Application for Removal of an Arbitrator — What should the Arbitrator do?

by ADRIAN L. BELLEMORE, LL.B., F.I.Arb.A, ACI Arb., Solicitor.
Partner Colin Biggers and Paisley, Sydney.

FREQUENTLY a party to an arbitration may make an application to the Supreme Court seeking the removal of an arbitrator for what is said to be misconduct.

That application coming before the Court it is the usual course of the arbitrator merely to submit to any order made by the Court other than as to costs.

I have been asked to place before the Institute, the position of the arbitrator in such or similar type applications.

The course taken by the arbitrator in submitting to the orders of the Court has valid and sensible bases. Firstly, it enables the arbitrator to be aloof and not to be embroiled in taking part in the proceedings where almost certainly, he will come out in favour of one party's version or the other and to that extent will have to "take sides" with one of the parties.

Secondly, if the arbitrator involves himself in the proceedings in a dog fight and the arbitrator is nonetheless removed, then he is in grave danger of an order being made against him for payment of the costs of the proceedings (or at least a substantial part of them) and these would have to be paid by him personally.

The position of an arbitrator, however, in these circumstances is recognised by the Courts. This is particularly so when applications are made in circumstances which cast grave doubt on the integrity of the arbitrator.

In the text book "Commercial Arbitration" by Mustill & Boyd it is said:

> "In any case where an application is made to remove an arbitrator, the arbitrator should be notified of the application, and given the opportunity to place before the Court any comments which he may wish to make on the grounds of application. This is particularly important where there is reason to believe that the application may not be strenuously resisted; since otherwise the Court may be presented with one-sided version of events, and may in all good faith embody this version in a judgment, the publication of which could do serious harm to the arbitrator's personal and professional standing".

This view was picked up in a decision *Succula v. Harland & Wolff* reported in (1980) 2 Lloyds Law Reports page 382 and in particular at 384. It is of interest to note that the Judge on that occasion was Mr Justice Mustill.

At page 384 he refers to the various allegations that are made about the arbitrators and says:

> "At a comparatively early stage, I expressed the view that it would be inappropriate to reach a decision without first communicating with the arbitrators. There are two separate reasons for this.

> First, the removal of an arbitrator by the Court is an unusual and serious matter . . . An order to remove them would inevitably attract widespread comment and could well be misunderstood by persons who did not fully appreciate the circumstances. It therefore seemed quite unacceptable to contemplate such a step without first giving these two gentlemen an opportunity to put before the Court such representations as they might wish to make . . .
>
> Second, the real thrust of the owners' argument for the reconstitution of the tribunal was that it would enable the Hull 1705 dispute to be concluded much more quickly. The evidence lodged by the parties expressed radically differing views . . . the conflict was so acute that the Court could make no reliable assessment as to which of the parties might be right. The persons best placed to offer an informed and balanced view on the practical consequences of adopting various alternative procedures would be the members of the tribunal themselves."

In the Australian textbook by Sharkey & Dorter reference is made to the case of *Modern Engineering (Bristol) Ltd v. C. Miskin & Son Ltd.* (1980) 15 BLR 93 where at first instance Mr Justice Robert Goff observed "in the case of this kind . . . such information is my experience very frequently placed before the Court, and it is of the utmost assistance to the Court to have information from the arbitrator explaining why he has acted as he has done . . ."

There is thus a balance to be sought between the two actions that are capable of being taken by the arbitrator.

The answer, I suppose, rests in those three very important words "It all depends".

If the arbitrator is reasonably of the view that the proper facts are to be put before the Court then he ought not be embroiled in the dispute.

It may be that the allegations that are made against him are so outrageous and so untrue that he nonetheless may wish to file an affidavit in Court stating what is his understanding of the position. This however, leaves him exposed to cross examination on his affidavit; it would require I suggest, that he be legally represented and he runs the risk of an order for costs being made against him . . .

The learned authors of Commercial Arbitration by Sharkey and Dorter suggest that it is necessary to serve upon the arbitrator the relevant Court documents and "in that way, the arbitrator will at least be provided with the opportunity of putting his view of the matter to the Court. Perhaps the best approach for the arbitrator in such circumstances is to write the same letter to each of the parties as one, at least, should be capable of being relied upon to place the letter before the Court."

In summary, I think that it is necessary for an arbitrator in the circumstances where there is an application to have him removed because of misconduct or in similar type applications that he take immediate advice.

If the arbitrator properly forms the view that the true facts will be placed before the Court then in my view he should not seek to intervene. He should merely indicate to the Court that he submits to the order of the Court other than as

to costs but at the same time indicates to the Court that if there is any matter in which, he the arbitrator can be of assistance with the facts then he is prepared to assist the Court in that regard.

If the arbitrator is not satisfied that the matter will be strenuously put (although in most cases one party has a very strong vested interest in keeping the arbitrator) then he should adopt the suggestion of Messrs. Sharkey and Dorter and write a letter to each of the parties setting out his version of the facts but only after he has received from both parties their respective affidavits as to what each of them alleges has occurred. This letter should be settled by his legal adviser.

To that end, the solicitor acting for the arbitrator should ensure that copies of the relevant affidavits are served upon him.

I think that arbitrators should instruct the solicitor who is to appear for them on any such application that he the arbitrator wishes to have the Court made aware of the fact that he is ready, willing and able to place before the Court any information that may be of assistance to the Court as to the matters in issue; secondly, he should, if he can, make a judgment as to whether or not his views will be vigorously put and argued by the representatives of one of the parties; thirdly, he should if he is not too certain that his views will be so put, write to each of the parties; and lastly, and only in the most extreme cases in my view should the arbitrator seek to file an affidavit and thereby embroil himself in the processes of the Court.