

20. Article 8 of UNCITRAL Model Law (Arbitration agreement and substantive claim before court)

- (1) Article 8 of the UNCITRAL Model Law, the text of which is set out below, has effect—

Article 8. Arbitration agreement and substantive claim before court

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
- (2) If a dispute in the matter which is the subject of an arbitration agreement involves a claim or other dispute that is within the jurisdiction of the Labour Tribunal established by section 3 (Establishment of tribunal) of the Labour Tribunal Ordinance (Cap 25), the court before which an action has been brought may, if a party so requests, refer the parties to arbitration if it is satisfied that—
- (a) there is no sufficient reason why the parties should not be referred to arbitration in accordance with the arbitration agreement; and
- (b) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.
- (3) Subsection (1) has effect subject to section 15 (Arbitration agreements) of the Control of Exemption Clauses Ordinance (Cap 71).
- (4) If the court refuses to refer the parties to arbitration, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
- (5) If the court refers the parties in an action to arbitration, it must make an order staying the legal proceedings in that action.
- (6) In the case of Admiralty proceedings—
- (a) the reference of the parties to arbitration and an order

- for the stay of those proceedings may, despite subsections (1) and (5), be made conditional on the giving of security for the satisfaction of any award made in the arbitration; or
- (b) if the court makes an order under subsection (5) staying those proceedings, the court may (where property has been arrested, or bail or other security has been given to prevent or obtain release from arrest, in those proceedings) order that the property arrested, or the bail or security given, be retained as security for the satisfaction of any award made in the arbitration.
- (7) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice apply to the property, bail or security retained in pursuance of an order under subsection (6) as would apply if the property, bail or security retained were held for the purposes of proceedings in the court making the order.
- (8) A decision of the court to refer the parties to arbitration under—
- (a) article 8 of the UNCITRAL Model Law, given effect to by subsection (1); or
- (b) subsection (2),
is not subject to appeal.
- (9) The leave of the court making a decision to refuse to refer the parties to arbitration under—
- (a) article 8 of the UNCITRAL Model Law, given effect to by subsection (1); or
- (b) subsection (2),
is required for any appeal from that decision.
- (10) A decision or order of the court under subsection (6) is not subject to appeal.
-

[20.01] Historical Note

The previous Ordinance did not explain clearly the provisions relating to employment claims (cf Arbitration Ordinance Cap 341). Nevertheless, under the current Ordinance, if the claim or dispute is within the jurisdiction of the Labour Tribunal, the court is entitled to rely on section 20(2) and referred the dispute to the Labour Tribunal unless it has satisfied the criteria as outset in sections 20(2)(a) and (b).

[20.02] General Note

This provision provides for the stay of legal proceedings where the dispute is subject to an arbitration agreement either in Hong Kong or elsewhere. The ideology of section 20(1) is: (I) A party shall challenge the tribunal's jurisdiction promptly; (II) To limit court intervention (see: section 12 above; For authorities and discussion about limiting court intervention, see: *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347); (III) The court will intervene when the agreement is 'null and void, inoperative or incapable of being performed'. Meanwhile, it should be noted that, in addition to the requirement that an arbitration agreement must not be null and void, inoperative or incapable of being performed, this provision presupposes that section 19(1) above has been complied with before a stay will be granted. As to the threshold for establishing compliance with section 19(1), and the functions and roles between the arbitral tribunal and High Court in relation to consequential jurisdictional issues, see [19.02] above.

For meaning and interpretation of 'null and void', 'inoperative' and 'incapable of being performed', see [20.11], [20.12] and [20.13] below.

In general, the underlying objective of the current Ordinance is the same as the New York Convention and UNCITRAL Model Law (Cf Article II(3) of the previous Ordinance in New York Convention; Sch I Article 8(1) of the UNCITRAL Model Law of the current Ordinance). As mentioned herein above, the objective of the present Ordinance is to promote the viability of arbitration by emphasising the primacy of the arbitral tribunal, restricting court's intervention (For discussion, see: *Quintette Coal Ltd v Nippon Steel Corp* [1990] 50 BCLR (2d) 207, YB Comm Arb VXIII (1993) 159 (CA, BC); *Sandbar Construction Ltd v Pacific Parkland Properties Inc* [1993] ADRLJ 46 (SC, BC); *Egmatra AG v Marco Trading Corporation* [1999] 1 Lloyd's Rep 862 at 865; *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam* [2001] 2 Lloyd's Rep 348; *Lesotho Highlands v Impreglio SpA* [2005] UKHL 43. Nevertheless, in some circumstances, the court shall intervene when it is necessary. For authority and discussion, see: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Albon v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 327. In general, if the format requirement in paragraph (1) have fulfilled, there is a presumption that a stay of litigation proceeding shall be granted unless any of the grounds for refusal set out in section 20(1) (For discussion, see [20.11]–[20.13] below are established: see *Quintette Coal Ltd v Nippon Steel Corp* (above); *Sandbar Construction Ltd v Pacific Parkland Properties Inc* (above); *Roy v Boyce* (1991) 57 BCLR (2d) 187 (SC, BC); *Lesotho Highlands v Impreglio SpA* (above). Hence, the applicant who wishes to challenge the validity of the arbitration tribunal has to be very strong. For discussion and authorities, see: *Gay Construction Pty Ltd v Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, third party)* [1995] 2 HKLR 35, [1994] 2 HKC 562. Once a valid arbitration agreement has been found to exist (as to which see s 19 above, in particular [19.02] above) and the conditions for a stay of proceedings have been met (see paragraph (1) below), there is no residual discretion to refuse a stay of proceedings: see *Nanisivik Mines Ltd v Canarctic Shipping Co* [1996] ADRLJ 117, Fed CA (Can); *Stancroft Trust Ltd v Can-Asia Capital Ltd* [1990] 43 BCLR (2d) 241 (CA, BC); *BWV Investments Ltd v Saskferco Products Inc* [1995] 2 WWR 1 (CA) (Saak); *Kaverit Steel & Crane Ltd v Kone Corp* (1992) 87 DLR (4th) 129, [1993] ADRLJ 108 (CA) (Alb); *Automatic Systems Inc v Bracknell Corp* [1994] 18 OR (3d) 257 (CA)