IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended

SC Appeal No: 225/2025
SC/HC/CALA No: 123/2025
WP/HCCA/COL/60/20/LA
DC Colombo Case No: DMR/03133/2018

Sri Lanka Insurance Corporation Limited,
21, Vauxhall Street, Colombo 2.

PLAINTIFF

Vs.

Ebert Silva Touring Company (Private) Limited,
No. 11, Malwatte Road, Dehiwela.

DEFENDANT

And between

Sri Lanka Insurance Corporation Limited,
21, Vauxhall Street, Colombo 2.

PLAINTIFF – APPELLANT

Vs.

Ebert Silva Touring Company (Private) Limited,
No. 11, Malwatte Road, Dehiwela.

DEFENDANT – RESPONDENT

And now between

Ebert Silva Touring Company (Private) Limited,
No. 11, Malwatte Road, Dehiwela.

DEFENDANT – RESPONDENT – APPELLANT

Vs.

Sri Lanka Insurance Corporation Limited,
21, Vauxhall Street, Colombo 2.

PLAINTIFF – APPELLANT – RESPONDENT

Before: **Arjuna Obeyesekere, J**
Menaka Wijesundera, J
M. Sampath K.B. Wijeratne, J

Counsel: Nihal Fernando, PC with Amith Silva for the Defendant – Respondent – Appellant

Jagath Wickremanayake, PC with Chamila Wickremanayake and Nuwan Jayalath for the Plaintiff – Appellant – Respondent

Argued on: 11th June 2026

Written Submissions: Tendered on behalf of the Defendant – Respondent – Appellant on 17th December 2025

Decided on: 17th July 2026

Obeyesekere, J

(1) The primary issue that needs to be determined in this appeal is whether there exists between the Plaintiff – Appellant – Respondent [**the Plaintiff**] and the Defendant – Respondent – Appellant [**the Defendant**] an agreement to refer to arbitration the dispute that has arisen between the parties, and if so, whether the District Court has jurisdiction to hear and determine the action filed by the Plaintiff in view of the provisions of Section 5 of the Arbitration Act, No. 11 of 1995 [**the Act**].

Background facts

(2) The Plaintiff is the Sri Lanka Insurance Corporation Limited. It filed action against the Defendant in the District Court of Colombo [**the District Court**] on 15th August 2018 seeking to recover a sum of Rs. 3,404,018.84 being the premium that the Plaintiff claimed was due from the Defendant on three insurance policies that it had issued the Defendant and which were reflected in the Schedules to the said policies marked as X3, X4 and X5.

(3) Whilst denying the claim of the Plaintiff, the Defendant pleaded in paragraph 1 of its answer that in terms of Clause 8 of the Contract of Insurance between the Plaintiff and the Defendant, the parties have agreed that any dispute between the parties shall be referred for arbitration, and hence, the Defendant is objecting to the District Court assuming jurisdiction over the said dispute.

(4) The following provisions of the Act are relevant when considering the said objection:

[A] Section 3(1), which provides that, "*An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement*.";

[B] Section 3(2), which mandates that, "*An arbitration agreement shall be in writing*. *An agreement shall be deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement*.";

[C] Section 50 which defines an "*arbitration agreement"* to mean "*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*."

[D] Section 4 which provides that, "*Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is* *entered into is contrary to public policy or, is not capable of determination by arbitration*."

[E] Section 5, which provides that, "*Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter*."

(5) Thus, an agreement to arbitrate must be in writing and may take the form of an arbitration clause in a contract between the parties or else be contained in a separate agreement between the parties. While parties can agree to refer to arbitration all disputes that may arise from their contract, parties can also agree to restrict the kind of disputes that they may wish to refer for arbitration. Thus, it is possible for the parties to agree to submit for resolution by arbitration only certain disputes that arise under their contract or else to agree to submit all disputes for arbitration. This intention of the parties must be gathered by the wording of the arbitration agreement and any bifurcation must be clearly set out in the agreement itself. Accordingly, any dispute that the parties have agreed to refer for arbitration may be resolved by arbitration provided the matter in respect of which the arbitration agreement is entered into is not contrary to public policy or is not capable of determination by arbitration. The reason for the use of the word, 'may' in Section 4 is that in terms of Section 5, where a party comes to Court notwithstanding an agreement to refer disputes arising between them for arbitration, it is open to the other party to not object to the Court assuming jurisdiction. The objection raised by the Defendant to the District Court assuming jurisdiction was therefore founded upon Section 5 of the Act.

<u>Contract of Insurance</u>

(6) The Plaintiff did not deny the existence of either the said Contract of Insurance referred to by the Defendant or the aforementioned Clause 8 that was contained in the said Contract, but instead took up the position that not all disputes between them must be referred for arbitration and that the cause of action contained in the plaint was outside the scope of the arbitration clause.

(7) Although the Plaintiff had pleaded the Schedules that were relevant to the three Insurance Policies for which the premium was due, it had not produced with its plaint the Contract of Insurance referred to by the Defendant. However, at the pre-trial hearing held on 22nd October 2019, both parties had agreed (a) to formally admit the Contract of Insurance, (b) to mark the Contract of Insurance as X(a), and (c) *inter alia* on the following admission:

> "X(a) ලේඛනය පිලිගනිති
>
> X(a) ලේඛනයට අදාලව පැමිණිල්ල සමග X3, X4 and X5 වශයෙන් ලකුණු කර ඇති ලේඛන පැමිණිලිකරු විසින් විත්තිකරු වෙත නිකුත් කරන ලද සහ විත්තිකරු වෙත ලැබුනු බව පිලිගනී"

(8) With the above admission, the Plaintiff admitted that the three policies that were the subject matter of the case before the District Court arose from the Contract of Insurance X(a), thus establishing the nexus between X(a) on the one hand and X3, X4 and X5 on the other.

(9) The Defendant had thereafter moved that the following issue raised by it be tried as an issue of law:

> "උත්තරයේ පලමුවන ඡේදයෙන් වඩාත් විස්තරාත්මකව සදහන් කර ඇති පරිදි:
>
> (අ) 1995 අංක 11 දරණ බේරුම්කරණ පනතේ පස්වන වගන්තිය ප්‍රකාරව මෙම පැමිණිල්ල අසා තීරණය කිරීමට මෙම අධිකරණයට අධිකරණ බලය නොමැත්තේද?
>
> (ආ) එසේ නම් මෙම නඩුව මුල් අවස්ථාවේදීම නිශ්ප්‍රභා කල යුතු වන්නේද?"

(10) In its Order delivered on 6th July 2020, the District Court held that by Clause 8, both parties had agreed to refer for resolution by arbitration, disputes arising under X(a) including the dispute that was currently before Court, and that in view of the objection raised by the Defendant founded upon Section 5, the District Court does not have jurisdiction to hear and determine the said dispute. The District Court had accordingly answered the issue of law in the affirmative and dismissed the plaint.

(11) Aggrieved, the Plaintiff filed an appeal with the Provincial High Court of the Western Province holden at Colombo exercising civil appellate jurisdiction [**the High Court**]. By the impugned judgment delivered on 28th February 2025, the High Court set aside the Order of the District Court and directed the District Court to proceed with the trial, for the following two reasons:

(a) The High Court upheld the submission of the Plaintiff that the dispute before the District Court relating to the non-payment of premium does not fall within Clause 8;

(b) The High Court held that in any event, the said issue cannot be determined as an issue of law and must be determined at the end of the trial.

(12) I must state that the High Court reached the latter conclusion notwithstanding the fact that the learned President's Counsel representing both parties before the District Court had agreed that the above issue referred to in paragraph 9 can be tried as an issue of law, as provided by Section 147 of the Civil Procedure Code. Hence, even though the parties had agreed that the said issue could in fact be raised as an issue of law as contemplated by the said Section, and that no further evidence, oral or documentary, was required to be led by either party in order to determine the said issue, the Plaintiff appears to have taken up a different position in the High Court. Thus, the conclusion reached by the High Court that the above issue can be determined at the end of the trial was contrary to what the parties had agreed before the District Court.

(13) Dissatisfied with the aforementioned findings of the High Court, the Defendant sought and obtained leave to appeal from this Court on 4th November 2025 on the following question of law:

> "Did the High Court err in law in the application of Section 5 of the Arbitration Act read with Clause 8 of the Contract of Insurance?"

Party autonomy

(14) While negotiating a contract and similar to any other provision thereof, parties are free to agree on the manner in which their disputes shall be resolved. Parties may either decide to keep silent with regard to the dispute resolution mechanism or else, specify the manner in which their disputes shall be settled. Such a mechanism can include an agreement to refer disputes to a court of law or else the parties may opt for an alternative to the traditional court process. Arbitration is a method of alternative dispute resolution that is chosen by the parties to a contract in order to provide them with an expeditious and binding resolution of disputes that may arise under their contract by obviating the complexities of the cumbersome, expensive and time consuming traditional court process.

(15) When drafting an arbitration clause or an arbitration agreement, parties enjoy broad freedom to construct a clause of their choice. The parties may provide for ad hoc or institutional arbitration and in the event of the latter, adopt the rules of such institution, designate the number of arbitrators, their qualifications including any particular expertise that the arbitrators must possess, the applicable law by which the contractual relationship shall be governed, the place where the arbitration shall be held, and any matters relevant to the procedure to be followed, including time limits for filing of pleadings and the language of the arbitration, with a view of ensuring an efficient and expeditious arbitration process. The autonomy the parties enjoy of customising the entire arbitral process to suit their requirements, commonly referred to as party autonomy, is a basic principle in commercial arbitration and plays a pivotal role in determining the scope and extent of an arbitration.

(16) As observed in **Softlogic Finance PLC v Kollurage Priyanka Don Kollurage** [SC Appeal No. 43/2024; SC minutes of 24th July 2025]:

> *"… it would not be an exaggeration to state that party autonomy is the golden thread that runs through the entire process of arbitration, and beyond.* ***The need to respect party autonomy manifested by the parties contractual bargain has been accepted as the cornerstone underlying judicial non-intervention in***

arbitration. *It is in this backdrop that the Courts have adopted an unequivocal judicial policy of facilitating and promoting arbitration and has been slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration.*" [emphasis added]

(17) With party autonomy being the golden thread, and with Courts playing a supporting role right through the entire arbitration process, it is extremely important that Courts endeavour at all times to uphold the common will of the parties and give effect to the intention of the parties.

<u>Intention of the parties – Sri Lankan context</u>

(18) I must state that Courts across all parts of the World have shown great reluctance to declare an arbitration clause inoperative when confronted with an objection that the arbitration clause that the parties negotiated is vague, inoperative due to a drafting flaw, and/or does not clearly reflect the intention of the parties to refer all of their disputes for arbitration. Instead, the unequivocal judicial policy has been to facilitate and promote arbitration with a view of giving effect to the agreement of the parties rather than defeating it, bearing in mind that:

(a) Arbitration is the primary means of resolving commercial disputes, and more particularly international commercial disputes;

(b) The intent of the parties to submit disputes to arbitration must be preserved and that Courts must endeavour at all times to give effect to the principle of party autonomy;

(c) Even if an arbitration clause is ambiguous, a party must not be allowed to take undue advantage of such ambiguity;

(d) Where multiple interpretations are available, preference must be given to the construction that renders the clause effective rather than void.

(19) Judicial precedents across many jurisdictions, including those of this Court, demonstrate that Courts have striven to interpret an arbitration clause in favour of arbitration, reinforcing the principle that arbitration agreements, even if defective in

form, should not be easily invalidated if the intention of the parties is clear. Thus, a Court would declare an arbitration clause as being inoperable only as a last resort and only in those extremely limited situations where the arbitration clause is incurably vague, incomplete, or internally inconsistent to the extent that no coherent interpretation can be sustained.

(20) The applicability of Sections 4 and 5 of the Act was considered in **Elgitread Lanka (Private) Limited v Bino Tyres (Private) Limited** [SC Appeal No. 106/2008; SC minutes of 27th October 2010]. In that case, the respondent instituted action in the Commercial High Court for the recovery of a sum of Rs. 40m as damages for alleged breach of contract. Clause 14 of the contract provided that, "*Any dispute arising out of this Agreement shall be referred to the Sri Lanka Chamber of Commerce and Industry, Colombo, for arbitration, whose decision shall be binding and final*". The appellant objected to the jurisdiction of the Commercial High Court on the basis that by reason of clause 14, the Court cannot hear and determine any dispute that may arise from the said contract, as Section 5 of the Act takes away the jurisdiction of Court when objection is taken to the exercise of jurisdiction by Court. The respondent took up the position that the agreement to refer the dispute for arbitration is frustrated since there does not exist in Sri Lanka any entity by the name of "*the Sri Lankan Chamber of Commerce and Industry, Colombo*" and that the intention to refer any dispute that may arise from the said Agreement for arbitration has been defeated by physical impossibility.

(21) The High Court held that since there is no entity in existence with the name "*the Sri Lankan Chamber of Commerce and Industry, Colombo*", the agreement to arbitrate contained in clause 14 is incapable of being given effect to, and is therefore void *ab initio*. In appeal, this Court was called upon to consider *inter alia* whether clause 14 amounted to a valid agreement to arbitrate in the context of the omission to specify an arbitral institution that was in existence.

(22) Justice Saleem Marsoof, PC stated that:

> "*Just as much as there can be no arbitration without a valid arbitration agreement, there can be no agreement to arbitrate without a manifestation of consent of parties to submit to arbitration any dispute that may arise from a*

contract entered into by them or other defined legal relationship. Learned Counsel for the Appellant has referred us to a passage in Russell on Arbitration *[22nd Edition by David St. John Sutton and Judith Gill (page 35 paragraph 2-025)], where the authors observe that "***the Courts seek to give effect to the parties' intention to refer disputes to arbitration, and to allow the tribunal full jurisdiction except in cases of hopeless confusion***". Counsel has cited several illustrative cases including* Astro Vencedor Compania Naviera S.A. v. Mabanaft G. M.B.H*. [(1970) 2 Lloyd's Reports 267], in which when considering whether a claim of damages for tort can be brought within the purview of the arbitration clause that formed part of the contract sued upon in that case, the Court in providing an affirmative answer, emphasized at page 271 that "the decision must in every case depend upon the facts, but* ***the Court should if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed***." [emphasis added]

(23) Justice Marsoof thereafter referred to the following three cases:

[A] **Onex Corp. v Ball Corp.,** [(1994) 12 B.L.R. (2nd) 151], where despite the ambiguity in the relevant arbitration clause, the Ontario Court held that, "*where the language of the arbitration clause is capable of bearing two interpretations, and only one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option*".

[B] **Star Shipping AS v China National Foreign Trade Transportation Corporation** [(1993) 2 Lloyd's Reports 445], where the arbitration clause provided that "*any dispute arising under the charter is to be referred to arbitration in Beijing or London in the defendant's option*". Responding to an argument that the arbitration clause was ambiguous, uncertain and one sided, the English Court of Appeal, while holding that the clause was a valid arbitration clause, emphatically stated that despite the ambiguity of the clause, "***the one thing that is clear*** *about Clause 35* ***is that the parties intended to refer their dispute to arbitration****. I would be very reluctant indeed to defeat that intention*." [emphasis added]

[C] **<u>Mangistaumunaigaz Oil Production Association v United World Trade Inc</u>**. [(1995) 1 Lloyd's Reports 617] where the arbitration clause only said, "*Arbitration, if any, by ICC Rules in London*." In rejecting the contention that there was no valid arbitration agreement as the said clause merely manifested an intention that, if and only if, the parties on a later date mutually decided to refer the matter for arbitration that the ensuing arbitration proceedings would be governed by the ICC Rules, Potter, J stated as follows:-

> "*In my opinion the clause as a whole, read in the context of an international contract for the sale of oil, demonstrates that the parties intended to settle any dispute which might arise between them by arbitration according to I.C.C. rules in London with English law to apply. The alternative is that, by providing for arbitration "if any", the parties were merely binding themselves in advance to the arbitral rules and venue which would govern any ad hoc agreement for arbitration which they might subsequently make if a dispute arose. The terms of the written contract suggest no need or reason to take so unusual a course. I consider that the commercial sense of an agreement of this kind, and the presumed contractual intention of the parties in importing the words used, can best be effected either by treating the words "if any" as surplusage, or as being an abbreviation for the words "if any dispute arises". Any other construction appears to me to strain common sense and to breach the overall rule of construction which is to give effect to the presumed intention of the parties having regard to the context in which the words appear*."

(24) Justice Marsoof proceeded to state that, "*In these and other cases, the courts have consistently given effect to **the spirit of the arbitration agreements** in question to refer disputes to arbitration. Clause 14 of the Franchise Agreement, which comes up for interpretation in this case, clearly manifests the consent of the parties to refer the dispute for arbitration, and is neither ambiguous nor capable of bearing two interpretations. The clause, in unequivocal terms refers any dispute that may arise from the said Agreement to arbitration, and is a clear and unambiguous manifestation of consent of the parties to resort to arbitration*." [emphasis added]

(25) Responding to the argument that the absence of a centre called "*the Sri Lanka Chamber of Commerce and Industry, Colombo*" would result in the arbitration agreement being frustrated by physical impossibility, Justice Marsoof relying on Section 7 of the Act which contains the mechanism for the appointment of arbitrators including the power of the High Court to appoint an arbitrator, stated that, "*Resort to such legislative provisions will certainly prevent arbitration proceedings from being frustrated by the lack of an effective mechanism to set up the tribunal, and in the face of such elaborate legal provisions, it is not possible to sustain the argument that the agreement to arbitrate was frustrated by physical impossibility.*"

(26) Referring to Section 4 of the Act, Justice Marsoof stated as follows:

> "*However, the important question that arises in this context is whether the word "may", as used in Section 4, makes it mandatory for any dispute which the parties have agreed to refer for arbitration, has necessarily to be determined through arbitration, if the matter is not contrary to public policy and is capable of being resolved by arbitration. The "may" and "shall" dichotomy has oft confounded courts in the process of statutory interpretation, and as N.S. Bindra's Interpretation of Statutes (10th Edition, Butterworths, 2007) explains at page 999:*
>
> > *The use of the expression "may" or "shall" in a statute is not decisive, and other relevant provisions that can throw light have to be looked into in order to find out whether the character of the provision is mandatory or directory. In such a case legislative intent has to be determined. The words "may", "shall", "must" and the like, as employed in statutes, will in cases of doubt, require examination in their particular context in order to ascertain their real meaning.*
>
> *In ascertaining the legislative intent, it is permissible to look at the purpose of the legislation in which the particular provision sought to be interpreted occurs. Learned Counsel for the Appellant has referred us to the preamble to the Arbitration Act which, inter alia states that one of the main objects of the legislation was to "give effect to the principles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [Done at New York, 10th June 1958; Entered into force, 7th June 1959 330 U.N.T.S. 38 (1959) also known as*

the "New York Convention"].. ……and to provide for matters connected therewith or incidental thereto". In this connection, he has also invited the attention of Court to Article II paragraph 1 of the said Convention, which provides that-

> *"Each Contracting State shall recognise 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."*

While it is axiomatic that in interpreting the provisions of the Arbitration Act, this Court has to bear in mind the national obligation cast on Sri Lanka by the above provision of the Convention, and the Court has to lean in favour of giving effect to the arbitration clause contained in Clause 14 of the Franchise Agreement despite its erroneous assumption that the institution named in the clause existed and was capable of functioning as an arbitration centre or facilitator of arbitration, it is also imperative that this Court does not lose sight of the statutory context in which Section 4 occurs in the Arbitration Act. Section 4 has to be read in conjunction with Section 5 of the said Act, which consistently with the concept of "party autonomy", expressly confers on every party to an arbitration agreement the right to decide whether or not to object to the jurisdiction of a court where the same is invoked by the other party to the agreement. Where a party to such an agreement decides not to take up any objection to the exercise of jurisdiction by court, it is free to hear and determine the case or other proceeding, and in such case Section 4 clearly would not make it mandatory for the matter to be determined by arbitration. However, in the action from which this appeal arises, the Appellant had in fact specifically objected to the exercise of jurisdiction by the Commercial High Court, and since there was no question of public policy or arbitrability involved, the said court had in my opinion erred in law in failing to give effect to the intent of Section 4 of the Arbitration Act."

(27) The discussion on the applicability of Section 5 would not be complete without referring to the judgment of this Court in **Kekul Kotuwage Don Aruna Chaminda v Janashakthi General Insurance Limited** [(2019) 2 Sri LR 169]. In that case, the cause

of action was based on the refusal of payment on a demand made upon an insurance policy that existed between the parties. The contract of insurance between the parties contained a clause to refer disputes between the parties for arbitration. In spite of such clause, the defendant admitted the jurisdiction of the Commercial High Court to hear the dispute not only in its answer but even at the time admissions were recorded. However, during cross examination, the defendant had withdrawn the admission regarding the jurisdiction of the High Court and raised an issue that the High Court had no jurisdiction since the parties had agreed to refer their disputes for arbitration. The High Court had thereafter considered the said issue as a preliminary issue, answered it in favour of the defendant and dismissed the plaint.

(28) Referring to the applicability of Section 5, Justice Gamini Amarasekara stated as follows:

> "*It is clear that the bar or limitation imposed by the said section on the trial court is contingent.* ***Unless there is an objection the court has jurisdiction****. There is no total prohibition on exercising jurisdiction. The section imposes a prohibition to exercise already existing jurisdiction when there is an objection as per Section 5 of the Arbitration Act and the Arbitration agreement. Thus, there was no total want of jurisdiction and with the admission of jurisdiction the trial court was fully clothed with jurisdiction*." [emphasis added]
>
> "*Section 5 of the Arbitration Act does not create a total want of jurisdiction in the relevant trial court which generally has the power to hear the action. It bars or creates a limitation on the exercise of jurisdiction when there is an objection to exercise its jurisdiction on the ground that there is an arbitration agreement over the same subject. Thus, the jurisdiction of the court is contingent on whether there is an objection or not*."
>
> "*The Commercial High Court had jurisdiction from the very inception of the case and exercised it without objection. It is obnoxious to the administration of justice if one is allowed to raise an objection to the jurisdiction at a later stage when it is not a case of patent lack of Jurisdiction*."

(29) Therefore, in the Sri Lankan context, the only instance where a dispute may not be referred for arbitration notwithstanding the intention of the parties to do so, is when the matter in respect of which the arbitration agreement is entered into is contrary to public policy, or is not capable of determination by arbitration as provided in Section 4 of the Act, or when a party to an arbitration agreement decides not to take up any objection to the exercise of jurisdiction by Court as provided in Section 5 of the Act.

Intention of the parties – a Singaporean perspective

(30) The Singaporean perspective in giving effect to an agreement to arbitrate is found in **Insigma Technology Co Ltd v Alstom Technology Ltd** [(2009) SGCA 24], a case decided by the Court of Appeal of Singapore.

(31) In that case, Insigma and Alstom were parties to a licence agreement which provided as follows:

> "*Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English*."

(32) Alstom had filed a request for arbitration with the International Chamber of Commerce [ICC] in Paris, under the ICC Rules of Arbitration. Alstom requested that the arbitral proceedings be conducted in Singapore, under the ICC Rules, at the premises of the Singapore International Arbitration Centre [SIAC]. Pursuant to discussions between the parties, Alstom withdrew the ICC arbitration and commenced the arbitration at the SIAC. At the hearing before the Tribunal, and finally before the Court of Appeal, the issue was whether an arbitration agreement may validly provide for *one* arbitral institution to administer an arbitration under the rules of *another* arbitral institution.

(33) Delivering the order of Court, Chief Justice Chan Sek Keong stated as follows:

"Our first observation is that an arbitration agreement should be construed like any other form of commercial agreement (see Julian D M Lew QC, Loukas A Mistelis & Stefan M Kröll, Comparative International Commercial Arbitration (Kluwer Law International, 2003) at para 7-60). The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document.

Our second observation is that, where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see Halsbury's Laws of Singapore, vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.017) so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This approach is similar to the "principle of effective interpretation" in international arbitration law, which was described in Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ("Fouchard") at p 258 as follows:

B. – THE PRINCIPLE OF EFFECTIVE INTERPRETATION

478. — The second principle of interpretation of arbitration agreements is the principle of effective interpretation. This principle is inspired by provisions such as Article 1157 of the French Civil Code, according to which "where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective." This common-sense rule whereby, if in doubt, one should "prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical," is widely accepted not only by the courts but also by arbitrators who readily acknowledge it to be a "universally recognized rule of interpretation." To give just one example of the application of this principle, an arbitral tribunal interpreting a pathological clause held that:

when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause.

A subsidiary principle to the principle of effective interpretation is the principle that an arbitration agreement should also not be interpreted restrictively or strictly. An arbitration agreement is not a statute. This was noted in Fouchard at pp 260–261:

D. – REJECTION OF THE PRINCIPLE OF STRICT INTERPRETATION

...

[T]his principle [that an arbitration agreement should be interpreted "restrictively"] is generally rejected in international arbitration. It is based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. …

This has been frequently confirmed in arbitral case law. For example, the Decision on Jurisdiction rendered in the Amco arbitration sets out the principle in general terms:

like any other convention, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law.

The interpretation of arbitration agreements by the French courts has, likewise, never been strict nor restrictive.

Another subsidiary principle is that, as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical (see Law Debenture Trust Corporation Plc v Elektrim Finance BV [2005] 2 Lloyd's Rep 755 at [39]). …

This approach to the interpretation of an arbitration agreement is necessary to uphold the underlying and fundamental principle of party autonomy as far as possible in the selection of the kind of arbitration and the terms of the arbitration. Given the inherently private and consensual nature of arbitration, our courts will ordinarily respect the principle of party autonomy and give effect to (workable) agreed arbitration arrangements in international arbitration, subject only to any public policy considerations to the contrary."

<u>Intention of the parties – an English Court perspective</u>

(34) This brings me to the final jurisdiction that I wish to consider.

(35) <u>**Fiona Trust & Holding Corporation & others v Yuri Privalov & others**</u> [(2007) EWCA Civ 20] was a case which brought into focus the scope and effect of arbitration clauses in eight charterparties. The owners purported to rescind the charters alleging that the charters were procured by bribery. The question was whether the entitlement of the owners to do so should be determined by arbitration or by a court, with the owners having commenced court proceedings for a declaration that the charters have been validly rescinded.

(36) The English Court of Appeal indicated that a new approach needs to be taken by the English courts when considering questions relating to the jurisdiction of arbitration clauses in international commercial contracts, with Longmore LJ concluding that:

"For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context… If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect … that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so. …"

It seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed."

(37) The appeal from the judgment of the Court of Appeal, by then known as **Premium Nafta Products Limited and others v Fili Shipping Company Limited and others** [(2007) UKHL 40], was heard before a bench of five Judges of the House of Lords.

(38) In his opinion, Lord Hoffman stated as follows:

"The case has been argued on the basis that there are two issues: first, whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery and secondly, whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause.

Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. ***Only the agreement can tell you what kind of disputes they intended to submit to arbitration****. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.*

In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of *international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.*

If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. …

In my opinion ***the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal****. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked [before the Court of Appeal in Fiona Trust & Holding Corporation & Ors v Privalov & Ors [2007] EWCA Civ 20, at para 17]: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."*

If one adopts this approach, the language of clause 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the *grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute."* [emphasis added]

(39) While concurring with Lord Hoffman, Lord Hope stated in a separate opinion that:

"The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, ***they must say so expressly****. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.*

Taken overall, the wording indicates that arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes. …

As Bingham LJ said in ***Ashville Investments Ltd v Elmer Contractors Ltd*** *[(1989) QB 488, 517], one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings. If the parties have confidence in their chosen jurisdiction for one purpose, why should they not have confidence in it for the other? Why, having chosen their jurisdiction for one purpose, should they leave the question which court is to have jurisdiction for the other purpose unspoken, with all the risks that this may give rise to? For them, everything is to be gained by avoiding litigation in two different jurisdictions. The same approach applies to the arbitration clause"*

In ***AT & T Technologies Inc v Communications Workers of America****, 475 US 643 (1986), 650, the United States Supreme Court said that, in the absence of any express provision excluding a particular grievance from arbitration,* ***only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail****.*

In ***Threlkeld & Co Inc v Metallgesellschaft Ltd (London)****, 923 F 2d 245 (2d Cir 1991), the Court observed that federal arbitration policy required that any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration and that arbitration clauses should be construed as broadly as possible. In* ***Comandate Marine Corp v Pan Australia Shipping Pty Ltd*** *[(2006) FCAFC 192,* *para 165] the Federal Court of Australia said that a liberal approach to the words chosen by the parties was underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places, particularly when they were operating in a truly international market. This approach to the issue of construction is now firmly embedded as part of the law of international commerce. I agree with the Court of Appeal that it must now be accepted as part of our law too*."

(40) Thus, the unequivocal position is that Courts across many jurisdictions strive to ensure that parties keep to their word once agreement is reached to refer a dispute for arbitration. In my view, in the absence of any **express provision** in the arbitration agreement excluding a particular dispute and/or a difference from arbitration, Courts must resolve in favour of arbitration. Accordingly, arbitration clauses shall be construed as broadly as possible acting under the presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard before two fora. To hold otherwise would not only defeat the golden thread that runs through the entire arbitration process and beyond but would defeat the very purpose of parties choosing arbitration as their preferred mode of dispute resolution.

<u>Clause 8 of the Contract of Insurance</u>

(41) I shall now consider the question before me – did the parties agree to refer to arbitration the dispute that was the subject matter of the action before the District Court. The starting point in finding an answer to this question is the agreement to arbitrate referred to by the Defendant found at Clause 8 of X(a). The said Clause reads as follows:

"*If **any difference** shall arise under this Policy, such difference shall be referred to an Arbitrator.*

(i) The Arbitrator shall be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within one calendar month, after having been

required so to do in writing by the other party. In case either party shall refuse or fail to appoint an Arbitrator within one calendar month requiring an appointment, the other party shall be at liberty to appoint a sole Arbitrator.

(ii) In case of disagreement between the Arbitrators, the decision shall be referred to the decision of the Chairman/Umpire who shall have been appointed by them in writing before entering on the reference, and who shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Company.

(iii) If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to Arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

(iv) Arbitration shall take place in Colombo."

(42) There is one matter that I wish to refer to at the outset with regard to Clause 8 of X(a), that being, Clause 8 does not use the word, '*dispute*' but instead has used the word, '*difference*' and provides that where **any difference** shall arise under the Policy, such difference shall be referred to an Arbitrator. Whether the use of the word, '*difference*' would exclude '*disputes*' was considered in **Eric Peiris v Sri Lanka Insurance Corporation Limited** [SC CHC Appeal No. 56/2014; SC minutes of 22nd August 2024] where Justice A.H.M.D. Nawaz stated as follows:

"The word "difference" is defined in The Reader's Digest Great Encyclopedic Dictionary to mean a disagreement in opinion, dispute or quarrel [Volume I, 2nd Edition (1971)]. Similarly, The Random House Dictionary of the English language [the unabridged edition (Random House, New York, 1960)] defines "difference" to include, among other things, a dispute or quarrel. Given that these authoritative sources clearly outline the broad meaning of "difference" to encompass disputes

between parties, it is unsurprising that the word is commonly used in the same sense within arbitration clauses.

In fact, Redfern and Hunter on International Arbitration [7th Edition (2022) Nigel Blackaby KC, Constantine Partasides KC with Alan Redfern at para 2.75], an authoritative text on International Commercial Arbitration quite clearly states the following:

> *Given words such as 'claims', 'differences', and 'disputes' have been held by English courts to encompass a wide jurisdiction in the context of the particular agreement in question. In the United States, the words 'controversies or claims' have similarly been held to have a wide meaning, …."*

In using the word 'difference' in the arbitration agreement, both parties must be taken to have used it to denote a dispute that will arise or has arisen as to quantum of loss or damage.

In its context, it is useful to refer to the preamble to the Arbitration Act, No. 11 of 1995, which, inter alia, states that one of the main objects of the enactment was to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Done at New York, 10 June 1958; Entered into force, 7 June 1959 330 U.N.T.S. 38 (1959) also known as the "New York Convention") and to provide for matters connected therewith or incidental thereto". In this connection, it is pertinent to look at Article Il paragraph 1 of the said Convention, which provides that,

> *"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or* ***any differences*** *which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

Even the New York Convention, which the Arbitration Act, No. 11 of 1995 seeks to implement, uses the phrase "any differences" in the broadest sense to signify a dispute between the parties. In this context, any "difference" regarding the quantum of loss or damage in the relevant arbitration clause should indeed refer *to any dispute that has arisen between the parties concerning the quantum of loss or damage*."

(43) The Plaintiff does not dispute the existence of Clause 8. Instead, the position of the Plaintiff is that:

(a) The claim before the District Court was only a money recovery action requiring the Defendant to pay the premium due and owing under the policies of insurance reflected in the Schedules thereto marked X3 – X5;

(b) The claim that had been preferred to the District Court was outside the scope of Clause 8; and

(c) Hence, the District Court possessed jurisdiction to hear and determine the claim of the Plaintiff.

(44) In other words, the case for the Plaintiff was that not all disputes that arose between the Plaintiff and the Defendant were covered by Clause 8, and that the dispute contained in the plaint was one such dispute. I must perhaps reiterate what I have stated in paragraph 8, that being, even though the Plaintiff took up the above position in its written submissions before the District Court, by then, it had, by way of a formal admission during the pre-trial hearing, admitted the nexus between X(a) on the one hand and X3, X4 and X5 on the other. Thus, the Plaintiff could not have taken a contrary position to what had already been admitted.

(45) Even in the absence of such an admission, to my mind, the intention of the parties is extremely clear. Clause 8 did not draw a distinction between different kinds of disputes that may arise between the parties. Instead, Clause 8 clearly required the parties to refer without exception, all their disputes arising under X(a) for resolution by arbitration. With Clause 8 being so, I am not persuaded by the argument of the Plaintiff that a claim arising out of unpaid premium due under the policy is not a difference contemplated by Clause 8.

(46) With the present dispute between the parties arising from insurance policies to which the Contract of Insurance X(a) is applicable, and with the parties having agreed to refer all their disputes for arbitration, I am of the view that:

(a) Once the Defendant objected to the District Court assuming jurisdiction, the District Court could not have proceeded to hear and determine the dispute relating to the non-payment of the premium; and

(b) The High Court erred when it held that the cause of action of the Plaintiff was outside Clause 8 and that in any event, it was a matter to be decided at the end of the trial.

<u>Pathological clause</u>

(47) Before I conclude, there is one matter that I wish to discuss.

(48) Section 6 of the Act, which is re-produced below, contains the statutory mechanism to determine the number of arbitrators:

"(1) The parties shall be free to determine the number of arbitrators of an arbitral tribunal subject to the provisions of subsection (3) of this section.

(2) Where no such determination is made, the number of arbitrators shall be three.

(3) Where the parties appoint an even number of arbitrators, the arbitrators so appointed shall jointly appoint an additional arbitrator who shall act as Chairman."

(49) While Clause 8(i) of X(a) contemplates a single arbitrator nominated by the claimant in the first instance followed by each party nominating one arbitrator each in the event of not being able to agree upon the single arbitrator nominated by the claimant, and back to a single arbitrator if one of the parties do not appoint an arbitrator, Clause 8(ii) provides for the dispute to be referred to a Chairman in case of disagreement between the two arbitrators. To my mind, Clause 8 is ambiguous for two reasons. The first is whether the Chairman forms part of the Arbitral Tribunal or whether the Chairman comes in only where the two arbitrators have a disagreement. The second is with regard to the number of arbitrators. Both situations are contrary to Section 6. I must perhaps state that the temporal limitation in Clause 8(iii) has no application to the dispute that formed the basis for the action in the District Court.

(50) Although the Plaintiff did not claim that there is a defect in Clause 8 of X(a) or that it is ambiguous, for the sake of completeness, I must consider what the position may have been had the Plaintiff's refusal to refer the dispute for arbitration was founded upon a defect or ambiguity in Clause 8. For this purpose, I shall once again turn to the aforementioned judgment of the Court of Appeal of Singapore.

(51) Responding to Insigma's argument that the Arbitration Agreement should not be given effect to because it was a "pathological clause" as the hybrid form of arbitration contemplated in the Arbitration Agreement was uncertain or unworkable, the Court of Appeal in **Insigma Technology Co Ltd v Alstom Technology Ltd** [supra] responded as follows:

> "*Calling the Arbitration Agreement "pathological" does not, of course, change its legal character or its substance. The idea of a pathological clause is derived from the civil law. That expression is defined in Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ("Fouchard") (supra) at p 262 as follows:*
>
> > *484. — The expression "pathological clause"… denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration.*
>
> *"A defect in an arbitration clause does not necessarily negate the agreement thereby constituted. It depends on the nature or the substance of the defect, or whether the defect is curable. The concept of a pathological clause fulfils a descriptive function rather than a prescriptive function and labelling or describing a clause as "pathological" does not automatically invalidate it as an agreement. In Benjamin G Davis, "Pathological Clauses: Frédéric Eisemann's Still Vital Criteria" (1991) 7 Arb Int 365 at 379, the author noted:*
>
> > *Certain pathologies that have touched on some or all of the essential functions of the arbitration clause have been examined. Notwithstanding the severe defects of many of the clauses, the fortuitous – but unpredictable – assistance of state courts, able institutions, and imaginative arbitrators, could still make them work. My intention has been to show what pitfalls should be avoided,*

while yet noting that arbitration under these clauses could still proceed to a final award susceptible of enforcement.

The acceptance by arbitration practitioners that a pathological clause is not void ab initio is also expressed in Fouchard at pp 262–263 in the following terms:

Arbitration agreements can be pathological for a variety of reasons. … At worst, the defect will prevent the arbitration from taking place at all. This will be the case where it is impossible to infer an intention which is sufficiently coherent and effective to enable the arbitration to function.

These clauses will need to be interpreted by the arbitrators, and by the courts reviewing the existence of an arbitration agreement and ensuring that the arbitrators remained within the bounds of their jurisdiction. In most cases, the arbitrators or the courts – relying on the principle of effective interpretation more than on any rule in favorem validitatis – will salvage the arbitration clause by restoring the true intention of the parties, which was previously distorted by the parties' ignorance of the mechanics of arbitration. [emphasis added]

Fouchard also noted at p 266 that:

The approach of the French courts is thus invariably to interpret pathological arbitration clauses so as to render them effective if at all possible. The same trend can be found in other jurisdictions."

(52) While concurring with the above reasoning, I am of the view that the ambiguity in Clause 8 does not negate the intention of the parties to have referred their disputes for resolution by arbitration.

(53) Accordingly, in the event any dispute arising under the Contract of Insurance is referred for arbitration, the arbitral tribunal constituted under Clause 8 shall be as follows:

(a) The Arbitral Tribunal shall consist of a single arbitrator where the parties agree on the arbitrator nominated by the claimant;

(b) Where the respondent does not agree on the nominee of the claimant, each party shall be entitled to nominate one arbitrator;

(c) Where the respondent does not agree on the initial nominee of the claimant and fails to appoint an arbitrator, the arbitral tribunal shall only consist of the arbitrator nominated by the claimant;

(d) Where each party appoints an arbitrator, the two arbitrators so appointed shall appoint a third arbitrator who shall serve as the Chairman of the Arbitral Tribunal.

Conclusion

(54) In the above circumstances, I answer the question of law in the affirmative. The judgment of the High Court is set aside, the Order of the District Court is affirmed and this appeal is allowed, without costs.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J

I agree

JUDGE OF THE SUPREME COURT

M. Sampath K. B Wijeratne, J

I agree

JUDGE OF THE SUPREME COURT