CANCELLATION FEES OF ARBITRATORS

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Is an Arbitrator in any way at risk with respect to the payment to the Arbitrator of Cancellation fees?

Consideration needs to be given to whether the demand by an Arbitrator for the payment of a cancellation fee is in all of the circumstances desirable and in accordance with public policy.

There is no doubt that the reasonableness of a request for a payment of a cancellation fee will depend upon a number of factors.

In Commercial Arbitration by Mustill and Boyd (Second Edition) at p.244 the learned authors suggest that an Arbitrator is not generally entitled to be paid a cancellation fee but that "If a dispute is so large and the potential hardship to the arbitrator so great the risk appears unacceptable, there is nothing to prevent the arbitrator from stipulating as a condition for agreeing to accept the appointment that he shall be recompensed for keeping his time available."

You will note that the authors condition the making of that agreement to matters where the dispute is large (and implicitly will therefore take a lengthy period of time) and further upon the "potential hardship to the arbitrator".

If the Arbitrator is a busy practitioner in whatever profession then it would be difficult for him to demonstrate a potential hardship i.e. that there would be lost revenue if the arbitration were to be settled.

The authors state "He may argue that but for the premature termination of the reference he would have been entitled to earn additional fees, and that the loss of fees is something for which he should be compensated. Such an argument may be (sic) isolated cases reflect a genuine hardship. The Arbitrator may have been asked to set aside several weeks for the hearing. If the dispute is settled immediately beforehand, the Arbitrator may not be able to fill the space with sufficiently remunerative work. The court would (although not said by the authors this is intended to relate to where there is no agreement) no doubt feel sympathy in such a case but it is unlikely to provide redress." (i.e. enable the payment of such fees to the Arbitrator.

And again "Public policy demands that the Arbitrator should be paid for what he has done, but not that he should be paid for what he has not done. Indeed, considerations of policy point the other way, for the Court would not wish to confer on the Arbitrator a right to compensation, the existence of which might inhibit the freedom of the parties to settle the dispute as they think best, or to invoke the supervisory jurisdiction of the

Court when circumstances so required. Much the better view, we suggest, is to treat the risk of settlement as an occupational risk of arbitrating."

What is stated by Mustill and Boyd as to the inhibition on parties settling the dispute is a factor which it is suggested must weigh heavily on the mind of an Arbitrator when seeking to solicit from the parties at the preliminary conference an agreement to have paid a cancellation fee if the matter were to settle.

It would clearly be necessary for the Arbitrator to demonstrate as a matter of probability that he would suffer hardship as a result of the matter settling.

Leggatt LJ in K/S Norjari v. Hyundai (1991) 1 Lloyds REP 524 at p.532 said:- "The notion that, if the arbitration were settled before it started, these particular arbitrators would find themselves unemployed for the whole of the period set aside (assuming that they then held themselves out as available to accept instructions) seems little short of absurd."

He was there referring to the appointment of the arbitrators who were practising barristers.

He further however went on to say:- "This is a cautionary tale for all barristers sitting as commercial arbitrators. They must not confuse the role of Counsel with that of Arbitrator: what is reasonable for the one to charge may not be so for the other. Any fee upon which they wish to insist should be made known at the outset before acceptance of appointment."

And again at p.532 "A modest proportion of the fees for the hearing should normally suffice to cover the period between settlement and the time by which an Arbitrator can reasonably expect to find substitute employment. The risk that an arbitration may settle after it has started is a diminishing one that besets barrister and arbitrator alike."

It can be seen from all of this that arbitrators must be cautious in seeking to solicit from the parties an agreement as to cancellation fees.

It is not suggested that the provision of cancellation fees is of itself misconduct.

However it is arguable that if there is no potential hardship to the arbitrator as is referred to by Mustill and Boyd and if there is in any event a general expectation by the Arbitrator that he or she can earn income during the "last" days in any event and if the amount of cancellation fee is more than "a modest proportion of the fees for the hearing" then it may well be that the agreement may be capable of being set aside.

It is of some interest to note a recent decision of Cole J in *Castleridge Pty Limited v. Racco Developments Pty Limited.* (See Case Note The Arbitrator Vol 12 No 4 at Page 228).

In that case there had been a pre-agreement as to the fees to be paid to the arbitrator.

An application was made to the Court to have the arbitrator's fees and expenses taxed.

The rate had been agreed but the judge took the view that he could not

determine whether or not the hours spend in calculating the fee of the arbitrator were spent or were "reasonably spent".

In the circumstances he granted to the plaintiff an entitlement to have the bill of the Arbitrator taxed notwithstanding the pre-existing agreement; one would assume that the agreement as to quantum per hour would not be the subject of taxation but rather the time spent by the Arbitrator in the hearing of the arbitration and the preparation of the award.

Nonetheless all of the above opens the door slightly to the possibility of an aggrieved party seeking to have the fees and expenses of the Arbitrator reassessed (either by taxation or otherwise) on a basis such as the agreement made at the preliminary conference was solicited by the proposed Arbitrator in circumstances where there was not an equality of bargaining; i.e. it would not, it could be alleged, be in the interests of the agreeing party to disagree and thereby to have an Arbitrator who subsequently entered upon the reference (without an agreement) having a perceived bias against the non-consenting party; and further provided that the fees were not a modest proportion or that there was no probable hardship to the arbitrator.

No doubt the matter will be the subject of future determination by a Court and one must keep in mind the view expressed by Wilcox J in *Commissioner of Australian Federal Policies v. Razzi and Ors* 101ALR425 and when dealing with cancellation fees of barristers. At p.428 he said: "At a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and legally aided, any new practice which further increases costs requires meticulous justification. I am not aware of any attempted justification of "cancellation fees".

It is of interest to note that Cole J in *Amec Construction Pty Ltd v. Cole & Allied Operations Pty Ltd* (unreported Supreme Court of New South Wales – 29 April 1993) said that "cancellation fees should not be permitted unless there is a clear agreement for their payment" (see paragraph 32.90 and 32.95 of Jacobs on Commercial Arbitration.