COSTS IN ARBITRATION

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It has been said by a distinguished judge of the last century (James L. J. in *Attorney-General v. Earl of Lonsdale* (1870) 23 LT 794) that, if the importance of issues in litigation were to be identified by the zeal with which lawyers pursued them, then the most important were issues of practice and procedure, next issues as to costs and last the issues relating to the merits of the case. This may be an unduly cynical observation, but the importance of costs cannot be over-emphasised in arbitration as well as in litigation.

The lawyer, like any professional man, requires to be paid for his services. He looks to his client for this payment. At the end of an arbitration it is inevitable that the arbitrator will be asked to order that the costs of one party be borne by the other. The consequence of this is, of course, to shift his burden or part of it to the other party. When asked to make such an order the arbitrator must have in mind what it is he is asked to do.

He must bear in mind the distinction between solicitor-client costs and party and party costs.

Solicitor-client costs are in general the bill which the solicitor will render to his client. It will include his disbursements—payments made to witnesses, consultants, barrister's fees and, of course to the arbitrator for his client's share of the arbitrator's remuneration. It will also include the solicitor's own fees which may be calculated on a time basis or an item basis (eg. so much for writing a letter or for a telephone call) or a mixture of these.

Party and party costs represent the sum which may be received from the other party upon taxation. They will almost certainly be less than the solicitor-client costs so that, even the successful party will be out of pocket.

Taxation is the process whereby the party and party costs are fixed in the absence of agreement. In the Supreme Court there is a Taxing Master whose function is to fix these costs. He has a scale of costs which is fixed by the judges for various items of work performed by barristers and solicitors. He applies this scale to items of work which are necessary for the proper conduct of the litigation and arbitration.

Party and party costs then will inevitably be less than the client's bill. The following are examples which commonly produce this result:

* the judges' scale of costs is conservative and usually out of date. Thus the scale provides for the costs of sending a special letter $16.89. It may be that the solicitor will charge his client $25.00 or even more. This means that, even if he wins the case, the client pays the difference.
* counsel's fee will commonly exceed the sum which the Taxing Master allows.
* Some items of work may be

treated as non-necessary. For example a consultant witness may not be called, investigation of an issue may prove fruitless, correspondence and telephone calls may take place to meet the particular demands of the client.

Section 34 of the Commercial Arbitration Act 1984 confers very wide powers on the arbitrator. It is in the following terms:

S.34 (1) Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may:

(a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;

(b) tax or settle the amount of costs to be so paid or any part of those costs; and

(c) award costs to be taxed or settled as between party and party or as between solicitor and client.

(2) Any costs of the arbitration (other than the fees or expenses of the arbitrator or umpire) that are directed to be paid by an award shall, except so far as taxed or settled by the arbitrator or umpire, be taxable in the Court.

It will be noted in the first place that the section is subject to a contrary intention. There is, however, some limit in the power of the parties to give effect to a contrary intention. They can make any agreement they like where the arbitration agreement refers *an existing dispute* to the arbitrator. The more common case is that in the usual building contract which refers *future disputes* to arbitration. In such a case the parties cannot agree that, in any event, each will bear its own costs or that a particular party will have to pay the costs: s.34(3).

Secondly, the arbitrator may himself tax or settle the amount of the costs. This is, in my experience, something which an arbitrator will not normally do. It may be, however, that in a simple case he will be persuaded to fix a sum which seems reasonable. In the rare case that he is so tempted he should:

(a) take care to include a sum for his own remuneration and the costs associated with the hearing, such as the hire of the venue.

(b) receive some material from the successful party as to what sum he wants and hear the parties generally on the matter.

(c) note that even if he fixes his own remuneration and expenses they may be submitted to the Taxing Master for review: s.35(2).

Thirdly, he may award costs on a party and party basis or on a solicitor-client basis. The difference between these two bases has already been discussed. For all practical purposes this option is not available.

THE NORMAL AWARD OF COSTS IS AN AWARD OF COSTS ON A PARTY AND PARTY BASIS

An arbitrator should depart from this rule only in the most extraordinary case—a case where the case of the unsuccessful party has been so vexatious or unworthy of dispute that the successful party should not be called upon to bear the shortfall between the normal measure of party and party costs and the bill his lawyers will submit. It will be a most unusual case.

Finally, subject to these matters, the power to award costs is in the discretion of the arbitrator. This does not mean he can do what he likes. He should not, out of sympathy or weakness split the difference or

order each party to bear his own costs. The discretion must be exercised in a proper manner. How should the discretion be exercised? The answer may be shortly stated in the form of a principle to which there are a number of exceptions.

Basic Principle: THE SUCCESSFUL PARTY SHOULD GET HIS COSTS

For the purposes of this principle the successful party is in most cases the party in whose favour the net balance falls.

It must be emphasised that this principle is fundamental to the proper exercise of discretion. The exceptions are just that—exceptions which in special cases may warrant a departure from the fundamental rule that the winner get his costs.

Exception 1

When money is paid into Court the arbitrator is obliged to have regard to the fact and the amount of the payment: s.34(5). Assume in a building arbitration that the Proprietor has paid into Court $2,500. This fact will not be brought to the attention of the arbitrator until after he has determined the dispute. Assume he awards the builder a net figure of $2,490 (including interest pursuant to s.31), the normal order as to costs will be as follows:

> The proprietor pays the builder's costs (party and party costs) incurred prior to the date of payment in and the builder pays the proprietor's costs in (party and party costs) incurred thereafter.

The consequence of such an order may well be that the successful builder ends up paying a substantial sum to the proprietor. This is not unfair since he might have avoided this disaster by accepting the offer represented by the payment into Court.

Exception 2

The Commercial Arbitration Act obliges the arbitrator to have regard to the conduct of the parties in exercising his discretion as to costs in two circumstances:

- Where a party fails to attend a settlement conference convened under s.27(1): s.34(6).
- Where a party fails to comply with an arbitrator's direction or does anything to delay or prevent an award being made, contrary to s.34: s.34(7).

Presumably, if it was the successful party who was the offender, the arbitrator could deprive him of all or part of his costs or direct him to pay the extra costs of the other party caused by his wrongful act. If it was the unsuccessful party who was the offender, the only thing the arbitrator could do would be to direct that he pay to the other his solicitor-client costs occasioned by the wrongful act. This is because the unsuccessful party would be paying the party and party costs of the other party by the application of the normal principle under which the successful party gets his costs.

Exception 3

We now get into an area where the Commercial Arbitration Act provides no guidance. It is therefore necessary to proceed with caution. It sometimes happens that certain issues are clearly defined and are separate. This is unusual, but in such a case the arbitrator might be justified in distributing the costs on the basis that some of the issues have been resolved in favour of each of the parties. Assume in a building renovation arbitration the issues involve two extras. The first extra involving rock occupied three days and is determined in favour of the builder. The second extra arose out of the builder's claim for the costs of

extensive shoring to the old roof to prevent its collapse. Assume the builder lost this issue which occupied two days. In such a case the arbitrator might be justified in ordering that the proprietor pay three-fifths of the builder's costs and that the builder pay two-fifths of the proprietor's costs notwithstanding that the net result of the two issues was a sum payable to the builder.

It should be emphasised, however, that this will be an unusual case. Usually the issues will be intermingled even in such a case, either because the credit of the parties is relevant to both issues or because there is common evidence given on the costing of both extras. In such a case the normal principle that the successful party gets his costs will apply.

It is sometimes suggested when there are claims brought by both parties to the arbitration that since the Claimant was successful in his claim and the Respondent was successful in his Cross claim each should get his costs and that these costs should be set-off against each other. This will normally mean that no party bears the costs of the other since the two lots of costs cancel each other out. Suppose the Builder's disputed claim is for $10,000 and the Owner alleges defects to a value of $7,000. If each is fully successful, the Builder wins on the balance and will get his costs by the application of the normal rule. It will be seen that it will be the party in the place of the Owner who will be arguing for two sets of costs, one for each. This argument will often be based on Rules of Court where special provision is made for counterclaims. It is thought that in most cases where cross claims are arbitrated they will arise out of the one commercial transaction. Accordingly, the Arbitrator should in the absence of special circumstances order one set of costs and these in favour of the party who collects the net balance.

Other Exceptions

It will often happen that the lawyer for the unsuccessful party will seek to persuade the arbitrator that special circumstances exist which warrant a departure from the normal principle that the successful party gets his costs. It may be that such circumstances exist and that a departure from the normal principle is warranted. But they will be rare. An arbitrator should look carefully at such an attempt and should be reluctant to accede to it. It is more unusual for a judge to deprive a successful party of his costs and an arbitrator should not feel free to do otherwise. ■