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VIEWPOINT

THE ARBITRATION ACT (Cap.10): Call For Review To Confer JURISDICTION TO THE SUBORDINATE COURTS

By G.Raman, LLB, FSIArb Barrister-at-Law

Section 7 of the Arbitration Act provides that any party to ***"legal proceedings may at any time after appearance and before delivering any pleadings or taking any steps in the proceedings apply to the Court to stay the proceedings."***

This provision has been invoked to stay proceedings brought in the Subordinate Courts or in the High Court in breach of an agreement to refer any dispute between the parties to arbitration.

"Court" has been defined in section 2 of the Act to mean "the High Court". Therefore, if any proceedings have been brought in the Subordinate Courts in breach of an arbitration clause an application can be made to stay proceedings. But to which court should the application be made?

The practice in our Courts has been for an Originating Summons to be issued in the High Court seeking an order to stay proceedings. ***See Lim Eng Hock Peter vs Batshita International (Pte) Ltd. 1996 2SLR pg.741.***

The need to apply to another forum to stay proceedings has been caused by the restrictive definition of "Court". This restriction may have been justifiable in the earlier years when the civil jurisdiction of the Subordinate Courts was low. In 1970 the District Courts' jurisdiction was limited to $5000. (S.20 of the Subordinate Courts Act 1970).

This jurisdiction has now been increased to $250,000. ***See section 31A of the Subordinate Courts Act, Cap 321;*** Subordinate Courts (Variation of District Court Limit) Order 1997, s.333/97. In view of the increase in the jurisdiction there would be more applications to the High Court for stay. This would be cumbersome and costly.

However, in a recent case, ***D C Suit 4361/96,*** an application was taken out in the District Court itself for stay of proceedings. The learned Assistant Registrar who heard the application initially stated that she had no jurisdiction despite the applicant arguing that she had. Upon failure to persuade the Assistant Registrar that applicant applied to the High Court in Originating Summons 48 of 1997 and the matter was heard before Kan Ting Chiu J. Justice Kan enquired why the applicant had applied for stay in the first instance in the Subordinate Courts. The counsel for the applicant replied that in his view the Subordinate Courts had jurisdiction.

Justice Kan then suggested that if counsel was confident that the Subordinate Courts had jurisdiction he ought to have appealed against the decision of the Assistant Registrar who stated that she had no jurisdiction. As the appeal period had not yet lapsed the counsel appealed to the District Judge in Chambers against the Assistant Registrar's decision. The learned District Judge decided to hear the application but he did not grant a stay. He then heard the application for summary judgement and gave leave to the Defendant to defend.

What is of interest is that the learned District Judge felt that he could hear the application despite observations made by opposing counsel that he had no jurisdiction. The opposing counsel did not choose to appeal against this decision thought it was clearly unsupportable in law. But it is submitted that practicality and expediency dictate in favour of the Subordinate Courts exercising such jurisdiction.

It is therefore proposed that the definition of "Court" be amended to include the Subordinate Courts so that unnecessary delay and additional expenses may be avoided where an action has been commenced in the Subordinate Courts in contravention of an arbitration clause. ▲

SEPARABILITY DOCTRINE: - ITS EFFECT ON ARBITRATOR'S JURISDICTION

by **Raymond KUAH Leong Heng**
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It would not be an over-statement to say that separability principle in relation to arbitration clauses is a topic most experienced lawyers and arbitrators are aware, but in practice, however, seldom anyone finds it absorbing enough to engage on such enquiry into the separability doctrine because it is neither simple in concept, nor easy of application.

In the approach to examine this separability principle the starting point may be to see how it relates to the new ***International Arbitration Act 1994 (Cap 143A),*** in which sections forming part of the ***UNCITRAL Model Law***[1] on international commercial arbitration are given the force of law in Singapore. For example, **Article 16[2] of the Model Law provides:-**

"the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ***ipso jure*** *the invalidity of the arbitration clause."*

In this context, the significance may be seen in the international commercial arbitration under Model Law, where there is a legislative severance of the arbitration clause in a contract as distinct from the rest of the contract, so that the tribunal may retain jurisdiction even if it finds that the contract of which the arbitration clause forms part is indeed invalid.

It is common ground that the jurisdiction of an arbitral tribunal clearly depends upon the validity of the arbitration agreement. It follows that the doctrine of separability in relation to arbitration clauses deals essentially with the fundamental effect of an averment that the contract is invalid. In this connection, it is by no means simple in concept and of application; and of which may be useful to approach this subject matter by asking the following relevant questions:

First, assuming that the contract is invalid, does it mean that the arbitration clause ipso facto invalid?

Secondly, what does the concept really mean?

Thirdly, to what extent the concept may develop in relation to arbitration?

By posing these three practical questions, there is a need to point out that separability principle is in fact an important aspect in international commercial arbitrations; and perhaps it may be equally appropriate to say that it is given wider application in domestic arbitrations, especially in Australia, where recent developments relevant to Australian Law with respect to domestic arbitrations have seen a strong endorsement of this separability principle.

However, those who hold the view that the first question is in the affirmative do so in the belief that the arbitration clause would have to be construed on the ground that it forms an integral part of the contract. This proposition is prima facie logical by virtue that it is arguable that arbitration clause cannot apply to a non-existent contract. Conversely, it is submitted that by virtue of the doctrine of separability, the contract and the arbitration clause should be regarded as having a separate existence; and the fact that the contract is invalid does not ipso facto affect the validity of the arbitration clause, nor is the arbitrator being deprived of his jurisdiction to determine the validity of the contract.

In this regard, it is quite apparent that the doctrine of separability is dictated by the practical necessity to enable the dispute resolution process to be proceeded with as effectively as the parties intended.

The doctrine of separability may be classified as having two contractual regimes. The first concerns the Parties' agreement to the truth that the contract and the arbitration clause were entered into, but one of the Parties decides to avoid the arbitration clause by attacking the validity of the contract through arguing that it is voidable ***ab initio*** on any ground cognisable in law. The second embraces those cases where arguments are advanced as a denial that either the contract or the arbitration clause was even concluded where, for instance, it is argued that a party's signature to

one or more of those documents was forged.

Thus it is likewise discernible that there is a correlation between the principles of separability and arbitrability: see the decision of the ***English Court of Appeal in Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.***[3] ***(1993) 1 Lloyds Rep. 456 at 459.*** In this case, Steyn J (as he then was) held, with some reluctance, that the issue of the initial illegality of the contract is always beyond the arbitrator's jurisdiction. His Lordship's holding was based on the precedent case: ***Smith Coney & Barrett v. Becker gray &. Co,(1916) 2 Ch. 86,*** and by which his Lordship considered himself bound. But, the Court of Appeal[4] (England) held that Steyn J was incorrect in his judgement, and should have held that the arbitration clause was sufficiently wide in its terms to take in a dispute and confer jurisdiction upon the arbitrator to determine whether the principal agreement was indeed void ***ab initio***.

Diplock LJ in ***Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp. Ltd.(1981) AC 909, at 980,*** must have had the doctrine of separability in mind when he held that:

"The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself".

There have been many reasons concerning the adoption of the concept of separability; and the court's recent approach in connection with arbitration, Domke, On Commercial Arbitration, para. 8.01, p. 89-90, noted:

"However, there has been a fundamental change in attitude of the courts concerning the nature of the arbitration clause in a normal commercial contract. The doctrine of separability, under which the arbitration clause is treated as an independent contract, even though within the main contract, has finally received wide acceptance after much debate, both in the United States and abroad. Of course, the separability theory can only apply to contracts containing a broad arbitration agreement. Where the clause restricts arbitration to disputes and controversies relating to specified matters, arbitrability is, in any case, to be determined by the courts".

Domke, however, went on to emphasise (p.90) that the arbitrator's authority is contained in an agreement, which is deemed to be ***"separate"***.

Domke continued: (para.8.02, p.93):

"Under the separability rule, the only test of what may be arbitrated is the measure of the scope of the arbitration clause. Thus, responsibility for arbitrability of any issue, is, first of all, in the hands of the draftsmen of the arbitration clause. Whether a clause is sufficiently wide will be decided on a case-by case basis by the Court".

It is submitted that divergence between the law governing international arbitrations and domestic arbitrations is undesirable, and a further impetus for the development of the domestic law has undoubtedly been the separability as recognised in international arbitration, and more so in the United States and a number of European countries.

There is to be found in an important discussion in the paper presented by Schwebel on the subject of ***"the severability of the arbitration agreement"*** in international arbitration: Three Salient Problems, 1987, which is well worth reading.[5] There has also been concern that as a matter of policy a party should not be able to stultify an arbitration simply by alleging that the contract of which the arbitration clause forms a part is ineffective[6].

It might be better appreciated if we were to ask the question: "What does separability mean?". For this, it is interesting to read what Broches has stated in his commentary on article 16(1) of the Model Law: that separability of the arbitration clause is intended to have the effect that should an arbitrator, who has been validly appointed and stayed within the limit of the jurisdiction conferred upon him by the arbitration clause, has arrived at a conclusion that the contract within which the arbitration clause as contained therein is invalid, he does not thereby lose his jurisdiction[7]. Such an approach is consistent with international arbitration practice, and with the law in other jurisdictions. It therefore paves the way for greater uniformity between domestic law and international practice.

Given that the aforesaid proposition were to be the purpose of the concept, then the following situations become meaningful for discussion:

(1) In practice, only in situation where the arbitration clause forms part of a contract in which the validity is in question would separability doctrine arise. But, it does not come into being when there is an ad hoc arbitration agreement after the dispute has emerged, and such an arbitration agreement can, if in appropriate terms,

empower the arbitrator to decide whether there ever was a contract between the parties[8]. It does arise also where an arbitration agreement is made after the contract has been entered into but before the dispute emerges[9]. It does not arise assuch where the arbitration agreement is made at the same time, but separately from, the contract: as it may be that there will be grounds for the challenge to the validity of the contract which would lead also to a challenge to the validity of the separate arbitration agreement, but if that were the case, separability would not save the arbitrator's jurisdiction[10].

(2) Again, separability doctrine can arise where the arbitration clause is wide enough to empower the arbitrator to make an award going to the validity of the contract. In the event that it is not the case, then there can be no question of the arbitrator losing jurisdiction upon finding that the contract containing the arbitration clause is invalid. For example, in ***QH Tours Ltd. v. Ship Design & Management (Aust) Pty Ltd.***[11], the arbitration clause provided only for reference of disputes concerning the performance of the ship, the buyers claim it could not have been entertained at all. In actual fact, the arbitration clause provided for reference of disputes arising under or in connection with the contract, and that was wide enough, in other words, separability preserves jurisdiction, it does not confer it.[12]

(3) It is important also to realise that separability doctrine has to be distinguished from the arbitral tribunal ruling on its own jurisdiction: namely, by the concept of ***"competence-competence"***. While under article 16(1) of the Model Law, the arbitral tribunal may rule on its own jurisdiction[13], the following paragraphs of the article make it clear that the ruling is neither exclusive nor final, and a court, rather than the tribunal, is the ultimate authority on jurisdiction[14]. But, the tribunal may make an act on an initial ruling as to its jurisdiction, and so similarly may an arbitrator in a domestic arbitration. However, in the latter case, the ruling is also not binding and may well be challenged, for example, on an application to enforce the award. There can be situation in which separability and the arbitrator ruling on his jurisdiction will over-lap if the arbitrator is called on to rule as to whether he retains jurisdiction notwithstanding that he concludes that the contract containing the arbitration clause is invalid, either applying the Model Law or determining what the domestic law might be, even though it is an over-lap, not concurrence.

(4) Much depends on how far one takes the concept of separability, because it can have a significant effect on the positions of the parties. Additionally, it may be of interest to refer to the sale of the ship in ***QH Tours Ltd. v. Ship Design & Management (Aust) Pty Ltd***[15], if separability have not enabled the buyer's claim to have the contract declared void ***ab initio*** to go to arbitration, there would not have been a stay of buyer's court proceedings, at least on that claim; either there would have been court proceedings and an arbitration running in parallel, or just court proceedings alone, and in the case of the court proceedings, with the full panoply of appellate rights. Instead, there was arbitration alone with appeal only with respect to matters of law arising under the award.

As has been said earlier, that separability preserves jurisdiction and does not confer it. But it is submitted that recognition and application of the concept of separability can have the effect of greatly enlarging the scope of arbitral processes. As such, it is logical that it will lead to the most important question that has to be asked: To what extent does separability go? The words of the Model Law, as it is noted, has not fully answered for international commercial arbitration by reason that their effect is open to debate and is the lack of clarification by reference to their drafting history[16]. Whereas for domestic arbitration, there is not the starting point of the legislative severance, and it has become necessary to grapple with the flow of reasons from first principle.

It seems that it is a simple point to recognise that an arbitrator's jurisdiction inherently comes from the agreement of the parties. However, this does not hold good to the extent that the legislature has, by the commercial arbitration legislation, grafted a number of matters on to the parties' agreement, and by the adoption of the Model Law has thus imposed on their agreement the severance in article 16(1). But in general, the principle remains, and so logically, if the contract containing the arbitration clause falls, the agreement to the arbitrator's jurisdiction falls with it.

In some circumstances, it is established that the agreement to the arbitrator's jurisdiction does not fall with the contract. But why has it been so? If the answer can be provided to this question, then it

may tell us to what extent separability actually goes.

To that end, there has been observations made by commentators that a wider scope is given to separability in some countries[17]. For example: Kaplan J (as he then was) of Hong Kong in ***Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd.*** found the relevant facts concern the buyers having resisted appointment of an arbitrator on its behalf pursuant to the Model Law on the ground that there was no concluded contract because the signatory on its behalf did not have the necessary authority. However, an arbitrator was appointed, and it was said that according to Article 16(1) of the Model Law, the arbitral tribunal could decide its own jurisdiction. But since the tribunal's decision had turned on whether a contract had come into existence, the learned Judge seemed to have thought that the tribunal could decide whether the contract had come into existence, although somewhat at pains to say that the decision was not final. The only reason given was:

"Insofar as Mr Yeung might have been contending that the separability principle does not apply where the initial validity of the agreement containing the arbitration clause is challenged, then..... commercial reality is to be preferred to logical purity".[18]

It would seem to make sense that commercial reality can and should be taken into account in moulding the law, but care should be exercised in order not to supplant the agreement of the parties as the foundation of an arbitrator' jurisdiction, however strained. This is not to suggest that Kaplan J actually took such a view. This most extreme stage of separability concerns not only that the arbitrator can decide that the contract containing the arbitration clause never came into existence without destroying his own jurisdiction, but also that the arbitrator can decide that the contract containing the arbitration clause did come into existence even though one of the parties denies that it did. Putting that aside, one school of thought is that there is no difference in principle whether the contract have fallen or never came into existence - in either case, there is no contract when the arbitrator gives his decision. There is however, another school of thought which onsiders it all the difference in the world.

There is no doubt that the logical purity of the proposition, that if the contract containing the arbitration clause falls the agreement of the parties founding the arbitrator's jurisdiction falls with it, has long been sullied. There remains however, at least until the final stage of separability, a more or less tenuous connection with the principle that an arbitrator's jurisdiction actually comes from the agreement of the parties. Even in the interpretation of Article 16(1) of the Model Law, it might be construed that the words "an arbitration clause which forms part of the contract" requires that a contract once existed. As we shall see: such consideration has shown that the concept of separability is neither simple nor easy of application.▲

Footnotes:

1. *IAA (143A) - gives Model Law the force of law in Singapore.*
2. *See First Schedule to the IAA (143A)*
3. *(1992) 1 Ll R 81.*
4. *(1993) QB 701.*
5. *See also the article by Svernlov, "What isn't, ain't" in (1991) 8 J Int. Arb 37.*
6. *See Svernlov at 49; Steyn J in Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd. at 93.*
7. *Broches, Commentary on the UNCITRAL Model Law, 1991, p.75.*
8. *See Heyman v. Darwins Ltd.(1942) AC 356 at 385, 392.*
9. *Steyn J, ibid.*
10. *Cf Steyn J, ibid.*
11. *(1991) 33 FCR 227.*
12. *So also art.16(1) of Model Law assumes that arbitral tribunal has jurisdiction to decide that the contract is null and void.*
13. *Sojuznefte export (NSE) (USSR) v. Joc Oil Ltd (Bermuda) (1991) XV Yearbook of Commercial Arbitration 384.*
14. *See Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co.Ltd. (1992) Doyles DR Reps. (Asia Pacific) 80-036, where the court declined to rule on the jurisdiction of the arbitral tribunal until the scheme under art.16 had been followed.*
15. *(1991) 33 FCR 227.*
16. *Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on Commercial Arbitration, 1989, pp 478-528.*
17. *Svernlov, "What isn't, ain't" (1991) 8 J, 37 Int.Arb.; Jacobs, Commercial Arbitration Law and Practice, vol.1, para. 5, 192-200.*
18. *(1992) Doyles DR Reps. (Asia Pacific) 80-036 at 80, 671.*

BOOK REVIEW

THE ARBITRATION ORDINANCE OF HONG KONG: A Commentary

by Robert Morgan

Butterworths Asia (Hong Kong) 1997
ISBN 962-8105-04-3

Reviewed by ***Raymond Kuah Leong Heng***
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This new edition of the book clearly attained the highpoint of a practical work, as is evident in the thoroughness with which the Author adopted a structured approach in this undertaking and on which has been much expanded and similarly updated in both of the Author's earlier work: the Annotated Ordinances of Hong Kong - the Arbitration Ordinance; and the Hong Kong Halsbury on Arbitration; as well as the 1997 Supplement, wherein the Author addresses the Arbitration (Amendment) Ordinance 1996 which came into effect in June 1997. Hence, the publication of new edition of this book should in fact present no confusion with the Author's earlier work.

In any event, what is singularly so impressive and useful are not only from its copious references to the number of extensive citation of authority (being domestic to Hong Kong and those from other jurisdictions), but also from the wide range and relevant in-depth commentaries which will go a long way to ensure that this excellent work would be an essential tool for lawyers, practising arbitrators, and students alike who would do well to read.

The arrangement of the book should be no stranger to any reader who has made reference to the Author's earlier work, wherein the typical approach adopted is by setting out the text of a section, or sub-section of the Ordinance, and this is followed by notes with Author's comprehensive commentaries covering details of the legislation by which a section may have been added to the Ordinance, to which a comparison is then made with the provisions of the English Arbitration Act. Typically, there are also useful notes being given to explain the way in which sections may be so affected by the transition of the sovereignty, and by the Arbitration (Amendment) Ordinance. Readers will find that the text very useful in that simple explanation and discussion of the provisions of the Ordinance have been included for good measure.

For the benefit of readers who may not be familiar with Hong Kong arbitration scene, particularly the historical events which unfolded in 1982 when Hong Kong had decided to model its Arbitration Ordinence on the English Arbitration Act 1979, though with certain modifications and improvements. Hence, from that year onward, the Hong Kong Court was conferred power to dismiss arbitration for delays; coupled with measures which were also taken to address the thorny problem of publicity that invariably followed closely in the wake of an arbitration that goes to Court. 1982 also saw the provision made for some conciliation, and by 1989 much improvements have been made in this direction. Again, following Hong Kong's adoption of the *UNCITRAL Model Law* in 1989, and its coming into force in April 1990, it is of practical interest to note that Hong Kong cases have actually been cited by many jurisdictions. Since then, numerous improvements have been made to the *Model Law*, and thus generally more power was given to arbitrators.

Against these background of developments of the Statutory Law in Hong Kong, it has afforded a unique opportunity for the Author to produce this remarkable commentary on the Hong Kong Ordinance together with a Supplementary on the 1996 Amendment Ordinance.

This new edition of the book is an invaluable reference work with comprehensive collection of decided cases and data which are useful for all practitioners involved in litigation and arbitration who would do well to take advantage of consulting this work in addition to those of English

texts. In this context, it is interesting to be in a position to observe how similar provisions have been, or are to be interpreted in other Common Law jurisdictions by the direct application of *Model Law* in practice.

Appropriately, this new book set aside several pages to the important matter on enforcement of cross-border, and the New York Convention awards as from 1st July 1997. It is readily apparent that the relevance of this topic cannot be over-stressed by virtue of the fact that New York Convention no longer applies between Hong Kong as a Special Administrative Region vis-a-vis the rest of China, especially as it followed the resumption of sovereignty to China. In any event, the expectation is that this problem may well have to be remedied by legislation after Hong Kong's handover to China.

There has been a number of significant changes made to the Amendment Ordinance which are dealt with in this work; and about which the default appointing power of the court both domestic to Hong Kong, and under *Article 11 of the Model Law* are transferred from the court to the Hong Kong International Arbitration Centre. This measure is clearly aimed at reducing the time and costs involved to get an arbitrator appointed where one party refuses to comply. Also if the parties cannot agree on one arbitrator of three, Hong Kong International Arbitration Centre will then make the decision to appoint an arbitrator.

Additionally, there is also the Rules for appointing arbitrators by Hong Kong International Arbitration Centre, as were approved by the Chief Justice and the Legislative Council, which are found in the Supplement and provided free to purchasers of the Book.

Clearly, the Hong Kong Amendment Ordinance followed closely the English Arbitration Act by expanding on the definition of "writing" in Article 7 (2) of the Model Law, which is applicable to both domestic and international cases. The arbitrator is thus given power to award security for costs, and it also specifies precisely what powers both the Court and the arbitrator have under the Model Law. The provision of section 2 GG gives the Court power not only to enforce awards as if they were judgement of the Court, but also the "orders" and "directions". Included in this comprehensive work are also the objectives and principles of the Legislation, and the responsibilities of arbitrators as found in the English Arbitration Act.

Of particular value in regard to the Supplement is that the Author has produced an update of the Arbitration Ordinance by inserting the new provisions from the Amendment Ordinance, and to delete those repealed and replaced irrelevant provisions. Whereas included are the useful comparison Tables and Appendixes found in the main volume of work with an inclusion of a comprehensive bibliography.

A great deal of energy and effort had been expended by the Author for its preparation of this new edition of thoughful and comprehensive book in which the text is not just readable and compendious; but an indispensable source of assistance for those who have to do with the resolution of disputes; and is largely a credit to the Author for his assduous industry. ▲

LEGAL DEVELOPMENT AFFECTING ARBRITRATORS

DELAY IN PROSECUTING CLAIM

House Of Lords

Food Corporation of India v Antclizo Shipping Corporation (1988)

I.W.L.R.603

In this case the House of Lords considered an application for a declaration that the arbitration had been abandoned by mutal consent and for an injunction restraining further proceedings in the arbitration. The U.K. Arbitration Act does not contain a provision similar to Section 46 in Australia Uniform Legislation. The House of Lords dismissed the application. In delivering the leading judgement, Lord Goff concluded (at p.609):-

"... I wish however to add a footnote. There has been clearly expressed, by all members of the Court of Appeal in the present case, grave concern about the law as it now stands with regard to arbitrations which have been allowed to go to sleep for many years; and it is plain that, in so expressing themselves, they were expressing a concern felt generally in the City of London. It may however be that the problem could be dealt with most expeditiously, and most clearly, by legislation conferring a power to dismiss claims in arbitrations for want of prosecution, similar to the power which now exists to dismiss similar actions for want of prosecution in the courts. If that is right, then, in the interests of all concerned, the sooner the matter is brought before the legislature for consideration, the better."

Three of the other four law Lords who heard the appeal expressly endorsed Lord Goff's plea for legislation in the area.

In any event, the problem does not arise under Australia Uniform Legislation where in Section 46 gives the Court power to terminate arbitration proceedings where there has been undue delay. ▲ **RK.**

POWERS OF ARBITRATORS

Supreme Court Of New South Wales
Application for Leave to Appeal, Smart J.
6th August 1987

Robert Patrick Pty. Ltd. v. George Bevan Enterprises Pty. Ltd.

Section 38, Leave to Appeal, Powers of Arbitrator

This case was in respect of an application for leave to appeal from a ruling of the arbitrator on the matter of pleadings.

While the progress of arbitration proceedings, the Builder sought to have a preliminary point of law determined in connection with the validity of a notice of determination.

But the Proprietor pointed out that this matter had not been raised in the pleadings. The arbitrator after due consideration ruled that this matter should have been raised in the pleadings.

The Builder then sought leave to appeal from the arbitrator's ruling, and the Proprietor raised objection to Smart J. this application.

His Honour doubted whether the ruling made actually amounted to an Interim Award, but even if was so, he gave indication to the effect that he would not grant leave to appeal.

His Honour concluded the following remarks:-

"As was pointed out by Stephen J. in Atkinson-Leighton 146 CLR at 235, subject to certain presently immaterial exceptions, the parties should be able to obtain from arbitrators such rights and remedies etc as would have been available if the proceedings were being held in a court of law".▲ **RK.**

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