

PROCEDURAL PROBLEMS IN ARBITRATION

I. Introduction

1. I propose to consider a miscellany of 6 procedural problems this evening. The questions typically arise in court proceedings ancillary to arbitrations. They are:-

- (1) In an application for a stay of proceedings, to what extent:-
 - (a) should the Court investigate whether a party is bound by an arbitration agreement; or,
 - (b) should the Court instead remit the matter to the putative arbitrator for determination?
- (2) Where a party appeals against the refusal of a stay to arbitration, should the Court grant an interim stay pending the outcome of the appeal?
- (3) How should set-offs and cross-claims be handled in the context of stay applications?
- (4) Can the present procedure for hearing applications for:-
 - (a) the review of an arbitrator's decision on his jurisdiction; and,
 - (b) leave to appeal against an arbitration award,be rationalised and improved?
- (5) Is there any practical difference between hearing an application for leave to appeal against an arbitration award and hearing a substantive application for leave?

- (6) How might the Court handle multi-party litigation where some of the parties are bound by an arbitration agreement and others are not?

2. My subject is (I fear) mundane, possibly even banal. I shall be concerned tonight with the merely procedural, as opposed to the great metaphysical questions of jurisprudence. My purview will be restricted to the commonsense, my object being the modest one of proposing practical principles for dealing with the problems just identified.

3. Since this lecture only aims to suggest and stimulate discussion, I shall not necessarily feel bound by what authority says or does not say. The corollary to this licence is, of course, that I would welcome feedback on whether what I suggest makes sense either at law or in practice.

4. I stress that my talk is not entitled "Solutions to Procedural Problems in Arbitration". There is unlikely to be any elegant or neat solution to the questions raised. The permutations of situations that may arise are too numerous and various for any one methodology to cater for all possible worlds. The best that one can do is to broach, tentatively, general lines along which problems might be addressed.

II. Problem 1: In stay applications, should the court investigate whether parties are bound by an arbitration agreement?¹

5. A frequent question is whether a person seeking to stay an action

¹ There is a brief, but helpful discussion of this topic, in Walser, "Two Bites of the Cherry? Disputes as to Scope of Arbitrators' Jurisdiction", (2004) 70 *Arbitration* 290, at 294-5.

against him is a party to an arbitration agreement.

6. In a recent case (Case 1), an insurer sued X both under the insurer's own name and, as a subrogated party, under the names of the main contractor and sub-contractor. The insurer claimed that X had negligently caused the subcontractor's employee to be injured in the course of employment.

7. As a result of the injury, the insurer was obliged to pay under an employees' compensation policy covering the main contractor and its subcontractors. The insurer sought to recover its payment from X.

8. X claimed to be a sub-contractor covered by the policy. The policy containing an arbitration agreement, X applied for a stay.

9. The insurer argued that X was not a sub-contractor within the terms of the policy and therefore could not rely on the arbitration agreement.

10. Following its typical approach, the Court held that X was arguably a sub-contractor within the terms of the agreement and stayed the matter to arbitration. It was left to the arbitrator initially to decide whether X was a subcontractor within the terms of the policy.

11. An arbitrator may rule on his own jurisdiction. See Model Law (ML) art.16 (for international arbitrations) and Arbitration Ordinance (Cap.341) (AO) s.13B (applying art.16 to domestic arbitrations). But such determination on jurisdiction cannot be conclusive. The Court has the final say.

12. I referred a moment ago to the Court's typical approach on a stay

application.

13. Chief Judge Ma (editor), Arbitration in Hong Kong: A Practical Guide (2003), §11-49 suggests that: "A stay application before a court need only involve a cursory look to establish a prima facie case that the dispute is the subject of the arbitration agreement".

14. This reflects the Court's practice in stay applications of simply assessing whether there is an arguable case that a dispute falls within the scope of an arbitration agreement. If the Court feels on a cursory examination of the evidence that there is an arguable case, it will conventionally refuse to decide the matter definitively. It will instead stay the action and leave the question of jurisdiction to be determined in the first instance by the arbitrator.

15. In Case 1, for instance, assume that the arbitrator decides that X is a sub-contractor within the ambit of the policy and so can rely on the arbitration agreement. The insurer could still challenge that finding in the Court.

16. If one or other party is unhappy with the arbitrator's decision on his jurisdiction, he may later come back to the Court for a more definitive ruling. ML art.16 provides that, where the arbitrator has decided his jurisdiction as a preliminary question, a dissatisfied party must challenge the ruling in the High Court within 30 days.

17. Art.16 does not specify what happens where the arbitrator decides his jurisdiction along with the merits of the substantive matter. Presumably, in such case the aggrieved party could either apply for leave to appeal against the arbitration award or seek to set it aside.

18. The hearing before the court challenging the arbitrator's conclusion as to jurisdiction would be a re-hearing. The Court would be entitled to review the evidence adduced before the arbitrator and even to allow new material to be introduced. Cf. Peterson Farms Inc. v. C & M Farming Ltd. [2004] 1 Lloyds Rep 603 (Langley J), §§17-18 in relation to jurisdictional challenges under Arbitration Act 1996 s.67 which is similar to Hong Kong's provisions.

19. But I have doubts whether the practice just outlined should be followed in all cases.

20. I do not think that there can be a single rule of practice on dealing with questions of an arbitrator's jurisdiction raised by stay applications. Flexibility is desirable in the interests of saving time and cost.

21. The Court's approach might depend on what is most expedient in a given situation. For example, consider the position where the question is limited to construing an arbitration agreement to determine whether a party or dispute falls within or outside its terms. There would be little point then in leaving jurisdiction to be provisionally determined by an arbitrator. Why should not the Court in the interests of efficiency construe the agreement at the stay application stage and, then and there, decide the issue of jurisdiction?

22. In contrast, there may be cases where it is necessary to have an inquiry (including examination of witnesses) as to the circumstances (factual matrix) leading to an alleged agreement to arbitrate between the parties. There may then be an advantage in granting a stay to enable an arbitrator to

determine relevant facts and rule on his own jurisdiction. If a party is not satisfied with the arbitrator's conclusion, he may at that stage apply to the Court.

23. Unfortunately, this latter course of action is not without difficulty.

24. Consider where a party unsuccessfully maintains before an arbitrator that the latter lacks jurisdiction. On challenge to the court, that party queries whether the arbitrator had jurisdiction even to determine the facts on which he rested his conclusion of jurisdiction.

25. In theory, the Court would have to conduct its own inquiry to arrive at its own determination on jurisdiction. If the Court has to do so, there would obviously be duplication of the effort and cost of the inquiry before the arbitrator.

26. Recent cases have striven to minimise the likely extent of duplication of time and cost in practice.

27. In Electrosteel Castings Ltd. v. Scan-Trans & Chartering SDN BHD [2003] 1 Lloyds Rep 190, Gross J (at §23) warned that, despite a challenge to the arbitrator's jurisdictional ruling being a re-hearing:-

"[N]othing said here should encourage parties to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because: (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the Court has ample power to address such matters when dealing with questions of costs".

28. In similar vein, in Peterson, Langley J (at §18) cryptically stated:-
"The fact that the Court is concerned with a re-hearing does not of course mean that it has no control over the evidence, if any, it should permit to be adduced. In this case the nature of the hearing involves no great extra burden."

29. I am not sure precisely how the potential threat of costs or the Court's power to control evidence, will mean that the re-hearing before the judge will be "no great extra burden". But, since the Court must decide "not whether [the tribunal] was entitled to reach the decision to which [they] came but whether [they were] correct to do so" (Electrosteel §22; Peterson §18), some duplication (great or small) of time and cost is inevitable.

III. Problem 2: Where there is an appeal against refusal of a stay, should an interim stay be granted pending appeal against the refusal?

30. This is a problem raised by another recent case (Case 2).

31. Early this year D applied for a stay of P's proceedings to arbitration. The stay was refused. The Court directed that P serve an amended statement of claim within 21 days and D file a defence within 28 days thereafter.

32. D appealed, within time, against the refusal of a stay. But, for whatever reason, the appeal was set to be heard by the Court of Appeal at the beginning of next year.

33. D applied for an interim stay pending appeal. D submitted that, without such a stay, it would be forced to file a defence before the appeal could be heard. Citing ML art.8, D claimed that filing of a defence would preclude D from challenging the court's jurisdiction.

34. The Court refused a stay.

35. P had undertaken in an open letter not to argue, on the hearing of the appeal, that the filing of a defence under the Court's directions prevented D from continuing with its appeal. D contended that the Court of Appeal was not bound by any such undertaking from P. But it was not apparent why P could not waive the time limit for a stay application in ML art.8.

36. D further suggested that filing a defence would mean duplication of time and cost, if the Court of Appeal should eventually hold in D's favour. Again that did not seem to a sustainable objection.

37. If the matter proceeded to arbitration, presumably the amended statement of claim could stand as the points of claim in the arbitration and the defence could stand as the points of defence. An arbitrator might have jurisdiction to direct otherwise. But in practice it is hard to envisage that a modern-day arbitrator, conscious of the exigencies of efficiency and expedition, would require new statements to be filed by the parties without some good reasons.

38. This was an unfortunate case in that the appeal was set down to be heard on a date many months after the first instance judgment.

39. The Court endeavours to ensure that litigation is speedy. Arbitration claims to be even speedier. In some cases there may be no alternative but to put everything on hold, pending an appeal. But, in the absence of good reason, the progress of court or arbitration proceedings should not have to be delayed,

simply because of the chance event of a late date for an appeal against a stay refusal.

40. Court pleadings should normally be able to double up as statements of the parties cases in an arbitration. However, that alone does not mean that a stay will invariably be refused.

41. I suggest that, in Case 2, the compelling reason for refusing an interim stay was probably P's undertaking not to take the filing of a defence as a point against a stay.

42. Where such an undertaking is given, D's dilemma effectively disappears. An interim stay should probably be refused. Conversely, where an undertaking is refused, D's dilemma would be stark. There may be little alternative but to grant an interim stay in such circumstance.

43. Hearing appeals against stay refusals early could reduce the future likelihood of similar applications. But this factor is difficult to control. It depends on the parties' estimate of the time for an appeal and the Court of Appeal's diary at any moment.

44. My suggestion is that, with good skeletons, the actual time for hearing an appeal orally, should not be long. In the run-of-the-mill situation, a time estimate of between 30 minutes and 1 hour may be realistic. Such an estimate might increase the prospect of receiving an earlier hearing date.

IV. Problem 3: How should defences of set-off be treated in stay applications?

45. Set-offs and counterclaims can generate procedural puzzles and headaches.

46. Let me first define some terms.

47. Set-offs are typically raised by way of defence to a plaintiff's claim.

48. Where a defendant says that he is entitled to reduce or extinguish the plaintiff's claim by a liquidated amount (however arising), there is an assertion of a legal set-off. The defence of legal set-off is usually accompanied by a counterclaim for the liquidated amount sought to be set-off.

49. Where a defendant says that he is entitled to reduce or extinguish the plaintiff's claim under contract X by an unliquidated amount due on a contract Y, there are 2 possibilities.

50. First, contracts X and Y are somehow related or connected with each other. In such case, the defendant is asserting an equitable set-off. That defence is usually matched by a counterclaim seeking unliquidated damages under contract Y.

51. Second, contracts X and Y are unrelated. In such case, no defence of set-off, legal or equitable, can be claimed. There is no legal set-off, because the claim postulated is one for unliquidated (as opposed to liquidated) damages. If the counterclaim under contract Y was for a liquidated sum, there would of course be a defence of legal set-off, despite the fact that contracts X and Y are

unconnected with each other.

52. Let me now give an example of the sort of problem which can arise.

53. Assume that a main contractor claims damages against a sub-contractor for breach of sub-contract X not subject to arbitration. By way of defence and counterclaim the sub-contractor pleads that he is not liable by reason of rights of legal and equitable set-off.

54. The legal set-off arises out of a liquidated debt alleged to be due from the main contractor under a different sub-contract Y subject to an arbitration agreement.

55. The equitable set off is said to arise out of unliquidated amounts claimed to be due under sub-contract X.

56. Can the main contractor insist on staying the trial of the sub-contractor's legal set-off and its associated counterclaim to arbitration? Alternatively, can the sub-contractor at least maintain legal and equitable set-off as a defence (if not as a counterclaim) in the Court proceedings?

57. If there is to be a stay (say) of legal set-off and its corresponding counterclaim to arbitration, will the sub-contractor be unfairly deprived of a defence (legal set-off) that in the ordinary course of Court litigation he should be entitled to raise against the plaintiff main contractor?

58. If only defences of set-off are allowed to be litigated, but not their associated counterclaims, there is a danger that Court and arbitrator will come

to different conclusions on the existence of viable set-offs and cross-claims.

59. In principle, all issues between the parties on claim and counterclaim, including any defence of set-off, should be dealt with in a single forum, either by the Court or an arbitrator. But this requires cooperation and goodwill among the parties. They need to agree the appropriate forum.

60. The problem arises when one party refuses to play ball and, for whatever reason, tactical or otherwise, insists on his strict legal rights. That which was agreed to be the subject of arbitration, is to be arbitrated. That which is outside the scope of the arbitration agreement, is not to be arbitrated. Such is the hardline attitude. What is the Court's approach?

61. The analysis of set-off claims given by Mustill and Boyd, Commercial Arbitration (2nd ed.) ("M & B") is confusing.

62. M & B write as follows (at p.130):-

"Space does not permit a full discussion but, in brief, the position is that there are four distinct ways in which a cross-claim is relied upon. First [Type 1], where a ground of complaint operates to reduce a sum to which the claimant would otherwise be entitled, for example, where defective goods are delivered, the price is pro tanto reduced. The buyer could, if he wished, raise the complaint as a cross-claim; but he is entitled to treat it as true defence, and not merely a procedural response, to the claim. Second [Type 2], one party has a statutory right to set off one debt against another debt. This right, which applies only to cross-debts and not to damages is also available as a true defence. Third [Type 3], one party has the right to set-off one cross claim of any kind against another, provided that the connection between the two claims is sufficiently

close to make it unfair to enforce one without taking the other into account. This is a procedural right, directed ultimately at enforcement, and does not operate by way of a true defence. Finally [Type 4], there is the case where the cross-claim does not raise any kind of a set-off, but the tribunal finds it convenient to allow both claims to be decided in the course of the same proceedings."

63. It will be noticed that M & B's Type 1 and Type 3 cross-claims correspond with what I have defined as claims of equitable set-off. Type 1 is a set-off arising from an unliquidated counterclaim in respect of the same contract under which P claims. Type 3 involves a set-off from an unliquidated counterclaim in respect of a different (but connected) contract from that under which P claims.

64. Type 2 is a legal set-off situation.

65. M & B refer to Type 1 and Type 2 set-offs as "true defences". On the other hand, Type 3 is referred to as merely a "procedural defence"².

² The reasons behind M & B's terminology appear to be historical.

A defendant could only set off after the passing of the Statutes of Set-Off (2 Geo. 2, c.22 and 8 Geo. 2, c.24). Those provided that, if there were debts or money demands between plaintiff and defendant, one might be set against the other.

Before the Judicature Acts, there were circumstances in which equity would restrain a plaintiff in an action at law from proceeding with a trial or from executing upon a judgment, until further order of the Court of Equity. But equity would not act in such a way simply because there were cross-demands. It was necessary to show that there was an equity which went to impeach the title of the legal demand. This relief was spoken of as "equitable set-off".

The Judicature Act 1873, s.24(3) first allowed the Courts to entertain a counterclaim. After the Judicature Acts, it was unnecessary for a defendant to bring a separate action to enforce a cross-claim. The cross-claim could be brought in an existing action.

The Judicature Acts further provided that equitable defences could be relied upon in actions at law. Where formerly the Court of Equity would restrain

66. Type 4 gives rise to no set-off defence.

67. M & B (at pp.129-30) posit 4 different situations of set-off and 4 associated questions:-

(1) Situation A:-

D has no defence of set-off to P's claim. But D has a counterclaim which is subject to arbitration.

Question A:-

Can D stay P's claim (which is not subject to arbitration)?

(2) Situation B:-

P has a claim which is subject to arbitration. D admits that he has no defence to P's claim, but D has a counterclaim which is subject to arbitration.

proceedings at law by orders of injunction or prohibition, such orders would no longer be granted but instead the equitable right could be asserted by way of defence in the action at law itself. Thus, as a result of the Judicature Acts 1873, not only could there be set-off in an action at law in respect of any ascertained demand, but the Court would also allow a defendant to defend by showing that he had an "equitable set-off," namely, some equitable ground for being protected against the Plaintiff's claim.

Type 2 set-offs were allowed by the Statutes of Set-Off. Presumably, for this reason they are "true defences". Type 3 set-offs arose as set-offs enforceable through the procedure of the Courts of Equity. Presumably, for this reason they are "procedural defences".

But, if this is right, it is unclear why Type 1 set-offs, which would also have been set-offs authorised by the Court of Equity, should be termed "true defences" by M & B.

For the history of set-off, see Hanak v. Green [1958] 2 QB 9; Derham, The Law of Set-Off (3rd ed). Derham §§2.52 - 2.53, however, states the reverse position from M & B. Thus, for Derham, legal set-offs are procedural, while equitable ones are substantive.

Question B:-

Can D compel P to arbitrate his claim?

(3) Situation C:-

P has a claim which is subject to arbitration. D genuinely disputes that claim. What is more D has a counterclaim which is not subject to arbitration.

Question C:-

Can D compel P to arbitrate his claim?

(4) Situation D:-

Claim and counterclaim are subject to arbitration.

Question D:-

Can D raise his counterclaim in the same arbitration as that of the claim or must D commence separate proceedings?

68. I shall not consider Situation D any further. To Hong Kong ears, the Question posed is artificial in light of AO s.6B which allows for the consolidation of arbitrations. Thus, even if there were separate arbitrations for claim and counterclaim, it may be appropriate for them to be consolidated by the Court on the application of a party.

69. M & B then answer the questions posed in Situation A to C as follows (at pp.130-1):-

(1) Situation A:-

- (a) D's counterclaim goes to arbitration. P can get judgment on his claim.
- (b) But execution on the judgment might be stayed pending determination of the counterclaim in arbitration. The Court might order the amount of P's claim to be paid in as a condition of a stay of execution.

(2) Situation B:-

- (a) If the counterclaim is a true defence, then D can stay P's claim for arbitration. The arbitrator will deal with both claim and counterclaim.
- (b) If the counterclaim is not a true defence, M & B say that "the position is the same as under [Situation A]". But there is no explanation as to what precisely that means.
- (c) Presumably, the plaintiff gets judgment in his favour on the claim, it being admitted that there is no defence. In the meanwhile, the defendant gets an arbitration award in his favour on his counterclaim. Pending arbitration, execution on the plaintiff's judgment is stayed.

(3) Situation C:-

- (a) The claim goes to arbitration. But M & B are adamant that the arbitrator "should not entertain the cross-claim unless it provides a true defence, but should leave the respondent to pursue it in separate proceedings".
- (b) M & B add: "Whether the Court will stay execution on the award, to take account of the cross-claim, depends on whether the latter is disputed and, no doubt, upon the Court's impression of its merits".

70. My principal difficulty with M & B's analysis is the distinction drawn between true and procedural defences of set-off. Why should there be any distinction?

71. M & B's 2001 Companion (at p.142) is no more enlightening:-
 "The modern tendency is to classify set-offs as either transactional (which encompasses common law abatement and equitable set-off [Types 1 and 3] ...) or independent [Type 2]. Contrary to what is stated in the text [at p.130], it has been held that transactional set-off gives rise to a true defence, whereas transactional set-off does not. In the case of transactional set-off, a cross claim which was arbitrable could not be pleaded as a set-off in an action on a claim which was not arbitrable, if the cross-claim was subject to a mandatory stay under section 1 of the 1979 Act. The reason is that the statutes of set-off from which independent set-off derives require the claim and cross-claim to be tried

by the same court. The court has, however, power to prevent injustice to the defendant to the action by staying the proceedings or execution pending the determination of the cross-claim. The position with regard to transactional set-off is less clear. There is authority in a case which was not subject to a mandatory stay that the court would itself decide on the merits of the cross-claim: Gilbert-Ash (Northern) Ltd. v. Modern (Engineering (Bristol) Ltd. [1974] AC 689. But this hardly seems appropriate in a case where legislation giving effect to the New York convention requires the court to grant a stay. See generally on this topic Aetna Refining and Marketing Inc. v. Exmar NV [1994] 1 WLR 1634, and Glencore Grain Ltd. v. Argos Trading Co. Ltd. [1999] 2 Lloyd's Rep 410."

72. What does all that mean? There are too many references to "transactional set-off". Even if one regards the plethora of references as typographical error, it is not wholly obvious which references are supposed to be to "transactional" and which to "independent" set-off.

73. Further, one might be forgiven for thinking that, caught up in terminology such as "true defence," "transactional set-off" and "independent set-off", one has stumbled (contrary to my opening apology) into a textbook of higher metaphysics.

74. Why should it matter in this modern world whether, for historical reasons, a defence is to be regarded as a "true defence" (ultimately or possibly deriving from the Statutes of Set-Off or pre-1873 Chancery procedure) or a "procedural defence (ultimately or possibly deriving from Chancery practice before 1873 or the 18th century statutes)?

75. I suggest rough-and-ready approaches which do not distinguish too finely between categories of set-off.

76. Assume the following:-

- (1) An arbitration agreement empowers the arbitrator to determine "any disputes or differences arising between the contracting parties out of or in connection with their contract"³.
- (2) The plaintiff has a claim subject to arbitration.
- (3) But for an alleged defences of legal or equitable set-off (that is, Type 1, 2 or 3 set-offs), there is admittedly no defence to the plaintiff's claim.

77. One possible answer is that the defendant should be allowed to stay the plaintiff's claim to arbitration.

78. The arbitrator (I suggest) would have jurisdiction to adjudicate the alleged defence of set-off as a dispute or difference arising "out of or in connection with" the relevant contract.

79. If at all possible, it would make sense for the same tribunal to deal with any counterclaim corresponding to any valid set-off asserted. I would suggest that the wording of the arbitration agreement is wide enough to empower the arbitrator to do so.

³ This (I assume) is a fairly common provision.

80. Any corresponding counterclaim (I suggest) may be regarded as arising "out of or in connection with the relevant contract".

81. If the set-off (legal or equitable) stems from the same contract out of which the claim is brought, there should be no real difficulty.

82. If the legal set-off alleged stems from a contract Y (which may or may not be connected with contract X), the dispute over the validity of the set-off and corresponding counterclaim under contract Y might be a difference arising "in connection with" contract X.

83. But I put this forward with hesitation. If an alleged set-off arising from contract Y apparently unconnected with contract X is nonetheless held to be related with contract X underlying the arbitration agreement, almost any contract Y might be brought within the purview of an arbitration agreement in contract X through the assertion of a set-off.

84. If the equitable set-off stems from a contract Y said to be related to contract X, there are 2 possibilities.

85. The arbitrator may first have to determine whether contract Y is truly connected with contract X.

86. If it is related, then again the counterclaim under contract Y may be a difference arising "in connection with" contract X.

87. If it is unrelated, there can be no defence of unliquidated set-off.

Further, the lack of relation between contracts X and Y means that the arbitrator has no locus to deal with the counterclaim asserted under contract Y.

88. Take the converse situation. A claim is made in Court proceedings. The claim arises out of an agreement which is not susceptible to arbitration. But the defendant asserts a set-off which is subject to arbitration. What happens if the plaintiff insists on staying the defendant's counterclaim to arbitration?

89. There are a variety of options open to the Court:-

- (1) It could give judgment on the claim, but stay execution pending determination of any relevant arbitration.
- (2) It could stay Court proceedings on the claim pending determination of the arbitration.
- (3) It may just possibly even hold that, insofar as the set-offs asserted may be defences to the claim, the claim falls within the ambit of the arbitration agreement, even though at first blush it does not appear to do so.

90. The precise solution in any case will probably depend on the peculiar circumstances and justice of a case, especially the proximity of the contract said to give rise to a claim with that said to give rise to the counterclaim.

91. That is the rough-and-ready analysis on set-offs and counterclaims

which I put forward to the scrutiny of members of the audience.

92. Note that context is important. A key assumption in my analysis (as well as that of M & B) concerns the wording of the arbitration agreement. Other arbitration clauses may lead to different results.

93. I stress that I am not saying that there is one elegant solution for all possible situations that one is likely to encounter. As can be seen from this talk, the possibilities are messy.

94. What I am proposing is more a first approximation of what a pragmatic approach to set-offs and cross-claims might look like.

95. I therefore look forward to interesting submissions from lawyers on this subject in the future.

V. Problem 4: How might the procedure for reviewing or appealing an arbitrator's decision be improved?

96. The procedure for applying for leave to appeal is found in RHC Orders 73, Rules 2 and 3 and Practice Direction (PD) 6. The provisions are unfortunately inconsistent and in need of revision.

97. Order 73, Rule 2(d) provides that applications for leave to appeal under AO s.23(2) "must be made by originating motion to a single judge in court". The notice should be served and the appeal entered "within 21 days after the award has been made and published to the parties".

98. Order 73, Rules 3(2) and (3) on the other hand provide that

applications for leave to appeal "shall be made to a judge in chambers" either by way of summons where an action is pending or otherwise by expedited originating summons providing for a hearing in chambers.

99. PD 6 §2.1 compounds the confusion by referring to "every notice of motion by way of appeal against an arbitration award" in connection with applications for leave to appeal.

100. The discrepancy has been known for some time. Hong Kong Civil Procedure 2004 (HKCP) Note 73/3/3 (p.1001), for instance, quotes Leonard J in Carl International (HK) Ltd. v. Ernest Komrowski & Co. [1996] 2 HKC 490 (at 492-4) on the anomaly. But the rules have yet to be clarified.

101. Although no express time limit for an application for leave to appeal against a domestic award appears to be stipulated, Order 73, Rule 5(2) as explained by HKCP Note 73/5/2 (pp.1002-3) argues that leave should be sought within 21 days of the publication of an award and its reasons. A time period should perhaps be expressly stated.

102. There also appears to be confusion on the Court's practice in hearing leave applications. In the past it seems that the Court may have heard a leave application and the corresponding substantive appeal at the same time, not unlike the procedure followed in hearing criminal appeals. The Court would then decide whether or not to grant leave and, if it did, immediately decide whether or not the appeal should be allowed.

103. Hearing times were consequently allocated on the basis that the leave application and the substantive appeal hearing would be treated as one and

the same. This meant that, instead of listing a leave application for (say) half-a-day, the application might be set down for a day-and-a-half to accommodate argument on the substance of the appeal.

104. Given that (as a rule of thumb) the longer the estimated time for an application, the longer the likely waiting time before the application can be heard, the Court's practice led to applications for leave being heard long after an award had been made.

105. Further, in practice, leave to appeal against an award is rarely granted. The scheduling of hearing dates on the basis of longer time estimates to accommodate argument on both leave and substance would accordingly have the effect that the Construction and Arbitration List judge's diary would unnecessarily appear to be fully booked. In most cases, there would inevitably be no need to hear argument on the substantive appeal.

106. In light of Swire Properties Ltd. and others v. Secretary for Justice [2003] 2 HKLRD 986 (CFA) I do not think that it is possible to hear a leave application and its underlying substantive appeal at the same time.

107. Swire Properties requires the Court to filter out unmeritorious applications for leave. If the Court adhered to what may have been its previous practice, it would not be fulfilling the role which AO s.23 and Swire Properties require it to undertake. However, I shall examine the ramifications (if any) of this view more closely in a moment.

108. At present applications for leave are made by Notice of Motion. Ordinarily, one or other or both parties will then request the leave hearing to

be heard in chambers pursuant to AO s.2D.

109. I would welcome suggestions on how the procedure for hearing leave applications can be expedited. I have in a previous lecture at the HKIAC proposed a revision along the lines which I now set out.

110. Leave is to be sought by expedited originating summons to be taken out within (say) 30 (instead of 21) days of the publication of an award.

111. There appears to be an anomaly in existing procedure in that a challenge to an arbitrator's decision (made on the hearing of a preliminary question) on jurisdiction can be lodged within 30 (instead of 21) days. Given that such challenge to jurisdiction partakes of the nature of an appeal, I suggest that the 2 time periods be rationalised.

112. The expedited originating summons is to be supported by an affidavit exhibiting a draft Notice of Appeal and a copy of the award. Any other material facts and matters necessary for the disposal of the leave to appeal application (for example, whether a relevant clause is a one-off provision or one commonly found in standard contracts) should also be included.

113. A 10-minute appointment for directions will be given upon the taking out of the expedited originating summons. Parties will be encouraged to agree directions for the filing of any further affidavits for the purpose of the hearing of the leave application.

114. Where agreement on directions is possible, the parties may simply file an appropriate consent summons and apply to vacate the 10- minute hearing

date.

115. The Court will then direct the application for leave to be set down. Typically, the estimated hearing time for such leave application should be no more than 2 to 3 hours.

116. The parties will be expected to provide detailed skeletons of their arguments for or against the grant of leave before the appointed hearing date to enable the judge to dispose of the leave application expeditiously.

117. It is hoped that the judge will be able to decide whether or not to grant leave at the end of the hearing of the application for leave. If he is able to do so and does grant leave, he will invite the parties to suggest directions for the disposal of the substantive appeal (including the filing of any Respondent's Notice and the setting down of the appeal for hearing).

118. If the judge wishes to reserve his decision on leave, he may nonetheless invite the parties at the end of the leave hearing to suggest directions as to the disposal of any substantive appeal should he be minded to grant leave. The judge's decision where he grants leave, would then incorporate directions for the further disposal of the substantive appeal.

119. The foregoing is only intended as the bare bones of any enhanced procedure. Obviously, matters will have to be refined through consultation and discussion with users of the Construction and Arbitration List. Any revised procedure would be promulgated by an amendment to the AO, Order 73 or PD 6 as necessary.

VI. Problem 5: Is there any practical difference between hearing a leave to appeal and a substantive appeal?

120. I have already stated my view that the Court would be shirking its duty of filtering under AO s.23(3)(b) if it were to treat the leave hearing and substantive appeal as the same.

121. The question which I now wish to raise is, "Does it matter in practical terms whether or not the leave and substantive hearings are separated?"

122. In theory, there is a difference between the leave application (gauging whether an arbitrator has gone obviously or seriously wrong) and determining the substantive issue on appeal. I suppose that even if at the leave stage the Court finds that an arbitrator is likely to have got it wrong, it is still open (albeit difficult) for a respondent to argue that the arbitrator got it right.

123. My nagging doubt is whether the arguments at the substantive hearing can differ greatly from those already broached at the leave stage. Will not the substantive hearing merely be a re-hash of what was advanced at the leave stage? At worst, will the substantive hearing be a second attempt by a respondent to show that the arbitrator got it right? If the material at the leave stage was not good enough, does the respondent get a second chance to deploy further evidence to buttress "new and improved arguments" which ought really to have been (but were not) raised at the leave stage?

124. Now, if the argument at the substantive appeal stage is only more of the same, then once it has been determined at the leave stage that there is obvious or serious error, should not the underlying dispute just be remitted to

the arbitrator for reconsideration?

125. To put it bluntly, apart from repetition, does the substantial appeal hearing stage serve any useful function?

126. Even where the Court believes the arbitrator has gone wrong, the Court will not readily vary the award to reflect what it believes to be the correct position. M & B state (at p.617):-

"An order varying the award will not necessarily result as a matter of course from a successful appeal. We suggest that such an order will only be appropriate where the variation (including any variation of the award on costs) follows inevitably from the Court's determination of the question of law. Where this is not the case, it is not for the Court to speculate as to what the arbitrator's decision would or might have been; the proper course is to remit the award for reconsideration, together with the Court's opinion on the question of law."

127. M & B (at p.618) add:-

"It is not easy to envisage circumstances in which the Court would on an appeal (as distinct from a motion to set aside on grounds such as misconduct) set aside a final award without at the same time remitting it to the arbitrator in order to make a fresh award: for otherwise the arbitration would never reach a conclusion."

128. Sometimes it may be possible to say that, the arbitrator erred in saying that the answer to a question of law was "X", rather than "not X". The answer being "not X", certain consequences naturally flow. But those consequences would be apparent by the time of the decision at the leave stage.

129. More usually, it will not be possible to conclude from an error made by the arbitrator that, applying the correct law, he would inevitably have come to a certain conclusion. In that case, all that can be said on appeal is that the arbitrator's decision on a specific question of law was wrong.

130. The Court cannot proceed to substitute its view as to the likely end outcome, without trespassing on the parties' agreement to confer the resolution of their disputes to arbitration. This would remain true, even at a substantive hearing of the appeal.

131. It is for the arbitrator and not for the Court to apply the correct law (as determined by the Court at the leave stage), to take a view on the matters in dispute, and to exercise his powers consequent upon such view.

132. I therefore doubt whether a substantive appeal hearing will have any real utility for the respondent who has lost the leave stage. I am not sure that it matters in practical terms whether the leave and substantive hearing are treated as separate.

VII. Problem 6: How should the Court handle multi-party litigation where some parties are bound by arbitration agreements but other parties are not?

133. Once more, there is no easy answer. There can be no prêt-à-porter suit to fit all sizes of eventuality.

134. Again, in an ideal world, the parties will see the benefit of agreeing a

single forum, Court or arbitration, for the resolution of all disputed questions. The problem is where, as unfortunately often happens, even with the best will in the world, parties are unable to agree.

135. In that case, it seems to me that the Court's options are limited.

136. In Hong Kong AO s.6B is helpful. Multi-party litigation may mean that there are related arbitrations, involving some (but not necessarily all) parties in common. Applications may be made for the arbitrations to be consolidated. Whether the Court will be prepared to do this will depend on a range of factors, including the stage which a relevant arbitration has reached.

137. Other techniques used are:-

- (1) stay related Court proceedings pending the outcome of arbitrations; or,
- (2) stay execution of Court judgments or arbitration awards pending the outcome of parallel proceedings in Court or arbitration as the case may be.

138. A final technique is to encourage parties' agreement to a single forum through the sanction of indemnity costs. But I suspect that using costs would be equivalent to "pushing on a string".

139. For example, costs are typically awarded at the end of the day against the losing party. The losing party could conceivably be the party who has all along been amenable to a single forum, but has been frustrated by the winning party's refusal.

140. Granted that in such case, the winning party may be deprived of all or some of the costs of a particular proceeding, where there has been duplication. But how exactly is "needless duplication" to be assessed? It is not impossible. But it is likely to be fraught with complication. That complication will itself mean added costs to disentangle.

141. The best safeguard seems to be for the parties themselves at the contractual stage to be aware of the possibility of multi-party litigation and to draft interlocking arbitration agreements. Such agreements would have the intended effect of ensuring that all obvious parties end up before a single arbitration tribunal in the event of dispute.

142. The task may not be easy. But, particularly against the background of AO s.6B, it is far from Herculean.

VIII. Conclusion

143. I have now covered the 6 problems mentioned in my introduction.

144. The message that emerges is perhaps self-evident and trivial. There are many options available to the Court when dealing with procedural problems in arbitration. The Court strives to find a way of proceeding which not only saves time and cost, but also is fair to the parties.

145. The basic tools at the Court's disposition are the same: stays of proceedings or execution, consolidation under AO s.6B or the RHC, and costs sanctions.

146. There may be no perfect solution in a given case. The Court must

simply do the best that it can, guided by good sense and pragmatism.