Singapore Journal of Legal Studies
[1993] 261 – 273

# AGREEMENTS TO REFER DISPUTES TO ARBITRATION

ONE would have thought that there would be no difficulty in determining whether the parties have agreed to refer their disputes to arbitration. After all, whether or not parties have so agreed to settle their disputes or differences by arbitration is a matter of construction of the arbitration agreement.[1]

However, as demonstrated by recent case law, the matter of what amounts to an arbitration agreement is not free from difficulty. First, there is the question of whether a clause which confers a unilateral right on one party to refer disputes to arbitration is an arbitration agreement. Secondly, there is the question of whether a clause which gives to both parties the choice of resolving their disputes by arbitration or curial proceedings is nonetheless an agreement to refer disputes to arbitration.[2]

## I. UNILATERAL RIGHT TO ELECT ARBITRATION

Clauses which confer on one party the right to proceed by arbitration to resolve disputes are also known as one-sided arbitration agreements. There is nothing objectionable in the fact that only one party is conferred the right to invoke the arbitral process to settle disputes. Writing in 1989, his Honour Judge Esyr Lewis QC in *RGE (Group Services) Ltd* v *Cleveland Offshore Ltd*,[3] stated that a provision in a contract which merely confers on one party the right to refer disputes to arbitration is a perfectly valid provision within the United Kingdom Arbitration Act, 1950.[4]

Indeed, as far back as 1948, Asquith LJ in *Woolf* v *Collis Removal Service*[5]

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1 The arbitration agreement usually takes the form of an arbitral clause in the contract documentation and may also take the form of a clause appearing in an exchange of letters, telex communications or facsimile transmissions signed by the parties. Of course, an arbitration agreement may also take the form of an agreement made between the parties after a dispute has arisen for the submission of the particular dispute to arbitration.

2 Particularly where one party has, prior to the commencement of the curial proceedings, elected to resolve the dispute by arbitration.

3 (1986) 11 Con LR 77.

4 14 & 15 Geo 6, c 27. It is pertinent to point out that s 32 of the United Kingdom Arbitration Act, 1950 defines an arbitration agreement as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

5 [1948] 1 KB 11.

in dealing with the contention that a one-sided arbitration agreement was analogous to an exception clause declared that "There is nothing in its unequal operation to divest it ... of the character attributed to arbitration clauses in general ...."[6] However, some two decades later, Davies LJ who delivered the leading judgment of the Court of Appeal in *Baron* v *Sunderland Corporation*[7] made some remarks which were perceived by the legal fraternity as undermining Asquith LJ's view of clauses which confer a unilateral right of arbitration. Davies LJ had stated: "it is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference."[8]

This view that an arbitration agreement must be predicated on mutuality in the sense of conferring bilateral rights of reference was adopted by Peter Gibson J in *Tote Bookmakers Ltd* v *Development & Property Holding Co Ltd*[9] In this case, a rent review clause had provided that the rent payable was to be the open market rental value of the rented property to be determined by the lessor serving on the lessee a notice specifying the proposed rent or by agreement or in default of agreement "at the election of the lessee by counter-notice in writing to the lessor not later than three months after the lessor's said notice (time to be the essence hereof) by an independent surveyor ... and every such determination shall be made in accordance with ... the provisions of the Arbitration Act 1950 ...."[10] Since the rent review clause gave the lessee a unilateral right to invoke arbitration by electing to serve a counter-notice within the stipulated time limit, Peter Gibson J held that the rent review clause was not an arbitration agreement within the United Kingdom Arbitration Act, 1950.[11]

It was the decision of the English Court of Appeal in *Pittalis & Ors* v*Sherefettin*[12]which dealt the death-blow to the view espoused by Davies LJ in *Baron* v *Sunderland Corporation* on clauses which conferred on one party the right to refer disputes to arbitration. The facts in *Pittalis & Ors*

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6 *Ibid,* at 17.

7 [1966] 2 QB 57.

8 *Ibid,* at 64. It does not appear that in *Baron* v *Sunderland Corporation,* the earlier Court of Appeal decision in *Ronaasen & Son* v *Metsanomistajain Metsakeskus O/Y* (1931) 40 LLR 267 was referred to. It suffices to say that in *Ronaasen & Son* v *Metsanomistajain Metsakeskus O/Y* the court assumed that a clause conferring a right only on the buyer to proceed by arbitration for the determination of certain disputes arising under a contract of sale was an arbitration agreement.

9 [1985] 2 WLR 603.

10 For the full text of the clause, see [1985] 2 WLR 603 at 605.

11 See *supra,* note 4.

12 [1986] 1 QB 868.

v *Sherefettin* may be shortly stated. The case concerned the right of a tenant under a rent review clause to set in motion machinery for the determination of the open market rental value of the rented premises. The relevant rent review clause had provided that "at the election of the lessee by notice in writing to the lessor not later than three months after the lessor's notification in writing... it [the open market rental value] shall be determined (in accordance so far as not inconsistent herewith with the provisions of the Arbitration Act 1950 ...) by an independent surveyor ...." As the tenant had failed to elect within the stipulated time, the tenant made an application under section 27 of the United Kingdom Arbitration Act, 1950 for extension of the time limit for the tenant to elect that the open market rental value be determined by an independent surveyor. One issue which confronted the court was whether, in the circumstances, it had power to make an order under section 27 of the Arbitration Act, 1950. The Court of Appeal took the view that the lease did contain, by reason of the clause set out above, an agreement to refer future disputes to arbitration. With characteristic clarity, Fox LJ stated:

> But an agreement to arbitrate in future if a party so elects can, in my opinion, correctly be described as an agreement to refer a future dispute to arbitration; if there is an election both parties are bound. Looking at the matter at the point of time when the lease was made, there was an agreement to refer a future dispute to arbitration, and not the less so because the reference was upon a contingency (*ie,* election).[13]

Thus, there is no requirement for an arbitration clause to confer bilateral rights of reference to arbitration. All that is required is that there shall be a contract which gives right of reference (whether unilateral or bilateral) to arbitration. It is sufficient to say that later decisions[14] have acted on Fox LJ's view of clauses which confer on one party the right to elect arbitration as the means for settlement of disputes.

At this juncture, it is pertinent to observe that the Delhi High Court has taken a position opposed to that accepted as correct in *Pittalis & Ors* v *Sherefettin.* In *Union of India* v *Bharat Engineering Corporation*[15] Chawla J, writing the judgment of the court, stated that an arbitration agreement must confer bilateral rights to refer disputes to arbitration. It is also worthy of note that the court distinguished an arbitration agreement from an agreement which contains an option conferring on one party the right to

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[13] [1986] 1 QB 868 at 874F-H.

[14] See, *inter alia, "The Amazona"* [1989] 2 Lloyd's Rep 130; "*The Stena Pacifica"* [1990] 2 Lloyd's Rep 234 and *RGE (Group Services) Ltd* v *Cleveland Offshore* Ltd (1986) 11 Con LR 77.

[15] (1977) 11 ILR (Delhi) 57.

elect arbitration for the resolution of disputes. In the court's view, an agreement containing an option to elect arbitration as the means of dispute resolution is not an arbitration agreement; the arbitration agreement comes into being only after the party has elected to proceed by arbitration. Such an agreement, according to the Delhi High Court, was more in the nature of an agreement to agree to arbitrate. Thus, the court in *Union of India* v *Bharat Engineering Corporation* held that the clause[16] considered in that case was not an arbitration agreement as first, it did not confer bilateral rights of reference and secondly, the clause was more properly characterised as an option to agree to arbitrate and as such partook of an agreement to agree to arbitrate.

On the point that a clause which confers on one party the right to elect arbitration as the means for dispute resolution is more properly described as an agreement to agree to arbitrate and therefore not to be treated as an arbitration agreement, it will be recalled that the English cases have taken a diametrically opposite view. In *Pittalis & Ors* v *Sherefettin* it was held that "an agreement to arbitrate in future if a party so elects can ... correctly be described as an agreement to refer a future dispute to arbitration ... there was an agreement to refer a future dispute to arbitration, and not the less so because the reference was upon a contingency (*ie,* election)."[17] Indeed, in the earlier case of "*The Messiniaki Bergen",*[18] Bingham J (as he then was) stated that a clause conferring on the parties the choice to settle disputes by arbitration is not an agreement to agree because:

> on a valid election to arbitrate no further agreement is needed or contemplated. It is, no doubt, true that by this clause the parties do not bind themselves to refer future disputes for determination by an arbitrator and in no other way. Instead the clause confers an option, which may but need not be exercised. I see force in the contention that until an election is made there is no agreement to arbitrate, but once the election is duly made (and the option is exercised)... a binding arbitration agreement comes into existence. Where the option agreement and the exercise of the option are both... expressed in writing, the statutory requirement of a written agreement is ... satisfied.[19]

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[16] The clause read "In the event of any dispute of difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties, on any matter in question ... the Contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration...."

[17] *Per* Fox LJ in [1986] 1 QB 868 at 874F-H. See also Dillon LJ at [1986] 1 QB 868 at 883.

[18] [1983] 1 All ER 382.

[19] *Ibid,* at 386.

In the later case of "*The Stena Pacifica",*[20] Evans J said that:

> even a conditional (or optional) agreement to refer future disputes to arbitration, is nevertheless 'an agreement to refer future disputes' within the clause. It is a binding agreement ... and it requires the parties to refer a future dispute to arbitration whenever a valid election is made. True there is no reference of any particular dispute until such an agreement [*sic*] does come into existence, but there can never be an actual reference until after the dispute has arisen. Before that there can only be an agreement that future disputes will be referred, and ... the fact that such an agreement depends upon the exercise of an option, even by the party claiming the arbitration, does not prevent this from being 'an agreement to refer future disputes' ....[21]

It is sufficient to say that this approach is entirely consistent with the reasoning of the English Court of Appeal in *Pittalis & Ors* v *Sherefettin.*[22] It will be recalled that in that case, the lessors had contended that there was no subsisting arbitration agreement and therefore the court had no power under section 27 of the United Kingdom Arbitration Act, 1950 to extend the time limit for the commencement of arbitration proceedings. By its finding that the trial judge had misdirected himself in the exercise of his discretion by granting the time extension, the Court of Appeal accepted that there was a subsisting arbitration agreement. As Fox LJ put it succinctly:

> Looking at the matter apart from authority, I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant.[23]

In like vein, Dillon LJ pointed out that "there is in the lease itself an agreement, binding on the landlords, that there shall be arbitration over the open market rental value of the premises if the tenant, by notice, so elects ...."[24]

In Western Australia, the Supreme Court in *Brunswick NL* v Sam *Graham Nominees Pty Ltd,*[25] has taken the view that a clause which confers on one

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[20] [1990] 2 Lloyd's Rep 234.
[21] [1990] 2 Lloyd's Rep 234 at 339 right-hand column.
[22] See the judgment of Fox LJ at [1986] 1 QB 868 at 874 and Dillon LJ's judgment at 883.
[23] [1986] 1 QB 868 at 875.
[24] *Ibid,* at 883.
[25] (1990) 2 WAR 207.

party the right to arbitrate is not to be characterised as an option. Ipp J thought that the right conferred by the clause was to be regarded as "a right to elect to submit a dispute to arbitration. Thus [the clause] does not on its own bar recourse by either party to the court. However, each has the right to choose to refer any dispute arising to arbitration."[26] More recently, in *Turner Corporation Ltd* v *Austotel Pty Ltd,*[27] Giles J had occasion to adopt the view that a clause which confers on both parties the right to elect arbitration as the means of dispute resolution is an arbitration agreement. In his Honour's view, the right of election is an election between referring the dispute to arbitration or proceeding with curial adjudication, and an agreement to arbitrate disputes under which there is such a right of election is an agreement to refer disputes to arbitration. In both *Brunswick NL* v *Sam Graham Nominees Pty Ltd* and *Turner Corporation Ltd* v *Austotel Pry Ltd,* the courts considered the earlier cases which supported the distinction between an arbitration agreement and an option to arbitrate. Two early cases in which the distinction between an arbitration agreement and an option to arbitrate formed the basis of the court's decision are *Hammond* v *Wolt*[28] and *Woolworths Ltd* v *Herschell Constructions Pty Ltd (In Liq).*[29] In both cases, the court took the view that the option given to the parties to settle their differences or disputes by arbitration or by litigation meant that there was no agreement to refer the difference or dispute to arbitration. At most, the parties had merely agreed that each would have the option to refer the dispute to arbitration. Unless and until the option or more properly *(pace* Ipp J in *Brunswick NL* v *Sam Graham Nominees Pty Ltd*[30]*)* the right to elect to submit a dispute to arbitration was exercised, there was no agreement to refer disputes to arbitration. In *Hammond* v *Wolt,* Menhennitt J described a clause conferring on the parties the right to elect arbitration as the means for dispute resolution as "permissive".

However, it may be said that merely to describe such a clause as "permissive" or as conferring an option to arbitrate or as conferring the right to elect to submit disputes to arbitration does not assist in the determination of whether such a clause is an arbitration agreement.[31] At the end of the day, the question must be whether by reason of the clause conferring the right to elect arbitration as the means of dispute resolution, there was an agreement to refer disputes to arbitration. It is respectfully submitted that in this regard, the English approach as exemplified by

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[26] *Ibid,* at 211.
[27] (1992) 27 NSWLR 592
[28] [1975] VR 108.
[29] Unreported decision of Smith J in the Supreme Court of Victoria, 19 June 1991.
[30] (1990) 2 WAR 207 at 211.
[31] See also the doubts expressed by Giles J in *Turner Corporation Ltd* v *Austotel Pty Ltd* (1992) 27 NSWLR 592 at 599A.

Evans J's approach in "*The Stena Pacifica"* is preferable. The point being that if the parties have agreed that disputes are to be referred to arbitration should one of them so elect, that in itself may aptly be described as an agreement to refer disputes to arbitration. Thus, the referral of a dispute to arbitration occurs only because of the prior agreement of the parties that there shall be a referral to arbitration when the right of election is exercised by, as the case may be, the parties or one of the parties. There are good policy reasons why such an agreement (conferring on parties the right to elect arbitration) should be regarded as an arbitration agreement – for one, it would subject such agreements to the local legislation regulating the conduct of arbitration.[32]

Thus, it is submitted that the preferred view is that a clause conferring on one party the right to elect to submit disputes to arbitration is an arbitration agreement.

## II. Bilateral Rights to Elect Arbitration

As noted earlier, there is also clear authority for the view that a clause which confers on both parties the right to elect arbitration as the means for settlement of disputes is an arbitration agreement.[33]

Turning to Singapore, it is pertinent to observe that the High Court has had the occasion to consider the question of whether a clause providing that disputes arising under or in connection with the contract shall be determined either by curial adjudication or arbitration is an arbitration agreement requiring the parties to refer disputes to arbitration. The case in point is "*The Dai Yun Shan"*.[34] In that case, clause 2 of the bill of lading provided that "All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or by arbitration, in the People's Republic of China." The plaintiffs who were the holders of the relevant bill of lading caused the defendants' vessel to be arrested in Singapore. The defendants took out an application to stay the action *in rem* on the ground that by clause 2 of the bill of lading, both parties had agreed to arbitrate and/or litigate the dispute in the People's Republic of China. The defendants succeeded in their application before the Senior Assistant Registrar and the plaintiffs appealed against the order of the Senior Assistant Registrar.

The plaintiffs' appeal came before Goh Joon Seng J who held that the dispute between the parties was not one which was required to be referred

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[32] See also the judgment of Giles J in *Turner Corporation Ltd* v *Austotel Pty Ltd* (1992) 27 NSWLR 592 at 599.

[33] See "*The Amazona"* [1989] 2 Lloyd's Rep 130; "*The Stena Pacifica"* [1990] 2 Lloyd's Rep 234 and *Turner Corporation Ltd* v *Austotel Pty Ltd* (1992) 27 NSWLR 592.

[34] [1992] 2 SLR 508.

to arbitration. In his Honour's view, in as much as clause 2 of the bill of lading conferred on the parties the choice of either arbitral proceedings in China or litigation in the Chinese courts, there was no requirement that the dispute between the parties be referred to arbitration. In the words of Goh J, the dispute between the plaintiffs and defendants was "not one that is required to be referred to arbitration. Therefore the [Arbitration (Foreign Awards) Act[35]] does not apply."[36]

It is obvious that Goh J's allusion to a dispute which is required to be referred to arbitration is founded on the statutory language of section 4(1)(b) of the Arbitration (Foreign Awards) Act. Section 4(1) of the Arbitration (Foreign Awards) Act provides that where one party to an arbitration agreement institutes legal proceedings in any court in Singapore, the other party may apply to stay the legal proceedings provided "the proceedings involve the determination of a dispute between the parties in respect of any matter which is required, in pursuance of the [arbitration][37] agreement to be referred to, and which is capable of settlement by, arbitration."[38] As it is clear that Goh J took the position that the dispute between the carrier and the holder of the bill of lading in "*The Dai Yun Shan*" was not a matter which was required to be referred to arbitration, it may be contended that his Honour must be taken to have accepted, albeit *sub silento,* that clause 2 of the bill of lading in "*The Dai Yun Shan*" is an arbitration agreement. The point is that one does not speak of a matter that is required to be referred to arbitration "in pursuance of the *agreement*"[39] unless one accepts that there is an arbitration agreement.

However, a perusal of Goh J's judgment in "*The Dai Yun Shan*" does not reveal the basis for his Honour's conclusion that clause 2 of the bill of lading did not require the parties to refer the dispute to arbitration. In fact, there are two possible bases for his Honour's conclusion. First, that clause 2 by its language cannot be said to contain an agreement to arbitrate any dispute. Secondly, that although clause 2 of the bill of lading provided for determination of disputes by arbitration, neither of the parties had elected to proceed by arbitration to resolve the particular dispute. The second basis would require the court to hold that clause 2 of the bill of lading conferred on both parties the right to elect arbitration as the means for the settlement of disputes. This, in effect, attributes to clause 2 of the

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[35] Cap 10A, 1985 Rev Ed.

[36] See *supra,* note 34, at 512F.

[37] The word in parentheses is added by the author. The addition of the word, it is submitted, conveys clearly the meaning of s 4(l)(b) of the Act.

[38] The words found in s 4(l)(b) of the Arbitration (Foreign Awards) Act.

[39] Emphasis is the author's. The agreement must be a reference to the arbitration agreement. See *supra,* note 33.

bill of lading in "*The Dai Yun Shan*" the import which the courts have ascribed to the clauses considered in "*The Stena Pacifica*"[40] and "*The Amazona*".[41] It must, however, be pointed out that the clauses considered in "*The Stena Pacifica*" and "*The Amazona*" were expressly clear in their intent – the clauses submitted all disputes to the jurisdiction of the courts subject to each party's right to elect to have any such dispute referred to arbitration in accordance with the machinery provided for in the arbitration clause. In "*The Amazona*", the English Court of Appeal described the relevant clause as providing for an option to arbitrate and confirmed that until and unless a valid election is made by a party to the agreement, the contract provides for High Court jurisdiction rather than arbitration.[42]

It would be difficult to contend that Goh J's conclusion in "*The Dai Yun Shan*" is founded on the first basis as Goh J's reliance on the statutory language of section 4(1)(b) of the Arbitration (Foreign Awards) Act points to his Honour's acceptance that there was, by virtue of clause 2 of the bill of lading, an agreement to submit to arbitration all or any differences arising under or in connection with the bill of lading.[43] However, it may be said with some force that Goh J did not decide that clause 2 of the bill of lading was an arbitration agreement. All that his Honour did was simply to deal with the less problematic point of whether on the facts of the case, the dispute before the court was one which was required by the parties to be referred to arbitration.

Be that as it may, it is respectfully submitted that given Goh J's reliance on the words "the determination of a dispute ... in respect of any matter which is required, in pursuance of the agreement to be referred to ... arbitration" found in section 4(1)(b) of the Arbitration (Foreign Awards) Act, it is more probable that Goh J's conclusion was founded on the second basis. In other words, clause 2 of the bill of lading considered in "*The Dai Yun Shan*" is a clause which confers on the parties the right to elect

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[40] [1990] 2 Lloyd's Rep 234.

[41] [1989] 2 Lloyd's Rep 130.

[42] This was the view of Evans J on the holding in "*The Amazona*" [1989] 2 Lloyd's Rep 130 on this point. See "*The Stena Pacifica*" [1990] 2 Lloyd's Rep 234 at 239, right-hand column. It suffices to say that the relevant clause considered in "*The Amazona*" is an arbitration agreement notwithstanding the court's treatment of the clause as evincing the intention of the parties that any dispute be settled by curial adjudication subject to the right to elect arbitration as the means of dispute resolution.

[43] The words "arbitration agreement" in the Arbitration (Foreign Awards) Act mean an agreement in writing under which the parties undertake to submit to arbitration all or any of the 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. See s 2(1) of the Arbitration (Foreign Awards) Act read with Art 11(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10 June 1958 scheduled to the Act.

arbitration as the mode of dispute resolution. It is significant to point out that the report of the case does not indicate whether there are any other provisions in the bill of lading which dealt with the matter of arbitration. In particular, there is no mention of any clause providing for the initiation of arbitration proceedings. Thus, one may safely assume that the matter of arbitration was only mentioned in clause 2 of the bill of lading. That being the case, one is left with the inference that by its language, clause 2 of the bill of lading provides for disputes to be resolved by arbitration. However, one may legitimately enquire as to the legal import of the reference in clause 2 of the bill of lading to curial proceedings in the Chinese courts.

Perhaps, the correct way of construing clause 2 of the bill of lading considered in "*The Dai Yun Shan*" is to view clause 2 as stating the parties' agreement that disputes be determined by curial proceedings in the People's Republic of China unless one of the parties desires the dispute to be determined by arbitration. Construed in this way, it is clear that there would be a need for one of the parties to manifest the desire or intention to determine the dispute by arbitration. The manifestation of this intention is the act of notifying the other party that the particular dispute is to be resolved by arbitration. On the facts before the court, neither party had – at the time of commencement of the curial proceedings in Singapore – manifested the intention to arbitrate the dispute. It is clear that the defendants had not initiated arbitration proceedings at the time that the application to stay the Singapore action was made. In fact, when the defendants' application for stay of the Singapore action *in rem* came before the Senior Assistant Registrar, the court had ordered that "[t]he defendants refrain from raising time bar as a defence to the plaintiffs' claim in arbitration or in the court of the People's Republic of China *provided the plaintiffs commence arbitration* or court proceedings in the People's Republic of China *within five months hereof*."[44]

Viewed on this basis, Goh J's conclusion that there was no dispute – as neither of the parties had elected arbitration as the means to resolve the particular dispute before the court – which was required to be arbitrated is unexceptionable. However, lest it be misunderstood, the point must be made that the non-exercise of the right of election (for the dispute to be determined by arbitration) provided for in clause 2 of the bill of lading does not mean that clause 2 is not an arbitration agreement. Clause 2 is a subsisting arbitration agreement albeit the particular dispute which arose in "*The Dai Yun Shan*" was not required to be referred to arbitration. The upshot of this is that in an appropriate case, section 27 of the Arbitration

[44] The emphasis is the author's. See [1992] SLR 508 at 511.

Act[45] is available to empower the court to extend the time limit for commencement of arbitration proceedings.

However, it must be conceded that it is certainly possible to take the position that clause 2 of the bill of lading does not in terms confer on any party the right to elect arbitration as the means of dispute settlement. All that clause 2 does is to spell out two different means of dispute settlement without stating that arbitration would necessarily override litigation in curial proceedings as the means of dispute settlement. In other words, clause 2 of the bill of lading is not an agreement by which parties have undertaken to refer disputes to arbitration. *Ergo,* clause 2 of the bill of lading is not a subsisting arbitration agreement. It would be otherwise if clause 2 of the bill of lading had provided that "All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or at the election of the either party, by arbitration in the People's Republic of China."[46]

Be that as it may, it is axiomatic that as with any other contract, the arbitration agreement must be construed according to its terms in and with regard to the relevant factual situation.[47] It may well be that commercial sense dictates that clause 2 of the bill of lading in "*The Dai Yun Shan"* be given an interpretation consistent with parties having agreed to arbitrate their disputes whenever one party desires arbitration and has notified this desire to the other party as the means of dispute resolution.

At this juncture, it is instructive to turn to *Turner Corporation Ltd* v *Austotel Pty Ltd* (hereinafter referred to as the "*Turner Corporation* case"). In that case, the relevant clause read as follows:

> In the event of any dispute or difference arising between the Proprietor ... on the one hand and the Builder on the other hand ... at any time as to the construction of this Agreement or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith then either party shall give to the other notice in writing by hand or by certified mail adequately identifying the matters the subject of that dispute or difference and the giving of such notice shall be a condition precedent to the commencement by either party of proceedings (whether by way of litigation or arbitration) with regard to the matters the subject of that dispute or difference as identified in that notice.

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[45] Cap 10, 1985 Rev Ed.

[46] It is submitted that the additional words inserted in clause 2 would make it clear that either of the parties has the right to elect arbitration as the mode of dispute resolution.

[47] *Per* Ralph Gibson LJ in *Harbour Assurance Co (UK) Ltd* v *Kansa General International Insurance Co Ltd & Ors* [1993] 3 WLR 42 at 49C-D.

It will be recalled that in the *Turner Corporation* case, the New South Wales Supreme Court took the view that the clause as set out above is an arbitration agreement. The clause is to be regarded as an arbitration agreement notwithstanding that it confers on either party the right to settle the dispute by arbitration. Founding himself on *Pittalis & Ors* v *Sherefettin,*[48] Giles J in the *Turner Corporation* case reasoned that notwithstanding the right of election conferred on the parties to choose arbitration as the means of settling the dispute, any subsequent arbitration of the dispute must perforce draw its legitimacy from the agreement which conferred on the parties the right of election to proceed by arbitration. Thus, it is the agreement conferring the right to elect to proceed by arbitration which is the agreement by which the parties have agreed to refer their disputes to arbitration. In the words of Giles J, the dispute proceeded to arbitration "because the parties agreed by the contract that [the exercise of the right to elect under the contract to proceed by arbitration] would have that effect. To that extent there was an agreement to refer disputes to arbitration."[49] The fact that a referral to arbitration was not inevitable in the event of a dispute and the fact that the parties had not agreed that the only way by which their disputes might be determined was arbitration did not preclude that the parties had agreed, in the event of the exercise of the right to elect arbitration as the means of dispute resolution, to refer the dispute to arbitration.[50]

Giles J in the *Turner Corporation* case pointed out that there was a difference between "an agreement to refer disputes to arbitration" and "an agreement referring disputes to arbitration." According to Giles J, in the case where parties are conferred the right to elect to refer disputes to arbitration, the exercise of the right to elect to refer the dispute to arbitration may still properly be described as stemming from "an agreement to refer disputes to arbitration". And the agreement to refer disputes to arbitration was the very agreement which conferred on the parties the right to elect arbitration as the means of resolving their dispute. Having agreed that each party could elect to resolve disputes by arbitration, the agreement was one where parties agreed to resolve their disputes by arbitration in the sense that they had agreed that disputes would be referred to arbitration if either party elects to do so by giving the necessary notices. In this connexion, the following rhetorical question posed by Giles J is particularly apposite: "If there is a referral to arbitration upon receipt of the notice under clause 13.02 [the clause which was held to be the arbitration

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[48] [1986] 1 QB 868.
[49] (1992) 27 NSWLR 592 at 595E.
[50] See the reasoning of Giles J at (1992) 27 NSWLR 592 at 595E-F and 601B-C.

agreement], how does that come about unless by the prior agreement of the parties?"[51]

Thus, there is support in the *Turner Corporation* case for the view that a clause of the ilk as clause 2 of the bill of lading in "*The Dai Yun Shan"* is an arbitration agreement.

Be that as it may, we await decisive appellate authority on whether a clause worded in the same way as clause 2 of the bill of lading in "*The Dai Yun Shan"* is an arbitration agreement. Of course, commercial men may render the whole matter academic by simply using clearer language in their contracts to manifest their intention that the parties are agreed that disputes are to be litigated unless one party elects to proceed by arbitration to resolve the dispute.

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[51] See (1992) 27 NSWLR 592 at 598D.

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