

“PACTA SUNT SERVANDA” – OR ARE THEY?

AN INTRODUCTION TO THE ENFORCEMENT OF ARBITRATION
AGREEMENTS

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by

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Introduction

- 1 This paper originated in a request that I talk about the January 2007 decision of the English Court of Appeal in *Fiona Trust & Holding Corporation v Privalov*¹ and about the enforcement of arbitration agreements generally.
- 2 The title I have chosen – “*Pacta sunt servanda*” – or are they? An introduction to the enforcement of arbitration agreements – has been chosen for two reasons:
 - (a) to emphasise the fact that not all arbitration agreements are enforced or, indeed, enforceable; and
 - (b) to emphasise that this paper is no more than an introduction to the subject.
- 3 The expression “*Pacta sunt servanda*” is a principle of the civil law and international law and means that “pacts must be respected” or “contracts must be honoured”.
- 4 I have divided my paper into two parts. In the first part I consider the *Fiona Trust* case. In the second part, I look at the wider question of the enforcement of arbitration agreements generally.

¹ [2007] 1 All ER (Comm) 891, [2007] 2 Lloyds LR 267. The decision was upheld by the House of Lords on 17 October 2007. At the time of revising this paper the only report of the House of Lords decision is [2007] 4 All ER 951. Both judgments ([2007] EWCA Civ 20 and [2007] UKHL 40 respectively) are available on the British & Irish Legal Information Institute website at www.bailii.org

The *Fiona Trust* case

5 On 24 January 2007 the Court of Appeal of England and Wales delivered its judgment in *Fiona Trust & Holding Corporation v Privalov*².

6 The appeal raised, apparently for the first time, according to the court:
*the question whether, if there is a plausible argument that contracts have been induced by bribery and have been rescinded on discovery of the bribery, that constitutes a dispute which can (and should be) [sic] determined by arbitration in the context of a common form of arbitration.*³

7 The arbitration clause in question was in the following terms:
41. (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.
(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.
(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime association of arbitrators in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.
(i) A party shall lose its right to make such an election only if:
(a) it receives from the other party a written notice of dispute which –
(1) states expressly that a dispute has arisen out of this charter;
(2) specifies the nature of the dispute; and
(3) refers expressly to this clause 41(c)
And
*(b) it fails to give notice of election to have the dispute referred to arbitration not later than 30 days from the date of receipt of such notice of dispute*⁴

8 In the course of its judgment the Court considered three aspects of the question :
(a) Whether a claim that the main contract had been rescinded for bribery was a claim within the scope of the arbitration clause?
(b) Whether the arbitration clause was separable? and
(c) What the relationship was between sections 9 and 72 of the Arbitration Act 1996⁵.

² See footnote 1

³ Paragraph 2 of the judgment

⁴ Paragraph 5 of the judgment

- 9 Counsel disagreed as to the order in which the questions as to the construction of the arbitration agreement and its separability should be considered by the Court. The Court held that the question of the scope of the clause should be decided before the question of separability was considered⁶.
- 10 On the construction issue, the Court:
- (a) noted the different arguments advanced by counsel (arguments directed to persuading the Court that the clause was either wide enough to cover claims of bribery or too narrow to do so)⁷;
 - (b) reviewed the appellate and first instance decisions on this issue to which they were referred⁸;
 - (c) expressed the view that:

*... the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.*⁹
 - (d) decided that the dispute as to whether the contract could be set aside or rescinded for alleged bribery came within the arbitration clause on its true construction.
- 11 On the issue of separability, the Court noted that:
- (a) *Ever since Heyman & Darwins Ltd the English common law has been evolving towards a recognition that an arbitration clause is a separate contract which survives the destruction (or other termination) of the main contract.*¹⁰
 - (b) *Heyman & Darwins Ltd* was “a case of termination by accepted repudiation”¹¹;
 - (c) a major evolutionary step was taken in *Harbour v Kansa* in which it was decided that the arbitration clause “applied to a dispute whether

⁵ Paragraph 8 of the judgment

⁶ Paragraph 9 of the judgment

⁷ Paragraph 9 of the judgment

⁸ Paragraphs 10-16 of the judgment

⁹ Paragraph 17 of the judgment. See also paragraphs 18 - 21

¹⁰ Paragraph 22 of the judgment

¹¹ Paragraph 22 of the judgment

*the agreement in which it was embedded was void for initial illegality*¹²;

(d) Section 7 of the Arbitration Act 1996:

*Codifies the principle that an allegation of invalidity of a contract does not prevent the invalidity question being determined by an arbitration tribunal pursuant to the (separate) arbitration agreement. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contract.*¹³

(e) in *Harbour v Kansa Hoffman LJ* (as he then was), in responding to a submission that the separability doctrine cannot apply to any rule which prevents the contract from coming into existence or makes it void ab initio, said:

It seems to me impossible to accept so sweeping a proposition. There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence.

*In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but ... it may not ... saying that arbitration clauses, because separable are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be.*¹⁴

(f) *A good example of direct impeachment is the decision of Rix J in Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyd Rpt 784 where an oral contract for the sale of Russian Notes was followed by a Trade confirmation with an English jurisdiction clause. Not only was it alleged that this document was fraudulently presented by Credit Suisse as a mere perfunctory confirmation (which it was not) but it was said that the oral contract was not with Credit Suisse Europe but with Credit Suisse US and that there was a specific agreement that the deal was to be centred to New York where Credit Suisse US had its centre of business. In those circumstances the English jurisdiction clause could not be relied on, whether or not the allegations of fraud were in the event made out*¹⁵.

12 The Court concluded its judgment on this point by saying:

So the question here is whether the assertion of invalidity goes to the validity of the arbitration clause as opposed to the validity of the charterparties as a whole of which the arbitration agreements are a part. Mr Butcher relied on Mr Shepherd's eighth witness statement in which he stated that the owners would not have made any contract at all with the charterers if they had been aware that their employees had been bribed by Mr Nikitin and then submitted that it was enough for the owners to say that whatever it was that impeached the main agreement also impeached the arbitration clause. But that is precisely the opposite of what the authorities on separability have laid down viz. that it is

¹² Paragraph 22 of the judgment

¹³ Paragraphs 22 – 23 of the judgment

¹⁴ Paragraph 23 of the judgment

¹⁵ Paragraph 24 of the judgment

not enough to say that the contract as a whole is impeachable. There must be something more than that to impeach the arbitration clause. That extra element is missing in the present case. Counsel's comments in Harbour v Kansa at 712B (that a party to a contract the making of which he says was induced by fraud would be surprised to be told that he is bound to have the issue tried by an arbitrator appointed under a clause in that contract) were as Ralph Gibson LJ said "no more than forceful comments". They did not carry the day. Bribery cannot be any different from fraud (indeed fraud is alleged in the present case although it is clear that the substantial allegation is one of bribery) and Mr Butcher's reliance on the "forcefulness" of that comment by counsel is, in our judgment, misplaced.¹⁶

...

For the reasons we have given we cannot agree. If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure. Illegality is a stronger case than bribery which is not the same as non est factum or the sort of mistake which goes to the question whether there was any agreement ever reached. It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular. There is no such reason here.¹⁷

13 Turning to consider the court's treatment of the procedural issue ie, the relationship between sections 9 and 72 of the Act, the Court:

(a) set those sections out in paragraph 32 of its judgment:

"9 Stay of legal proceedings

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

....

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed

72 Saving for rights of person who takes no part in proceedings

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question –

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief.

(2) He also has the same right as a party to the arbitral proceedings to challenge an award –

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him"

¹⁶ Paragraph 25 of the judgment

¹⁷ Paragraph 29 of the judgment

- (b) made the following finding with regard to the relationship between the sections:

33 *The reference to section 67 in section 72 reminds the reader that once an award has been made an application to the court can be made challenging the award on jurisdictional grounds. It is also important to be aware that sections 30 – 32 of the 1996 Act relate to the jurisdiction of the arbitral tribunal. Section 30 provides that the arbitral tribunal may rule on its own substantive jurisdiction including (in the same words as used in section 72) the question whether there is a valid arbitration agreement. Section 31 provides that any objection as to jurisdiction must be taken before any step is taken to contest the merits of the matter and section 32 provides for the court to be able to determine a preliminary point of jurisdiction if all the parties agree in writing or the tribunal itself permits the court (for good reason) to do so.*

34 *This combination of sections shows, together with the prescriptive section 9(4), that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. In these circumstances, although it is contemplated also by section 72 that a party who takes no part in arbitration proceedings should be entitled in court to "question whether there is a valid arbitration agreement", the court should, in the light of section 1(1) of the Act, be very cautious about agreeing that its process should be so utilised. If there is a valid arbitration agreement, proceedings cannot be launched under section 72(1)(a) at all.*

35 *That will be the situation where the arbitration agreement is wide enough to comprise the relevant dispute and the arbitration clause, being a severable agreement, is not directly impeached by whatever ground is used to attack the invalidity of the contract in which the arbitration clause is contained. That is this case. Section 72 has, accordingly, no application.*

36 *For our part, we would go further than this and say that, if the party who denies the existence of a valid arbitration agreement has himself (as the owners have here) instituted court proceedings and the party who relies on the arbitration clause has applied for a stay, the application for a stay is the primary matter which needs to be decided. It would only be if a stay were never applied for or were refused, but for some reason the party relying on the arbitration clause insisted on continuing with the arbitration that any question of an injunction should arise. Of course section 72 might well be applicable if the party denying the existence of an arbitration agreement had not started English proceedings and did not wish to do so. Such a party would then be entitled to apply under section 72 for a declaration that there was no valid arbitration agreement; even then an injunction would usually be necessary only if there was some indication that the other party was intending not to comply with any declaration which the court might make. This is all a long way from the present case in which court proceedings have been instituted and an application has been made to stay (some part of) those proceedings. Section 9 governs the position and for that section to apply there must be an arbitration agreement. If the existence of an arbitration agreement is in issue, that question will have to be decided under section 9 and there is no reason, at the moment at any rate, for any invocation of section 72 at all.*

The general position

(a) Introduction

- 14 Issues of the enforceability of an arbitration agreement may arise at a number of points in the arbitral process:
- (a) Where an action is brought in a matter which is the subject of an arbitration agreement and a party seeks a stay of the proceeding;
 - (b) Where a party to an arbitration agreement requests from a court an interim measure of protection;
 - (c) Where a court is requested to appoint an arbitrator;
 - (d) Where a court is requested to decide on the jurisdiction of the arbitral tribunal;
- and, of course:
- (e) where a party seeks to set aside, or to resist the recognition and enforcement of, an award on the ground that a party to the arbitration agreement is under some incapacity or the agreement is not valid under the relevant law.
- 15 Most legal systems, certainly including those of Singapore and New Zealand, provide for all these situations.
- 16 In addition to these situations, the question of the enforcement of an arbitration agreement may come up where a party to such an agreement seeks to injunct another party to the agreement from instituting legal proceedings in another jurisdiction in relation to the subject matter of the agreement (an anti-suit injunction) or, conversely, where a party seeks to injunct another party from instituting or seeking to proceed with an arbitration (an anti-arbitration injunction).
- 17 In my paper this evening I am going to concentrate on the enforcement of arbitration agreements in the context of stay applications¹⁸. Many of the questions which arise in that context also arise in the other contexts identified above.

¹⁸ I considered some of the other aspects of the topic in a paper on *The Role of Courts in Arbitration Proceedings*, presented at the UNCITRAL-SIAC Conference *Celebrating Success: 20 years UNCITRAL Model Law on International Commercial Arbitration* held in Singapore in September 2005. the paper appears at pp 100-114 of the volume of the same name published in 2006.

(b) The legislative framework in countries or jurisdictions which have incorporated the New York Convention¹⁹ and the Model Law²⁰ in their law.

- 18 A great many countries²¹, including Singapore and New Zealand, have ratified or acceded to the New York Convention.
- 19 A number of jurisdictions²², again including Singapore and New Zealand, have incorporated the provisions of the Model Law, with or without modification, into their local law. In some cases the provisions of the Model Law have been applied to all arbitrations, whether domestic or international, in other cases only to international arbitrations.²³
- 20 In addition, England, while not adopting the Model Law, has been heavily influenced by the Model Law in the drafting of its new arbitration legislation.²⁴
- 21 There are, of course, many countries which have not adopted either the New York Convention or the Model Law.
- 22 The text of Article II of the New York Convention and Articles 7 and 8(1) of the Model Law are set out in Appendix 1 to this paper.
- 23 As noted above, New Zealand is a country which has adopted the Model Law in respect of both domestic and international arbitrations. The text of the definition of '*Arbitration agreement*' in s2(1) and s9 of, and Articles 7 and 8(1) of Schedule 1 to, the New Zealand Arbitration Act 1996 are set out in Appendix 2 to this paper.
- 24 As already noted, Singapore is an example of a country which maintains separate regimes for domestic and international arbitration. The text of ss 3, 4 and 6 of the Arbitration Act (Chapter 10) and parts of s 2 of the International Arbitration Act (Chapter 143A) and s 6(1), (2) and (5) of that Act are set out in Appendix 3 to this paper.

¹⁹ The full title of the Convention is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was adopted on 10 June 1958 and entered into force on 7 June 1959.

²⁰ The full title of the Model Law is the UNCITRAL Model Law on International Commercial Arbitration. It was adopted by UNCITRAL on 21 June 1985.

²¹ 142 as at 1 January 2007

²² 58, including the Hong Kong and Macau SARs, Scotland, Bermuda and 6 States of the USA.

²³ New Zealand and Malaysia are examples of the former, Singapore and Australia of the latter.

²⁴ Arbitration Act 1996

(c) The questions which arise when a party seeks a stay of proceedings on the ground that there is an applicable arbitration agreement

- 25 Where, as in Singapore in relation to international arbitrations and in New Zealand in relation to both international and domestic arbitrations, a regime based on the Model Law applies, it is clear that the following questions require, or may require, to be considered when a party seeks the stay of legal proceedings on the ground of the existence of an applicable arbitration agreement :
- (a) Is there an arbitration agreement?
 - (b) Are the parties to the court proceeding parties to the arbitration agreement?
 - (c) Are the matters in issue in the court proceeding within the scope of the arbitration agreement?
 - (d) Is there a dispute regarding those matters?
 - (e) Has the party seeking a stay done so in time?²⁵
 - (f) Is the arbitration agreement null and void, inoperative or incapable of being performed?
- 26 Although the structure and wording of s 6 of the Arbitration Act (Chapter 10) are different from those of s 6 of the International Arbitration Act (Chapter 143A), I suggest that the same questions will, or may, arise in relation to domestic arbitration in Singapore as will, or may arise in relation to an international arbitration. It is clear from the opening words of s 6(1) that, for an application under this section of the Arbitration Act to be successful, there must be an arbitration agreement, the parties to the court proceeding must be parties to the arbitration agreement, the court proceeding must be in relation to matters within the scope of the arbitration agreement, and the application for a stay must be made within the time prescribed. When you then consider s 6(2)(a), the fact that the arbitration agreement was null and void, inoperative or incapable of being performed would, I suggest, provide sufficient reason why the matter “*should not be referred in accordance with the arbitration agreement*”. Of course, under the Singaporean domestic regime, the court retains a discretion, which is not the case under the international regime.
- 27 In the case of the New Zealand and Malaysian Acts, there is a further question, viz, Is there in fact a dispute between the parties with regard to the matters agreed to be referred?
- 28 In the succeeding sections of this paper I will say something about the general approach of the courts to the question of enforcement of arbitration

²⁵ This question does not arise under Article II(3) of the New York Convention

agreements and then deal, in varying degrees of detail, with the questions identified in paragraph 25 above. In the case of some questions I will do no more than refer to the relevant provisions and to the standard texts. In the case of the other questions, I will deal with them in more detail.

- 29 Inevitably, in dealing with these various topics, we will find that many matters could be dealt with under different heads depending upon how one differentiates between the heads or perceives the nature of the matters. For example, one could deal with questions of invalidity under the first heading in paragraph 25 or under the last. I have chosen to deal with them under the last heading.

(d) The courts' general approach

- 30 Given the wording of Article II(3) of the New York Convention and Article 8(1) of the Model Law, both of which refer to a request for a stay, one would have thought it clear that a court operating under those provisions does not have the power to raise the question of a stay on its own motion.²⁶ An examination of the cases abstracted in UNCITRAL's Case Law on UNCITRAL Texts ("CLOUT") reveals only two cases on the point, to differing effect: a Canadian case in which a first instance court referred the parties to arbitration of its own motion and a Croatian case in which an appellate court held that the courts in Croatia do not have the power to refer parties to arbitration without that being requested by one of the parties.²⁷
- 31 Of more importance are questions of the approach to the interpretation of arbitration agreements, the appropriate standard of review of arbitration agreements by the courts, and the separability of arbitration agreements from the contracts in which they are found.
- 32 So far as the first question is concerned, the Ontario courts have expressly stated that, where an arbitration clause is capable of bearing two interpretations and one of those interpretations fairly provides for arbitration, the courts should lean towards that option.²⁸

²⁶ This certainly seems to be the view of Lew & ors: *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ("Lew & ors") at paragraphs 14-36 to 14-39

²⁷ See respectively *AMEC E&C Services Ltd v Nova Chemicals (Canada) Ltd* CLOUT Case 515 and CLOUT Case 657 (parties not named)

²⁸ *Canadian National Railway v Lovat Tunnel Equipment Inc.*, Ontario Court of Appeal [1999] O.J. No. 2498; (1999) 174 DLR (4th) 385; CLOUT Case 389, followed in *Dalimpex Ltd v Janicki* [2003] 64 Ontario Reports (3^d) 737; (2003) 228 DLR (4th) 179; CLOUT Case 509.

33 So far as the second question is concerned, viz What is the appropriate standard of review of arbitration agreements? there is a marked difference in approach from country to country, as exemplified by the following decisions of the courts of Canada, England and Wales, Hong Kong and India.

34 In Canada:

(a) In 1992 the British Columbia Court of Appeal in *Gulf Canada Resources v Arochem International Ltd*²⁹ spoke of requiring a clear case that the matter in issue in the proceeding before the court was not the subject matter of an arbitration agreement before it would refuse to grant a stay;

(b) In 2003 in *Dalimpex Ltd v Janicki*³⁰ the Ontario Court of Appeal adopted a similar approach to that of the British Columbia Court of Appeal, holding:

In cases where it is not clear, it may be preferable to leave any issue related to the 'existence or validity of the arbitration agreement' for the arbitral tribunal to determine in the first instance under Article 16. [T]his deferential approach is consistent with both the wording of the legislation and the intention of the parties to refer their disputes to arbitration"

(c) About three weeks after this paper was presented the Supreme Court of Canada ruled on the matter in *Dell Computer Corp v Union des Consommateurs*³¹, the majority of the Court holding:

84 ... [We]would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. this exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

85 *If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration*

²⁹ (1992) 66 BCLR (2^d) 113; 43 CPR (3^d) 390.

³⁰ [2003] 64 Ontario Reports (3^d) 737; (2003) 228 DLR (4th) 179; CLOUT Case 509. The judgment is also available on the Canadian Legal Information Institute website at www.canlii.org

³¹ 2007 SCC 34 (CanL11)

unless the questions of fact require only superficial consideration of the documentary evidence in the record.

86 *Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceedings. This means that even when considering one of the exceptions, the court may decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.*

35 In England and Wales, the courts approach the matter on a case by case basis having regard to “*all the circumstances ... the dominant matters being the interests of the parties and the avoidance of unnecessary delay and expense.*”³²

36 In Hong Kong:

(a) In 1996 in *Nanhai West Shipping Co v Hong Kong United Dockyards*,³³ the High Court spoke of requiring only a prima facie case of the existence of an applicable agreement before the court would grant a stay;

(b) In 2005 in *New Sound Industries Ltd v Meliga (HK) Ltd*³⁴, the finding of the court below that:

On an application for a stay in favour of arbitration, the onus is on the applicant to demonstrate a “good prima facie case” or a “plainly arguable” case that an arbitration agreement existed and bound the parties

was not challenged in the Court of Appeal, the appeal being on the question of whether the judge had correctly applied that test

37 In India, in *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd*³⁵, a three-judge court of the Supreme Court divided on the subject in relation to international arbitration agreements and even the members of the majority differed between themselves on the test:

(a) Shrikrishna J, having identified the issue as being whether the finding of a court under s 45 of the Indian Arbitration and Conciliation Act 1996 that an arbitration agreement is or is not “*null and void, inoperative or incapable of being performed*” should be a final expression of the view of the court or should be a prima facie view

³² Harris, Planterose & Tecks: *The Arbitration Act 1996 A Commentary* (3rd ed, 2003) paragraph 9D. See the cases of *Birse Construction Ltd v St David Ltd* [1999] BLR 194 and *Ahmad Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyds Rep 522 (CA) referred to in that paragraph.

³³ [1996] 2 HKC 639. See also *Private Company “Triple V” Inc v Star (Universal) Co Ltd* [1995] 3HKC 129, a case on article 11 of the Model law.

³⁴ [2005] HKCA 31. The judgment is also available on the Hong Kong Legal Information Institute website at www.hklii.org/in

³⁵ (2005) 7 SCC 234

formed without a full-fledged trial, held, without qualification, that “*the correct approach to be adopted under section 45 at the pre-reference stage, is one of a prima facie finding by the trial court as to the validity or otherwise of the arbitration agreement*”

- (b) Darmadhikari J held that a court may make a decision to refer to arbitration in a summary manner, ie on the documents and material on record and without a fully reasoned judgment, but not a decision to refuse to refer to arbitration; the latter decision must only be made after allowing the parties “*full opportunities ... to lead whatever documentary or oral evidence they want to lead*” and deciding the issue “*like trial of a preliminary issue on jurisdiction or limitation in regular civil suit and pass[ing] an elaborate reasoned order*”. The judge left open the question of the effect of such an order.³⁶

38 For the position in Singapore see the article by Mr Andrew Chan and Mr Tay Yong Seng “*Securing Arbitration in the Face of Litigation – a Singapore Perspective*”³⁷.

39 For a strong argument in favour of the prima face standard of review being the correct one see the article by Bachand: *Does Article 8 of the Model Law Call for Full or Prima Face Review of the Arbitral Tribunal’s Jurisdiction?*³⁸ See also Lew & ors paragraphs 14-49 to 14-64.

40 The third important question when considering the courts’ general approach is whether the invalidity of the contract in which an arbitration agreement is found invalidates the arbitration agreement or whether the arbitration agreement remains in force notwithstanding any alleged invalidity of the main contract. This is the issue of separability which was the second matter considered in the *Fiona Trust* case and I do not propose to say anything more about it beyond noting that the approach of the English Court of Appeal and the House of Lords in that case is the same as that of the United States Supreme Court in *Buckeye Check Cashing, Inc v Cardegna* 546 US 440 (2006).

(e) The courts’ approach to the specific questions identified in paragraph 25

³⁶ The position is further complicated by the decision of a six-judge Court of the Supreme Court in *S.B.P. & Co v Patel Engineering Ltd* AIR 2006 SC 450 on the nature of the enquiry to be made under s 11 of the Indian Act. See further Nair: *Surveying a Decade of the “New” Law of Arbitration in India* (2007) 23 *Arbitration International* 699-739 at 722-725.

³⁷ (2006) 2 *AIAJ* 113-136 at 121-125

³⁸ (2006) 22 *Arbitration International* at 463-476. This article was referred to in the recent Supreme Court of Canada decision in *Dell Computer Corporation v Union des Consommateurs* (see paragraph 34(c) of this paper).

(i) Is there an arbitration agreement?

41 Under Article II of the New York Convention³⁹ there are two requirements for an arbitration agreement:

- (a) that it be in writing⁴⁰; and
- (b) that it be an agreement “*under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration*”⁴¹

Article II(2) provides that:

“The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

42 Article 7 of the Model Law⁴² is to the same effect as the New York Convention so far as the requirements of writing and content⁴³ but contains an extended definition of when an agreement is “*in writing*”⁴⁴

43 It is important to remember that, even in the case of those countries that have adopted the Model Law, there are differences in the detailed provisions of the local law. For example:

- (a) the New Zealand Arbitration Act 1996 permits an arbitration agreement to be made orally and does not adopt the extended definition of “*in writing*” contained in Article 7(2) of the Model Law⁴⁵;

whereas:

- (b) the Singaporean Arbitration Act (Chapter 10) and International Arbitration Act (Chapter 143A) not only include the extended definition found in the Model Law but also both specifically include

³⁹ See Appendix 1

⁴⁰ Article II(1)

⁴¹ Article II(1)

⁴² See Appendix 1

⁴³ Article 7(1). It does not contain the words “*concerning a subject matter capable of settlement by arbitration*” but that concept is obviously covered by the expression “*null and void*” which appears in Article 8(1) of the Model Law as it does in Article II(3) of the Convention.

⁴⁴ Article 7(2)

⁴⁵ The Malaysian Arbitration Act 2005 departs from its New Zealand model at this point and incorporates the Model Law extension

within the definition cases where there is a reference in a bill of lading to a charter party or other document containing an arbitration clause⁴⁶

- 44 Leading international texts such as Redfern and Hunter: *Law & Practice of International Commercial Arbitration*⁴⁷ and Lew & Ors contain useful discussions of this issue.⁴⁸
- 45 So much for the requirement of writing. What of the requirement as to content or nature?
- 46 What is required so far as content or nature is concerned is that the agreement be one which, on its proper interpretation is an agreement to submit disputes or differences to arbitration and that the disputes or differences “*concern ... a subject matter capable of settlement by arbitration*”. As to the first of these requirements, what is necessary is that the process provided for in the agreement be recognisable as arbitration as opposed to any other form of dispute resolution. As to the second requirement, the question is, of course, one of arbitrability.⁴⁹

(ii) Are the parties before the court parties to the arbitration agreement?

- 47 Article II(3) of the New York Convention reads as follows:
The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration ...
- 48 Article 8(1) of the Model Law reads as follows:
The court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests ... refer the parties to arbitration ...
- 49 Article 8(1) of the First Schedule to the New Zealand Arbitration Act 1996 is in the same terms as Article 8(1) of the Model Law, save for the substitution of the word “*proceedings*” for the words “*an action*”.

⁴⁶ Arbitration Act (Chapter 10), s 4(4) and (5); International Arbitration Act (Chapter 143A), s 2(3) and (4). For comment on the Singaporean position regarding the requirement of writing see paragraph 20.015 of the *Arbitration* title in *Halsbury's Laws of Singapore* (2003 Reissue).

⁴⁷ Sweet & Maxwell, 4th ed, 2004 (“Redfern & Hunter”)

⁴⁸ Chapters 3 (paragraphs 3-07 to 3-09) and 7 (paragraphs 7-05 to 7-32) respectively

⁴⁹ For comment on this issue, see Lew & Ors Chapter 9 and elsewhere and Redfern & Hunter paragraphs 3-25 to 3-36.

- 50 The intent of all three provisions is that the parties to an arbitration agreement which applies to the subject matter of the proceedings before a court should be bound by the arbitration agreement unless it is “*null and void, inoperative or incapable of being performed*”.
- 51 The wording of s 6 of the Arbitration Act (Chapter 10) and of the International Arbitration Act (Chapter 143A) in Singapore makes this perfectly clear (I quote from the International Arbitration Act s 6(1)):
... where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may ... apply to that court to stay the proceedings so far as the proceedings relate to that matter.
- 52 It is not uncommon for the parties to court proceedings to include, but not be limited to, the parties to an applicable arbitration agreement. In those circumstances, the arbitration agreement can be enforced only against those parties to the court proceedings who are also parties to the arbitration agreement. There are a number of cases in which the question of whether, in those circumstances, the arbitration agreement is inoperative has been considered. I refer to some of them in paragraph 83 of this paper.
- 53 In contrast to that situation is the situation in which a party to the court proceedings which is not, on the face of the arbitration agreement, a party to the arbitration agreement, claims to be entitled to enforce the arbitration agreement. This latter situation is dealt with in Redfern and Hunter⁵⁰, Lew & Ors⁵¹ and the *Arbitration* title in *Halsbury’s Laws of Singapore*⁵².

(iii) Is the subject matter of the court proceeding within the scope of the arbitration agreement ?

- 54 This is probably the question which historically has arisen most often in relation to the enforcement of arbitration agreements. There is a multiplicity of cases in the various jurisdictions. It may become less common if the approach of the English Court of Appeal and the House of Lords in the *Fiona Trust*⁵³ case is followed or adopted.
- 55 Because the English Court of Appeal and the House of Lords recognised that the parties might wish to exclude certain types of dispute from the scope of

⁵⁰ Paragraphs 3-30 to 3-36

⁵¹ Paragraphs 7-50 to 7-57

⁵² Paragraph 20.020

⁵³ See the first part of this paper.

their arbitration agreement, it is still important to have regard to the parties' intention.

56 Many different types of arbitration agreements have been considered by the courts, from agreements which have been very general in their wording to those which have been very specific.

57 The following are some examples of general clauses:

*Any dispute which may arise between the parties to this agreement shall be settled by arbitration ...*⁵⁴

*Any dispute or difference arising out of this Agreement shall be referred to ... arbitration in London ...*⁵⁵

*Any dispute between the Parties arising out of the construction, meaning or effect of any clause or matter contained in this agreement or of the rights and liabilities of the Parties ... shall be referred to arbitration ...*⁵⁶

*Any dispute or controversy relating to this mandate or initiated by other business relationships or arrangements between the parties [to be referred to arbitration] ...*⁵⁷

*All disputes, controversies or differences which may arise out of or in relation to this Agreement and the sales contracts entered into pursuant [sic] shall be settled by arbitration in Japan in accordance with Commercial Arbitration Rules of the Japan Commercial Arbitration Association.*⁵⁸

*Any dispute or difference... as to the construction of the contract or as to any matter or thing whatsoever arising thereunder or in connection therewith ...*⁵⁹

58 The following are some examples of restrictive arbitration agreements:

(a) The by-laws of a mutual marine insurance company provided for arbitration of disagreements over the quantum of claims and contained a general provision for resolution by arbitration of disputes between the company and its members “*arising out of the affairs of the*

⁵⁴ *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246 (CA)

⁵⁵ *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 (CA)

⁵⁶ *Cecrop Co v Kinetic Sciences Inc* (2001) 16 BLR (3d) 15 (British Columbia Supreme Court); also reported in Alvarez & ors: *Model Law Decisions* under the heading of Article 8 (“Alvarez & ors”)

⁵⁷ *World LLC c Parenteau & Parenteau Int’l Inc* (Quebec Superior Court) reported in Alvarez & ors

⁵⁸ *Turnbridge v Cansel Survey Equipment (Canada) Ltd* (British Columbia Supreme Court) reported in Alvarez & ors

⁵⁹ *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508

company”. They did not provide for arbitration in cases where coverage was denied completely.⁶⁰

- (b) An arbitration clause provided that differences between the parties should be resolved through arbitration, with the exception of differences involving a question of law.⁶¹
- (c) An arbitration clause in a lease provided:
 - 44.1 *UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision then relating to arbitration.*
 - ...
 - 44.3 *THE procedures prescribed in this clause shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable hereunder which remain unpaid or from exercising the rights and remedies in the event of such default prescribed in clauses 28 and 29 hereof.*⁶²
- (d) The contract between a hospital in Ontario, and an American company included a section headed “*Remedies*” and another section headed “*Dispute Resolution*”. The former detailed specific default events which would entitle one party to begin court proceedings against the other. The latter referred all disputes to arbitration. The hospital instituted proceedings in Ontario, claiming damages for breach of contract and misrepresentation and a declaration that the plaintiff was entitled to treat itself as discharged from its contract with the American company. The company responded with a motion to stay in accordance with article 8 of the Model Law. The court dismissed the motion on the ground that the claims fell within the specified events of default under the “*Remedies*” section of the contract and that the arbitration clause did not apply.⁶³
- (e) An arbitration clause was limited to disputes “*as to the interpretation and application of any terms of this agreement*”⁶⁴

59 Examples of the types of claim which have raised issues as to the scope of an arbitration agreement are pre-contractual misrepresentation⁶⁵, rectification⁶⁶,

⁶⁰ *Ocean Fisheries Ltd v Pacific Coast Fishermen’s Mutual Marine Insurance Co* (Federal Court of Canada) (1997) 125 FTR 20; (1997) 128 FTR 232; [1998] 1FC 586; (1997) 220 NR 68; [1998] 1 ILR 1-3492; Alvarez & ors

⁶¹ *TIT2 Ltd Partnership v Canada* (Ontario Court of Justice) CLOUT Case 113; Alvarez & ors

⁶² *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Ltd* [2006] NZHC 1228 (High Court, Auckland, CIV 2006-404-3579, 13/10/06, Abbott AJ

⁶³ *Temiskaming Hospital v Integrated Medical Networks Inc* (Ontario Court of Justice) CLOUT Case 388

⁶⁴ *Traff v Evancic* (British Columbia Supreme Court) (1995) 15 BCLR (3d) 85; 55 BCAC 235; CLOUT Case 180, Alvarez & ors

⁶⁵ *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 (CA)

variation under legislation relating to contractual mistakes⁶⁷, claims under consumer protection or similar legislation⁶⁸, fraud, breach of trust and breach of fiduciary duty⁶⁹, termination⁷⁰, and related tortious⁷¹ and other claims, such as claims for unjust enrichment or quantum meruit⁷².

- 60 Just as some of the parties to the relevant court proceedings may be parties to the arbitration agreement while others are not, so it is quite possible for some of the issues in a proceeding to be held to be within the scope of the relevant arbitration agreement while others are not.⁷³

(iv) Is there a dispute?

- 61 The need for there to be a dispute is, of course, inherent in the very nature of an arbitration agreement as an agreement under which the parties undertake to submit to arbitration “differences”⁷⁴ or “disputes”⁷⁵. A court which is asked to enforce an arbitration agreement must therefore be satisfied that there is a dispute which comes within the arbitration agreement.
- 62 The nature of the court’s enquiry in this regard is well stated in Harris, Planterose & Tecks: *The Arbitration Act 1996*⁷⁶:

Where an agreement refers disputes to arbitration, the court has only to consider whether there is a dispute within the meaning of the arbitration agreement, not whether in fact there is a dispute between the parties. Hence there is a dispute once money is claimed

⁶⁶ *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246 (CA); *Ashville Investments Ltd v Elmer Contractors Ltd* (1987) 37 BLR 60 (CA); *Onex Corp v Ball Corp* (Ontario Court of Justice) (1994) 12 BLR (2^d) 151; CLOUT Case 69; Alvarez & ors; *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508

⁶⁷ *Apparel Holdings Ltd v Jones* [1992] 3 NZLR 713.

⁶⁸ *Turnbridge v Cansel Survey Equipment (Canada) Ltd* (British Columbia Supreme Court) reported in Alvarez & ors

⁶⁹ *Traff v Evancic* (British Columbia Supreme Court) (1995) 15 BCLR (3d) 85; 55 BCAC 235; CLOUT Case 180, Alvarez & ors

⁷⁰ *Cangene Corp v Octapharma AG* (Manitoba Court of Queen’s Bench) reported in Alvarez & ors

⁷¹ See, for example, *Traff v Evancic* (British Columbia Supreme Court) (1995) 15 BCLR (3d) 85; 55 BCAC 235; CLOUT Case 180, Alvarez & ors

⁷² See, for example, *Abigroup Contractors Pty v Transfield Pty Ltd* (Supreme Court of Victoria) reported and criticised in an article by Baron: *The Australian International Arbitration Act, the Fiction of Separability and Claims for Restitution* (2000) 16 *Arbitration International* 159-187

⁷³ See for example, *Simmonds Capital Ltd v Eurocom International Ltd* (Federal Court of Canada) (1998) 144 FTR 30; 81 CPR (3^d) 349; Alvarez & ors

⁷⁴ Article II(1) of the New York Convention

⁷⁵ Article 7(1) of the Model Law

⁷⁶ Harris, Planterose & Tecks: *The Arbitration Act 1996 A Commentary* (3rd ed, 2003) (“Harris”) paragraph 9F

unless and until it is admitted that the sum is due and payable, and there is a dispute if a party refuses to pay a sum claimed, or denies that it is owing: Halki Shipping Corporation v Sopex Oils Ltd [1998] 1 Lloyd's Report 465 (Court of Appeal). In Secretary of State for Commonwealth Affairs v The Percy Thomas Partnership [1998] CILL 1342 it was held that the law as to what constitutes a dispute is well summarised in Mustill & Boyd (2nd ed) pp 127/8, every case being heavily dependant upon its facts. Further it was held that once a dispute has arisen it remains a dispute unless and until something happens to indicate that the dispute is either resolved or abandoned.

63 Canadian and Hong Kong authority is to the same effect.

64 In *Borowski & Heinrich Fiedler Perforiertechnik GmbH*⁷⁷, a decision of the Alberta Court of Queen's Bench:

The plaintiff, an employee of the defendant, sued for damages in lieu of notice of termination of the employment contract and for loss of wages and benefits. The defendant sought a stay of proceedings and submission of the dispute to arbitration since the employment contract contained an arbitration clause.

*The court found that, with regard to the claim for past wages and benefits, there was no dispute to be referred to arbitration, since the defendant had admitted that it owed the plaintiff for past wages and benefits. With regard to damages in lieu of notice of termination, the court found that there was a dispute governed by the arbitration clause, stayed the proceedings and referred them to arbitration.*⁷⁸

65 In *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV*⁷⁹ the Hong Kong Court of Appeal held that, under article 8(1) of the Model Law:

*The court is not concerned with investigating whether the Defendant has an arguable basis for disputing the Claim ... if a claim is made against him in a matter which is the subject of an arbitration agreement and he does not admit the claim then there is a dispute within the meaning of the Article.*⁸⁰

66 The position in Singapore appears to differ depending upon whether the arbitration in question is international or domestic⁸¹. In the case of an international arbitration, the position is the same as in England and Wales, Canada and Hong Kong⁸². In the case of a domestic arbitration, however, a stay may be refused if the court considers that the claim is indisputable.

⁷⁷ (1994) 158 Alberta Reports 213; [1994] 10 WWR 623; CLOUT Case 111

⁷⁸ Quoted from the CLOUT abstract.

⁷⁹ [1996] 1 HKC 363; CLOUT Case 128

⁸⁰ For other Hong Kong authority to the same effect see *Zhan Jaing E&T Dev Area Service Head Co v An Hau Company Ltd*, CLOUT Case 61; *Joong and Shipping Co Ltd v Choi* CLOUT Case 63; *Nassetti Ettore S.p.a.v Lawton Development Ltd* CLOUT Case 129

⁸¹ See paragraphs 20.036 and 20.043 of the *Arbitration* title of *Halsbury's Laws of Singapore*

⁸² See paragraphs 62-65 above

- 67 In the New Zealand and Malaysian Acts⁸³ there is an added provision which is not present in the other Acts based on the Model Law: the court hearing a stay application may refuse a stay if it finds “*that there is not in fact any dispute between the parties with regard to the matters agreed to be referred*”⁸⁴. Under these Acts there is therefore a two-stage enquiry:
- (a) Is the claim admitted? If it is, there is no dispute.⁸⁵
 - (b) If there is a dispute, is it a real one?
- 68 There is a divergence of view between members of the High Court of New Zealand as to the test to be applied in deciding whether there is a real dispute. In *Fletcher/Brown Joint Venture v Kiwi Dairies Ltd*⁸⁶ I held that the test is “*not whether the party disputing liability is bona fide but whether it has arguable grounds for disputing liability*”. In *Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity Ltd*⁸⁷ Master Thomson took the same approach. However, in two subsequent decisions (*Todd Energy Ltd v Kiwi Power (1995) Ltd*⁸⁸ and *Alstom New Zealand Ltd v Contact Energy Ltd*⁸⁹) he resiled from that position and adopted a lesser test of whether there was in fact “*anything disputable*”. The Court of Appeal has not considered the issue yet.
- 69 Rajoo & Davidson in their text on the Malaysian Act, *The Arbitration Act 2005*, argue in favour of adopting the lesser test adopted by Master Thompson, which they describe as being whether there is a “*bona fide dispute*”.⁹⁰
- 70 Where the prima facie standard of review is adopted⁹¹, it will apply to this aspect of whether the matter before the court is one which can be referred to arbitration, as well as to other aspects.⁹²

(v) Has the party seeking a stay done so in time?

⁸³ Arbitration Act 1996, Schedule 1, article 8(1) and Arbitration Act 2005, s 10(1) respectively.

⁸⁴ The New Zealand Act; the wording of the Malaysian Act is slightly different but to the same effect.

⁸⁵ *Rayonier MOT New Zealand Ltd v Metro Panelboard Ltd* (High Court, Auckland, CIV 2002-404-1747, CP 256-02, 27/5/03, Master Faire

⁸⁶ High Court, New Plymouth, CP 7/98, 27/5/98

⁸⁷ High Court, Wellington, CP 179/99, 22/12/99

⁸⁸ High Court, Wellington, CP 46/01, 29/10/01

⁸⁹ High Court, Wellington, CP 160/01, 12/11/01

⁹⁰ op. cit at paragraphs 10-05 – 10-08 (pp48-49)

⁹¹ See paragraphs 33-37 above

⁹² *Leung Kwok Tim & Building Federal (Hong Kong) Ltd* [2001] 3 HKC 527; CLOUT Case 524

- 71 If the application for a stay is made in reliance on the New York Convention rather than the Model Law, there is no express time limit for the making of an application for stay. However, a failure to make an application at an early stage may lead to an argument that the party seeking a stay has waived the right to a stay or is estopped from seeking one.
- 72 Where the relevant legal system is based on the Model Law, it will include a requirement that any application for a stay be made by a certain point in the proceedings. What that point is differs from jurisdiction to jurisdiction. In Singapore any such application must be made “*before delivering any pleading or taking any other step in the proceedings*”⁹³. In New Zealand, in contrast, the application must be made “*not later than when submitting that party’s first statement on the substance of the dispute*”⁹⁴. In Malaysia the relevant section requires the making of the application “*before taking any other steps in the proceeding*”⁹⁵.
- 73 It is also clear, I suggest, from the wording of Article II(3) of the New York Convention and Article 8(1) of the Model Law that an application cannot be made under either provision before there are court proceedings. This is clear from the wording of the provisions. There is also Canadian authority to that effect⁹⁶.

(vi) Is the agreement null and void, inoperative or incapable of being performed?

- 74 There is a divergence of view among the leading textbook writers as to the manner in which the question of whether an arbitration agreement is null and void, inoperative or incapable of being performed should be approached. By way of example:
- (a) Professor Boo, in paragraph 2.041 of the *Arbitration* title of *Halsbury’s Laws of Singapore*, states:
- The term “null and void, inoperative or incapable of being performed” is described as a reflection of the common law concepts of void or voidable contracts (“null and void”), unenforceable contracts (“inoperative”) and frustrated contracts (“incapable of being performed”)*
- (b) Lew & ors, in paragraph 14-41 of their text, counsel against:
- ... distinguish[ing] meticulously between the different grounds. Irrespective of the grounds on which a court basis its decision whether an agreement is “null and void, inoperative or incapable of being performed”, the result will always be the same*

⁹³ International Arbitration Act (Chapter 143A) s 6(1); Arbitration Act (Chapter 10) s 6(1)

⁹⁴ Arbitration Act 1996, Schedule 1, Article 8(1)

⁹⁵ Arbitration Act 2005 s 10(1)

⁹⁶ *ATM Compute GmbH v DY 4 Systems. Inc* [1995] OJ. No. 1678; CLOUT Case 386

- (c) *Russell on Arbitration* (22nd ed, 2003), at paragraph 7-018, states:
- Where the conditions mentioned in the preceding paragraphs are satisfied, the court must make an order under s 9 of the Act⁹⁷ staying the proceedings unless either:*
- *The court is satisfied that the arbitration agreement is null and void. This will be the case where the arbitration agreement (as opposed to the main contract) was never entered into or where it was entered into but has subsequently been found to be void ab initio, or*
 - *The court is satisfied that the arbitration agreement is inoperative or incapable of being performed. It will be inoperative where, for example, the arbitration agreement has been repudiated or abandoned or it contains such an inherent contradiction that it cannot be given effect and incapable of performance where even if the parties were both ready willing and able to do so, it could not be performed by them.*
- (d) AJ van den Berg: *The New York Convention of 1958* (Kluwer 1981), as quoted in Branson: *The Enforcement of International Commercial Arbitration Agreements in Canada*⁹⁸, states:
- The term “null and void” covers cases where the arbitral agreement itself (as opposed to the main contract) is tainted by misrepresentation, duress or other undue influence. The word “inoperative” can be deemed to cover those cases where the arbitration agreement has ceased to have effect. This may occur for a variety of reasons, eg that the parties have implicitly or explicitly revoked the agreement to arbitrate, or that the same dispute between the same parties has already been decided in arbitration or court proceedings. An arbitration agreement can also be inoperative where the agreement is shipwrecked for some reason, and for this reason, under the applicable law, the agreement ceases to have effect. The words “incapable of being performed” would seem to apply to those cases where the arbitration cannot be effectively set in motion.*
- (e) Redfern & Hunter, in paragraph 3-71 of their text, say:
- The reference to the agreement being ‘null & void’ refers to the arbitration agreement itself since, as seen in the discussion of the principle of separability, in most countries the nullity of the main contract does not necessarily affect the validity of the arbitration agreement. At first sight it is difficult to see a distinction between the terms ‘inoperative’ and ‘incapable of being performed’. However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression ‘incapable of being performed’ appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal.*

75 While there is clearly potential for overlap between the concepts “*inoperative*” and “*incapable of being performed*”, I would suggest that it is important to identify and maintain the distinction between the three terms “*null and void, inoperative or incapable of being performed*”.

⁹⁷ Section 9 is the English equivalent of Article 8 of the Model Law

⁹⁸ (2000) 16 *Arbitration International* 19-52 at 49-51

- 76 I would also suggest that it is perhaps dangerous to assume that the meaning of the words used is determined by common law concepts, as appears to be accepted by Professor Boo in the passage just quoted. The New York Convention and the Model Law are both, of course, international instruments. Their meaning is therefore influenced not only by the common law but by other systems, in particular the civil law.
- 77 It is necessary to remember that, certainly, the first of the concepts will be governed by the applicable law whereas the second and third concepts will, I suggest, usually be matters of fact.
- 78 I will now look at some cases under each of these headings. This review is not exhaustive but intended only to provide an idea of the sort of issues that have arisen under each heading.

“Null and void”

- 79 In *Tennessee Imports Inc v Filippi*⁹⁹ a US District Court made the following comments on the interpretation of the “null and void” clause in the New York Convention:
- ... the Court should limit application of the ‘null and void’ clause to cases in which the arbitration agreement itself is “subject to an internationally recognised defence such as duress, mistake, fraud or waiver or when [the agreement] contravenes fundamental policies of the forum State”*
- 80 Examples of situations in which an arbitration agreement has been, or would be, held to be null and void are:
- (a) Where one of the parties lacks the necessary contractual capacity;
 - (b) Where there is no concluded agreement or where the party opposing the application for a stay successfully pleads non est factum,¹⁰⁰
 - (c) Where the agreement is uncertain,¹⁰¹
 - (d) Where the clause provides for one of the parties to be the arbitrator and, thus judge in his own cause¹⁰²;

⁹⁹ (1990) ICCA Yearbook Commercial Arbitration (“Yearbook”) XVII pp 620-638 (USA Case 114)

¹⁰⁰ See the passage from the judgment of Hoffman LJ (as he then was) in *Harbour v Kansa* quoted in the *Fiona Trust* case (see paragraph 11(e) above).

¹⁰¹ See, eg, *EJR Lovelock Ltd v Exportles* [1968] 1 Lloyd’s Rep 163. In that case Lord Denning said: “*I am forced to the conclusion that the clause is so uncertain that the court cannot give effect to it. The clause is divided into 2 parts, which are inconsistent with one another: and it is impossible to reconcile them ... It is beyond the wit of man – or at any rate beyond my wit – to say which dispute comes within which part of the clause*”. In the course of the discussion as to whether to grant leave to appeal from the Court of Appeal decision, Diplock LJ said “*It can so easily be cured by not doing the same silly thing again*”. Leave to appeal was refused. See also CLOUT Case 557 (the parties in this German case are not named).

- (e) Where the dispute is not arbitrable according to the applicable law¹⁰³;
- (f) Where the agreement conflicts with the sovereign immunity of a state party¹⁰⁴.

81 There is Canadian authority for the proposition that the existence of other forms of relief which are not capable of being arbitrated is not a bar to the arbitration of those forms of relief which are arbitrable.¹⁰⁵

“Inoperative”

82 Arbitration clauses have been held to be inoperative in the following circumstances:

- (a) Where there has been a failure to comply with a procedural requirement of the applicable law. For example, in New Zealand an arbitration agreement which forms part of a consumer contract is only enforceable if there is a separate written arbitration agreement. In *Marnell Corrao Associates Inc v Sensation Yachts Ltd*¹⁰⁶ the High Court of New Zealand held that the arbitration agreement in that case was inoperative because this requirement had not been satisfied.
- (b) Where the matters in issue “*ha[ve] already been decided in arbitration or court proceedings*”¹⁰⁷
- (c) Where the dispute has been settled¹⁰⁸;
- (d) Where there has been a subsequent agreement between the parties inconsistent with the arbitration agreement¹⁰⁹.

¹⁰² *Jean Charbonneau v Les Industries A.C. Davie Inc* (Superior Court of Quebec) *Recueil de Jurisprudence du Québec* 1989, 1255; CLOUT Case 66 (the CLOUT abstract records the Court as treating the arbitration agreement as inoperative; but I suggest that it is better regarded as a case of nullity); but see the New Zealand case of *O’Connor v Thaico Corp Ltd* (High Court, Christchurch, CP 119/99, 11/11/99, Master Venning) in which the Court held, on a summary judgment application, that, even if one of the after-appointed arbitrators had had an interest in the outcome of the dispute, that would not have rendered the arbitration agreement contrary to public policy.

¹⁰³ *Cogeco Sp.A v Piersanti* (1979) Yearbook VI pp 229-230 (Italy Case 37), a case involving an employment contract which the Italian court held was not able to be settled by arbitration under Italian law which was the applicable law.

¹⁰⁴ *B V Wijsmuller v USA* (1976) Yearbook IV pp 290-291 (USA Case 15)

¹⁰⁵ *BWV Investments Ltd v Saskferco Products Inc* (Saskatchewan Court of Appeal) [1995] 2 WWR 1; CLOUT Case 116; 2 MALQR 9. See also *Condominiums Mont St-Sauveur Inc v Les Constructions Serge Sauv re Lt e* (Quebec Court of Appeal) [1990] RJQ 2783; [1990] A.Q. No 2052; [1991] RDI 8; Alvarez & ors.

¹⁰⁶ (2000) 15 PRNZ 608

¹⁰⁷ See van den Berg: *The New York Convention 1958* at p158, quoted in paragraph 74(d) above.

¹⁰⁸ *Shanghai Foreign Trade Corp v Sigma Metallurgical Co Pty Ltd* (New South Wales Supreme Court) 1 MALQR 95; 11(8) International Arbitration Report (August 1996); Alvarez & ors

83 The following have been held not to render an arbitration agreement inoperative:

- (a) A failure to comply with a contractual time-bar¹¹⁰;
- (b) The fact that the same issues would fall for consideration in separate proceedings not subject to arbitration¹¹¹;
- (c) The fact that some issues fall within the arbitration agreement and others do not¹¹²;
- (d) The fact that there are a number of parties some of whom are not bound by the arbitration agreement¹¹³ or some of whom, because they have failed to apply for a stay in time, are not entitled to the protection of Article 8 of the Model Law or the national equivalent¹¹⁴;
- (e) The occurrence of unforeseen issues which, nevertheless, come within the wording of the arbitration agreement¹¹⁵;
- (f) Failure to take prior procedural steps¹¹⁶.

“Incapable of being performed”

¹⁰⁹ See for example, *Bitumat Ltd v Multicom Ltd* (Zimbabwe High Court), CLOUT Case 370, *Methanex New Zealand Ltd v Fontaine Navigation S.A.* [1998] 2 FC 583, 142 FTR 81; CLOUT Case 382; Alvarez & ors and *Ishimaru Ltd v Page* [2007] NZHC 571 (High Court, Auckland, CIV 2007-404-1342, 1/6/07, Heath J). For examples of cases where it was held that there had not been a subsequent inconsistent agreement see *Paladin Agricultural Ltd v Excelsior Hotel (Hong Kong) Ltd* [2001] 2 HKC 215; CLOUT Case 522 and *Daily Win Engineering Ltd v Incorporated Owners of Greenwood Terrace* CLOUT Case 525.

¹¹⁰ *BC Navigation v Canpotex Shipping Services Ltd* (1987) 16 FTR 79; CLOUT Case 9; Alvarez & ors; 1 MALQR 95; *Grimaldi Compagnia di Navigazione SpA v Sekihyo Line Ltd* [1999] 1 WLR 708

¹¹¹ *Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Ors* (1978) Yearbook IV pp 320-323 (UK Case)

¹¹² *Kaverit Steel and Crane Ltd v Kone Corp* (Alberta Court of Appeal) (1992) 87 DLR (4th) 129; [1992] 3 WWR 716; 85 Alta LR (2nd) 287; Alvarez & ors

¹¹³ *Fibreco Pulp Inc v Star Shipping A/S* (Federal Court of Canada) [1998] FCJ No 297, (1998) 145 FTR 125; affirmed (Federal Court Trial Division) [1998] FCJ No 1504, (1998) 156 FTR 127; CLOUT Case 381; Alvarez & ors. See also *The City of Prince George v AL Sims & Sons Ltd* (1995) 9 BCLR (3^d) 368; [1995] 9 WWR 503; 61BCAC 254; 23 CLR (2^d) 253, CLOUT Case 179 and *Montgomery Watson NZ Ltd v Milburn NZ Ltd* (High Court, Christchurch, CP 86-00, 9/10/00, Young J)

¹¹⁴ *Stancroft Trust Ltd v Can-Asia Capital Co Ltd* (1990) 3 WWR 665; CLOUT Case 17; Alvarez & ors

¹¹⁵ An example of this situation occurred in *Arbella SA v “Aghia Markella”* [1995] FCJ 723; 94 FTR 229; Alvarez & ors. In that case the parties entered into a charter party which called for a fixed delivery date. Before delivery, the vessel was detained by the Canadian Coast Guard. The plaintiff cancelled the charter party and commenced an action for damages. The defendant applied for a stay of proceedings on the ground that the arbitration clause was inoperative since the parties had not contemplated that the arbitrators could be seized with a dispute relating to whether the Canadian Coast Guard had complied with Canada’s treaty obligations and domestic law. The court held that these facts did not render the arbitration agreement inoperative.

¹¹⁶ *International Resource Management (Canada) Ltd v Kappa Energy (Yemen) Inc* (Alberta Court of Appeal) [2001] 92 Alberta Law Reports (3d) 25; CLOUT Case 503, *Burlington Northern Railroad Co v Canadian National Railway* (British Columbia Court of Appeal) [1997] 1 SCR 5; 207 NR 243; Alvarez & ors

- 84 In *Paczy v Haendler & Natermann GmbH*¹¹⁷ it was held that an arbitration agreement is only incapable of being performed “*if the circumstances are such that it could no longer be performed even if both parties were ready willing and able*”
- 85 In *The Rena K*¹¹⁸ Brandon J, as he then was, held that the words “*incapable of being performed*” relate to the agreement and not to the resulting award, so that the words are to be construed:
“*as referring only to the question of whether an arbitration agreement is capable of being performed up to the stage when it results in an award; and should not be construed as extending to the question of whether, once an award has been made, the party against whom it has been made will be capable of satisfying it.*”
- 86 The argument that an arbitration agreement is incapable of being performed is raised most often where the named institution has never existed or has ceased to exist.
- 87 Where the part of the arbitration agreement affected by this fact is separable from the rest, the courts are likely to enforce the balance of the arbitration agreement. An example of this approach is *Gatoil International Inc v National Iranian Oil Co*¹¹⁹. In that case the arbitral clause provided for arbitration in accordance with the laws of Iran and went on to provide for default appointments by the President of the Appeal Court of Teheran, Iran. The default appointor had not existed since the Iranian Revolution, which predated the contract containing the arbitration agreement. The Queen’s Bench Division held that the impossibility of performance of the default appointment provision did not nullify the rest of the arbitral clause.
- 88 Where the non-existence (whether at all times or from a particular date) of the arbitral institution named in the arbitration agreement is relied on to defeat the agreement entirely, the court’s decision will depend upon whether there is in existence an institution which can reasonably be said to equate to that described by the parties, even though not strictly speaking a legal successor. See, for example, the decision of the Divisional Court of the Ontario Superior Court of Justice in *Dalimpex Ltd v Janicki*¹²⁰.
- 89 Where the arbitration agreement provides for arbitration in a particular country and that part of the agreement is inseparable from the balance, the

¹¹⁷ [1981] 1 L.L. 302

¹¹⁸ [1979] QB 377, [1979] 1 AllER 397; (1978) Yearbook IV pp 323-327 (UK Case 7)

¹¹⁹ (1988) Yearbook XVII pp 587-593 (UK Case 30)

¹²⁰ [2003] 64 Ontario Reports (3^d) 737; (2003) 228 DLR (4th) 179; CLOUT Case 509.

agreement will be held to be incapable of being performed if it is impossible to arbitrate in that country.¹²¹

(f) “Pacta sunt servanda” – or are they?

- 90 While, obviously, there will be cases in which one disagrees with the decision of the court, I suggest that the above review shows that arbitration agreements will be enforced where they meet the requirements of the New York Convention, the Model Law and the relevant national law. Therefore, it is possible to say that arbitration agreements are honoured by all concerned, including the courts.

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¹²¹ For example, a clause requiring arbitration in Iran after the Iranian Revolution: *National Iranian Oil Co v Ashland Oil Inc* (1987) 817 F 2d 26. See also the cases referred to in Lew & ors paragraph 14-47

Text of Article II of the New York Convention and Articles 7 and 8(1) of the Model Law

A New York Convention Article II

- 91 Each Contracting State shall recognise and agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
- 92 The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
- 93 The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of the article, shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

B Model Law Articles 7 and 8(1)

Article 7 Definition and Form of Arbitration Agreement

- (1) “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 in respect of a defined legal relationship, whether contractual or not. An arbitration agreement can be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8 Arbitration Agreement and Substantive Claim Before Court

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

Text of the New Zealand Arbitration Act 1996, s 2(1)(part), s 9, and First Schedule,
Articles 7 and 8(1)

S2(1)

In this Act, unless the context otherwise requires,—

“Arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not:

S9

(1)Where a provision of this Act is inconsistent with a provision of any other enactment, that other enactment shall, to the extent of the inconsistency, prevail.

(2)Subject to subsection (1), where a provision of this Act applies to an arbitration under any other enactment, the provisions of that other enactment shall be read as if it were an arbitration agreement.

Article 7

(1)An “arbitration agreement” may be made orally or in writing. Subject to section 9, an “arbitration agreement” may be in the “form of” an “arbitration” clause in a contract or in the “form of” a separate “agreement”.

(2)A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract.

Article 8

(1)A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

Text of Singapore Arbitration Act (Chapter 10) ss 3, 4 and 6 and International Arbitration Act (Chapter 143A) ss 2(part) and 6(1), (2) and (5)

A Arbitration Act (Chapter10)

3. This Act shall apply to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act (Cap. 143A) does not apply to that arbitration

4. —(1) In this Act, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall, except as provided for in subsection (4), be in writing, being contained in —

(a) a document signed by the parties; or

(b) an exchange of letters, telex, telefacsimile or other means of communication which provide a record of the agreement.

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

(5) A reference in a bill of lading to a charterparty or other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading.

...

6. —(1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —

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

(b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,

make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

(3) Where a court makes an order under subsection (2), the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as the court thinks fit in relation to any property which is or forms part of the subject of the dispute to which the order under that subsection relates.

(4) Where no party to the proceedings has taken any further step in the proceedings for a period of not less than 2 years after an order staying the proceedings has been made, the court may, on its own motion, make an order discontinuing the proceedings without prejudice to the right of any of the parties to apply for the discontinued proceedings to be reinstated.

(5) For the purposes of this section, a reference to a party includes a reference to any person claiming through or under such party.

B International Arbitration Act (Chapter 143A)

2. —(1) In this Part, unless the context otherwise requires —

"arbitration agreement" means an agreement in writing referred to in Article 7 of the Model Law and includes an agreement deemed or constituted under subsection (3) or (4);

....

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

(4) A reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading.

....

6. —(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

...

(5) For the purposes of this section and sections 7 and 11A —

(a) a reference to a party shall include a reference to any person claiming through or under such party;

(b) "court" means the High Court, District Court, Magistrate's Court or any other court in which proceedings are instituted.

