

CHAPTER-7

ARBITRATION CLAUSES INCORPORATED BY REFERENCE IN CORPORATE BYLAWS

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I INTRODUCTION

The cornerstone of international arbitration is the agreement to arbitrate. The validity of the parties' consent is critical to trigger the arbitral process, whereas the scope of the agreement strictly delimits the extent of the mandate to resolve the dispute brought before to the arbitral tribunal.¹ Focusing on the more common form of arbitration agreements, namely the arbitration clause, their inclusion in corporate and association bylaws² is not a new phenomenon. An increasing number of arbitration or company municipal laws now explicitly recognise their binding validity for disputes between the corporation and its shareholders, directors and board members, *inter alia* with a view of

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¹ Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 71-73.

² Bylaws (or bye-laws) are drafted by a corporation's founders or directors under the authority of its charter or articles of incorporation/association and consist rules directing the corporation's operations.

reducing the burden of litigation.³ Among the most recent examples of legislative reforms are those of Russia⁴ and Brazil.⁵

Such arbitration clauses are considered a type of incorporation by reference, meaning that the clause is found in a separate and pre-existing document (bylaws of the legal entity) and not in the main contract signed by the parties.⁶ While some jurisdictions' arbitration, corporate or company law provisions explicitly recognise their validity for intra-corporate disputes, others' remain silent. What is more, Article II (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: NYC) also provides no guidance on whether a specific reference or only a general reference is needed for a valid incorporation of an arbitration clause. Thus, the question arises, when there is no express legal provision on the validity of arbitration clauses contained in bylaws, if and how these can be upheld. The more difficult question arises, however, when the parties merely incorporate another document or agreement without referring specifically to the arbitration clause contained within that instrument. In addressing this question, there is little apparent uniformity among national legal systems.

³ These constitute intra-corporate disputes and may involve, for instance, rights to dividends, corporate wrongdoing or a dissenting opinion of minority shareholders regarding the management of the company's assets.

⁴ The amended 'Rules of Arbitration of Corporate Disputes' of the International Commercial Arbitration Court's (ICAC) at the Chamber of Commerce and Industry of the Russian Federation verify the validity of arbitration clauses incorporated by reference to the company's charter, available at: <<https://mkas.tpprf.ru/en/documents/>>. Article 3 of the Rules of Arbitration of Corporate Disputes dated 11.01.2017 stipulates that:

"1. The corporate disputes may be referred to the ICAC, if an arbitration agreement in respect thereof is concluded:

- a) by means of its incorporation into the charter;*
- b) by means of its incorporation into a contract or any other document, including those expressing a person's consent to be bound by the arbitration agreement provided by the charter;*
- c) by other method, which is recognized as permissible by the applicable law.*

2. The parties may express their consent with referring a corporate dispute to the ICAC in several documents (including the charter), which constitute an arbitration agreement.

3. When an arbitration agreement is incorporated into the charter and does not provide otherwise, it shall be binding for:

- a) the legal entity;*
- b) the participants, including those who became the participants after the arbitration agreement was incorporated into the charter;*
- c) former participants of the legal entity provided that the arbitration agreement in the charter was effective at the moment when they had the status of such participants;*
- d) directors, including those appointed after the arbitration agreement was incorporated into the charter, as regards their corporate rights and duties;*
- e) former directors as regards their corporate rights and duties provided that the arbitration agreement in the charter was effective at the moment of their directorship.*

4. Any type of corporate dispute indicated in subparagraph 2 of paragraph 2 of the Rules may be referred to the ICAC provided that the legal entity, all participants, as well as other parties to the corporate dispute enter into an arbitration agreement referring such dispute to the ICAC, or such an agreement is binding upon them on other grounds".

⁵ The Brazilian Corporations Act (Law 6.404/76, as amended by Federal Law No. 13.129/2015), states in Article 109(3) that: "*The corporation's bylaws may establish that any disputes between the shareholders and the corporation, or between the majority shareholders and the minority shareholders may be resolved by arbitration under the terms specified by it*".

⁶ Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd edn, Berne: Stämpfli 2015) 155

The objective of the present chapter is to present how two different jurisdictions deal with arbitration clauses found in corporate bylaws incorporated into subsequent contracts, when there is no express provision in their relevant legislation. *Part A* deals with the analysis of Switzerland's case, while *Part B* with that of England's, as Geneva and London represent two of the most frequently chosen arbitral seats.⁷ Additionally, the juxtaposition between these two jurisdictions will serve comparative purposes, as the legal frameworks of both a civil and a common law country are examined. This comparative method stresses the importance of the choice of the *situs* in international arbitration that comes into play at different stages of the procedure. It first becomes relevant when seeking to establish the tribunal's jurisdiction and then, at the enforcement and annulment stage; if the arbitration agreement is found invalid, the arbitral award will face the immediate risk of being vacated. Therefore, it is essential for practitioners to be aware of the consequences of their choice. This chapter hypothesises that, despite the slight nuances between the two jurisdictions, there is a convergence establishing a position *in favorem validatis* of the arbitration agreement.

II NATIONAL LAWS AND JURISPRUDENCE

2.1 Switzerland

Switzerland has long been associated with international arbitration and is considered to be among the most arbitration-friendly jurisdictions. The relevant texts are the Swiss Code of Civil Procedure (CCP) and the Swiss Private International Law Act (PILA), the latter having been amended in 2017. Despite the fact that there are provisions on the arbitral procedure, there are none explicitly dealing with arbitration clauses in bylaws of legal entities. Hence, the question of validity and scope of said arbitration clause arises and has to be tested under both Articles 178(1) and (2) of the PILA and 358 CCP. First, the two components of validity are studied; the 'written' requirement and the consent of the parties. Then, this section proceeds with the examination of the scope of said arbitration clause; the scope *ratione personae*, which largely overlaps with consent, and the arbitrability of intra-corporate disputes.

Pursuant to the aforementioned provisions, the arbitration agreement must be made "*in writing [...] or any other means*" allowing it to be evidenced by text. This formal requirement is strongly linked to the substantive part of validity, the consent, and primarily serves an evidentiary purpose.⁸ It must be noted that some scholars are of the opinion that a document provided by one party does not suffice for the other to be bound by the arbitration clause and that the latter's signature is a vital element.⁹ However, this opinion consists a minority and this requirement for signatures is considered outdated. This leads to the pragmatic conclusion that bylaws need not be signed anew, each time a person acquires shares in the company. Further, there is no requirement for an exchange of documents, as in Article II of the NYC, which renders the Swiss regime more arbitration-friendly and less formalistic.¹⁰

⁷ QMUL and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration', 9; available at: < [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)>.

⁸ Philippe Bärtsch, "'Consent" in Sports Arbitration: Which Lessons for Arbitrations Based on Clauses in Bylaws of Corporations, Associations, etc.?' in Elliot Geisinger and Elena Trbaldo – de Mestral (eds), *Sports Arbitration: A Coach for other Players?* (ASA No 41 2015).

⁹ *X Co v Y Ltd* 4A_84/2015 para 3.3.1.

¹⁰ Gabrielle Kaufmann Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015) 111-115.

Consequently, since the arbitration agreement is incorporated in a distinct from the main contract document,¹¹ it is essential to investigate when the consent to be bound by the clause of the other document is indeed established. The federal case law has adopted a liberal approach as to the existence of consent, which may be implied.¹² As a rule of thumb, there will be acquiescence, when there is explicit mention to the arbitration clause and the document is either attached to the main contract or unmistakably has or could have become known to the other party (for instance, if it can be accessible to the public). The interpretation shall, in any case, be conducted in light of the principle of good faith and the ‘*rule of the unusual*’¹³, as developed by Swiss case law. Under these rules, even inexperienced businessmen in trade usages may, under circumstances, be expected to be aware of the reference to an arbitration clause.¹⁴ Conversely, in case the reference is deemed unusual, their consent is considered absent and the arbitration clause not binding upon them. Considering the trend to oust the courts’ jurisdiction in favour of arbitrating shareholder and intra-corporate disputes, one could argue for the formation of such usage. If we accept that arbitration is becoming the norm in this kind of disputes, even a global reference would suffice to establish the parties’ consent and the arbitration agreement would be valid. Finally, it was accepted from early on that contracts between experienced businessmen need not have a specific reference to the arbitration clause they intend to incorporate.¹⁵

When it comes to the scope of the arbitration clause and, to be precise, to its scope *ratione personae* a variety of issues emerges. In accordance with the principle of relativity of contractual obligations,¹⁶ the arbitration agreement binds solely the parties entering the contract bearing no consequences for and imposing no rights or obligations on third parties. However, in some cases, non-signatories can be bound by the agreement and the federal case law adopted from early on a liberal approach as to the extension of the arbitration clause to them. The Federal Swiss Court has found that, if a third party participated in the conclusion or performance of the contract, it is deemed to have ratified it by conduct.¹⁷ The rationale is based on Article 178(2) PILA, under the true intent of the parties and the principle of good faith. In addition, non-signatories are bound by the arbitration clause, “*when a claim is assigned, in case of the simple or joint assumption of an obligation, or when a contractual relationship is taken over*”.¹⁸ Regarding the transfer of a stock company’s shares, it has been widely suggested by legal commentators that the transferee shall be bound by the arbitration clause on the grounds that all members or shareholders and partners of the corporation should be bound by the same dispute settlement mechanism. The same applies to partnerships and associations.¹⁹

¹¹ To give an illustration, before the advent of the digital age, the stock purchase agreement between the shareholder and the corporation may not have included the arbitration clause, which would be found in the corporation’s bylaws.

¹² Blackaby and Partasides (n 1) 77.

¹³ BGE108 II 416 para 1b: “*A party cannot be expected to have agreed to a clause contained in a text to which the main contract or another document refers if the content of such a clause is unusual, i.e., if the content departs from what a reasonable party in the same circumstances could expect*”.

¹⁴ Christoph Müller, Commentary on Chapter 12 PILS, Article 178 in Manuëlo Arroyo (ed) *Arbitration in Switzerland – The Practitioner’s Guide* (Kluwer Law International 2013).

¹⁵ Tribunal Fédéral, 12 January 1989 (15 YBCA 510, 1990).

¹⁶ According to the principle of relativity of contractual obligations, the arbitration agreement included in a contract binds only the parties to the contract.

¹⁷ *X v Y and Z SpA*, 4A_128/2008 para 3.2

¹⁸ *International Ice Hockey Federation v SCB Ice Hockey AG* 4A_627/2011 para 3.2; *X v Y and Z SpA*, 4A_128/2008 para 5; *X et al v Z* 4A_115/2003 paras 5.3.1

¹⁹ Kohler and Rigozzi (n 10)118; See also Berger and Kellerhals (n 6) 156.

Arbitrability is the final criterion to establish the scope (*ratione materiae*) of the agreement to arbitrate and poses no issues. As a notion, it determines which disputes may be settled through arbitration and thus, their subject matter is put under the microscope. Under Article 177(1) of the PILA, any dispute involving an economic interest may be the subject-matter of an arbitration. Indisputably, the vast majority of corporate disputes is of economic nature and this criterion will in most cases be met. Moreover, the Swiss Federal Courts have adopted a broad notion of the term and most solutions will be *in favorem validatis* of the arbitration agreement.²⁰ It is maintained that “*the fact that an exact determination of the amount [...] is impossible or difficult is insufficient to categorise a dispute as not of financial nature. It is instead relevant whether the claim ultimately pursues an economic purpose*”.²¹ Nevertheless, it is noted that an international arbitral award rendered in Switzerland may not be enforceable in other jurisdictions, if corporate disputes are non-arbitrable as a matter of their respective public policy.²²

All in all, Swiss jurisprudence is more inclined towards a pro-arbitration approach. Speed and confidentiality are the main advantages in arbitrating intra-corporate disputes and thus, it tends to be preferred. Nonetheless, there are cons to be taken into account, such as the issue of the uneven bargaining power and that of costs. What is more, “*mandatory*” arbitration is an expensive procedure and not every minority shareholder may afford to pay the costs each time a dispute arises. On a similar note, in sports arbitration, there has been a proposal to resolve the issue with a sound system of legal aid,²³ but, in intra-corporate disputes, I am of the view that this would not be a defensible option. Minority shareholders are given the choice to request from the company to repurchase their shares (though not in companies limited by shares) and have also the option of exit. In any case, shareholders are in no way forced to own shares in a company as a matter of livelihood and their situation comes in stark contrast with professional athletes, who are compelled to be part of an association or federation in order to be able to compete.

2.2 *England*

In England, there is also no explicit reference to arbitration clauses incorporated by reference in bylaws. Section 6(2) of the Arbitration Act of 1996 (hereinafter: 1996 Act) states that: “*The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement, if the reference is such as to make that clause part of the agreement*”. However, whilst it clearly defines what is meant by an “arbitration agreement”, the provision leaves open the question of what is required for the effective incorporation of an arbitration clause by reference.

²⁰ Laurent Lévy, Arbitrability of Disputes in Corporate Matters (Swiss Law) (IAL Review 2002) 77-83.

²¹ Berger and Kellerhals (n 6) 71.

²² Bärtsch (n 8) 112-113; *Football Association of Serbia v M* 4A_654/2011 para 3.4.

²³ Antonio Rigozzi and Fabrice Robert-Tissot, “Consent” in Sports Arbitration: Its Multiple Aspects’ in Elliot Geisinger and Elena Tralbaldo – de Mestral (eds), *Sports Arbitration: A Coach for Other Players?* (ASA No 41 2015) 73-81.

Regarding the validity of arbitration clauses, in the 1996 Act the requisite of “*in writing*” appears once more (1996 Act, S. 5). The agreement is considered to be in writing under the three circumstances enumerated in paragraph 3: “(a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing”. It is further noted that: “where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing”. This provision is vague, in the sense that it does not specify whether the reference should be global or specific.

Turning to the heart of the matter, namely consent, English jurisprudence had been largely discrepant before the 1996 Act came into force. In *Aughton and Thomas v Portsea*, the prevailing view was that, to oust the jurisdiction of the courts, the arbitration clause should be incorporated by express reference in the main contract.²⁴ The trend has somehow shifted and now, general words of incorporation may be acceptable under certain conditions.²⁵ In *Habas Sinai*, Justice Clarke, distinguishing between ‘single contract’ and ‘two-contract’ situations declared that:

“Parties are free to incorporate [...] most attempts at incorporation [...] fall within one of the following broad categories (in which the terms referred to include an arbitration clause):

(1) A and B make a contract in which they incorporate standard terms.

These may be the standard terms of one party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.

(2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties.

(3) A and B make a contract incorporating terms agreed between A (or B) and C.

Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub contracts incorporating the terms of a main contract or sub-sub contracts incorporating the terms of a sub contract

(4) A and B make a contract incorporating terms agreed between C and D.

*Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category”.*²⁶

²⁴ *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd* (1991) 57 BLR 1; *TW Thomas & Co Ltd v Portsea Steamship Co Ltd (The Portsmouth)* [1912] AC 1.

²⁵ Andrew Tweeddale and Keren Tweeddale, *Incorporation of Arbitration Clauses Revisited* (2010) 76 Arbitration 4, 656.

²⁶ *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm) para 13.

In a single-contract case, he clarified, no extraordinary method of incorporation is required,²⁷ since the contracts are concluded between the same parties (i.e. in the first two cases). By contrast, when the parties involved in the subsequent contract are different than those in the main one, there is a need for “*clear words*” and express reference to the arbitration clause (i.e. last two cases enumerated above).²⁸ Hence, for the agreement between the original shareholders a global reference will suffice, whereas for the one between the company and a new shareholder a specific may be needed to dispense doubts about the parties’ intentions. In a recent case, the need for a specific reference in a two-contract situation was reiterated.²⁹ The importance rests on the awareness a party should have had at the time of the conclusion of the contract. Two such cases, stemming from sports matters, but also relevant for our purposes and hereunder examined.

In *Paul Stretford v The Football Association Ltd*, the Court of Appeal was seized with an appeal from an order made by the Chancellor, who stayed the action of the Appellant on the ground that the dispute between the parties had been submitted to arbitration.³⁰ The facts were as follows: Mr. Stretford, a player’s agent, had previously acquired his licence from FIFA, in order to legally carry out negotiations between players and clubs. Due to FIFA promulgating new rules, under which the national associations were to issue the relative licences after deliberate examinations and investigations, he had to issue a new one at the Football Association (FA). This new licence expressly stated: “*the holder agrees to abide by the rules and regulations of FIFA, The FA Premier League and the Football League*”. In 2005, disciplinary proceedings were brought against Mr. Stretford, who commenced legal proceedings. The Chairman of the Disciplinary Committee and FA, against whom these proceedings were initiated, requested for a stay. The Chancellor was faced with the questions of whether the arbitration clause in FA’s annual handbook, was incorporated in the contract between FA and Mr. Stretford and also, whether it was null, void or inoperable under Section 9(1) and (4) of the 1996 Act, by reason of Article 6 of the European Convention of Human Rights.³¹ The facts provided solid proof that Mr. Stretford was informed of the existence of the clause and that the terms were brought fairly to his attention. The Chancellor was of the opinion that Mr Stretford was given notice and that, in any case, he had a duty, of which he was aware, to observe the Rules. These Rules were published by FA at least once a year in its handbook and were publicly available in the website.³² Arriving to the second issue, it was upheld that his rights to a fair hearing by an impartial tribunal were not infringed, because he voluntarily entered the arbitration agreement.

²⁷ *Ibid*, para 46; With regard to the single-contract case, see also: *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (“the Athena No 2”)* [2006] EWHC 2530 (Comm); [2007] 1 Lloyd’s Rep 280, where Langley J rejected the submission by Sea Trade’s counsel that the rule, as enunciated in *Thomas v Portsea* applied.

²⁸ *Ibid* para 49.

²⁹ *Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 (QB) paras 27-29.

³⁰ *Paul Stretford v The Football Association Ltd and Anr* [2007] EWCA Civ 238; *Paul Stretford v The Football Association Ltd and Anr* [2006] EWHC 479 (Ch).

³¹ S. 9: (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

³² [2006] EWHC 479 (Ch) para 26

The second case is that of *Fulham Football Club*. In 2009, two football clubs, Fulham and Tottenham, were competing for a player's transfer from Portsmouth's Club. It was alleged that Sir Richards, the chairman of the Football Association Premier League (FAPL), intervened as an unauthorized agent to facilitate the player's transfer to Tottenham. Fulham claimed that he breached the FAPL Articles of Association and Rules, but FAPL's legal advisor found his role to be legitimate. The FAPL and its member clubs are bound by the FAPL's Articles of Association and Rules and the Football Association (FA) Rules. These rules contain dispute resolution clauses, which refer all disputes arising between the clubs or between a club and the FAPL or an official to arbitration. Fulham initiated court proceedings against Sir Richards and the FAPL. The respondents applied for a stay under the 1996 Act.

The issue of arbitrability was at the heart of this case. Fulham argued the non-arbitrability of the dispute on the grounds that the interests and representations of third parties, that is to say the other shareholders, needed to be taken into account as a matter of public policy. The judge had to weight up two earlier conflicting decisions: in the first, *Re Vocam Europe Ltd*, the High Court had granted a stay of an unfair prejudice petition, where a shareholders agreement had provided for all disputes to be referred to arbitration, whereas in the second, *Exeter City Association Football Club Ltd*, the High Court had refused a stay, on the basis that the right to bring an unfair prejudice petition before the courts could not be altered or removed by contract otherwise. The High Court in *Fulham* tallied with the first, and the stay was granted. After scrutinizing the clause's wording, which left no room for doubt about the submission of every dispute to arbitration, the Lord Justices examined if the 2006 Companies Act impliedly or expressly excluded matters on an unfair prejudice petition and if, in lack of a statutory prohibition, any rule of public policy led to such a conclusion. In relation to the former, LJ Longmore stressed: "*the fact that a statutory power, which a court would not have at common law apart from the statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power*" and regarding the last, with reference to S. 1(b)³³ of the 1996 Act that: "*I cannot see that it is necessary in the public interest that agreements to refer disputes about the internal management of a company should in general be prohibited; nor [...] why it is necessary to prohibit arbitration agreements to the extent that they, in particular, apply to disputes whether a company's affairs are being (or have been) conducted in a manner unfairly prejudicial to the interests of its members*".³⁴

In conclusion, English jurisprudence, though more 'reluctant' as compared to the Swiss *in favorem validitatis* approach, seems to have developed after the implementation of the 1996 Act and adopted a more flexible stance. Nonetheless, it does not seem probable that the restrictive approach in the two-contract type of situations will be modified.

III CONCLUSION

³³ Article 1(b): "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".

³⁴ *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855, paras 96, 99, 101-103.

To conclude, the importance of the choice of *lex arbitri* should be stressed. It plays a major role for the determination of the law applicable to the validity of the arbitration agreement and serves to avoid frictions that would otherwise arise, if other laws were applicable. To provide a straightforward illustration, an arbitration agreement found in a corporation's bylaws and incorporated by global reference to a contract for the acquisition of shares between the corporation and the future shareholder, may be valid under Swiss law, whereas, national courts will retain jurisdiction under UAE law.³⁵

Regarding the two jurisdictions analysed above, it seems that over the course of time their approaches on the matter of validity and scope of arbitration clauses incorporated by reference in corporate bylaws, despite their nuances, have started to come together and reach similar, if not the same, inferences. For instance, they share the criterion of assessing the parties' experience in trade usages in order to decide upon the nature of the reference. It remains to be seen how their courts will develop future caselaw and how those of other jurisdictions will recognise the validity of arbitration clauses made by general reference. Overall however, I opine that the pro-enforcement towards the arbitration agreement stance will prevail as many jurisdictions will seek to render their regimes more attractive to international practitioners and parties, as the recent examples mentioned in the introduction demonstrate.

³⁵ The Dubai Court of Cassation (see for instance the decision of: Real Estate appeal 153 of 2011, issued on 19 February 2012) has ruled that an arbitration clause is valid when the parties explicitly agree to the jurisdiction of the arbitral tribunal. As such, reference made in the main agreement to an arbitration clause can be construed as an arbitration agreement, only if such reference is incorporated explicitly in the main agreement. However, in the event the reference is generally made to incorporate general terms and conditions without including an explicit reference to arbitration to indicate that both parties have agreed to the arbitration, the reference then does not extend to include the arbitration clause.