Before exercising such discretion in favour of stay, the court has to be satisfied that:

(1) there is no sufficient reason why the parties should not be referred to arbitration in accordance with the arbitration agreement; and

36 *Ibid*, §§54 & 57 .
37 *Xu Yi Hong v. Chen Ming Han & Ors* [2006] HKCFI 1136, §§35-48.
38 *Gossip Daily Ltd v. Next Media Magazines Ltd & Ors* [2018] HKCFI 1946, §§21-25.
39 *Secretary for Justice v. HP Enterprise Services (Hong Kong) Ltd* [2012] HKCFI 1328, §38.
40 See: s 7 and Schedule to the *Labour Tribunal Ordinance* (Cap 25).

(2) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.

4.020 Section 20(3) of the *Arbitration Ordinance* (Cap 609) in Hong Kong provides a further exception to mandatory stay under Art 8 of the *Model Law*. It makes express reference to s 15 of the *Control of Exemption Clauses Ordinance* (Cap 71) which provides that as against a person dealing as consumer[41], an agreement to submit future differences to arbitration cannot be enforced except – (1) with his written consent signified after the differences in question have arisen; or (2) where he has himself had recourse to arbitration in pursuance of the agreement in respect of any differences. In *Fung Hing Chiu Cyril v. Henry Wai & Co (a firm)*[42], the court stayed the proceedings in favour of arbitration under an arbitration agreement between a firm of solicitors and its former clients. The Court held that there is nothing in Hong Kong law or public policy to indicate that a dispute between a firm of solicitors and its clients over the issue of fees is not arbitrable. The court rejected the claimants' case that they were "dealing as consumer" and hence s 15 of the *Control of Exemption Clauses Ordinance* could not be invoked to resist the stay of proceedings.[43]

G. Procedure for Stay

4.021 Applications for stay of proceedings under s 20(1) of the *Arbitration Ordinance* (Cap 609) shall be made by summons to the Judge.[44] Under s 16 of the *Arbitration Ordinance* (Cap 609), such an application is to be heard "otherwise than in open court", i.e., in Chambers unless otherwise ordered by the Court on the application of a party or of

41 See the definitions of "dealing as consumer" at s 4 of the *Control of Exception Clauses Ordinance* (Cap 71).
42 *Fung Hing Chiu Cyril v. Henry Wai & Co (a firm)* [2018] HKCFI 31.
43 *Ibid*, §§32 & 36-50.
44 Order 73, rr 1, 3 & 6 of the *Rules of High Court* (Cap 4A); Practice Direction 6.1.

its own motion. A short supporting affidavit should be filed together with the summons to explain the relevant circumstances and to set out the grounds for stay which should include why the dispute comes within the arbitration agreement. The said arbitration agreement and other supporting documents should be exhibited to such an affidavit.

4.022 An application for stay of proceedings should be made as swiftly as possible and must be made "not later than when submitting his first statement on the substance of the dispute".[45] This should generally be referred to as filing of the defence. A defendant will not be prejudiced by taking steps to protect his position e.g., by simply filing an acknowledgement of service of the writ since failure to do so will result in default judgment being entered against him. In short, an application for stay should be made after filing the acknowledge of service but before filing of defence.[46]

4.023 Parties should expect that the court will enforce arbitration agreements as a matter of course. Challenges to the courts should be exceptional events. A party who takes an exceptional and high-risk strategy to challenge the validity of either an arbitral award made pursuant to an arbitration agreement or such an arbitration agreement itself will have to take the risk and accept the higher costs consequences of its action.[47] A party who commenced court proceedings in breach of the arbitration agreement and having failed to resist an application for stay may well be ordered to pay costs on an indemnity basis.[48]

45 Article 8(1) of the *Model Law*; s 20(1) of the *Arbitration Ordinance* (Cap 609).

46 In *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* [1996] ADRLN 34, 7 May 1996, the Ontario Court (Gen Div) overturned an appeal and held that a stay would still be validly made if an application was made at the same time as the defence and counterclaim filed.

47 *A v. R (Arbitration: Enforcement)* [2009] HKCFI 342.

48 *Fung Hing Chiu Cyril v. Henry Wai & Co (a firm)* [2018] HKCFI 31, §57.

III. STAY OF PROCEEDINGS IN FAVOUR OF ARBITRATION IN OTHER COMMON LAW JURISDICTIONS

4.024 Many other common law jurisdictions also introduced the mandatory application of the *Model Law* and/or the *New York Convention* by way of local legislation.

4.025 The Canadian courts had affirmed mandatory application of the *Model Law*. It was said that the decisions reflected the important policy considerations in favour of a liberal approach to international commercial arbitration and judicial deference to arbitration agreements.[49] It should be noted that on 22 March 2017, Ontario[50] adopted the new *International Commercial Arbitration Act 2017* (repealing its 1990 version)[51], which explicitly adopted the *New York Convention*. In addition to the *Model Law*, s 2 expressly adopts and applies the *New York Convention* set out in Schedule 1. Both the *Model Law* and the *New York Convention* therefore have the force of law in Ontario. Section 9 of the *International Commercial Arbitration Act 2017* further provides that where pursuant to Art II(3) of the *New York Convention* or Art 8 of the *Model Law*, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.[52] Therefore, the same

49 *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* [1996] ADRLN 34, 7 May 1996, the Ontario Court (Gen Div), §11. See also: *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449, 12 B.L.R. (2d) 132, 13 C.L.R. (2d) 171 (Ont. C.A.); *Nanisivik Mines Ltd v. F.C.R.S. Shipping Ltd* (1994), 113 D.L.R. (4th) 536, [1994] 2 F.C. 662, 167 N.R. 294 (C.A.)

50 In Alberta, the *International Commercial Arbitration Act SA 1986* adopted the test in the *New York Convention: Kaverit Steel & Crane Ltd v. Kone Corp.*, XIX Y.B Comm. Arb 643 (1992 ABCA 7) (Alberta Court of Appeal, 1992), §47.

51 Previously, s 2 and the Schedule of the 1990 version expressly adopted and applied the *Model Law* including Art 8 concerning mandatory stay. Section 8 provided for stay of proceedings pursuant to Art 8 of the *Model Law*, https://www.ontario.ca/laws/statute/90i09#BK7.

52 https://www.ontario.ca/laws/statute/17i02b#BK11.

requirements set out above in Part II of this Chapter will need to be satisfied for a stay to be granted.[53]

4.026 In United States, the *Federal Arbitration Act* incorporated the *New York Convention* at 9 US Code s 201 (i.e., Enforcement of Convention). Pursuant to s 3 of the *Federal Arbitration Act*, "*if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of action until such arbitration has been had in accordance with the terms of the agreement…*".[54] Likewise, it expresses a "liberal federal policy favouring arbitration agreements" and "any doubts concerning the scope of arbitration issues should be resolved in favour of arbitration".[55]

4.027 In Singapore, s 3 of the *International Arbitration Act* (Chapter 143A) provides that the *Model Law* produced in its First Schedule shall have the force of law.[56] Section 6(2) further provides for mandatory stay of court proceedings in respect of any matter which is the subject of the arbitration agreement, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of

53 *Supra* note 49. See also: *Joseph Popack, United Burlington Retail Portfolio Inc. & United Northeastern Retail Portfolio Inc. v. Moshe Lipszyc & Sara Lipszyc* (Ont. SC) 07-CV-339295-0000, 2 September 2008, where the requirements for stay were discussed.

54 See, e.g., the grant of stay pursuant to s 3 of the *Federal Arbitration Act in Danisco v. Novo Nordisk No. 1 Civ.* 10557 (LTS) (S.D.N.Y. 10 February 2003).

55 *Louis Dreyfus Negoce S.A. v. Blystad Shipping Trading Inc.* 252 F.3d 218, 233 (2d Cir. 2001); *Bischoff v. DirecTV*, 180 F. Supp.2d 1097, 1103 (C.D Cal. 2002) opt. cited in *Danisco v. Novo Nordisk, ibid.*

56 The intention is that the *Model Law* shall apply to international commercial arbitration: s 5 of the *International Arbitration Act* (Chapter 143A).

being performed.[57] Likewise, the applicant for stay of proceedings only needs to show on a *prima facie* basis that (1) there is a valid arbitration agreement between the parties; (2) the parties' dispute falls within the scope of the arbitration agreement; and (3) the arbitration agreement is not null and void, inoperative or incapable of being performed.[58] Recently, in *TMT Co Ltd v. The Royal Bank of Scotland PLC & Ors*[59], the Singapore High Court held that an arbitration agreement did not meet such a *prima facie* standard for a mandatory stay on the basis that there was no valid arbitration agreement. It took the view that the relevant clause which provided that "*any dispute arising from or relating to these terms of any Contract made hereunder shall be referred to arbitration under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct…*" was either not a valid arbitration agreement or otherwise incapable of being performed because there was in fact no such "relevant exchange".[60] This approach is in stark contrast from that of the Hong Kong Courts where an arbitration agreement would still be construed as valid notwithstanding a non-existent arbitration institution is named.[61] Indeed, the Singapore courts had on previous occasions tried to construe a somewhat defective arbitration agreements to be a valid one even where a non-existent arbitration institution was named. [62]

4.028 Unlike many other developed common law jurisdictions, the England and Wales has not fully adopted the *Model Law*.[63] However, s 9 of the *Arbitration Act 1996* intends to reflect Art 8 of the *Model Law*. It

57 Section 6(1) of the *International Arbitration Act* (Chapter 143A) provides that an application for stay of proceedings in favour of international commercial arbitration should be made "after appearance and before delivering any pleading or taking any other step in the proceedings", https://sso.agc.gov.sg/Act/IAA1994#pr7-.

58 *Tomolugen Holdings Ltd & Anor v. Silica Investors Ltd* [2016] 1 SLR 373 (CA), §63.

59 *TMT Co Ltd v. The Royal Bank of Scotland PLC & Ors* [2017] SGHC 21.

60 *Ibid*, §§65-68.

61 *Supra* notes 32 & 33.

62 *HKL Group Co Ltd v. Rizq International Holdings Pte Ltd* [2013] SGHCR 5.

63 *Arbitration Act 1996 by Merkin & Flannery* (5th Ed), Part 1, p.1.

confers upon a party to an arbitration agreement who is being sued in court proceedings the right to apply for stay of proceedings[64], even if there are other co-defendants who are not parties to such an arbitration agreement.[65] The statutory conditions for a mandatory stay under s 9(4) of the *Arbitration Act 1996* are broadly similar to other jurisdictions which have fully adopted the *Model Law*.[66] An applicant for stay needs to show an arguable case as to (1) the validity of the arbitration agreement[67] which must be in writing[68] and (2) the dispute is in respect of a matter which under the arbitration agreement is to be referred to arbitration i.e. subject to the scope of the arbitration agreement. Once that is shown, a stay must be granted unless the respondent to the stay application, i.e., the claimant in the court proceedings can show that the arbitration agreement is null and void, inoperative or incapable of being performed.[69] Section 9(3) of the *Arbitration Act 1996* provides that an application for stay may not be

64 Section 9(1) of the *Arbitration Act 1996*.

65 However, each of the applicant for the stay and the respondent to the application must either be a party to the arbitration agreement or be regarded as claiming "through or under" a party i.e., no stay may be ordered as against a non-party: s 82(2) of the *Arbitration Act 1996*. See also: *Wealands v. CLC Contracts Ltd* [1999] 2 Lloyds Rep. 739.

66 The decisions discussed in Part II of this Chapter above are therefore relevant in determining whether the statutory requirements or conditions for mandatory stay under s 9 of the *Arbitration Act* are met.

67 Unless the Court can resolve the issue of validity either on the application or by directing an issue to be tried then a merely arguable case as to validity will not be sufficient. In other words, the court must first decide if it considers it appropriate to resolve the issue of validty itself, if it does, the higher standard will apply: *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (comm), §54. Normally, the arbitral tribunal ought to be the proper forum to determine the issue of validity such that the standard for proving validity before the court for the purpose of a stay should be one of a good arguable case i.e., an approach consistent with other common law jurisdictions discussed in this chapter. See also: *Fiona Trust & Holding Corp. & Ors v. Yuri Privalov & Ors* (HL) [2007] Bus LR 1719.

68 Section 5(1) of the *Arbitration Act 1996*.

69 Section 9(4) of the *Arbitration Act 1996*; see also *JSC Aeroflot Russian Airlines v. Berezovsky & Ors* [2013] EWCA Civ 784, §77, and *Associated British Ports v. Tata Steel UK Ltd* [2017] 1 CLC 826, §20.

made before taking the appropriate procedural step to acknowledge the legal proceedings against him or after he has taken any step in the proceedings to answer the substantive claim.

IV. POSITION IN THE PRC

4.029 The PRC acceded to the *New York Convention* which came into effect as of 22 April 1987.[70] The PRC also enacted the *Arbitration Law* (2017 Revision) in 1994 amended in 2017 which is different from the *Model Law* in a number of respects.[71] Article 5 of the *Arbitration Law* provides that if the parties have concluded an arbitration agreement and one party institutes an action in a people's court, the people's court shall not accept the case, unless the arbitration agreement is null and void (当事人达成仲裁协议，一方向人民法院起诉的，人民法院不予受理，但仲裁协议无效的除外).[72] It therefore appears that the people's court will refuse to accept a court case brought in breach of an arbitration agreement where (1) there is a concluded arbitration agreement that do not cover disputes which may not be arbitrated pursuant to Art 3 of the *Arbitration Law* and (2) the arbitration agreement is not null and void. In such circumstances, the parties should instead be notified to apply to an arbitral institution for arbitration.[73]

4.030 In this regard, Art 16 of the *Arbitration Law* provides that an arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms. It must contain (1) an expression

70 *Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China*, http://www.newyorkconvention.org/implementing+act+-+china.

71 *The Practice of International Commercial Arbitration – A Handbook for Hong Kong Arbitrators*, (2018), §3.3.1.

72 See also: Arts 124 & 271 of the *Civil Procedure Law of the People's Republic of China* (2017 Revision).

73 Article 124(2) of the *Civil Procedure Law of the People's Republic of China* (2017 Revision).

of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission. Article 17 of the *Arbitration Law* further provides that an arbitration agreement shall be null and void if (1) the agreed matters for arbitration exceed the range of arbitrable matters as specified by law; (2) one party that concluded the arbitration agreement has no capacity for civil conducts or has limited capacity for civil conducts; or (3) one party coerced the other party into concluding the arbitration agreement. However, the validity of the arbitration agreement would not be affected by the invalidity of the underlying or principal contract[74]. In addition, the Interpretation of the *Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the Republic of China* (effective from 9 September 2006) is also relevant in construing the relevant provisions including Arts 16 and 17 of the *Arbitration Law*.

4.031 In particular, practitioner should note that even where the name of an arbitration institution as stipulated in the arbitration agreement is inaccurate, if the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected.[75] Therefore, where "深圳市仲裁委员会" as specified in an arbitration agreement is inaccurate but only contained an extra word from the arbitration institution "深圳仲裁委员会"which actually existed, the arbitration agreement was held not to be null and void and the parties were directed to go to arbitration.[76]

4.032 Where a party brings court proceedings in breach of the arbitration agreement, the counter party must make sure to raise objection pursuant to Art 5 of the *Arbitration Law* and/or Arts 124 & 271 of the *Civil Procedure Law of the People's Republic of China* (2017

74 Article 19 of the *Arbitration Law*.

75 Article 3 of the *Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the Republic of China* (effective from 9 September 2006).

76 *广州兴艺展览服务有限公司与上海钧爵展览展示服务有限公司承揽合同纠纷上诉案* (2018)粤01民终2811号(Judgment of Intermediate People's Court of Guangzhou City, 11 February 2018) CLI.C.10863922.

Revision) at the first available opportunity. A defendant who fails to raise any objection that the People's Court should not accept the case or ask to refer the matter to arbitration before the first hearing will be deemed as having waived or given up his right to arbitration pursuant to the arbitration agreement.[77]

77 Article 26 of the *Arbitration Law*. See also: *蔡登峰等与调兵山市嘉纳置业有限公司房屋买卖合同纠纷上诉案*(2018)辽12民终782号(Judgment of Intermediate People's Court of Tieling City, 23 March 2018) CLI.C.10961974.