

**NONSIGNATORIES, GROUPS OF COMPANIES AND GROUPS OF CONTRACTS
IN SELECTED ASIAN COUNTRIES:
A CASE LAW ANALYSIS**

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INTRODUCTION

1. An arbitration agreement only applies to the disputes that fall within its scope (*rationae materiae*) and in relation to the persons who may be considered to be parties to the arbitration agreement (*rationae personae*).
2. The determination of the scope of the arbitration agreement raises specific issues in two different scenarios:
 - In relation to groups of contracts: when the dispute finds its origin in several contracts concluded by the same parties or different parties and which do not all contain the same arbitration clause or, at least, compatible arbitration clauses. The issue arises as to whether it is possible to join and decide together in one procedure all the disputes which arise from the various contracts relating to the same project, or whether it is possible to decide under the arbitration clause contained in one contract the disputes arising under a related agreement that does not contain an arbitration clause or contains a jurisdiction clause².
 - In relation to groups of companies or more generally non-signatories: when the project which is at the heart of the dispute has been negotiated and performed by one or more companies which belong to a group of companies (e.g. with a parent and subsidiary relationship) and/or by one or more individuals, some or all of which have not formally signed the arbitration clause or the contract containing this clause, the issue arises as to

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² See in this respect our analysis of the case law, mostly European and American, in relation to this issue in Bernard Hanotiau, Complex Arbitrations : Multiparty, Muticontract, Multi-Issues and Class Actions, Kluwer Law International, 2005, Chapter II, and in particular the conclusions of the analysis of the case law at pp. 96 and following.

whether such non-signatories may be properly considered to be parties to the arbitration agreement³.

3. The purpose of this article is to analyse the published decisions rendered on these issues in selected Asian countries, namely, Singapore, Mainland China, Hong Kong, India, South Korea, Malaysia and Japan.

SECTION I. SINGAPORE

4. The Singapore Courts have been confronted with the issues of non-signatories, groups of companies and groups of contracts in a number of cases.⁴

SUB-SECTION I. GROUPS OF CONTRACTS

1. The parties to the various agreements are not the same and the agreements do not contain incompatible arbitration clauses

5. With respect to groups of contracts, and the issue of whether an arbitration clause in one contract can be said to apply to disputes arising under other contracts of the group, the position in Singapore has evolved from the strict rule that clear and express reference to the arbitration agreement is required for such incorporation in a case of multiple contracts (the “strict rule”) to the current contextual approach based on an inquiry into the objective circumstances surrounding the entering into of the contracts in question, including the parties’ intentions objectively assessed (the “contextual approach”).
6. The strict rule approach appeared in Singapore jurisprudence in the Court of Appeal’s decision in the case of *Star-Trans Far East Pte Ltd v. Norske-Tech Ltd. and Others*.⁵ Star-Trans, a freight forwarder, had entered into a contract with Norske-Tech and Speditor. The purpose of the contract was for Star-Trans and Speditor to organise ocean carriage of plant and equipment from various parts of the world to a proposed construction site in Riau, Indonesia for Norske-Tech (the company that had undertaken the construction project). That contract contained an arbitration clause. Separately, another company PT Riau, had furnished a performance guarantee to secure Norske-Tech’s performance of its obligation under the above contract. The performance guarantee did not contain an arbitration clause and bore the signatures of Star-Trans, Norske-Tech and PT Riau. Clause 3 of the performance guarantee provided *inter alia* that “all rights of Norske-Tech under the contract may be exercised by PT Riau [...] and the rights of Norske Tech under the

³ See our analysis of the case law, mostly European and American in relation to this issue in the same treatise, Chapter III, and in particular the conclusions of the analysis of the case law at pp. 160 and following.

⁴ The 2013 Arbitration Rules of the Singapore International Arbitration Centre – which are presently under revision – contain themselves several provisions on the multiparty appointment of arbitrators (Rule 9) and joinder of the proceedings (Rule 24 b).

⁵ [1996] 2 SLR (R) 196.

contract may at any time be assigned to PT Riau” (emphasis added). Disputes later arose between Star-Trans, Norske-Tech and PT Riau, as a result of which Star-Trans commenced court proceedings. Norske-Tech and PT Riau applied for a stay of the court proceedings on the grounds that Star-Trans had agreed to submit disputes between the parties to arbitration.

7. The issue before the Court of Appeal was whether PT Riau was a party to the main contract as a consequence of the performance guarantee. The court observed that the performance guarantee was a separate and distinct contractual undertaking vis-à-vis the main contract. Further, the use of general words such as “*all rights*” was not sufficiently clear to permit the incorporation by reference of the arbitration clause into the performance guarantee. The court cited the views of Robert Merkin according to which: “*The approach taken by the courts is that the arbitration clause in the charterparty between owner and charterer is not, in the absence of clear wording, to be incorporated into the contract evidenced by the bill of lading as between owner and consignee. The rule is probably not confined to bills of lading cases, and it has been held in other contexts that an arbitration clause in a contract between A and B is not to be incorporated by reference into a contract between B and C unless clear words of incorporation are used*”.⁶
8. However, in the recent case of *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* (the “*Lufthansa*” case),⁷ the Court of Appeal considered that there may no longer be place for the strict rule in Singapore jurisprudence: “*The strict rule has been overextended impermissibly from its original application in the context of bills of lading and charterparties. It clearly should not be taken as a rule of general application. The question in general is one of construction: did the parties intend to incorporate the arbitration agreement in question by referring, in their contract, to it or to a document containing it? In our judgment, the analysis of whether a particular case is a “one contract” or a “two-contract” case as that notion has developed in English law, while possibly useful in some aspects, is not helpful for our purposes. It is ultimately a matter of contractual interpretation; and in undertaking this exercise [...] the task is one which must be done having regard to the context and the objective circumstances attending the entry into the contract. As the [High Court] rightly noted, “[b]e it incorporation or construction, the court is always seeking to ascertain the parties’ objective intentions”*” (emphasis added).⁸
9. The *Lufthansa* case concerned the challenge of an arbitral tribunal’s ruling on jurisdiction pursuant to Section 10 of the IAA. The case is quite interesting given that the gist of the challenge was whether an arbitration clause contained in one contract between two parties

⁶ Arbitration Law, Lloyd’s 1991, ¶ 4.22. See also *L&M Concrete Specialists Pte Ltd v. United Eng. Contractors Pte Ltd*. [2000] 2 SLR(R) 852 at 18 where the Court held that for an arbitration agreement in one contract to be incorporated into another, it must be brought to the attention of the other contracting party with a “red hand pointing to it”.

⁷ *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.

⁸ [2013] SGCA 55 at ¶34 of the judgment.

bound a third party who subsequently entered into supplemental agreements with the original two parties.

10. Under an agreement between Datamat and Thai Airways International Public Company Ltd (“Thai Airways”) entered into on 12 January 2005, Datamat had agreed to provide to Thai Airways an electronic data protection system (“EDP system agreement”). Two months later, on 11 March 2005, Lufthansa and Datamat entered into a Cooperation Agreement under the terms of which Lufthansa agreed to supply, deliver and commission to Datamat a new Maintenance Repair and Overhaul system (“MRO system”), a component of the EDP system.
11. On 14 March 2005, Datamat entered into a Sale and Purchase Agreement (“S&P Agreement”) with International Research Corporation Public Company Ltd (“IRCP”), a company engaged primarily in the business of providing information and communication technology products and services. Under the S&P Agreement, IRCP had three main obligations:
 - first, it would provide a banker’s guarantee in the name of Datamat in order for Datamat to comply with its obligations under the EDP system agreement;
 - second, it would supply and deliver various hardware and software for the EDP system; and
 - third, it would pay Lufthansa for the goods and services provided by Lufthansa under the Cooperation Agreement.
12. Datamat assigned its rights to receive payment from Thai Airways to the Siam Commercial Bank Public Company Ltd (“SCB”).
13. Datamat subsequently ran into financial difficulties and was unable to meet its payment obligations to Lufthansa. On 8 August 2005, Lufthansa, Datamat and IRCP entered into Supplemental Agreement No. 1 (backdated to 2 May 2005), under the terms of which Datamat was obliged to transfer to IRCP moneys received from Thai Airways. Upon receiving these moneys, IRCP would pay Lufthansa for the works and services rendered by Lufthansa under the Cooperation Agreement.
14. On 3 May 2006, Lufthansa, Datamat and IRCP entered into Supplemental Agreement No. 2. According to this agreement, IRCP would pay Lufthansa for sums payable by Datamat under the Cooperation Agreement directly from IRCP’s bank account with SCB. IRCP would disburse the payments to Lufthansa after payments by Thai Airways to Datamat were received by Datamat and transferred to IRCP’s SCB account.
15. The Cooperation Agreement contained a multi-tiered dispute resolution mechanism providing *inter alia* that “*all disputes arising out of this Cooperation Agreement, which cannot be settled by mediation [...] shall be finally settled by arbitration to be held in*

Singapore in the English language under the Singapore International Arbitration Centre Rules". The Supplemental Agreements did not contain an arbitration clause.

16. It appeared that IRCP refused to pay Lufthansa. As a result, on 24 February 2010, Lufthansa informed Datamat and IRCP that it was terminating the Cooperation Agreement and Supplemental Agreements No. 1 and No. 2 (collectively, the "Supplemental Agreements"). On 13 May 2010, Lufthansa filed its notice of arbitration with the Singapore International Arbitration Centre. IRCP argued that it was not a party to the arbitration agreement, an objection that the tribunal dismissed. In its decision dated 1 June 2012, the Tribunal held that the Cooperation Agreement and the Supplemental Agreements were to be treated as one composite agreement between Lufthansa, Datamat and IRCP. Accordingly, the arbitration agreement found in the Cooperation Agreement applied to the Supplemental Agreements, to which IRCP was indisputably a party. The decision was challenged by IRCP before the High Court.
17. Lufthansa's position was that IRCP was bound by the arbitration agreement as Lufthansa, Datamat and IRCP had intended for the Supplemental Agreements to be an extension of the Cooperation Agreement. Lufthansa also submitted that the Cooperation Agreement and the Supplemental Agreements were in fact one composite agreement; in other words, the contract between Lufthansa, Datamat and IRCP comprised of the Cooperation Agreement and the Supplemental Agreements and that, on this analysis, there was nothing to "incorporate" into the Supplemental Agreements as per the strict rule. Conversely, IRCP's position was that the Supplemental Agreements were separate and distinct from the Cooperation Agreement and that, consequently, the arbitration clause contained in the Cooperation Agreement did not apply to the Supplemental Agreements.
18. The High Court⁹ and subsequently the Court of Appeal were in agreement that the true issue was: "*what were Lufthansa, Datamat and IRCP's common intentions, if any, when objectively ascertained, as to the applicability of the [multi-tiered dispute resolution mechanism] to resolve their disputes [...] at the time when all of them entered into the Supplemental Agreements?*".¹⁰ The Court of Appeal emphasised that the task was one which must be done having regard to the context and the objective circumstances attending the entry into the contract.¹¹ However, as explained below, the Court of Appeal did not agree with the High Court's findings on the object and purpose of the Supplemental Agreements.
19. The High Court took the view that "*the object and purpose of the Supplemental Agreements was to enforce Lufthansa's right to payments under the Cooperation Agreement [and that the] Supplemental Agreements transferred Datamat's payment obligations under the*

⁹ *International Research Corp v Lufthansa Systems Asia Pacific Pte Ltd and Another* [2013] 1 SLR 973.

¹⁰ *Ibid.* at ¶48.

¹¹ [2013] SGCA 55, at ¶34 of the judgment. See *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

Cooperation Agreement to IRCP".¹² The High Court went on to hold that "it is clear that IRCP's payment obligations to Lufthansa are inextricably tied to Datamat's obligations under the Cooperation Agreement. A dispute over an invoice issued under the Cooperation Agreement would invariably affect IRCP's payment obligations under the Supplemental Agreements. IRCP's payment obligations are not free-standing and unconnected to the terms of the Cooperation Agreement".¹³ The High Court therefore decided that, having adequate regard to the plain language of the Supplemental Agreements and the relevant factual matrix, the parties (i.e. Datamat, Lufthansa and IRCP) had intended the same dispute resolution mechanism in the Cooperation Agreement to bind all three parties to the Supplemental Agreements.

20. The Court of Appeal,¹⁴ after having considered the relevant factual matrix, disagreed with and overturned the finding of the High Court that the parties had intended that the dispute resolution mechanism in the Cooperation Agreement was to be incorporated as part of the Supplemental Agreements. IRCP was therefore not bound by the dispute resolution mechanism in the Cooperation Agreement and the arbitral tribunal did not have jurisdiction over Lufthansa and its dispute with IRCP. It appears that the Court of Appeal came to this conclusion because of the manner in which it characterised the purpose of the Supplemental Agreements: "*The Supplemental Agreements were entered into not with a view to [IRCP] guaranteeing or undertaking any obligation under the Cooperation Agreement. Instead, [IRCP]'s only substantive obligation was in effect to act as a payment agent. The primary contractual arrangement between Datamat and [Lufthansa] as reflected in the Cooperation Agreement remained intact. Significantly, the Supplemental Agreements were to be annexed to and made part of the Cooperation Agreement, to which only Datamat and [Lufthansa] were party. The point, shortly put, is that the Cooperation Agreement, which was between [Lufthansa] and Datamat only, remained the only contract dealing with the rights and obligations between them, save that in relation to payment, [IRCP] agreed to act as a payment agent in accordance with the terms of the Supplemental Agreements*" (emphasis added).¹⁵

2. The parties to the various agreements are the same and the agreements do not contain incompatible arbitration clauses

21. The *Lufthansa* case is particularly interesting since IRCP was not a party to the Cooperation Agreement. The issue is generally easier to resolve when the parties to the various agreements are the same, the agreements are closely connected and none of them contains an incompatible arbitration or jurisdiction clause. One example is *Tjong Very Sumito and Others v. Antig Investments Pte Ltd*.¹⁶ In that case, the appellants and the

¹² [2013] 1 SLR 973, at ¶60 of the judgment.

¹³ *Ibid.* at ¶62 of the judgment.

¹⁴ *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.

¹⁵ *Ibid.* at ¶38 of the judgment.

¹⁶ [2009] 4 SLR(R) 732; [2009] SGCA 41.

respondent entered into a Shares Sale and Purchase Agreement (“SPA”) which contained a clause providing for disputes to be resolved by arbitration. The same parties subsequently entered into four further supplemental agreements. Each supplemental agreement was expressed to be supplemental to the SPA. A dispute arose as to whether a payment arrangement under the fourth Supplemental Agreement (that did not contain an arbitration clause) was subject to the arbitration clause in the SPA. The Court of Appeal held that it was, since the fourth Supplemental Agreement “*could not exist independently without the SPA; nor would it make sense on its own. Like the first three supplemental agreements, its purpose was to supplement and/or modify certain terms of the SPA*”¹⁷. The dispute therefore arose in connection with the SPA. The Court concluded that the intention of the parties to be bound by the arbitration clause in the SPA extended to the fourth supplemental agreement.

22. In *Coop International Pte Ltd. v. Ebel SA*,¹⁸ the parties had entered into a distribution agreement which contained an arbitration clause. Subsequently, the parties terminated the distributorship agreement by entering into a termination agreement that did not contain an arbitration clause. They then entered into a settlement agreement. A dispute arose as to the payment of sums under the settlement agreement as a result of which Coop commenced proceedings in the Singapore courts. Ebel applied for a stay of the proceedings on the basis of the arbitration agreement in the distributorship agreement. Coop objected, stating that the dispute did not arise out of the distributorship agreement which had been terminated; instead, the parties’ respective rights were now governed by the settlement agreement.
23. Before reaching its decision, the High Court enunciated the following principles :

“ If the parties subsequently enter into a new agreement or a series of new agreements which do not have any arbitration clause, and the dispute concerns these new agreements and not the original distributorship agreement, it becomes much less clear (a) whether the dispute in fact has any connection at all with the original agreement; and (b) whether the arbitration clause contained in the original agreement is applicable at all to the later agreements. [...] It is therefore a question of construction whether the new agreement is merely supplemental to or a variation of the first agreement, or it is one which is wholly separate and independent of the first agreement. [...] Where two agreements can be regarded substantially as one agreement rather than two separate agreements, then it is likely that the arbitration clause in one agreement would govern disputes arising out of the other agreement. However, if in reality, the two agreements are distinct and separate agreements which cannot be viewed properly as one agreement with varied or additional terms, it would be much less likely for an arbitration clause in one agreement to be construed as having been imported or incorporated into the other agreements without there being some appropriate words in either agreement indicating that there was such an intention by the parties to have it construed in that way. There is no presumption that the

¹⁷ At ¶67 of the judgment.

¹⁸ [1998] 1 SLR(R) 615; [1998] SGHC 425.

parties, after having agreed to refer to arbitration disputes arising out of one agreement must necessarily have agreed also to refer disputes in all subsequent agreements to arbitration”.¹⁹

24. On the basis of these principles, the High Court decided that the settlement agreement was not a variation of the distributorship agreement since it did not make any sense to vary or supplement an agreement which had been terminated. At the time the settlement agreement was concluded, it was clear that the parties considered the distributorship agreement “dead”. The absence of a new arbitration clause or any reference to the arbitration clause in the distributorship agreement was an indication that the parties did not intend to resolve disputes under the settlement agreement by arbitration.²⁰

3. Whether or not the parties are the same, the various agreements contain incompatible dispute resolution clauses

25. Whether or not the parties to the various agreements are the same, the fact that one agreement contains a jurisdiction clause makes it impossible to have the disputes arising thereunder subject to an arbitration agreement contained in another contract, unless such disputes undoubtedly fall within the scope of the arbitration agreement. This is illustrated by the Court of Appeal’s decision in *Astrata (Singapore) Pte Ltd v. Portcullis Escrow Pte Ltd and another and other matters*.²¹ In that case, Astrata had entered into a supply agreement with Tridex to develop and supply an electronic plate system to Tridex. Pursuant to this agreement, Astrata, Tridex and a third entity PEPL entered into an escrow agreement. Under this escrow agreement, PEPL was to hold in escrow certain assets. PEPL was obliged to deliver the escrow property to Tridex if a stipulated triggering event occurred. The supply agreement contained an arbitration clause. The escrow agreement contained a non-exclusive jurisdiction clause in favour of the Singapore courts. Considering that Astrata had breached its obligations, Tridex terminated the supply agreement and wrote to PEPL stating that it was invoking its rights under the escrow agreement. This was disputed by Astrata, which instructed PEPL not to release the escrow property to Tridex.
26. PEPL brought the matter before the Singapore court to determine whether any triggering event had occurred. Astrata applied to stay the court proceedings on the ground that its dispute with Tridex was covered by the arbitration clause in the supply agreement. According to Astrata, the non-exclusive jurisdiction clause in the escrow agreement only covered trilateral disputes between Astrata, Tridex and PEPL. Tridex’ position was that the

¹⁹ ¶¶26 and ¶¶30-31 of the judgment.

²⁰ See by contrast SIAC Award of 21 October 2011 in *Singapore Arbitral Awards 2012*, volume 1, p. 127, where the parties had concluded a sales contract containing an arbitration agreement and subsequently entered into a settlement agreement that did not contain an arbitration clause. The arbitral tribunal rejected the Respondent’s objection to the jurisdiction of the tribunal on the basis that the Claimant had expressly reserved its right to bring its claims against the Respondent pursuant to the terms of the sales contract in the event of the Respondent’s breach of the settlement agreement.

²¹ [2011] 3 SLR 386; [2011] SGCA 20.

dispute over escrow assets had been carved out from the supply agreement and had to be dealt with exclusively under the non-exclusive jurisdiction clause in the escrow agreement.

27. The Court of Appeal agreed with Tridex. The court pointed out that it was not rational for a bilateral dispute between Astrata and Tridex over whether a triggering event had taken place under the escrow agreement to be determined by arbitration and for a trilateral dispute involving Astrata, Tridex and PEPL concerning the same issue to be determined by the Singapore courts. Moreover, the entire agreement clause in the subsequent escrow agreement suggested that the escrow agreement and the supply agreement were intended to apply to “their respective spheres”. The court therefore held that a dispute over whether a triggering event had occurred was a matter to be determined in accordance with the escrow agreement. On that basis, the non-exclusive jurisdiction agreement and not the arbitration agreement applied.²²
28. In *Econ Piling Pte Ltd v NCC International AB*,²³ the two parties had entered into a joint venture agreement which contained an arbitration clause. Less than a year later, Econ Piling faced difficulties and the two parties then entered into a variation agreement which contained an exclusive jurisdiction agreement in favour of the Singapore courts. A dispute arose and the issue before the High Court was which one of the two dispute resolution clauses was operative.
29. After observing that the purpose of the variation was to “reconstitute, in very significant ways, the commercial relationship between the parties”, the court held that :

“... it is counterintuitive for two contracts that are meant to be read together to have different dispute resolution regimes. Therefore unless there is a clear and express indication to the contrary, it may usually be assumed that parties to two closely related agreements involving the same parties and concerning the same subject matter would not have intended to refer only disputes arising under one contract to court and not those arising under the second contract.”²⁴ [...] A different approach would result in the wholly uncommercial position that some disputes under what is in substance a composite agreement between the parties, are to be referred to arbitration while others are to be

²² See also *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821; [2010] SGHC 31 in which the High Court decided that “Where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the nature of the claim and the particular agreement out of which the claim arose ought to be considered. Where a claim arose out of or was more closely connected with one agreement than the other, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter was on a literal reading, wide enough to cover the claim” (¶7 of the judgment). Considering that the dispute arose due to the non-payment of moneys into the escrow account as required by the Escrow Agreement, the Court decided that the jurisdiction clause in the latter prevailed over the arbitration clause contained in the main contract and consequently dismissed the application to stay the court proceedings.

²³ [2007] SGHC 17.

²⁴ Referring to the decision of Tay Yong Kwang J in *Mancon (BVI) Investment Holding v. Heng Holdings SEA* [2000] 3 SLR 220.

*resolved in court. This difficulty becomes especially acute, even impossible, in situations such as the present where a subsequent agreement varies an earlier agreement, and where it is therefore conceivable, even likely, that many disputes might straddle both contracts”.*²⁵

30. On this basis, the court held that the exclusive jurisdiction clause in the variation agreement applied to all disputes arising under both the joint venture agreement and the variation agreement.

SUB-SECTION II. GROUPS OF COMPANIES AND THE ISSUE OF NON-SIGNATORIES

31. Singapore courts and arbitral tribunals sitting in Singapore have been confronted in a number of cases with the issue of whether the scope *rationae personae* of an arbitration agreement may be interpreted to include companies or individuals who are not formally signatories to the arbitration agreement even though they are involved in some way in the underlying transaction or project.
32. In *The Engedi*,²⁶ the Singapore High Court affirmed that the process of arbitration is consensual and that consequently a party may not be forced to arbitrate against its will. Similarly, in *Go Go Delicacy Pte Ltd v Corona Holdings Pte Ltd*,²⁷ the High Court disallowed an application for a stay of proceedings in favour of arbitration, holding that: “A Court cannot compel non-parties to an agreement that contains an arbitration clause to arbitrate their dispute merely because one defendant is a party to that agreement”.²⁸ Although that decision was later reversed on appeal, the Court of Appeal approved the above dictum.²⁹ The High Court recently reaffirmed the principle in *Silica Investors Ltd. v. Tomolugen Holdings Ltd. and others*³⁰: “Under Singapore law, the referral of matters to an arbitrator is a purely consensual process. There is no power for me to otherwise order that the parts of the dispute not caught by the arbitration clause and those against the other defendants not party to it to also be heard at an arbitration ...”.
33. It is therefore a well-established principle of law in Singapore that entities cannot be compelled to arbitrate pursuant to an arbitration agreement to which they are not parties. The corollary is also generally true - that is, third parties cannot compel arbitration by invoking an arbitration agreement to which they are not parties. This principle is a natural

²⁵ At ¶¶16-17 of the judgment.

²⁶ [2010] SGHC 95.

²⁷ [2008] 1 SLR 165.

²⁸ At ¶26 of the judgment. However, Singapore courts may enforce foreign awards rendered against a non-signatory to the arbitration agreement as long as the arbitral tribunal’s decision to “extend” the scope of the arbitration agreement to the non-signatory is valid under the foreign law governing the arbitration agreement: see *Aloe Vera of America, Inc. v Asianic Food (S) Pte Ltd and Another* [2006] 3 SLR (R) 174; [2006] SGHC 78.

²⁹ *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at 7.

³⁰ [2014] SGHC 101 at 138.

offspring of the rule in contract that a third party cannot enforce rights arising under a contract to which he is not a party (“the privity rule”).³¹

34. A leading case on this issue is *Kiyue Co Ltd v Aquagen International Pte Ltd*.³² In that case, PGSI and KCL were major and minority shareholders of AIPL respectively. Separately, PGSI, AIPL and a third company were shareholders of Anchorville Pte Ltd (“Anchorville”) pursuant to a Shareholders’ Agreement (the “SHA”). KCL, however, was not a shareholder of Anchorville. The SHA included an arbitration clause. Subsequently, PGSI claimed that the SHA had been frustrated and that it was released from its obligations thereunder. PGSI commenced arbitration proceedings against AIPL and ordered AIPL not to contest the claim. KCL, as minority shareholder of AIPL, tried to intervene in the arbitration being of the view that PGSI’s conduct was unfair. Since it was not party to the SHA, KCL applied under Section 216 A of the Companies Act for leave to intervene in the arbitration. The High Court disallowed the application. Implicit in its judgement was the acceptance that KCL had no right to participate in the arbitration proceedings.
35. However, the privity rule is not absolute. There are several situations in which non-signatories may be considered a party to the arbitration agreement. Such situations may arise by way of incorporation by reference of the arbitration agreement; an assumption of rights or liabilities to a contract with an arbitration clause (for example, assignment or novation); where the arbitration agreement was entered into by an agent; the piercing of the corporate veil on the basis of the *alter ego* principle; or where the claims alleged by the non-signatory against a party to the contract containing the arbitration clause are so intertwined with that contract that the doctrine of equitable estoppel applies to prevent the party to the contract from denying the non-signatory’s right to participate in the arbitration.³³ An exception to the privity rule has also been created to allow a third party who has been granted the right to enforce a contractual term pursuant to section 2 of the Contracts (Rights of Third Parties) Act (Cap 53B) (“CRTPA”) to pursue claims against a “promissor”³⁴ in arbitration within the scope of section 9 of the CRTPA.³⁵
36. Non-signatories may also be joined as parties to the arbitration if all the parties have expressly or impliedly consented to the joinder. Such consent will more easily be found when it is the third party that invokes the arbitration agreement rather than in the opposite scenario where signatories of the arbitration agreement try to compel non-signatories to

³¹ *Jiang Haiying v Tan Lim Hui and Another Suit* [2009] 3 SLR(R) 13; [2009] SGHC 42 at ¶¶19 and 22. See also Lawrence Boo in 4 *SAL Ann Rev* 48 (2003).

³² [2003] 3 SLR 130; [2003] SGHC 156.

³³ On the scope of application of the doctrine of equitable estoppel in the context of arbitration, see *Jiang Haiying v Tan Lim Hui*, *op. cit.* at footnote 31, at ¶¶25 to 42 of the judgment

³⁴ A “promissor” is defined in section 7 of the CRTPA to mean “the party to the contract against whom the term is enforceable by the third party”.

³⁵ *Jiang Haiying v Tan Lim Hui*, *op. cit.* at footnote 31, at ¶23 of the judgment, referring to *Halsbury’s Laws of Singapore*, vol. 2 at ¶20.020.

arbitrate. The issue was recently addressed by an SIAC arbitration tribunal whose awards gave rise to various proceedings before the Singapore courts.³⁶

37. In SIAC Arbitration No. 062 of 2008,³⁷ the dispute arose out of a failed joint venture between two groups of companies, the A group and the L group, to provide direct-to-home multi-channel digital satellite pay television, radio and interactive multimedia services in Indonesia. The eight Claimants were part of the A group, while the three Respondents were part of the L group. In 2005, five companies of the A group entered into a Subscription and Shareholders Agreement (the “SSA”) with three companies of the L group. The sixth to eighth Claimants were not party to the SSA but the SSA contemplated their involvement in the provision of the services envisaged under the joint venture, as evidenced by their participation in the provision of services, equipment and funding to the joint venture vehicle to carry out direct-to-home services in anticipation of the closing of the SSA. A dispute arose and the five companies of the A group (all of which were party to the SSA) together with the sixth to eighth Claimants started an arbitration against the three companies of the L group (all of which were also party to the SSA) under the SIAC Rules 2007. The place of arbitration was Singapore. The arbitral tribunal issued five awards comprising of one award on jurisdiction and four awards on the merits. In the award on jurisdiction, the arbitral tribunal decided that it had jurisdiction over all the parties to the reference.
38. The Claimants obtained leave to enforce the awards in Singapore. The enforcement orders were purportedly served on the respondents in Indonesia. After expiry of the period to set aside the enforcement orders, the Claimants entered judgement against the Respondents. The Respondents subsequently brought applications to challenge the enforcement of the awards, on the grounds that the tribunal had no jurisdiction over the sixth to eighth Claimants in the arbitration. The Singapore High Court dismissed the application on the grounds that the Respondents had not sought a review of the award on jurisdiction pursuant to Article 16 of the Model Law and had not filed an application to set aside the awards within the statutory time limit (“threshold issues”).³⁸ Accordingly, the High Court did not proceed to consider the substantive question of the tribunal’s jurisdiction over the sixth to eighth Claimants in the arbitration.
39. The Singapore Court of Appeal overturned the High Court decision.³⁹ On the threshold issues, the Court of Appeal found that the Respondents could resist enforcement on jurisdictional grounds, even though they had not challenged the tribunal’s jurisdictional ruling at an earlier stage. According to the Court of Appeal, under the scheme of the Model Law as applicable in Singapore, there is a “choice of remedies” available to a party seeking

³⁶ SIAC Arbitration No. 062 of 2008 (ARB062/08/JL), unpublished.

³⁷ *Ibid.*

³⁸ See *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636.

³⁹ *PT First Media TBK v. Astro Nusantara International BV & others* [2013] SGCA47.

to raise an objection against an arbitral award on the grounds of jurisdiction. It can choose to pursue “active” remedies at the seat of the arbitration (i.e. by way of an application for setting aside of the award), or wait to resist “passively” at the place of enforcement (i.e. by way of an application to refuse the recognition and enforcement of the award). On the issue of joinder, the Court of Appeal held that the Tribunal did not have the power under the SIAC Rules to join to an arbitration third parties who are not parties to the arbitration agreement. Consequently, the Tribunal had no jurisdiction to make an award in favour of the sixth to eight Claimants. Leave to enforce the awards on the merits was therefore refused in relation to the tribunal’s orders in the awards that purported to apply as between the sixth to eighth Claimants and the Respondents.

40. The issue of joinder was at the core of the award on jurisdiction (made in 2009). The Respondents objected to the joinder of the sixth to eighth Claimant on the basis that they were strangers to the arbitration agreement in the SSA. On this question, the tribunal found that the joinder of the sixth to eighth Claimants was a matter that could be determined in accordance with its powers under Rule 24(b) of the SIAC Rules 2007, which provided as follows:

“Additional Powers of the Tribunal

In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to allow other parties to be joined in the arbitration with their express consent and make a single final award determining all disputes among the parties to the arbitration”.

(emphasis added)

41. As explained below, the tribunal’s decision turned on the meaning of the phrase “*other parties*”. The Respondents argued firstly that the reference to “*other parties*” in Rule 24(b) of the SIAC Rules 2007 referred to persons who were parties to the arbitration agreement but had not hitherto joined or been involved in the individual reference to arbitration and secondly that Rule 24(b) required not only the consent of the party to be joined but also of all other parties to the individual reference to arbitration. These objections were dismissed by the tribunal. The tribunal decided on the first objection that the power “*to allow other parties to be joined in the arbitration*” had to be understood as referring to “*parties who are not already parties to the agreement to refer the dispute which is the subject of the reference*”, and not “*other parties to the agreement to refer future disputes*”. In other words, the phrase “*other parties*” in Rule 24(b) referred to non-parties to the arbitration agreement, and not persons who were parties to the arbitration agreement but had not hitherto joined or been involved in the individual reference to arbitration. With respect to the second objection, after noting that the sixth to eighth Claimants had expressly consented to being joined in the arbitration, the tribunal decided that there was no scope for implying into Rule 24(b) the requirement that there should be a further expression of consent by all parties to the reference before a third party can be joined. By agreeing to arbitrate in accordance with the SIAC Rules, the parties had already given their consent to joinder of “*other parties*” with the express consent of the other parties and the permission of the

arbitral tribunal. According to the tribunal, the Respondents' interpretation of Rule 24(b) did not make sense:

“To have drafted a rule when required, beyond the consent given by agreeing to an arbitration in accordance with the rules, some further express consent by all parties to the arbitration, would have produced a result of little or no practical value [...] No rule is required to make this happen [...] Indeed it is difficult to conceive circumstances in which an arbitral tribunal would consider it could properly refuse to allow joinder where all parties concerned wished it to take place. On the other hand, to promulgate a rule, as Respondents say SIAC has done, which allowed one party to the proceedings to veto the joinder of a third party with the consent of everyone else concerned would have been simply pointless. That is the position without such a rule and is precisely the mischief which the international arbitration community has been searching for means to avoid”.

42. Having concluded that it had the power to allow the joinder of the sixth to eighth Claimants, the tribunal turned to consider whether it should exercise its discretion in favour of doing so and decided in favour of joinder. It considered that there was a close connection between the claims advanced by the first to fifth Claimants and the sixth to eighth Claimants, as well as between the Respondents' defences and counterclaims to the claims of all the Claimants. Joinder was therefore *“desirable and necessary in the interests of justice and to avoid so far as possible the risk of inconsistent findings”*.
43. The Court of Appeal disagreed. It accepted the Respondents' (the Appellant before the Court of Appeal) argument that Rule 24(b) acted as a procedural power and not as a means for a tribunal to extend its jurisdiction, holding that *“[t]he proper construction of [Rule 24(b)] is that it permits other parties to the arbitration agreement who are not yet part of the arbitration reference to be joined into an existing arbitration reference”*.⁴⁰ In other words, Rule 24(b) was merely a procedural mechanism for such joinder. Accordingly, a tribunal could not extend its jurisdiction to disputes over which it had no jurisdiction by simply purporting to rely on Rule 24(b), save with the explicit consent of all the parties. As for the case where the parties to the arbitration agreement have adhered to institutional rules such as the LCIA Rules (see Art 22(1)(h) of the 1998 LCIA Rules) or the Swiss Rules (see Art 4(2) of the 2012 Swiss Rules), both of which explicitly and unambiguously confer on the putative tribunal the power to join to the arbitration non-parties to the arbitration agreement without first obtaining the consent of all the parties who are part of the extant arbitration, the Court of Appeal reserved its views as these rules were not before the court.⁴¹ However, the Court of Appeal observed, as a matter of principle, that *“[t]he forced joinder of non-parties is [...] a major derogation from the principle of party autonomy,*

⁴⁰ At ¶ 198 of the judgment.

⁴¹ At ¶ 176 and ¶¶ 180-181 of the judgment.

which is of foundational importance because all arbitrations must proceed in limine from an agreement to arbitrate".⁴²

44. With respect to the tribunal's interpretation of Rule 24(b), the Court of Appeal noted that interpreting "*other parties*" as referring to parties other than those in the agreement to arbitrate was "*a linguistic election which derives no clear support from the rest of the 2007 SIAC Rules*".⁴³ Rule 24(h), for example, uses the phrase "*other parties*" where "*other*" clearly serves to indicate another party to the arbitration reference; and Rule 34.2 uses "*third party*" to the exact same effect as the tribunal's understanding of "*other parties*".⁴⁴ Moreover, Rule 24(b) has been amended in the 2013 version of the SIAC Rules to unequivocally state that only other parties to the arbitration agreement can be joined to the reference, i.e., the precise proposition which the tribunal thought to be so obvious as to be unworthy of its inclusion in the SIAC Rules.⁴⁵

SECTION II. MAINLAND CHINA

Introduction

45. In Mainland China, the only statutory document concerning the issue of multiparty disputes is the "Interpretation of the Supreme Peoples' Court (SPC) concerning Some Issues on Application of the Arbitration Law of the Peoples' Republic of China (PRC)", issued by the SPC in August 2006 which provides that an arbitration agreement can be extended to non-signatories in the case of succession, inheritance and debt assignment. For other situations, the decision on the issue will depend on the court's interpretation of the scope of the arbitration agreement.
46. Chinese courts have been confronted to the issue of non-signatories, groups of companies and groups of contracts and more generally to the issue of who is party to the arbitration agreement.
47. The first part of this section will address the case law on agency and representation, universal and individual transfers and incorporation by reference and subrogation. The second part will analyse cases concerning the so-called "extension" of the arbitration

⁴² At ¶ 188 of the judgment.

⁴³ At ¶ 190 of the judgment.

⁴⁴ At ¶¶ 187, 190 and 191 of the judgment.

⁴⁵ At ¶¶ 194 and 173 of the judgment. The new Rule 24(b) in the 2013 version of the SIAC Rules provides that "*... the Tribunal shall have the power, upon application of a party, to allow one or more third parties to be joined in the arbitration, provided that such a person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties*" (emphasis added).

agreement to non-signatories. The third part will be devoted to the issue of groups of contracts⁴⁶.

SUB-SECTION I. AGENCY, TRANSFERS, INCORPORATION BY REFERENCE AND SUBROGATION

I. Agency and representation

48. Chinese courts apply the theory of agency. Chinese civil law provides that a contract concluded by agency or representation can bind the principal as long as the agent or representative has authority⁴⁷. In cases where the agent lacks authority, the situation is more delicate and in many cases, Chinese courts have reached the conclusion that the principal was not bound⁴⁸. The 1999 PRC Contract Law has incorporated the ostensible authority theory in Article 49 which provides that “*where the person lacking agency authority, acting beyond his agency authority, or whose agency authority was extinguished, concluded a contract in the name of the principal, if it was reasonable for the other party to believe that the person performing the act had agency authority, such act of agency is valid*”. Chinese courts have applied the theory of ostensible authority even before the promulgation of the 1999 Contract Law. The problem of the theory in practice is that it is strictly applied and in many cases Chinese courts have determined that circumstances did not warrant its application.

II. Universal and individual transfers

49. The fact that a legal successor is bound by an arbitration agreement concluded by his predecessor has been confirmed in Chinese case law. In *Qinghua Tongfang Inc. & Qinghua Tongfang Disc INC. v. Yuguyoujia*⁴⁹, Qinghua Tongfang Inc., National Engineering Research Centre of Qinghua University and Yuguyoujia, entered into a contract containing an arbitration clause. Later, the National Engineering Research Centre was restructured and its name was changed to Qinghua Tongfang, Inc. The SPC ruled that the latter should be bound by the arbitration clause in the contract since it inherited all the rights and obligations of the National Engineering Research Centre.

⁴⁶ Most of the material in this section is to be found in an article by Fei Lanfang, “Multi-Party Disputes and Referral to Arbitration under Chinese Law” in [2009] *Int. A.L.R.*, p. 151.

⁴⁷ General Principles of Civil Law of the PRC, Article 63. For an example, see *Aoetker Germany v. Nanjing Branch of China Sino-Trans*, in Wan E’xiang (Ed.), *Guide on Foreign-Related Commercial and Maritime Trial (GFCMT)*, Beijing, Peoples’ Court Press, 1, 2002, pp. 133-142.

⁴⁸ See for example *British Glencore Co. Ltd. v. Chongking Mechanical Equipment Import and Export Corporation*, in Wan E’xiang (Ed.), GFCMT, 1, 2001, p. 67, rejecting the application of the theory of ostensible authority and *Dewei Enterprise Co. Ltd. v. Rongcheng Fengshengyuan Food Co. Ltd.*, in Wan E’xiang (Ed.), GFCMT, 10, 2005, pp. 107-110, where the SPC refused to apply the theory of representation since the agent had not been authorized by his principal to enter into the contract, even though he was the legal agent of that company.

⁴⁹ Cited in Wan E’xiang (Ed.), GFCMT, 5, 2003, pp. 50-57.

50. This approach was subsequently confirmed in Article 8 of the Interpretation of the SPC concerning Some Issues on Application of the Arbitration Law of the PRC according to which :

“Where a party concerned is merged or divided after concluding an agreement for arbitration, the agreement for arbitration shall be binding upon the successor of its rights and obligations. Where a party concerned has died after concluding an agreement for arbitration, the agreement for arbitration shall be binding upon the inheritor who inherits his rights and obligations in the matter to be arbitrated”.

51. For the transferees of a contract or a debt, Article 9 further provides that :

“Where the credits or debts are entirely or partially assigned, the agreement for arbitration shall be binding upon the assignee, unless the parties concerned have otherwise agreed, or the assignee explicitly objects to the assignment of the credits or debts or does not know there is a separate agreement for arbitration”.

52. It appears however that the assignment of shares might be treated in a different way. For example, in *Yangbo Bao v. Chongqing Shangqiao Industries CO et al.*⁵⁰, one respondent refused to comply with an award condemning all respondents to pay certain sums on the basis of a joint venture agreement containing an arbitration clause. That respondent claimed that it was not a party to the joint venture contract but had only received shares transferred to it by other parties. The SPC accepted the respondent’s position and decided that the award was not enforceable insofar as it adjudicated matters concerning transfer of shares to that respondent.

III. Incorporation by reference and subrogation

53. It appears that Chinese law allows the incorporation of an arbitration agreement by reference to another contract including an arbitration clause in circumstances where the terms were readily available to the parties and the arbitration clause was clear and obvious from the referred contract⁵¹.
54. However, in cases where two contracts and three parties are involved, such as charter party and bill of lading cases, Chinese courts always require the express consent of the third party who did not sign the relevant charter party⁵².
55. In *Beijing (China) Ailisheng Import & Export Co. ltd. v. Songa Shipholding PTE Ltd. & Solar Shipping & Trading S.A.*⁵³, the consignee, Beijing Ailisheng, started proceedings

⁵⁰ Cited in Wan E’xiang (Ed.), GFCMT, 5, 2003, pp. 30-42.

⁵¹ Fei Lanfang, *op. cit.*, p. 155 and reference cited.

⁵² *Idem.*

⁵³ Cited in Wan E’xiang (Ed.), GFCMT, 14, 2007, pp. 73-79.

before the Wuhan Maritime Court against the carrier, Songa Shipholding, and the actual carrier, Solar Shipping, for damage to the consignment following a voyage from America to China. The carrier objected to the jurisdiction of the Maritime Court, by referring to the arbitration clause included in the bill of lading according to which : “*in the event charter party is not sufficiently incorporated above, any and all disputes arising out of this bill are to be arbitrated in London or New York, at Owner’s/Carrier’s opinion, subject to the SHELLVOY 84 arbitration clause*”.

56. The SPC decided that this clause was an arbitration clause itself rather than an incorporation clause. It further decided that the arbitration agreement expressed the unilateral intention of the charterer and therefore could not bind the holder of the bill of lading. Consequently, the Wuhan Maritime Court had jurisdiction.
57. The express consent of the third party was also required in *Shenzhen Branch of Chinese People Property Insurance INT. v. Guangzhou Shipping Company*, a case involving subrogation⁵⁴. In that case, the Shenzhen Branch of Chinese People Property Insurance INT., that was subrogated to the rights of the receivers, initiated proceedings before the Guangzhou Maritime Court against Guangzhou Shipping Company, the owner of the vessel “M/VLIANG SHANV. 41” with respect to damage to a consignment of fishmeal following the voyage from Peru to Guangzhou. Respondent objected to the jurisdiction of the court, invoking an arbitration clause incorporated in the bill of lading. The SPC decided that unless the insurer accepted the arbitration clause expressly or entered into a new arbitration agreement with the owner after the dispute arose, the clause included in the bill of lading could not be binding upon it since it was not the party who negotiated and concluded the arbitration agreement.
58. Similar rulings can also be found in numerous other cases where the SPC held that without an express note on the face of a bill of lading, the arbitration clause in a charter party cannot be automatically incorporated into the bill of lading.⁵⁵

SUB-SECTION II. NON-SIGNATORIES AND GROUPS OF COMPANIES

59. May an arbitration agreement in a contract be extended to individuals such as directors, managers or shareholders, who were involved in the negotiation and/or performance of the agreement? It appears that the answer of Chinese courts is negative and that they always require express evidence that the non-signatory agrees with the arbitration agreement⁵⁶.

⁵⁴ Cited in Wan E’xiang (Ed.), GFCMT, 11, 2005, pp. 141-146.

⁵⁵ See in particular *Xiamen Branch of the Chinese People Property Insurance INT. v. Zhongbo Lunchuan Co. Ltd.*, ([2004] Min Si Ta Zi, No. 43; *Liberia Power Shipping Service Company v. ChiMinna Chongqing Xinpei Foods Co. Ltd.*, ([2006] Min Si Ta Zi, No. 26; *Dalian Branch of Pingan Insurance Co. Ltd v. Zhongyuan Hangyun Co. Ltd, et al.* [2006] Min Si Ta Zi, No. 49; *Dorval Kaiun K. K., Hachiman Shipping S. A. v. Shanghai Senfu Industrial Co. Ltd.*, [2010] Min Si Ta Zi, No. 52, cited in Wan E’xiang (Ed.), GFCMT, 21, 2010, pp. 104-109.

⁵⁶ Fei Lanfang, *op. cit.*, p. 154 and the cases cited.

60. Along the same line, Chinese courts have also been reluctant, when an arbitration agreement has been entered into by a company of a group, to extend the clause to other entities of the same group. For example, in *Gerald Metals Inc. and Wuhu Smeltery Anhui*⁵⁷, claimant had entered into a sale contract with Wuhu Smeltery, containing an arbitration clause providing that all disputes should be arbitrated in London according to the Metals Exchange of London Rules. It started arbitration in London against Wuhu Smeltery and Wuhu Hengxin Copper Group Company Ltd. The arbitral tribunal rendered an award in favour of the claimant. Later, Gerald Metals applied for recognition of the award in China. The SPC partially set aside the award as far as it condemned Wuhu Hengxin Copper Group Company Ltd. since the latter was not a party to the arbitration agreement.

SUB-SECTION III. GROUPS OF CONTRACTS

61. It appears that the Chinese courts will generally not agree that disputes arising from interrelated contracts be brought together in one single arbitration before one single tribunal. They will only do so in very specific circumstances and in particular where there are two identical arbitration agreements in two identical contracts concluded by closely related parties⁵⁸.
62. It should be noted however that CIETAC has introduced in its 2012 Arbitration Rules a provision on consolidation which reads as follows :

“Article 17. Consolidation of Arbitrations.

1. At the request of a party and with the agreement of all the other parties, or where CIETAC believes it necessary and all the parties have agreed, CIETAC may consolidate two or more arbitrations pending under these rules into a single arbitration Rule.

2. In deciding whether to consolidate the arbitrations in accordance with the preceding Paragraph 1, CIETAC may take into account any factors it considers relevant in respect of the different arbitrations, including whether all of the claims in the different arbitrations are made under the same arbitration agreement, whether the different arbitrations are between the same parties, or whether one or more arbitrators have been nominated or appointed in the different arbitrations.

3. Unless otherwise agreed by all the parties, the arbitrations shall be consolidated into the arbitration that was first commenced”.

63. This provision has been amended in the recently promulgated 2015 CIETAC Arbitration Rules that have also introduced new provisions on Multiple Contracts and Joinder, which read as follows :

⁵⁷ Cited in Wan E’xiang (Ed.), GFCMT, 10, 2006, pp. 30-35.

⁵⁸ See in this respect *Zhejiang Giuli Incorporation (Group) v. Zhejiang Jiayuan Development Co. Ltd. & AOD Systems Incorporated and Giorgio Schmid / Aike Engineering Consultant International Co. v. Langfang East Real Estate Development Inc.* cited by Fei Lanfang, *op. cit.*, p. 155 and *Xianggang Ouya Technology Co. Ltd. v. Xinjiang Pijiuhua Inc.*, *idem*, p. 153.

Article 14 Multiple Contracts

“The Claimant may initiate a single arbitration concerning disputes arising out of or in connection with multiple contracts, provided that :

- a) such contracts consist of a principle contract and its ancillary contract(s), or such contracts involve the same parties as well as legal relationships of the same nature;*
- b) the disputes arise out of the same transaction or the same series of transactions;*
and
- c) the arbitration agreements in such contracts are identical or compatible”.*

Article 18. Joinder of additional parties

“1. During the arbitral proceedings, a party wishing to join an additional party to the arbitration may file the Request for Joinder with CIETAC, based on the arbitration agreement invoked in the arbitration that prima facie binds the additional party. Where the Request for Joinder is filed after the formation of the arbitral tribunal, a decision shall be made by CIETAC after the arbitral tribunal hears from all parties including the additional party if the arbitral tribunal considers the joinder necessary.

The date on which the Arbitration Court receives the Request for Joinder shall be deemed to be the date of the commencement of arbitration against the additional party.

2. The Request for Joinder shall contain the case number of the existing arbitration; the name, address and other means of communications of each of the parties, including the additional party; the arbitration agreement invoked to join the additional party as well as the facts and grounds the Request relies upon; and the claim.

The relevant documentary and other evidence on which the Request is based shall be attached to the Request for Joinder.

3. Where any party objects to the arbitration agreement and/or jurisdiction over the arbitration with respect to the joinder proceedings, CIETAC has the power to decide on its jurisdiction based on the arbitration agreement and relevant evidence.

4. After the joinder proceedings commence, the conduct of the arbitral proceedings shall be decided by the Arbitration Court if the arbitral tribunal is not formed, or shall be decided by the arbitral tribunal if it has been formed.

5. Where the joinder takes place prior to the formation of the arbitral tribunal, the relevant provisions on party’s nominating or entrusting of the Chairman of CIETAC to appoint an arbitrator under these Rules shall apply to the additional party. The arbitral tribunal shall be formed in accordance with Article 29 of these Rules.

Where the joinder takes place after the formation of the arbitral tribunal, the arbitral tribunal shall hear from the additional party of its comments on the past arbitral proceedings including the formation of the arbitral tribunal. If the additional party requests to nominate or entrust the Chairman of CIETAC to appoint an arbitrator, both parties shall nominate or entrust the Chairman of CIETAC to appoint arbitrators again. The arbitral tribunal shall be formed in accordance with Article 29 of these Rules.

6. The relevant provisions on the submission of the Statement of Defence and the Statement of Counterclaim under these Rules shall apply to the additional party. The time period for the additional party to submit its Statement of Defence and Statement of Counterclaim shall start counting from the date of its receipt of the Notice of Joinder.

7. CIETAC shall have the power to decide not to join an additional party where the additional party is prima facie not bound by the arbitration agreement invoked in the arbitration, or where any other circumstance exists that makes the joinder inappropriate”.

Article 19. Consolidation of arbitrations

“1. At the request of a party, CIETAC may consolidate two or more arbitrations pending under these rules into a single arbitration if :

- a) All of the claims in the arbitrations are made under the same arbitration agreement ;*
- b) The claims in the arbitration are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature;*
- c) The claims in the arbitration are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved consist of a principle contract and its ancillary contract(s); or*
- d) All the parties to the arbitrations have agreed to consolidation.*

2. In deciding whether to consolidate the arbitrations in accordance with the preceding Paragraph 1, CIETAC shall take into account the opinions of all parties and other relevant factors such as the correlation between the arbitrations concerned, including the nomination and appointment of arbitrators in the separate arbitrations.

3. Unless otherwise agreed by all the parties, the arbitrations shall be consolidated into the arbitration that was first commenced.

4. After the consolidation of arbitrations, the conduct of the arbitral proceedings shall be decided by the Arbitration Court if the arbitral tribunal is not formed, or shall be decided by the arbitral tribunal if it has been formed”.

SECTION III. HONG KONG

Introduction

64. Arbitration in Hong Kong is governed by the Arbitration Ordinance (Cap 609 of the Laws of Hong Kong) effective from 1st June 2011. The Ordinance is based on the UNCITRAL Model Law 2006. Section 19(1) of the Ordinance defines “Arbitration agreement” by reference to Article 7(1)-(6) of the UNCITRAL Model Law. According to Article 7(1), an 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 may be in the form of an arbitration clause in a contract or in the form of a separate agreement”.

SECTION I. THE ISSUE OF NON-SIGNATORIES

Sub-section I. The grounds for joining non-signatories under the UNCITRAL Model Law (1985) and the Arbitration Ordinance (Cap 341) prior to the Arbitration (Amendment) Ordinance (N° 75 of 1996)

65. Section 7 of the UNCITRAL Model Law (1985), which applied by virtue of Section 2 of the Arbitration Ordinance (Cap 341) prior to the enactment of the Arbitration (Amendment) Ordinance (N° 75 of 1996) Section 4, contained the same definition of an arbitration agreement that the one above and also provided that the arbitration agreement had to be in writing.
66. The seminal case on the joining of non-signatories to arbitration agreements under the previous version of the UNCITRAL Model Law (1985) was *H Smal Ltd. v. Goldroyce*⁵⁹. In that case, A submitted a purchase order to B. The purchase order contained an arbitration clause and was signed by A, but not by B. B proceeded to perform the purchase order in accordance with its terms. A dispute subsequently arose surrounding the quality of the supplied goods. B offered compensation to A under a compensation agreement consistent with the head contract but the compensation agreement contained no reference to the arbitration clause. A made an application for the appointment of an arbitrator under Section 12 of the Arbitration Ordinance (Cap 341) to commence arbitration. B objected to the appointment on the ground that there was no valid arbitration agreement under Article 7(2) of the UNCITRAL Model Law (1985).
67. The Court held that :
1. Article 7(2) of the Model Law required either :
 - a) *Limb 1* : The arbitration agreement to be in writing and signed by both parties;

⁵⁹ [1994] HKCFI 203.

- b) *Limb* : The arbitration agreement to be contained in letters, telex, telegrams, or other means of telecommunications providing a record of the agreement;
- c) *Limb 3*: The arbitration agreement to be contained 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; or
- d) *Limb 4*: The contract refers to a document containing an arbitration clause, and the reference is such to make that clause part of the contract.

2. Limb 3 of the UNCITRAL Model Law (1985) was not applicable on the basis that there had been no exchange of statements of claim and defence where B had failed to dispute the existence of an arbitration agreement;

3. Limb 4 could not apply because the compensation agreement did not refer to the purchase order;⁶⁰

4. Limb 2 could not apply because the arbitration agreement was not contained in correspondence among the parties;⁶¹

5. Limb 1 could not apply because it required the arbitration agreement to be in writing and signed by both B and A, not merely A;⁶²

6. Despite evidence of a consistent course of dealings among the parties, a course of dealings could not be sufficient to satisfy the writing requirement under Article 7(2) of the UNCITRAL Model Law (1985);⁶³

68. Therefore, the Court concluded that the arbitration agreement could not be enforced because it was not “*in writing*” as required under Article 7(2) of the UNCITRAL Model Law (1985). This result, which was commercially absurd⁶⁴, formed part of the legislative impetus for enacting the Arbitration (Amendment) Ordinance (N° 75 of 1996) which inserted Section 2AC(2)(a) of the Arbitration Ordinance (Cap 341), removing the dual signature requirement.

Sub-section II. The grounds provided by the UNCITRAL Model Law (2006) and the Arbitration Ordinance (2010)

69. Under the UNCITRAL Model Law (2006) and the Arbitration Ordinance (Cap 609/2010), a non-signatory may be regarded as bound by a “written” arbitration agreement where:

⁶⁰ *Ibidem*, [8].

⁶¹ *Ibidem*.

⁶² *Ibidem*.

⁶³ *Ibidem*, [12].

⁶⁴ As opined by Kaplan J.: Neil Kaplan, “Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?” (1996) 12 (1) *International Arbitration* 27.

1. The arbitration agreement has been concluded orally, by conduct, or by other means, but is recorded in any form⁶⁵;
2. The arbitration agreement is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party but not denied by the other⁶⁶; and
3. A reference in a contract incorporates a document containing an arbitration clause into the agreement⁶⁷.

I. Express consent

70. Where there are multiple exchanges, correspondence, and contracts among the parties, representations contained within such documents may establish the existence of an intention to be bound by an arbitration agreement despite the arbitration agreement not being duly executed by all the parties⁶⁸.
71. Provided that :
 - a) The arbitration agreement is recorded in writing; and
 - b) The parties can be shown to have consented to the arbitration agreement, a valid arbitration agreement will exist. The recording of the arbitration agreement may occur before or after it has been concluded and need not be signed.⁶⁹

II. Implied consent

72. Implied consent, whether in the form of a consistent course of dealings, trade practice, or industry custom, may constitute the foundation of a valid arbitral agreement. Implied consent may arise by the conduct of the parties, a consistent course of dealings, or the existence of custom or trade practice.⁷⁰ However, the arbitration agreement must nonetheless be recorded in writing, regardless of whether occurring before or after the purported implied consent.⁷¹
73. In *Winbond*, the parties entered into a distribution agreement in the electronics industry containing an arbitration clause. The distribution agreement expired in 2003, but the parties nonetheless continued the distributorship. A dispute arose in 2005 regarding the price of certain electrical components. The plaintiff sought arbitration on the basis of the arbitration clause contained in the expired distribution agreement. The defendant resisted on the basis

⁶⁵ UNCITRAL Model Law (2006), art 7(3); Arbitration Ordinance (Cap 609) 2010, arts 19(1), 19(2)(a).

⁶⁶ UNCITRAL Model Law (2006), art 7(5); Arbitration Ordinance (Cap 609) 2010, arts 19(1), 19(2)(a).

⁶⁷ UNCITRAL Model Law (2006), art 7(6); Arbitration Ordinance (Cap 609) 2010, arts 19(1), 19(3).

⁶⁸ *Pacific International Lines (PTE) Ltd. and Another v. Tsinlien Metals and Minerals Co. Ltd.* [1992] HKCFI 225.

⁶⁹ *William Co. v. Chu Kong Agency Co. Ltd. and Another* [1993] HKCFI 215 and *PT Wearwel International v. Asia Ltd.* [1994] 3 HKC 344.

⁷⁰ *Winbond Electronics (HK) Ltd v Achieva Components China Ltd* [2007] HKEC 1617.

⁷¹ Ibidem.

that the arbitration agreement had expired. The plaintiff claimed that although the distribution agreement expired, the arbitration agreement subsisted as an implied term by reason of conduct evidenced by past dealings or industry custom.

74. The Court accepted that the conduct of the parties, a consistent course of dealings, or the existence of custom or trade practice may form the foundation of a valid arbitration agreement⁷². However, the Court concluded that there was insufficient evidence to establish the existence of the consistent course of dealings, industry custom or trade practice.⁷³ Therefore, there was no valid arbitration agreement among the parties.

III. Existence of an Arbitration Agreement not Denied or Refuted in Exchange of Statement of Claim and Defence

75. Where allegations in statements of claim or defence assert the existence of a valid arbitration agreement, a failure of the counterparty to deny or refute such allegations will be sufficient to conclude that the arbitration agreement is “in writing”.⁷⁴ “Statements of claim and defence” include such statements arising in judicial or arbitral proceedings, but may also encompass legal correspondence in anticipation of such judicial or arbitral proceedings which comprehensively state the grounds of the respective parties’ claims and defences.
76. In *William Co. v. Chu Kong Agency Ltd and Another*⁷⁵, the parties entered into an agreement under a bill of lading for the carriage of goods by sea which contained an arbitration clause. The bill of lading was not signed by the plaintiff. During the voyage, the goods sustained fire and water damage. The plaintiff commenced the claim in the Hong Kong Court of First Instance. The defendants sought to resist litigation by relying on the arbitration agreement. The plaintiff contended that the arbitration agreement was invalid under Article 7(2) of the UNCITRAL Model Law (1985) prior to the 1996 amendments to the Arbitration Ordinance (Cap 341) because the bill of lading was not signed by both parties.
77. In correspondence prior to the litigation, where the parties exchanged information regarding the respective bases for their claims and defences, the defendants asserted the existence of the valid arbitration agreement. The plaintiff failed to deny or refute the assertion. The Court determined that the phrase “statements of claim and defence” under the UNCITRAL Model Law (1985) was not defined in any technical, special, or legal sense. It concluded that the legal correspondence could constitute “statements of claim or defence” without doing “violence to the language” of the Model Law. Therefore, the Court held that the

⁷² *Ibidem*, [6].

⁷³ *Ibidem*, [11] – [12].

⁷⁴ UNCITRAL Model Law (2006), Art 7(5); Arbitration Ordinance (Cap 609) 2010, Arts 19(1), 19(2)(a).

⁷⁵ *William Co. v. Chu Kong Agency Co. Ltd. and Another* [1993] HKCFI 215, [36].

matter should be referred to the arbitral tribunal to conclude whether Article 7(2) had been satisfied.⁷⁶

IV. Incorporation by reference

78. As far as incorporation by reference is concerned, Article 7(6) of the UNCITRAL Model Law (2006) provides that where a contract refers to any contract containing an arbitration clause, and such arbitration clause forms part of the contract, the reference constitutes an arbitration agreement in writing.⁷⁷ The reference may include a reference to either a document containing a substantive arbitration clause, or a particular form of arbitration clause.⁷⁸ Neither Article 7(6) of the UNCITRAL Model Law (2006) or section 19(3) of the Arbitration Ordinance (Cap 609) 2010 requires the referring contract to be in writing. Therefore, the referring contract may be formed by writing, oral statements, or conduct.
79. The leading case on incorporation by reference is *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1994] HKCFI 276. This case involved the construction of the Tsing Ma bridge for the new Hong Kong airport at Chep Lap Kok. The Hong Kong Government entered into a contract with an Anglo-Japanese joint venture. The joint venture subcontracted the steel decking works to CMC. CMC entered into two assembly contracts with CSEL and MES. CSEL further subcontracted the work with A, who then further subcontracted the work to B. Although there was no arbitration clause in the A-B subcontract, the CSEL-A subcontract contained an arbitration clause. A dispute arose between A and B, and A sought to litigate the matter within Hong Kong national courts. B resisted litigation, seeking an order from the Hong Kong Court of First Instance to stay legal proceedings in favour of arbitration.
80. B claimed that the substantive contract between A and B expressly incorporated the arbitration agreement contained in the contract between CSEL and A because it stated that the terms and conditions of the CSEL-A subcontract were “directly applicable”. A claimed there was no valid arbitration agreement between A and B because: (a) Article 7(2) only permitted incorporation by reference where the arbitration agreement was contained in a document between the parties to the referring contract; and (b) Article 7(2) required specific reference to the arbitration clause, rather general incorporation of the clause into the contract.
81. The Court concluded that: (a) The document subject to the reference need not be between the parties to the referring contract; and (b) The contract need not expressly refer to the relevant arbitration agreement. Indeed, the reference clause in the A-B subcontract clearly evinced an intention for the terms of the CSEL-A contract to apply. Accordingly, the

⁷⁶ *Ibidem*, [36].

⁷⁷ UNCITRAL Model Law (2006), art 7(6), adopted by Arbitration Ordinance (Cap 609) 2010, art 19(1).

⁷⁸ Arbitration Ordinance (Cap 609) 2010, art 19(3).

general reference to the CSEL-A contract was sufficient to incorporate the arbitration agreement into the A-B subcontract. Therefore, the Court stayed proceedings in favour of arbitration.

82. Incorporation of an arbitration agreement into a contract may also occur where the subject contract is formed by conduct or oral statements.⁷⁹ In *Fai Tak*, A and B entered into a contract to install fire protection equipment into A's premises. B subcontracted the installation work to C. The contract between A and B included an arbitration agreement, but the contract between B and C did not. C brought a claim against B for breach of contract in the Hong Kong Court of First Instance. B sought a stay of litigation on the grounds of a valid arbitration agreement.
83. The contract between B and C was informal. B had accepted C's tender, and returned a letter requesting that C countersign to form a valid contract. The letter was not countersigned. C had sent further correspondence, which it claimed to be a counteroffer. However, B did not respond to C's letter, and C carried out work through installing the fire equipment. The court concluded that performance constituted conduct impliedly accepting either the terms of the preliminary letter, or the terms as varied by the subsequent letter. Both the preliminary and subsequent letter contained references to the main contract, which contained an arbitration clause. Therefore, the contract formed between the parties included a valid arbitration agreement. Accordingly, the litigation was stayed in favour of arbitration.

Sub-section III. Common law grounds

84. Article 7 of the UNCITRAL Model Law (2006) and section 19 of the Arbitration Ordinance (Cap 609) do not exhaustively set out the grounds on which non-signatories may be bound by arbitration agreements. The following four common law grounds for binding non-signatory third parties to arbitration agreements may also be invoked:
1. Where the signatory or contracting party acts as an actual, implied, or ostensible agent for a principal;
 2. Where the courts "pierce the corporate veil" to join non-signatory third parties which possess actual control over the contracting party;
 3. Where the non-signatory third parties sought to be joined are derivative rights-holders; and
 4. Where the non-signatory third party is estopped from asserting that it is not bound by the arbitration agreement.

I. Agency

⁷⁹ See, for example: *Fai Tak Engineering Co Ltd v Sui Chong Construction and Engineering Co Ltd* [2009] HKCFI 141.

85. The least controversial basis on which a non-signatory may be joined in arbitral proceedings is a case where it can be established that a person, acting with actual or ostensible authority, entered into an arbitration agreement with a party. In that case, the principal will be bound to the terms of the arbitration agreement. In *ICC Chemical Corporation*⁸⁰, the Hong Kong High Court of First Instance refused to interfere in arbitral proceedings where a former employee entered into a contract containing an arbitration agreement with actual or ostensible authority. The Court of First Instance concluded that provided such authority existed, the principal would be bound as a non-signatory to the arbitration agreement.
86. The leading authority on joining third party non-signatories to arbitration proceedings on the ground of agency is *Private Company "Triple V" Inc v Star (Universal) Co Ltd and Another*⁸¹. The facts of this case are discussed further under Section II.

II. Piercing the corporate veil and alter egos

87. Third party non-signatories may be bound by arbitration agreements in circumstances justifying piercing the corporate veil, or where the signatory is an alter ego of the non-signatory sought to be joined.⁸² The ordinary circumstances justifying piercing the corporate veil are where the corporate form is being used as an instrument of fraud, or to evade contractual or other legal obligations.⁸³ Although no cases in Hong Kong have used the "corporate veil" doctrine to join third parties in arbitral proceedings, the Hong Kong Court of First Instance has pierced the corporate veil to prevent a third party from launching a collateral attack against an arbitral award by relitigating proceedings in the judicial forum.⁸⁴

III. Derivative claimants

88. Third parties possessing derivative claims will be bound by the arbitration agreement.⁸⁵ This may include assignees, successors in titles, and statutory transferees.⁸⁶ However, in the absence of any special agreement, general words in performance bonds guaranteeing due performance of the underlying contract will not result in a guarantor or surety being bound by an arbitral agreement or arbitral award.⁸⁷

⁸⁰ *ICC Chemical Corporation v Zhuhai Minmetals International Non-Ferrous Metals Trading Corporation* [1996] 2 HKC 64.

⁸¹ [1995] HKCFI 368.

⁸² See, for example: *Lee Thai Lai v Wong Chung Kai* [2003] HKFCI 263, [6]; *China Ocean Shipping Co v Mitrans Shipping Co* [1995] 3 HKC 123, [17]; *Lee v Kelly McKenzie Ltd* [2004] HKCA 218, [16].

⁸³ *Lee Thai Lai v Wong Chung Kai* [2003] HKFCI 263, [6].

⁸⁴ See further *Parakou Shopping PTE Ltd v Jinhui Shipping and Transportation Co and Others* [2010] HKCFI 817.

⁸⁵ Arbitration Ordinance (Cap 609) 2010, ss 20, 73(1).

⁸⁶ See the discussion in: *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nicolov* [1990] 2 Lloyd's Rep 11.

⁸⁷ *Weltime Hong Kong Ltd v Cosmic Insurance Corp Ltd* [2004] 2 HKC 155.

IV Estoppel

89. Estoppel has been applied in Hong Kong to prevent parties from claiming that the arbitration agreement was invalid, or did not extend to encompass the respondents, during enforcement proceedings.⁸⁸ However, there does not seem to be any reported Hong Kong judicial decision in which a party has successfully argued that a non-signatory party should be estopped from asserting that it is not bound by an arbitration agreement.
90. However, in *Newmark Capital* the Hong Kong Court of First Instance considered the application of British Virgin Islands law to extend the scope of an arbitration agreement to include a non-signatory third party by promissory estoppel and estoppel by convention. In that case, although neither form of estoppel was available on the facts, the court noted that British Virgin Islands law on estoppel was the same as Hong Kong and English law.⁸⁹ This may suggest a willingness on the part of Hong Kong courts to utilize promissory or convention estoppel to extend arbitration agreements to third parties.

SECTION II. MULTI-CONTRACT DISPUTES

91. The three leading cases concerning the possibility to join to one single arbitration dispute arising under several contracts, potentially involving non-signatories, are :
1. *Karaha Bodas*;⁹⁰
 2. *Gay Constructions*;⁹¹ and
 3. *Private Company “Triple V”*.⁹²
92. In *Karaha Bodas*, A and B entered into two contracts: (a) The Joint Operation Contract (“JOC”); and (b) The Energy Sales Contract (“ESC”). The parties to the JOC were A and B, but under the ESC were A, B, and C. The arbitral tribunal ordered consolidation on the basis of the similarity between the contracts, although they were separate contracts, with different parties, and distinct arbitration agreements. The tribunal rendered an award adverse to B. B thereupon sought an order from the Hong Kong Court of First Instance to

⁸⁸ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] 3 HKC 375; *Jianxi Provincial metal and Mineral Import and Export Corporation v Sulanser Co Ltd* [1995] 2 HKC 373; *Aggressive Construction Company Ltd v Data-Form Engineering Ltd* [2009] HKCU 1533.

⁸⁹ *Newmark Capital Ltd and Others v Coffee Partners Ltd and Others* [2007] HKCFI 113, [56]. Indeed, the court hypothesized that under the BVI law of estoppel, which was the same as Hong Kong law, estoppel might have applied if the plaintiffs had led the defendants to believe that the plaintiffs were content to arbitration, and the defendants then incurred time and costs in preparing for arbitration instead of litigation.

⁹⁰ *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2003] HKFCI 390, [21]-[30].

⁹¹ *Gay Constructions Pty Ltd and Another v Caledonian Techmore (Building) Limited and Another* [1994] HKFCFI 171.

⁹² *Private Company “Triple V” Inc v Star (Universal) Co Ltd and Another* [1995] HKCFI 368.

declare that the arbitral award should not be enforced. The court held that the consolidation was not wrongful because:

1. The contracts and transactions were integrated, and part of a single commercial enterprise;
2. B and C were represented by the same lawyers, meaning B could not be embarrassed by having a third party present in the proceedings; and
3. The award gave careful and separate consideration to B and C's respective positions.⁹³

93. In *Gay Constructions*, A, B and C (a subcontractor for B) entered into a contract containing an arbitration clause for certain construction work. A and B signed the contract, but C did not. A sought to join C as a third party in the arbitral proceedings. C resisted the joinder on the grounds that C was not a signatory to the contract. A ground upon which A sought to join C was that C had made a claim against B in 1992 for compensation for breach of contract, in which C made reference to the arbitration clause, which was never denied by B. The court decided that the claim constituted a "statement of claim", which was never denied by B. Therefore, it concluded that C could be joined as a non-signatory third party to the arbitral proceedings because the arbitral agreement was in writing.⁹⁴

94. Finally, in *Private Company*, which is also the leading authority on joining third party non-signatories to arbitration proceedings on the ground of agency, A and B entered into two contracts for the sale of goods. A dispute arose between A and B regarding B's failure to deliver the goods to A in accordance with a contract. A sought to join C, a third party company, to the proceedings on the basis that B, a separate company, contracted as agent for C. The evidence indicated that Mr X, who dealt with A in respect of both contracts, was a director and shareholder of B and C. X held a majority of shares (65%) in B, but only a significant minority of shares (25%) in C. X allegedly represented before the contracts were signed that B and C were being reorganized, and C would be responsible for performing the contract. However, at the time of contracting and the decision B and C were two separate and discrete legal entities. The Court concluded that there was strong *prima facie* evidence that B had contracted on behalf of itself, as principal, and as agent of C. Therefore, the Court ordered for the appointment of arbitrators to proceed.⁹⁵

95. It should also be pointed out that the 2013 Arbitration Rules of the Hong Kong International Arbitration Centre contain a provision on Joinder of Additional Parties⁹⁶ and Consolidation of Arbitrations⁹⁷. It also contains in Article 29 a provision on "Single Arbitration under Multiple Contracts" which provides as follows :

⁹³ *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2003] HKCFI 390, [21]-[30].

⁹⁴ *Gay Constructions Pty Ltd and Another v Caledonian Techmore (Building) Limited and Another* [1994] HKCFI 171, [13].

⁹⁵ *Private Company "Triple V" Inc v Star (Universal) Co Ltd and Another* [1995] HKCFI 368.

⁹⁶ Article 27.

⁹⁷ Article 28.

“29.1. Claims arising out of or in connection with more than one contract may be made in a single arbitration provided that:

- a) All parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration ;
- b) A common question of law or fact arises under each arbitration agreement giving rise to the arbitration;
- c) The rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions; and
- d) The arbitration agreements under which those claims are made are compatible.

29.2. The parties waive any objection, on the basis of the commencement of a single arbitration under Article 29, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration, so far as such waiver can validly be made.”

SECTION IV. INDIA

96. Indian courts were confronted these recent years to several cases involving multicontract - multiparty disputes.
97. In a case decided on 31 August 2001 by the City Civil judge at Ahmedabad⁹⁸, Nirma Ltd. had entered into an agreement with the first respondent “for supply of know how and supervision for three numbers CFB boilers of 100tph each for the purpose of steam generation to be used for process requirement and power generation for its Soda Ash and Pure Water Plant to be set up at its site”. The contract provided for ICC Arbitration in London in case of dispute. Subsequently, the first respondent incorporated in India the second respondent as its wholly owned subsidiary with a view to nominating the second respondent as the engineer, contractor and erection contractor under three agreements (detailed engineering, supply and erection and commissioning) entered into between Nirma and the second respondent in pursuance of the first agreement. These three agreements provided for arbitration in India in case of dispute. Certain disputes arose between the parties and, consequently, Nirma started arbitration in India against the first and the second respondent. The first respondent objected to the jurisdiction of the arbitral tribunal. The tribunal decided in favour of the first respondent and the matter was subsequently submitted to the city civil judge at Ahmedabad which confirmed the arbitral tribunal’s finding. In the meantime, the first respondent started arbitration against Nirma in London under the arbitration clause contained in the first agreement.

⁹⁸ Court n° 11, Civil Miscellaneous Application n° 155 of 2001, *Nirma Limited v. Lurgi Lentjes Energietechnik GmbH (Germany) and Lentjes Energy (India) Pvt. Ltd.* For an overview of Indian cases dealing with these issues, see Dushyant Dave, Non-Party Participation - The Extent to which Non-Contracting Parties can be encouraged or compelled to join the Proceedings, [2000] *Int. A.L.R.*, 78.

98. According to the court, the last three agreements were necessary for the implementation of the first one. The contracts were closely intertwined. Nirma and the first respondent were required to facilitate the performance of the first agreement. It was provided that the appointment of the engineer, erection contractor and contractor was to be decided by Nirma and approved by the first respondent. The latter also ensured the performance of the three last agreements as a guarantor. But it remained that the first agreement and the last three had incompatible arbitration clauses and that no evidence was supplied that the first respondent had agreed to arbitration in India or had agreed to any of the terms and conditions of the last three agreements with the consequence that it would have accepted to be a party to them. Finally, the court also rejected Nirma's argument that by refusing to be joined to the Indian arbitration, the first respondent tried to evade its liability or committed a fraud. Even if it would have been ideal to bring together before the same arbitration tribunal all the disputes involving the various parties and arising under the various agreements, the first respondent had the right to invoke the arbitration clause contained in the first agreement and consequently, to refuse to be impleaded in the Indian arbitration. Nothing in its conduct could justify applying the theory of lifting the corporate veil.
99. The landmark decision rendered these recent years on the issue of multiparty disputes is *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Others* decided by the Supreme Court of India in 2012⁹⁹.
100. In this case, Claimant was Chloro Controls India Pvt Ltd, a company carrying on business for the manufacture of chlorination equipments and incorporated under Indian law by Madhusudan Kocha (Respondent 9) and his group (the "Kocha" group). This company had been negotiating since 1988 with Respondent 1 for entering into a JV agreement to deal with the manufacture, distribution and sale of gas chlorination equipment in India. This led to the execution of a joint venture agreement between the Appellant and Respondent 1, providing for the creation of a Joint Venture which was going to become R5.
101. Respondent 1 was Severn Trent Water Purification Inc. (originally Capital Control Company, Inc., Colmar, Pennsylvania, USA), a company held by Severn Trent Services Plc UK.
102. Respondent 2 was Capital Control (Delaware) Co. Inc., a company held by Severn Trent Services (Delaware) Inc., itself a 100% subsidiary of Severn Trent (Delaware) Inc. (formerly known as Severn Trent U.S. Inc.). Respondents 1 and 2 developed and sold electro-chlorination equipment under the brand "Hypogen", which was subsequently replaced by the brands "Sanilec" and "Omnipure".
103. Respondent 3 was Titanor Components and Respondent 4 was Hi Point Services. They were both in the business of electro-chlorination equipment. In 1998 Severn Trent Services (Delaware) Inc. acquired Excel Technologies, a company dealing in the manufacture of two

⁹⁹ Supreme Court of India (2012) 9 SCC 95.

brands of chlorination products, “Omnipure” and ‘Sanilec”. Later, Excel Technologies entered into a JV agreement with De Nora North America Inc. and created another JV company, Severn Trent De Nora LLC for dealing in the above brands and “Seaclor Mac”, a product distributed by Respondent 3. The distribution rights of all three products in India were given by Severn Trent De Nora LLC to Respondent 4.

104. Respondent 5 was Capital Controls (India) Pvt Ltd, a joint venture between Appellant and R1, that had merged in between with R2 and whose purpose was to design, manufacture, import, export and do the marketing of gas and electro-chlorination equipments.
105. Respondents 6 and 8 were the Directors of Respondent 5 appointed by the Capital Controls group, owned by Severn Trent Services Plc. (UK).
106. Respondent 7 was the Chairman of the JVC.
107. Respondents 9 to 11 were the shareholders of Claimant and the Directors nominated by the Kocha group. Respondent 9 was also the managing director of the JVC.
108. The Parties to the Joint Venture Project had entered into 7 agreements:
109. A Shareholders Agreement (the “SHA”, also referred to as the “Principal Agreement”) between Appellant, Respondent 2 and Respondent 9, containing an ICC arbitration clause providing for arbitration in London and application of English law. Its purpose was to start a JV company for manufacture, sale and services of the products defined in the Financial and Technical Know-How License Agreement.
110. An International Distributor Agreement (the “IDA”) between Respondent 1 and Respondent 5, appointing the JV as the exclusive distributor for the distribution in India, Afghanistan, Bhutan and Nepal, of the products manufactured by Respondent 1. The contract was governed by the laws of Pennsylvania and contained a clause giving jurisdiction to the Courts of that State in case of dispute.
111. A Managing Director’s Agreement between Respondent 5 and Respondent 9, not containing and arbitration clause. This agreement, like the IDA, was executed in accordance with the terms of the SHA.
112. An Export Sales Agreement (the “ESA”) between Respondent 1 and Respondent 5, relating to the export of the products manufactured by Respondent 5. It provided for arbitration in Pennsylvania under the Rules of the American Arbitration Association.
113. A Financial and Technical Know-How License Agreement (the “FTKHLA”) between Respondent 1 and Respondent 5, containing an ICC arbitration clause providing for ICC arbitration in London and application of English law.

114. A Trademark Registered user License Agreement (the “TRULA”) between Respondent 1 and Respondent 5, not containing an arbitration clause. This Agreement and the FTKHLA were inter-dependent and referred one to the other. They were executed in accordance with the provisions of the SHA, that required the parties to cause the Joint Venture Company to enter into the FTKHLA under which Respondent 1 was to grant the JVC the right and license to manufacture the products in India in accordance with the Technical Know-How and other technical information possessed by Respondent 1; and to enter into the TRULA for obtaining the right to use certain trademarks and trade names in relation to the goods in the Territory.
115. A Supplementary Collaboration Agreement between Respondent 1 and Respondent 5, executed to comply with the conditions of the letter of approval of the Government of India for the commencement of the Joint Venture operation.
116. Except Respondents 3 and 4 who were not signatories to any agreement, the other parties had signed one or more agreement(s) although they were not parties to all the agreements.
117. Disputes arose between the parties that resulted in the termination by Respondents 1 and 2 of all the Joint Venture Agreements, which included Agreements 1, 2, 4, 5, 6 above. Claimant started a court action before the Bombay High Court in the course of which Respondents 1 and 2 prayed for reference of the suit to arbitration. This application was contested but was finally decided by the High Court in favour of the applicants. Claimant appealed invoking in particular Section 45 of the Indian Arbitration Act providing that “*a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 [an arbitration agreement in writing], shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed*”¹⁰⁰.
118. According to Claimant, the judgement of the High Court, in referring the entire suit to arbitration, including the parties who were not parties to the arbitration agreement, as well as those against whom the cause of action did not arise from arbitration agreement, suffered

¹⁰⁰ The provisions of Section 45 are somewhat similar to Article II(3) of the New York Convention. However, Section 45 includes the wording “*or any person claiming through or under him*” that is not part of Article II(3), which provides that : “[*t*]he 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”. According to Article II(1), “[*e*]ach 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”. Section 44 of the Indian Arbitration Act provides in its relevant parts that ““*foreign award*” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India ... in pursuance of an agreement in writing for arbitration ...”.

from error of law. As mentioned above, the various agreements did not all include arbitration clauses and the arbitration clauses contained in some of the agreements were not all identical or compatible. Moreover, Respondent 3 and 4 were not signatories to any agreement.

119. At the term of a very detailed judgement, the Supreme Court confirmed the High Court decision. The Court focussed all along its judgement on the wording of Section 45 of the 1996 Act, referring specifically to a party or “*person claiming through or under him*”. In this respect, it noted in the first place that, if normally arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as to the substantive contract underlying that agreement, arbitration is possible in certain circumstances between a signatory and a third party¹⁰¹. The Court referred in its judgement to the cases mentioned by Sir Michael Mustill in his *Law and Practice of Commercial Arbitration*:

*“1. The Claimant was in reality always a party to the contract, although not named in it.
2. The Claimant has succeeded by operation of law to the rights of the named party.
3. The Claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
4. The original party has assigned to the Claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.”*¹⁰²

120. The Supreme Court also referred to the principle applied in a number of arbitral awards, according to which a non-signatory affiliate or sister or parent company can be subjected to arbitration provided the disputed transactions were within a group of companies and there was a clear intention of the parties to bind both the signatory as well as the non-signatory parties¹⁰³.
121. Finally, the Court also emphasized that in exceptional cases, a non-signatory or third party could be subjected to arbitration without its prior consent. According to the Court, these exceptions should be examined from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement of the parties being a composite transaction: “[*t*]he transaction should be of a composite nature where performance of mother agreement may not be feasible without aid,

¹⁰¹ ¶65.

¹⁰² Ibidem. See also ¶100: “*Various legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing the veil (also called the “alter-ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of the applicable law”.*

¹⁰³ ¶¶66 and 67.

*execution and performance of the supplementary or auxiliary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed”*¹⁰⁴. The Court further stated that “[w]here the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreement being so intrinsically intermingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration”.¹⁰⁵

122. In its application of these principles to the facts of the case, the Court first noted that :
- with respect to formal validity, the requirement that an arbitration agreement be in writing requires to be construed liberally.¹⁰⁶ Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its *rationae personae* scope.¹⁰⁷
 - The intention of the Legislature when incorporating in Section 45 the words “*or any person claiming through or under him*” was to give them a liberal meaning.¹⁰⁸ The intent of the framers of the statute was to encourage arbitration¹⁰⁹ and “[o]nce the words used by the Legislature are of wider connotation or the very language of section is structured with liberal protection then such provision should normally be construed liberally”.¹¹⁰
 - The words “*or any person claiming through or under him*” should be read in harmony with the concept of “legal relationship” as incorporated in Article II(1) of the New York Convention¹¹¹: “*the expression “legal relationship connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of the parties*”.¹¹²

123. Taking all these principles into consideration, the Supreme Court decided that :

¹⁰⁴ ¶68.

¹⁰⁵ ¶71.

¹⁰⁶ ¶72.

¹⁰⁷ ¶103.

¹⁰⁸ ¶89.

¹⁰⁹ ¶91.

¹¹⁰ ¶90.

¹¹¹ Quoted above at footnote 100.

¹¹² ¶92.

- All the disputed agreements – signed on the same day and in furtherance of the SHA – formed one composite transaction for attaining the purpose of business of the Joint Venture Company. They were so intrinsically connected to each other that it was neither possible nor probable to imagine the execution and implementation of one without collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction.¹¹³
- Even if all the parties to the arbitration were not signatory to all the agreements in dispute, they were covered under the expression “*claiming through or under*” the parties to the agreements. “*The interests of these companies are not adverse to the interest of the principal company and/or the joint venture company. On the contrary, they derive their basic interest and enforceability from the Mother Agreement and performance of all the other agreements by respective parties had to fall in line with the contents of the Principal Agreement*”¹¹⁴
- The arbitration clause contained in the SHA is widely worded. It requires that any dispute or difference which could not be settled by friendly negotiation and agreement between the parties would be finally settled by arbitration conducted in accordance with the Rules of the ICC. It is comprehensive enough to include the disputes arising under and in connection with the SHA.¹¹⁵
- Where the parties to such composite transaction provide for different alternative forums, “*it has to be taken that real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law*”.¹¹⁶ In the present case, “*the court can safely gather definite intention on behalf of the parties to have their disputes collectively resolved by the process of arbitration. Even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over a refusal of reference to arbitration. There appears to be no uncertainty in the minds of the parties in that regard, rather the intention of the parties is fortified and clearly referable to the mother agreement*”.¹¹⁷

124. Consequently, the Supreme Court decided that the disputes arising from all the disputed agreements were capable of being referred to the arbitral tribunal “*in accordance with the agreement of the parties*”.

125. The Delhi High Court subsequently followed the same approach in Chloro Controls in *HLS Asia Ltd. v. Geopetrol International Inc.*¹¹⁸ The case concerned an exploratory drilling contract awarded by M/s. Geopetrol International Inc. (GII) to HLS Asia Ltd (“HLS”)

¹¹³ ¶139.

¹¹⁴ ¶143.

¹¹⁵ ¶144.

¹¹⁶ ¶154.

¹¹⁷ ¶158.

¹¹⁸ (2013) 196 DLT 52.

(hereinafter the “Contract”). GII was the operator of a consortium of four parties, the other three being NTPC, BVL and CRL. The preamble clause of the Contract noted that GII was acting as an Operator for and on behalf of NTPC, BVL and CRL. It also noted that each consortium partner would be liable to HLS severally and jointly and only to the extent of their participating interest.

126. HLS started arbitration under the contract for non-payment of monthly charges. On GII’s application, the Arbitral Tribunal joined all consortium members as parties to the arbitration. On NTPC’s application that it had been wrongly joined as a party, the Arbitral Tribunal ordered deletion of NTPC as a party to the arbitration. HLS introduced an action to set aside the interim award before the Delhi High Court. The Court set aside the interim award and ordered NTPC to continue as a party to the arbitration. It referred to the Joint Operation Agreement (“JOA”) between the consortium members and noted that GII was authorised to act on behalf of all the members. It was pursuant to such authorisation that GII entered into the Contract with HLS. The Court noted that eventhough NTPC was not a signatory to the Contract, it was entered into by GII as an operator for and on behalf of the members of the consortium. NTPC, BVL and CRL, although non-signatories to the Contract between HLS and GII, were necessary parties to the arbitral proceedings in light of the interrelationship between them as the members of the consortium.
127. Finally, Indian law and Indian courts also recognise the possibility for a non-signatory to invoke an arbitration agreement or be bound by it in case of :
- assignment of a contract containing an arbitration clause;
 - subrogation: the subrogee steps into the shoes of the subrogor. He exercises the rights of the latter and may therefore prevail himself of the arbitration clause contained in the underlying contract;
 - agency, when the person or entity that formally signed the arbitration agreement was only representing its principal;
 - incorporation by reference of an arbitration clause into a later contract, provided it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated¹¹⁹.

SECTION V. SOUTH KOREA

128. South Korea tends to adhere to a strict requirement of express consent when determining who are the parties to the arbitration agreement. However, a non-signatory to a contract can still be considered to be party to that contract on the basis of the theory of agency or representation or if the non-signatory is considered a third party beneficiary or transferee under a universal or individual transfer. Moreover, based on a body of veil piercing cases, it is also understood that if there is a legal basis for piercing the corporate veil, the individual

¹¹⁹ See on these theories Mohit Saraf, “Who is a Party to an Arbitration Agreement – Case of the Non-Signatory” in Institutional Arbitration in Asia, 2005, 1 (Collection of Papers presented at the ICC and SIAC Symposium on Institutional Arbitration in Asia, 18-19 February 2005, Singapore),

behind the veil may be bound by an arbitration agreement even though it was not a signatory to it¹²⁰. Likewise, assignments are also recognised as a legal basis for holding a non-signatory to be bound by an arbitration agreement. For example, in a Seoul district court decision dated 5 July 2002¹²¹, a party to a contract assigned one of its contractual claims to the plaintiff. When the plaintiff sued the defendant before the Seoul Court, the defendant requested dismissal of the case due to the existence of an arbitration clause in the contract. Although the plaintiff was not a signatory to the contract, but an assignee of a contractual claim, the Court found that he was bound by the arbitration clause and dismissed the case.

129. Korean courts have also been confronted to the issue of non-signatories in the context of disputes in the maritime industry¹²². In that industry, a common scenario is for a supplier or manufacturer to retain a third party to transport the goods to the desired destination. The supplier is called the “shipper” and the third party transporter is the “carrier”. The carrier is often not the ship owner but he will most often charter a ship, including crew, who are usually the employees of the actual ship owner. A bill of lading is generally issued by the carrier to the shipper, acknowledging that the goods have been loaded on the vessel. Bills of lading may be endorsed to another party, thus transferring the ownership of the goods to that party. In addition, a bill of lading may specify multiple stages and means of transport and often involves changing hands when moved from one ship to another or from sea to land.
130. A contract between a shipper and a carrier and a bill of lading issued by the carrier to the shipper will often necessarily require the involvement of multiple actors in transporting the goods to the consignee at the chosen destination. Most of these parties are not parties to the bill of lading although they may be involved in disputes that arise in connection with the cargo and that, therefore, implicate the rights established under the bill of lading. Consequently, the question arises whether or not third parties in the transport chain are bound by, or have rights under, an arbitration agreement contained in a bill of lading which on its face, only applies in the relationship between the shipper and the carrier.
131. The question was considered in a judgment of the Supreme Court of Korea of 15 July 2010.¹²³ In this case, a Korean company, importer, contracted with a carrier for the delivery of a cargo of steel slabs to Korea. Part of the cargo was lost during the transportation and the importer then sued the carrier – charterer – and the ship owner in Korean courts. The Korean importer held three bills of lading that had been issued by the carrier, each

¹²⁰ Gee-Hong Kim, “Arbitration agreement’s binding effect on non-signatory”, *Journal of Arbitration Studies*, Korean Association of Arbitration Studies, vol. 17.3(2007), p. 101-119; Keechang Kim, “Arbitration agreement under Korean law”, *Korea University Law Review*, vol. 3, 2008, p. 98.

¹²¹ Seoul District Court, 2001 GaHab 6107, cited by Kevin Kim in “Korean Supreme Court Case Review : Do arbitration agreements in bills of lading reach non-signatories in the chain of transportation?”, *Korean Arbitration Review*, vol. 1, 2012, p. 53, 57.

¹²² *Ibidem*, 53.

¹²³ Case n° 2009Da70064.

containing an arbitration agreement. The defendants asserted that the court had no jurisdiction over the dispute because the arbitration agreement in the bills of lading were binding on all the parties and required all disputes to be resolved by arbitration. Since the only actual signatory to the bill of lading was the carrier, the issues were, in the first place, whether the plaintiff, a non-signatory, was bound by the arbitration agreement and in the second place, whether the ship owner, a non-signatory, might avail itself of the defence that the filing of the law suit in court was prevented by the arbitration agreement.

132. The court decided that plaintiff, as the holder of the bills of lading, was bound by the arbitration clause. It reasoned that when the holder, who has acquired the rights specified in the bills of lading by way of endorsement and delivery of the bills, claims his rights against the carrier under the bills of lading, it is deemed to be bound by the arbitration agreement contained in the document. More precisely, the court held that an arbitration agreement is binding not only with regard to disputes arising directly from the agreement (in this case the bills of lading) which contains the arbitration clause but also with respect to any disputes directly or closely related to the execution, performance and validity of the agreement. It also held that in light of the characteristics of a bill of lading, it cannot be said that the separate consent of plaintiff as the holder of the bills of lading or a notice thereof is required for the recognition of the validity of the arbitration clause.
133. With respect to the second issue of whether defendant 2 could avail itself of defendant 1's defence that the law suit is not permitted under the arbitration clause, the court relied on the presence of a Himalaya clause in the bills of lading. A Himalaya clause is a provision for the benefit of a third party who is not a party to the contract. In this case, the clause stipulated that "*if an action is brought against any servants, agent or subcontractor of the carrier, such person shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this bill of lading*". The court held that where the bills of lading include such a clause and the ship owner relies on the carrier's defences, an arbitration agreement in writing is deemed to have existed by and between the ship owner and the holder of the bills of lading. There is no reason that the clause should be limited only to the defences on the merits such as liability limitations to the exclusion of a jurisdictional defence under the arbitration agreement.

SECTION VI. MALAYSIA

134. Malaysian courts have repeatedly affirmed the consensual nature of arbitration. For example, in the case decided by the Court of Appeal of Putrajaya on 26 February 2009¹²⁴, Alami Group Sdn Bhd, as the charterer, had entered into a charter party with Lombard Commodities Limited ("Lombard") as agents of the owners of the vessel. The charter party contained an arbitration clause. A dispute arose between the parties and Lombard commenced arbitration against Alami Group Sdn Bhd. An award was rendered in London.

¹²⁴ Court of Appeal, Putrajaya, 26 February 2009, civil appeal n° W-02-449 of 2005, *Yearbook Commercial Arbitration* XXXI, 2009, p. 688.

Lombard sought enforcement of the award against another company of the Alami Group, Alami Vegetable Oil Products Sdn Bhd (Alami in Malaysia). The High Court granted enforcement, denying Alami's argument that it was not a party to the charter and to the arbitration clause therein. The court of appeal reversed the lower court's decision. It decided that the award was unenforceable because there was never an arbitration agreement in existence between the appellant and the respondent. The court pointed out that it is a fundamental principle of arbitration law that arbitration is a consensual form of dispute resolution and it is also a fundamental precondition that an award must be based on an arbitration agreement. The court referred to the decision of Gopal Sri Ram JCA in *Bauer (M) Sdn Bhd v. Daewoo Corp.*¹²⁵: "To begin with, it is important to recognise that the foundation of an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an agreement, there is no jurisdiction. And as a general rule, mere participation in a proceeding before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction". It should be pointed out however that the Court in *Bauer* also confirmed that an arbitration agreement could come into existence either by incorporation, by reference or by conduct. With respect to incorporation by reference, the Court of Appeal held that "whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case"¹²⁶. The Court further held that "... a term may be incorporated not only by words but also by conduct".¹²⁷

135. A signatory and a non-signatory may also be bound to arbitrate their disputes as a result of an assignment of the underlying contract. In *Usahasama SPNB-LTAT SDN BHD v. Borneo Synergy (M) Sdn Bhd*¹²⁸, the plaintiff had entered into a contract with PPHM as its main contractor to carry out certain works. PPHM in turn had appointed the defendant as its subcontractor. Subsequently, PPHM purported to withdraw from its contract with the plaintiff (the "main contract") and recommended to the plaintiff that the remainder of the piling works under the main contract be transferred to the defendant to continue and complete. PPHM's suggestion was taken up and acted upon by the plaintiff who agreed to let the defendant complete the outstanding piling works according to the existing contract rates. A document referred to as the deed of assignment was entered into between PPHM and the defendant and was acknowledged by the plaintiff. The defendant then sought the plaintiff's confirmation that the deed of assignment would bring into effect a contractual nexus between the plaintiff and the defendant which included the defendant taking over PPHM's role under the main contract in relation to the piling works. The plaintiff confirmed. Later, a dispute arose between the plaintiff and the defendant in respect of the payment for the work done and damages suffered by the defendant. The defendant initiated

¹²⁵ [1999] 4 MLJ 545.

¹²⁶ At p. 557.

¹²⁷ At p. 559.

¹²⁸ [2009] 7 CLI 779.

an arbitration against the plaintiff pursuant to the arbitration clause of the main contract. At the outset of the proceedings, the plaintiff raised a challenge to the jurisdiction of the arbitrator to hear the dispute. The arbitrator upheld its jurisdiction and the plaintiff started an action to set aside the award before the High Court of Kuala Lumpur. The plaintiff alleged that there was no arbitration agreement between the parties because there was no binding contract between the plaintiff and the defendant. It further submitted that the assignment was not an absolute assignment of the main contract and that there was no arbitration clause in the assignment.

136. The Court dismissed the application, considering that there was a clear intention by all the parties that there would be a binding contract between the plaintiff and the defendant on the terms of the main contract upon the withdrawal of PPHM. According to the Court, the true understanding of the parties as to the effect of the deed of assignment was that it brought into effect a direct contractual nexus between the plaintiff and the defendant that saw the defendant taking the place of PPHM under the main contract in respect of the remainder of the piling work. Consequently, owing to the fact that there existed between the defendant and the plaintiff a binding contract on the terms of the main contract, the arbitration clause included in the latter was a term of the contract between the plaintiff and the defendant and therefore, the arbitrator had jurisdiction to decide on the arbitration proceeding.
137. The 2013 Arbitration Rules of the Kuala Lumpur Regional Centre For Arbitration do not contain any provision on joinder or arbitrations arising under multiple contracts but contain a provision on consolidation which reads as follows :

“Rule 8. Consolidation of Proceedings and Concurrent Hearings

1. The parties may agree:

a) that the arbitration proceedings shall be consolidated with other arbitration proceedings; or

b) that concurrent hearings shall be held, on such terms as may be agreed.

2. Unless the parties agree to confer such power on the arbitral tribunal, the tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings”.

SECTION VII. JAPAN

138. In 2003, Japan has adopted a new arbitration law based on the UNCITRAL Model Law¹²⁹. The law came into force on 1 March 2004. It replaced Japan’s old arbitration law of 1890. There does not seem to be much case law in Japan on the issues raised in this article. It is however admitted that a non-signatory may be bound by an arbitration agreement by

¹²⁹ Law N° 138 of 2003.

application of the civil law theories of assignment, subrogation and third party beneficiary¹³⁰.

139. Rights and obligations under a contract containing an arbitration clause may be assigned by the assignor to the assignee by way of contract between them. Article 466(1) and (2) of the Japanese Civil Code provides that contractual rights can be assigned to a third party without the consent of the debtor unless the nature of the assigned rights is such that the assignment shall not be permitted or such assignment is restricted under the contract. This provision is usually interpreted to the effect that the debtor may not assign its debt to a third party without the consent of the creditor. Consequently, the assignment of a party's rights and obligations under a contract would normally require the consent of the other party. As a matter of practice, where there is consent to the assignment and where the assignee and the other party providing such consent is deemed to have agreed to be bound by the arbitration clause contained in the original contract either explicitly or impliedly, there will be no problem in finding a binding arbitration agreement as between the assignee and the other party. However, as an exception to this rule, Japanese courts take the position that in the case of the assignment of a promissory note by way of endorsement, in light of the nature of the rights under the promissory note¹³¹, the arbitration agreement will not be assigned except where there was a specific agreement on the part of the assignee.¹³²
140. Under Article 13(2) of the new arbitration law, the arbitration agreement must be in writing. What happens therefore if the assignee and the other party have impliedly agreed to be bound by the arbitration clause in the original contract and no written agreement has been signed by the assignee? It is considered that as long as there is a written agreement between the assignor and the other party, and the assignee and the other party have, at least impliedly, agreed to be bound by such arbitration agreement, the requirement of the written form would be satisfied.¹³³
141. Rights under a contract that contains an arbitration clause may also be assigned to a third party by way of subrogation, for example, where the insurer that has paid the insurance money to the insured is subrogated in the latter's rights. The transfer of rights by way of subrogation is considered a transfer by operation of law and it is generally considered that the consent of the obligor is not required. As a consequence, the arbitration clause under the contract is binding upon the subrogating party and the obligor.¹³⁴
142. The issue whether and to what extent the arbitration agreement entered into by a company may extend to the directors, officers and employees of that company has been the object of

¹³⁰ Hiroyuki Tezuka, "Who is a Party-Case of the Non-Signatory", Institutional Arbitration in Asia, referred to at footnote 119, p. 63.

¹³¹ These rights are strictly based upon the language of the note and are entirely separate and independent from the underlying relationship between the maker and the payee.

¹³² Tezuka, op.cit., pp. 64-65.

¹³³ Idem., p. 65

¹³⁴ Idem., p. 66.

debate in Japan since the decision of the Supreme Court in the celebrated *Ringling Circus* case rendered on 4 September 1997.¹³⁵ In that case, plaintiff-appellant Nihon Kyoiku-sha Co., Ltd. (hereinafter referred to as the “plaintiff”), a Japanese corporation, and defendant-appellee Kenneth J. Feld (hereinafter referred to as the “defendant”), representative of a United States corporation named Ringling Brothers and Barnum and Bailey Combined Shows Inc. (hereinafter “Ringling Inc.”) had, on October 2, 1997, entered into an agreement for the performance of the Ringling Circus in Japan during 1988 and 1989. The agreement contained an ICC arbitration clause providing that if arbitration was initiated by Ringling Inc., the seat of the arbitration would be Tokyo and if it was initiated by the plaintiff, the arbitration would take place in New York City.

143. The plaintiff filed an action before the Tokyo District Court against the defendant claiming damages based on an alleged deceit by the defendant. The latter moved to dismiss the action, invoking the arbitration agreement between the appellant and Ringling Inc. The Tokyo District Court granted the defendant’s motion and dismissed the action. The Tokyo High Court affirmed the judgement on appeal. And so did also the Supreme Court.
144. The Supreme Court held that considering the nature of arbitration as a means of dispute resolution based on an agreement between the parties, the law applicable to the validity and effect of the arbitration agreement should be determined primarily by the intentions of the parties under Article 7(1) of the *Horei* (former act concerning conflict of laws in Japan) which provided that the governing law of a contract is determined by agreement of the parties, if any, and absent such agreement, by the place where the contract is made, and primarily in accordance with the parties’ intention. The Supreme Court decided that even where the arbitration agreement did not explicitly refer to its governing law, where an implied agreement on the governing law can be found in light of the parties’ agreement on the place of arbitration, the main contract and other related facts, such governing law must be applied. In the case under reference, the Supreme Court decided that the arbitration clause suggested that with regard to an arbitration to be initiated by the plaintiff, there was an implied agreement that the law applied at the agreed place of arbitration, New York, should be the governing law of the arbitration. The Court further decided that under the United States Federal Arbitration Act and the US Federal Court’s precedents related to that law, the scope of the arbitration agreement in the case under reference was to include plaintiff’s damages claim against the appellee.
145. The case was therefore decided under New York law. The Supreme Court did not indicate its view as to whether under Japanese arbitration law, the scope of the arbitration agreement entered into by a company could extend to the company’s representatives.
146. It appears however that this approach is gaining increasing support in Japan in the case where permitting a court action against the individual representatives could undermine the

¹³⁵ Minshu 51-8-3657. An English summary of the case is available on the Court’s website (http://www.courts.go.jp/app/hanrei_en/detail?id=318).

spirit of the arbitration agreement to resolve by arbitration all the disputes arising in connection with the contract.¹³⁶

147. In a decision of the Nagoya District Court of 27 October 1995¹³⁷, the Court decided that the arbitration clause included in a distribution agreement entered into by a company did extend to individuals closely associated with the company. Japanese company X had entered into a distribution agreement with a UK distributor company Y which later failed to pay the purchase price of the goods. X started a court procedure against Y as well as two of its directors. X claims against the individual defendants A and B were based upon an alleged fraud on the part of those individuals who allegedly acted on behalf of company Y to induce company X to enter into the contract while knowing that company Y had no intention of paying the purchase price from the beginning. The District Court held that although defendants A and B were not party to the distribution agreement containing the arbitration clause, each of X claims against Y, A and B were technically based upon the same ground and it was desirable to resolve those disputes in a unified manner. The Court further decided that the dispute resolution mechanism applicable to Y did also apply to A and B and that consequently, under the rule of reason (*jori*), both defendants A and B were bound by the arbitration agreement.
148. In a recent article, Professor Mari Nagata also notes that eventhough the *Ringling Circus* case was delivered before the new Arbitration Act was enacted, lower courts have basically followed the approach of the Supreme Court since the Act entered into force.¹³⁸
149. Finally, it has been held that an arbitration agreement entered into by the principal debtor shall not extend to the guarantor. It is suggested however that where the principal debtor is a closely held corporation that is an *alter ego* of its owner, who has signed a guarantee, the owner might be bound by the arbitration agreement entered into by the corporation, either on the basis of the theory of piercing the corporate veil or by application of the general duty of good faith¹³⁹.
150. There has not been so far any published court decision dealing with the issue whether the effect of an arbitration agreement entered into by one company would extend to other companies in the same group. It seems probable that to solve this issue, Japanese courts would rely on theories such as implied agreement, agency, piercing the corporate veil and the general duty of good faith.¹⁴⁰

¹³⁶ Tezuka, *op.cit.*, p. 68.

¹³⁷ Kaijiho Kenkyu 150-33.

¹³⁸ “Some practical issues concerning International Arbitration in Japan”, *Osaka University Law Review* N° 60 (February 2013), 1, 5 (although the author expresses doubts whether the reasoning of the Supreme Court is still appropriate under the new Arbitration Act).

¹³⁹ Tezuka, *op.cit.*, p. 70.

¹⁴⁰ *Ibidem*.

151. It should finally be pointed out that the 2014 Arbitration Rules of the Japan Commercial Arbitration Association contain provisions on Single Arbitration for Multiple Claims¹⁴¹, Appointment of Arbitrators in Multiparty Arbitration¹⁴², Third Party Joinder¹⁴³ and Consolidation¹⁴⁴,

SECTION VIII. CONCLUSION

152. On the basis of the case law reviewed in this article, it appears that express consent is still viewed as a strict requirement for an arbitration to proceed in Singapore, China, South Korea and Malaysia. Japan seems to offer more flexible solutions. India, on the other hand, appears to have an extremely liberal jurisprudence since the decision of the Supreme Court in *Chloro Controls*, both with respect to non-signatories and the issue of whether it is possible to join in one single arbitration all disputes arising under various connected agreements. In the context of this last issue of groups of contracts, Singapore has also a very sensible approach comparable to the one followed by many courts in most European countries.

¹⁴¹ Rule 15.

¹⁴² Rule 28.

¹⁴³ Rule 52.

¹⁴⁴ Rule 53.