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Key role of State courts before the commencement of arbitral proceedings: referral to arbitration and provisional and conservatory measures

The Hon Sir Bernard Eder

A. Referral to arbitration

1. At the international level, see:

(A) **Article II of the New York Convention ("NYC")**:

"Article II

1. Each Contracting State shall recognize an agreement in writing 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.

2. 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.

3. 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, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

(B) **Article 8 of the UNCITRAL Model Law ("ML"):**

"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 an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of

> *the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> …… (4) If the court refers the parties in an action to arbitration, it must make an order staying the legal proceedings in that action." [emphasis added]

2. For present purposes, I propose to focus on Art 8 of the Model Law. However, it is important to note that the position at the local domestic level will of course depend upon

   (i) the extent to which the local state has become a party to the Model Law; and

   (ii) the terms of the relevant local domestic legislation.

   For example, in Hong Kong, Art 8 of the Model Law has effect by virtue of s20 of the Arbitration Ordinance – but the position is not always identical in other jurisdictions.

3. In addition, the domestic courts may have a discrete inherent jurisdiction to stay proceedings: see, for example in Hong Kong: *Choi Yick Interior Design v Fortune World* [2010] 2 HKC 360 at §§14-19; *Schindler Lifts v Sui Chong Construction & Engineering* [2014] HKDC 1348 at §§64-69.

4. I simplify – but the underlying notion is that where the Model Law (or equivalent domestic legislation) applies, the court "shall" respect an "arbitration agreement" and give effect to it. The language is mandatory. Thus, if an action is brought in a matter which is the subject of an arbitration agreement, then, in effect, the court is obliged to refer such matter to arbitration unless one or more of the exceptions apply - if requested to do so by one of the parties within the stipulated time limit.

5. This general notion has a long pedigree. For example, in England in mediaeval times, proceedings brought in Court in respect of disputes covered by an arbitration agreement would generally be stayed in favour of arbitration to enable the parties to have what was referred to as a *"jour d'amour"* or *"loveday".* Originally, the grant of a stay was a matter which was discretionary. However, as I have stated, where Art 8(1)

(or its equivalent) applies, the requirement to refer the matter to arbitration is mandatory. Thus, if Article 8(1) applies, the court is not concerned with investigating whether the defendant has an arguable basis for disputing the claim: see eg. *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam* [1995] HKCA 626.

6. The following points relating to the scope of Art 8(1) are important.

7. First, it only applies where an *"action is brought"* i.e. there must be an existing *"action".*

8. Second, that action must be one *"… in a matter which is the subject of an arbitration agreement.."* In each case, it is therefore necessary for the court to consider at least two things viz.
    a. Whether there is an "arbitration agreement"; and
    b. Whether, in effect, the *"matter"* is one which falls within the scope of the arbitration agreement.

9. Difficult issues can arise as to the proper approach of the Court particularly where one party asserts that there is no and never was any "arbitration agreement" at all or there is an issue as to whether the dispute is one which falls within the scope of the arbitration agreement.

10. In England, the leading case (in relation to s9(1) of the English Arbitration Act 1996 where the wording is slightly different) as to the proper approach of the court in such circumstances is: *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's LR 522 CA. In summary, the Court of Appeal stated that there were four main options viz.

    a) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay;

    (b) to give directions for the trial by the court of the issue;

    (c) to stay the proceedings on the basis that the arbitrators will decide the issue; and

(d) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for a stay.

This issue has since been considered in a number of cases in England: See eg *El Nasharty v J Sainsbury plc* [2007] EWHC 2618 (Comm), [2008] 1 Lloyd's Rep 360; *Albon v Naza Motor Trading SDN BHD* [2007] EWHC 665 (Ch), [2007] 2 Lloyd's Rep 1; *Dallah Estate & Tourism Hoilding Co v Ministry of Religious Affairs, Govt of Pakistan* [2010] UKSC 46, [2011] 1 AC 763; *JSC BTA Bank v Ablyazov* [2011] EWHC 587 (Comm), ([2011] ArbLR 6. In very broad terms, the approach adopted by the English Courts is that the Court should generally determine both questions (i.e. validity and scope) but, in appropriate circumstances, may stay the proceedings under its inherent jurisdiction to enable the arbitral tribunal to determine for itself these questions (in accordance with the *kompetenz-kompetenz* principle): see *Arbitration Law,* Merkin paras 8.21-8.24. However, as noted by Merkin at para 8.24 fn 12, decisions from other jurisdictions, including Model Law jurisdictions, have been rather more supportive of the arbitral procedure and have not accepted the English approach of regarding initial jurisdictional questions as a matter for the court rather than the arbitrators other than in exceptional circumstances. See also: *"Commentary to the UNCITRAL Model Law"* by Stavros L Brekoulakis and Laurence Shore in *Concise International Arbitration*, Loukas A Mistelis (ed) (Kluwer Law International, 2010) at pp 601–602.

11. The position in Hong Kong has been considered in a number of cases including *Pacific Crown Engineering Ltd v Hyundai Engineering and Construction Co Ltd* [2003] 3 HKC 659 and recently summarised by HHJ Andrew Li in *Schindler Lifts v Sui Chong Construction & Engineering* [2014] HKDC 1348 at §27 as follows:

> *"(1) The test is whether there is a prima facie case that the parties were bound by an arbitration clause. The onus is on the applicant to show this.*
>
> *(2) Unless the point is clear, the court should not attempt to resolve the issue and the matter should be stayed for arbitration.*
>
> *(3) When there is a dispute as to whether there was an arbitration agreement, the onus on the applicant means that he has to prove that there is a good prima facie or plainly arguable case, predicated on cogent, and not dubious or fanciful, evidence that an arbitration agreement existed.*

(4) There are four questions that the court must generally deal with:-

(i) Is there an arbitration agreement between the parties?
(ii) Is the clause in question capable of being performed?
(iii) Is there in reality a dispute or difference between the parties?
(iv) Is the dispute or difference between the parties within the ambit of the arbitration agreement?"

12. A similar approach was recently (August 2015) adopted in Singapore in *Malini Ventura v Knight Capital* [2015] SGHC 225 in the context of an application for a stay under s6 of the Singapore International Arbitration Act where the Judge determined (after a review of the cases and other legal material) that a stay would be granted if the Court were satisfied on a *prima facie* basis that the arbitration agreement existed and the dispute fell within the clause. That test has now been confirmed even more recently (October 2015) by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57.

13. In Hong Kong, with regard to the scope of the arbitration agreement, in *Tommy CP Sze v Li & Fung* [2003] 1 HKC 418 at §§54-57, Ma J (as he then was) held that:-

(1) The court is required to construe the arbitration agreement in order to identify exactly what matters are required to be referred to arbitration.

(2) In particular, 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".

14. This reflects the modern approach in favour of construing the arbitration agreement broadly in favour of "one-stop" adjudication. As stated by Lord Hoffmann in *Fili Shipping Co Ltd and Others v Premium Nafta Products Ltd* [2007] UKHL 40"

"13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

This passage has been referred to and followed in a number of cases in Hong Kong see eg. *T v TJ* [2014] HKCFI 1428 (Mimmie Chan J.).

15. Third, Art 8(1) is only triggered when one of the parties requests the court to refer the matter in question to arbitration. This underlines the general rule that the existence of an arbitration agreement does not, of itself, generally operate as an ouster of the Court's jurisdiction.

16. Fourth, Art 8(1) lays down an important time-limit for a party to request that the matter to be referred to arbitration i.e. the request must be made not later than when submitting his first statement on the substance of the dispute. There is some controversy as to the scope and effect of the latter words i.e. as to what constitutes a *"..first statement on the substance of the dispute…"*. For example, it would appear that in Canada, it has been held that a statement submitted in the arbitral process would qualify: see *Bab Systems v McLurg* [1994] Carswell Ont 4226 at §10. As stated by Waung J in *Louis Dreyfus Trading v Bonarich* [1997] 3 HKC 597 at §21, the tenor of the Model Law is strongly *in favour of arbitration* and the court should not construe the bar to mandatory stay *too narrowly*:

> *"…It is not the intention of the Model Law to take away the strong right of mandatory stay easily by any casual act of the defendant. It seems to me therefore legitimate to construe Article 8 as contemplating the bar to the right to be some formal act of consequence on the part of defendant in the court action who later seeks to arbitrate the dispute.."*.

17. Fifth, the Court will, as appropriate, have to consider whether any of the exceptions apply viz. whether the arbitration agreement is *"…. null and void, inoperative or incapable of being performed".* There is much authority in relation to the scope and effect of these words. For present purposes, I would emphasise that the cases show that the onus is on the party seeking to resist going to arbitration to prove that the arbitration agreement is null, void, inoperative or incapable of being performed. There are perhaps two important points to note viz.

    a. The standard of proof in this respect is said to be "high", denoting "impossibility, or practical impossibility, or certainly not mere inconvenience or

difficulty": *Klockner Pentaplast GmbH v Advance Technology* [2011] 4 HKLRD 262 at §19 per Saunders J.

b. There is an important distinction between the arbitration agreement and the remaining provisions of the underlying contract: see, for example, in Hong Kong, *Paquito Limia Buton v Rainbow Joy* [2007] HKCA 73 at paras 52-54 referring to the classic (English) case of *Heyman v Darwins* [1942] AC 356 in particular at p373. The result is that regardless of the "status" of the underlying contract, the court must consider the discrete position of the independent agreement to arbitrate.

18. Finally, it should be noted that where the Court does grant a stay of the proceedings whether under Article 8(1) of the Model Law (or equivalent domestic legislation) or under its inherent jurisdiction, the court may grant "interim relief" in appropriate circumstances: see, eg. *The Owners of the Vessel "Lady Muriel" v Transorient Shipping Ltd* [1995] HKCA 615 at paras 10-16.

B. Provisional and Conservatory Measures

19. It is important to bear in mind that the arbitration agreement itself and/or the rules of any relevant arbitral institution which govern the arbitration may empower the arbitral tribunal itself to grant provisional or conservatory relief – see UNCITRAL Model Law Articles 17A-17F and e.g. ICC Rules Article 28, LCIA Rules Article 25.

20. So far as the Court itself is concerned, at the international level, the position is governed negatively by Article 9 of the Model Law which provides:

> *"Article 9. Arbitration agreement and interim measures by court*
> *It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

21. Thus, ultimately, the availability of interim measures from the Court will depend on local domestic law. For example:

a. In Hong Kong, the position is generally governed by s.45, Hong Kong Arbitration Ordinance which provides in subsection (2) as follows:

> *"On the application of any party, the Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong, grant an interim measure."*

The remainder of s45 contains further detailed provisions with regard to the grant of such relief.

b. In Singapore, the position is generally governed by Singapore International Arbitration Act s12A which is in different terms but similarly gives the Singapore Courts wide powers to grant interim relief irrespective of whether the place of arbitration is in Singapore.

c. In England, the Court has similar powers to grant interim relief under s37 of the Senior Courts Act 1981 and other more specific relief under s44 of the Arbitration Act 1996.

22. It is important to note that the effect of the decision of the Privy Council in a case on appeal from Hong Kong viz. *Mercedes Benz v Leiduck* [1996] AC 284, was that the Court here in Hong Kong could not grant interim relief in aid of foreign proceedings. A similar conclusion was also reached in Singapore: see *Swift-Fortune v Magnifica Marine SA* [2006] SGCA 42 where the Singapore Court of Appeal held that s12(7) of the Singapore International Arbitration Act applied only to Singapore international arbitrations and did not give power to the court to grant interim measures, including a "freezing" injunction, to assist foreign arbitrations. However, the position in each of these three jurisdictions has now been reversed by legislation with the result that the court in each of these jurisdictions (i.e. Hong Kong, Singapore and England) has power, in an appropriate case, to grant interim relief not only in support of arbitral proceedings taking place within the jurisdiction but also foreign arbitral proceedings. For example, that is now made explicit in Hong Kong in s45(2) of the Hong Kong Arbitration Ordinance provided at least that the requirements set out in s45(5) are satisfied i.e. provided that (a) such foreign arbitral proceedings are capable of giving rise to an arbitral award that may be enforced in Hong Kong; and (ii) the interim

measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the Court.

23. The domestic legislation and/or case law in each jurisdiction also provide detailed "rules" as to the circumstances in which the court may exercise its discretionary power to grant interim relief. For example, in England if the case is one of "urgency", s44(3) of the 1996 Act provides that the court may, on the application of a party, *"…make such orders as it thinks necessary for the purpose of preserving evidence or assets."* However, if the case is not one of urgency, the court's powers are more limited viz. in such case, s44(4) stipulates that the court can act only on the application of a party made with notice and either the permission of the arbitral tribunal or the agreement in writing of the other parties. In any event, s44(5) requires *inter alia* that the court shall act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.

24. Examples of circumstances in which the various courts have, in appropriate circumstances, granted interim relief include:
    a. Appointment of receiver;
    b. Injunctions freezing assets including a worldwide freezing order ("WFO");
    c. More general injunctive relief including, for example:
        i. injunctions restraining breach of contract and infringement of actual or alleged contractual rights by virtue of their status as "assets";
        ii. protection of confidential information;
        iii. restraint of alleged wrongful call on a performance bond.

25. It is important to bear in mind that the grant of any such relief is discretionary and subject to "rules" applicable generally to the grant of such relief eg. the requirement to show a "good arguable case" (or such threshold test as may be appropriate); the "balance of convenience" and, in an appropriate case, the provision by the applicant of a cross-undertaking in damages if necessary fortified by some form of security. In exercising that discretion, the Court will generally be cautious not to usurp the function of the arbitral tribunal and to ensure that the relief granted does not incidentally involve the preliminary (or even final) determination of an issue which the parties have agreed to submit to arbitration: see, for example, *The Owners of the Vessel "Lady Muriel" v*

Transorient Shipping Ltd [1995] HKCA 615 at paras 10-16. However, in an appropriate case, the court will grant relief: see eg. *Muginoho v Vimiu HK* [2012] HKCFI 414.

26. This point was also made forcefully by the recent decision of the Court of Appeal in Singapore in *Maldives Aiports Co Ltd v GMR Male International Airport Pte Ltd* [2013] SGCA 16 where it was held that the Court had no jurisdiction to make an order requiring the respondent to continue to perform a concession agreement pending the outcome of an arbitration in which the validity of the termination of the agreement was in issue because a court could not have ordered specific performance of an agreement of that type and the appropriate remedy was damages.

27. In recent years, a common form of relief granted by the court is an anti-suit injunction i.e. an injunction preventing a party to an arbitration agreement commencing proceedings in a foreign court in breach of such agreement. As stated for example in *Ever Judger v Kroman Celik Sanayi Anonim* [2015] HKFCI 602 at para 79, an anti-suit injunction does not involve any assertion that the court or arbitral tribunal is a superior or better forum either for the resolution of this dispute in question or generally: *"..It seeks simply to uphold the parties' contract to resolve any dispute within the scope of the clause by arbitration…".* Subject to the Court's jurisdiction and discretion, such type of injunction is, in principle, now generally well-recognised and, after a full review of the cases, has recently been upheld by the Supreme Court in England in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35. Importantly, as held in that case, such relief may be granted even in cases where there are no extant or even intended arbitration proceedings. In addition, there is authority in England at least that the court may in appropriate circumstances:

    a. Grant an anti-anti-suit injunction i.e an injunction restraining a party from making an application to the foreign court to restrain the other party from making an application to the English court for an anti-suit injunction; and

    b. Grant an "anti-arbitration" injunction i.e. an injunction to restrain a party from pursuing arbitration proceedings notwithstanding their seat is in another jurisdiction: see *Weissfisch v Julius* [2006] EWCA Civ 218; *Albon v Naza Motor*

Trading Sdn Bhd [2007] EWCA Civ 1124; *Amtrust Europe Ltd v Trust Risk Group SpA* [2015] EWHC 1927 (Comm).

Bernard Eder

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