ASPECTS OF ARBITRATION: JOINDER, CONSOLIDATION AND REMEDIES

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Introduction

This note concerns two matters which have not been canvassed in the Law Commission's preliminary paper No 7, *Arbitration.* These are matters upon which, it is respectfully suggested, some view needs to be evolved prior to a final scheme for a reviewed Arbitration Act being brought down by the Commission.

The first concerns the ability - or the lack of it - of an arbitrator or the parties to join into the arbitration other parties who were not signatories to the contract containing the submission.

The second concerns the possibility of consolidation of arbitrations.

I will also make some comments on a third matter - the kinds of remedies an arbitrator may award - which has been discussed by the Law Commission.

The note is not intended as a review of the existing law. This is clearly set out in standard texts such as Mustill and Boyd, *Commercial Arbitration* (2nd ed 1989) and Russell on *Arbitration* (20th ed 1982). The note is intended rather as a basis for discussion and where solutions are put

forward they are suggested with due diffidence. The views of seminar participants are encouraged.

The nature of an arbitration

The foregoing issues can only be reviewed against an appreciation of two essential conceptual features of arbitration law as it has evolved in the common law jurisdictions. First, an arbitration is consensual in nature. Second, an arbitration is subject to judicial control.

As to the first matter, under our law an arbitration can only arise when the parties to a contract have included in it a submission to arbitration. There must be an agreement to refer some or all matters which may become in dispute between the contracting parties to an arbitrator rather than to the regular courts of law. Where there is a submission the parties will - if necessary with the assistance of a court - be held to the submission unless there are relatively exceptional circumstances which make it more appropriate that the matter in dispute be dealt with in a court of law.

And, once there is a submission courts will, in the most general terms, not interfere unless an arbitrator is acting outside the scope of the authority conferred upon him or fails to have proper regard to some applicable principle of law. That is, arbitrators are in a position closely analogous to that of administrative tribunals in that courts exercise a "lawfulness principle" to confine the arbitrator to the four corners of the document creating his "jurisdiction" *and* require him to act lawfully.

Joinder of parties

As Mustill frankly acknowledges (143) "one of the weakest features of [present] arbitral procedure is its inability to deal with third party situations : *ie* those in which a party against whom a claim is made seeks to recover from someone else an indemnity in respect of his liability. In such a situation the defendant wishes above all to avoid fighting the same claim twice. He does not want to incur the cost of two actions, nor to run the risk that the two different tribunals will reach different conclusions on the facts or the law - for if they do he may find himself with a liability to the claimant which he cannot pass on to the third party. He also wishes to avoid the inconvenience of having to put forward diametrically opposed contentions in the two hearings. For if (for example) the claimant maintains that goods sold to him by the defendant were defective; the defendant will answer the claim by saying that they were sound; whereas if the defendant loses against the claimant, he will have to advance the opposite view in his own claim upon the third party. This is bound to place his witnesses in difficulty. Moreover, he will not wish to wait until he has been held liable to the claimant before he prosecutes his claim against the third party." Mustill goes on to observe that "in few jurisdictions has [this] problem been faced, and in fewer still (perhaps in none) has a satisfactory solution been achieved." (143, fn 10).

The position in a court action is of course quite different. It is possible to join further plaintiffs or defendants and in particular to issue third party proceedings to see that all necessary parties and all proper issues are before the court for determination at the one time.

In an arbitration, as the law stands, this is not possible. One or more parties may object that they agreed to arbitrate *only* with the other party to the contract. And even if all parties to a submission were agreed on the desirability of bringing in a third party, that third party can object that he was not a party to that contract and that its provisions are not of the slightest interest to him.

It is possible that there may be an arbitration clause in the contract between the defendant and the potential third party and the parties might then agree to a tripartite arbitration before the same arbitrator. I doubt if that fact pattern would occur very often.

In reality, in a situation where there is a potential third party the "defendant", as Mustill properly notes, is in a difficult situation. If the claimant institutes proceedings in the High Court the defendant can institute third party proceedings. But the defendant - or potential defendant - cannot take the initiative. The claimant in these three cornered disputes is in a very strong tactical position. If the claimant insists on arbitration the defendant has no way of joining the third party into the arbitration. Perhaps the best the defendant could hope for would be to provoke litigation in some form and to persuade a court under its statutory discretion (see Section 5 of the 1908 Act) to stay the arbitration. The third party might then be joined in the litigation. And if the defendant were to threaten such a course it is possible that a potential arbitral claimant might be persuaded to drop the notion of arbitration and to proceed via the courts. But in reality the use of the stay power seems both an indirect and highly problematic control vehicle for this kind of problem.

Another possible solution, where there are two parties who are prepared to arbitrate and a recalcitrant third party, would be for the two parties who wish to arbitrate to commence proceedings, join the third party, and then invite a judge to exercise the powers under s 14 or s 15 of the Arbitration Act 1908 to refer the dispute to an arbitrator with the third party now safely aboard as a party. But this procedural route suffers from the deficiencies that ss 14 and 15 of the Arbitration Act are constrained in some respects. A Judge might not be prepared to so exercise that power. And this would be a most cumbersome and expensive way of reaching the desired result.

If the problem of joinder is thought to be sufficiently significant to warrant a statutory solution, one possibility would be to give the High Court an explicit statutory discretion whereunder the Court, on the application of any party or the arbitrator, could order the joinder of the third party into the arbitration. This notwithstanding that the third party was *not* a party to the original submission. From the point of view of the compelled third party the objections in principle to such a reform would presumably be that the third party is being compelled to become part of a contractual "deal" to which he, she or it, never belonged; that the terms of the submission were wider or narrower than he, she or it would have been prepared to agreed to; and that the third party is being forced into an arbitration rather than allowed a day in court, and hence is in a very direct way being denied due process of law. Moreover, the costs of an arbitration fall substantially on the parties rather than being supported (at least to some extent) by the State. Thus this recalcitrant third party to the arbitration could be heard to say, that he, she or it had got the

worst of all possible worlds. The reply to these kinds of concerns would presumably have to be of a fairly robust variety : that a dispute has in fact broken out; that the third party *in any event* will be engaged in litigation and that the preferable means of resolving the particular dispute is, in the view of the Court, in all the circumstances, arbitration. And it is quite possible that the mere existence of such a power and the knowledge that a court *could* exercise it would force a third party to pay far more attention to the possibility of resolving the dispute by arbitration than is presently the case. The role of the court under such a discretion would be like that of a half back in a football game - that is, to deliver the ball to the most appropriate quarter.

Finally, a more radical proposition again would be to empower a Judge to refer an entire dispute to arbitration (on such terms as may be ordered by the Courts) notwithstanding the objection of all or any parties. Conceptually, a Court then becomes (at least in the first instance) a "revolving door", and has jurisdiction to direct where a dispute will be resolved. This proposal would go further than the present New Zealand law (which is discussed at pp 55-58 of Issues Paper No 7). If this quite radical approach were adopted, the problem of joinder would disappear.

Consolidation of arbitrations

A not dissimilar problem can arise (particularly in "string" contracts containing arbitration clauses) with respect to consolidation of arbitrations. In practice, in such situations (which so far as I am aware do not arise all that frequently in New Zealand, although they are not uncommon in the United Kingdom) the parties can agree to a single

arbitrator for all the arbitrations. However, once again one or more parties may be bloody-minded and there does not appear to be any power in the present New Zealand statute to order consolidation. In the civil courts the power to consolidate actions has existed for many years now, and it may be appropriate that there should be a general discretionary power in a court to consolidate arbitrations where necessary.

Arbitrators' remedies

Once an award has been given it may (under s 13 of the 1908 Act) "by leave of the Court, be enforced in the same manner as a judgment or order to the same effect." This is commonly known as an action on the award.

The specific remedies which may be granted by an arbitrator are discussed at pp 44-46 of Preliminary Paper No 7 issued by the Law Commission. These include (now), the power to make money awards, to order specific performance and make orders under the various contractual adjustment statutes, to make interim awards, and to award interest and costs.

One remedy which is not specifically mentioned is that of rectification of the contract. There is New Zealand authority, which has been followed in the English Court of Appeal, to the effect that under a submission which is sufficiently widely drawn, an arbitrator *can* exercise this remedy. A claim to rectification does not impeach the contract but merely seeks to bring it in to conformity with the true agreement between the parties. Given this recognition by the courts, should a new statute imply such a power unless it is specifically excluded by the parties?

A second issue is more fundamental. At the moment the assistance of the court is required with respect to the equity type remedies. Ultimately, for instance, specific performance is enforced by commital or sequestration if the decree (award) is not complied with. The question has not been squarely asked in the reviews of arbitration acts to date in the Commonwealth whether an arbitrator should be given those ultimate powers. It is after all inconvenient and certainly expensive for the parties, and to the State, for a party to have to go to the High Court to enforce say an order of specific performance. And increasingly many awards are given by former judicial officers. It would be possible by statute (but presumably not by agreement?) to confer contempt and sequestration powers upon an arbitrator or umpire. However, it seems inconceivable that such a power should be conferred without a right of appeal to the regular courts of law. I am not aware that there have been sufficient (if any instances) of incidents in the field to warrant the statutory conferment of powers of this kind. And it should be recalled in this connection that arbitrators have, through the costs remedy, if appropriately applied, a relatively potent control device. Again the views of seminar participants would be useful.