(1) Court's power to order recovery of arbitrator's fees under clause 62 of the Bill

(2) Similar legislation pertaining to the power of the court to order recovery of arbitrator's fees

(3) Considerations in exercising court's discretion under clause 62 of the Bill

(4) Clause 62 of the Bill to be substituted by an agreement of the parties

(5) "Any person claiming through or under any of the parties" in clause 73(1)(b) of the Bill

I. Introduction

Following requests for information by Members at the meeting of the Bills Committee of the Legislative Council held on 25 January 2010, this paper addresses the following matters:

(a) providing information on the legislation in other jurisdictions pertaining to the power of the court to order recovery of arbitrator's fees;

(b) advising whether clause 62 of the Arbitration Bill ("the Bill"), which provides for the court's power to order recovery of arbitrator's fees, could be substituted by an agreement of the parties that sets out the circumstances under which arbitrator's fees are to be recovered;

(c) considering the need for setting out in the Bill the considerations that may be taken into account by the court in exercising its discretion to order that an arbitrator is not entitled to receive his fees or expenses;

(d) providing information on previous cases, if any, to illustrate the circumstances in which the court had regard to the conduct of an arbitrator in question; and

(e) explaining the meaning of "any person claiming through or under any of the parties" in clause 73(1)(b) of the Bill, and considering the need to improve the clarity of the expression.

II. Court's power to order recovery of arbitrator's fees under clause 62 of the Bill

2. Under clause 62(1) of the Bill, on the application of any party, the Court of First Instance may, in its discretion and having regard to the conduct of the arbitrator and any other relevant circumstances, order that an arbitrator is not entitled to receive his fees or expenses and order their recovery if the arbitrator's mandate has terminated upon challenge under Article 13 of the UNCITRAL Model Law (given effect to by clause 26) or failure to act under Article 14 of the UNCITRAL Model Law (given effect to by clause 27).

3. This clause implements the recommendation of the Committee on Hong Kong Arbitration Law as follows:

> *"We are of the view that, where there is a successful application for removal under Article 13 of the Model Law or under the delay provisions of Article 14 of the Model Law, the court should have a discretion to disentitle the removed arbitrator to the whole or part of his fees. We are further of the view that, in respect of the fees of the removed arbitrator, the Court should have a discretion to order repayment of such fees that are already paid."*[1]

III. Similar legislation pertaining to the power of the court to order recovery of arbitrator's fees

4. A similar provision can be found in section 15(3) of the current Arbitration Ordinance (Cap 341). It provides as follows:

> *"The Court may, on the application of any party to a reference, remove an arbitrator or umpire who*

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[1] Hong Kong Institute of Arbitrators, *Report of Committee on Hong Kong Arbitration Law*, 30th April 2003, paragraph 43.42

> *fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the Court under this subsection* ***shall not be entitled to receive any remuneration in respect of his services.*** *"*(emphasis added)

5. This section specifies that there is no need for any party to make any application to recover fees from the arbitrator and it is mandatory that an arbitrator will not be entitled to receive any remuneration in respect of his services if he is removed under this section. For example, in *Kailay Engineering Co (HK) Ltd v Farrance*[2], the defendant was an arbitrator appointed to arbitrate a dispute in December 1995. On 8 August 1998, no award having yet been made, the plaintiff's solicitors applied to the court under section 15(3) for an order to remove him for failing to use all reasonable dispatch in proceeding with the reference. The defendant arbitrator conceded before the judge that he had been guilty of undue and unreasonable delay.

6. Similar provision can also be found in section 24 of the English Arbitration Act 1996 where, upon application by a party to arbitral proceedings, the court may remove an arbitrator on any of the following grounds:

(a) arbitrator not impartial;
(b) arbitrator not qualified;
(c) arbitrator physically or mentally incapable to act;
(d) arbitrator failed to conduct the proceedings properly; and
(e) arbitrator failed to use reasonable dispatch.

7. Section 24(4) of that Act provides that "where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid".

IV. Considerations in exercising discretion under clause 62 of the Bill

8. It was suggested that the power under section 24(4) of the English Arbitration Act 1996 should be exercised "where the behaviour of the arbitrator was inexcusable to the extent that this should be marked by

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2 [1999] 2 HKC 765

depriving him of some or all of this fees and expenses"[3].

9. Such a case can be found in *Wicketts and Sterndale v. Brine Builders*[4], where the arbitrators made the following orders and directions:

> (a) the arbitrator entirely of his own volition in anticipation of a settlement gave directions in relation to the possible settlement. In particular, the arbitrator directed that no settlement was to be implemented before he had confirmed in writing that he had received the whole of his outstanding fees; and
> (b) the arbitrator ordered that both parties give security for each other's costs and arbitrator's fees.

10. It seems that the main concern of the arbitrator was to secure payment of his own fees and his conduct was described by His Honour Judge Seymour QC as follows:

> *"...[T]he terms of the two sets of directions to which I have referred, demonstrate to my satisfaction that [the arbitrator] has a pitifully inadequate comprehension of the nature of his function as arbitrator, what powers he has and what is the appropriate way in which to exercise these powers. He seems to have no conception of the fact that these powers are to be exercised in accordance with law, or what the relevant principles of law are. That fact on its own means that if the arbitration proceeds with [the arbitrator] as arbitrator, it is likely that substantial injustice will be caused to the claimants, because it is likely that [the arbitrator] will continue to demonstrate that wholly inadequate grasp of the nature of his functions and powers to which I have referred.*[5]*"*

11. The UK court also indicated the approach and factors of consideration in relation to the exercise of discretion under section 24(4) of the English Arbitration Act 1996 as follows:

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3 UK Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, February 1996, paragraph 108

4 [2001] *Construction Industry Law Letter* Dec 2001/Jan 2002, 1805; [2001] *App. L.R* 06/08

5 At paragraph 55 of the judgment in the case of *Wicketts and Sterndale v. Brine Builders*

> *"In exercising my discretion in relation to fees and expenses which I am satisfied in the circumstances of the present case it would be appropriate for me to exercise, I am not limited, as it seems to me, to considering only the matters which have led to the conclusion that [the arbitrator] should be removed as arbitrator.* ***In considering what fees and expenses it is proper he should receive, I am both entitled and bound, to consider the full progress of the arbitration and all of the events in it since it commenced.***"[6] (emphasis added)

12. In view of the similarity between clause 62 of the Bill and section 24 of the UK Act, the Court of First Instance, in exercising its discretion under clause 62 of the Bill, may also have regard to the conduct of the arbitrator and any other relevant circumstances. In view of the broad scope of circumstances (analogous to "*the full progress of the arbitration and all of the events in it since it commenced*" as discussed in the case of *Wicketts and Sterndale v. Brine Builders* [above]) that would be taken into account by the court in exercising its discretion to order that the arbitrator is not entitled to receive his fees or expenses, the Administration considers it neither practicable nor desirable to enumerate all the factors of considerations under clause 62 of the Bill. A statutory list of matters that should be taken into consideration may unduly fetter the wide discretion of the court and may be counter-productive.

V. Can clause 62 of the Bill be substituted by an agreement between the parties and an arbitrator?

13. Members of the Bills Committee enquired whether clause 62 of the Bill may be disapplied if there is an agreement between the parties and an arbitrator on payment (including repayment) of arbitrator's fees that may cover the situations envisaged by clause 26 (challenge of arbitrators) and clause 27 (failing to act etc.).

14. It should be noted that the power of the court under clause 62 may only be exercised if there is an application by a party under this clause. Whilst many disputes concerning arbitrator's fees are settled between the parties and an arbitrator without the need to resort to court proceedings, clause 62 provides a formal channel for resolving such

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[6] At paragraph 58 of the judgment in the case of *Wicketts and Sterndale v. Brine Builders*

disputes if the parties (including the arbitrator) could not reach an agreement or if the parties had reached agreement but one or more parties failed to honour the agreement. The Administration does not consider that clause 62 may be substituted by parties' own agreement although the clause itself would not be invoked if the parties had concluded an agreement on fees and had honoured the agreement.

VI. "Any person claiming through or under any of the parties" in clause 73(1)(b) of the Bill

15. An award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and "any persons claiming through or under any of the parties" under clause 73(1)(b) of the Bill.

16. The phrase "any persons claiming through or under any of the parties" was used in section 4(1) of the English Arbitration Act 1950 and section 1(1) of the English Arbitration Act 1975, in the limited context of the right to apply for stay of judicial proceedings under a domestic arbitration agreement. It is now a generalized concept under section 82(2) of the English Arbitration Act 1996. The question of who may be regarded as claiming "under or through" a party is a technical one and English case law indicates that the following claimants fall within that formula:

> (a) A claimant who is the assignee of the benefit of the contract. The assignment must be a valid one: if the contract is not assignable either by its nature or by virtue of an express non-assignment clause which prevents any benefit passing to a third party, the third party has no rights under the contract and in particular cannot seek a stay of legal proceedings. A statutory assignee, e.g., a person claiming against the liability insurers of an insolvent defendant under the Third Parties (Rights Against Insurers) Act 1930[7], is a person claiming "through or under" the assured and is thus bound by an arbitration clause in the policy.[8]
> (b) An assignment by operation of law falls within the formula. The claimant has succeeded by operation of law to the rights of the named party. Death, bankruptcy and

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[7] Similar legislation can be found in Hong Kong in the Third Parties (Rights Against Insurers) Ordinance (Cap 273)

[8] See the discussion in para. 1.42 of Robert Merkin, *Arbitration Law*, Informa

liquidation operate to transfer rights to the personal representative, trustee in bankruptcy, administrator or liquidator, as the case may be[9].

(c) The claimant has replaced the person originally named as a party by a novation, i.e. an agreement between the two original parties and the new party that the latter shall replace one of the original parties. Here, the new party can and must enforce the arbitration clause, for his position is the same as if he had been a party from the outset. The original party cannot resort to arbitration, for he no longer has any status in the contractual relationship[10].

17. In contrast, the English court has held that a mortgagee only claims in his own rights and is outside the formula of "claiming through or under any of the parties". The guarantor of the liability of one of the parties to an arbitration is not a person claiming "through or under" that party. In all but exceptional cases, the court may be prepared to lift the veil of incorporation and to hold that a wholly owned subsidiary may seek to claim to be a party to an arbitration where the agreement for arbitration is between its parent company and another person.[11]

18. In the light of the above analysis, the phrase "claiming through or under any of the parties" is a term of art which has special meaning at common law in the particular context of arbitration. If required to construe the phrase, the court will refer to the relevant case law for the different categories of the claimants as outlined above to see if the facts of the disputes before it fall within the formula. The Administration is of the view that it is not necessary to make further provisions with regard to the meaning of the phrase.

Department of Justice
April 2010

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9 See Robert Merkin (above)

10 Mustill & Boyd, (2nd ed., 1989), *The Law and Practice of Commercial Arbitration in England*, at page 137

11 See Robert Merkin (above)