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DUTIES AFTER THE PRINCIPAL AWARD

Termination of Powers (functus officio)

1. Probably the most important post-award duty of an arbitrator is to recognise that once he has given his award his majestic status largely evaporates. Even the most experienced of arbitrators can fall into the trap of trying to correct errors in the principal award, award costs, give supplementary rulings, or give directions as to remedies, long after he has lost the jurisdiction to do so.[1] Once an arbitrator has given the principal award, his further powers are strictly limited to five categories.

(a) Further jurisdiction by agreement

2. An arbitrator always has jurisdiction to determine further issues if the parties so agree. As no legislative sanction is needed for that proposition, it is not easy to see the point of art 33(1)(b). It provides that within 30 days of receipt of the award a party may request the Arbitral Tribunal to give its interpretation of a specific point or part of the award*if so agreed by the parties*. If something is so agreed by the parties an arbitrator can do anything. The time limits in the Act will normally be relevant only in the rare case that one party seeks to exercise an interpretational jurisdiction agreed upon in advance but now opposed by the other.

(b) Power to correct errors

3. Within 30 days of receipt of the award (unless some other period has been agreed upon) a party can request an arbitrator to correct in the award any errors in computation, any clerical or typographical errors, or any errors of a similar nature. In addition to compliance with the time limit, a party seeking to invoke this jurisdiction will need to show two things: first that the reasons for award demonstrate a clear error on the part of the Arbitral Tribunal; and secondly that the error was of a mechanical nature as distinct from something which required the exercise of judgment. That approach would be consistent with authority on art 33(1)(a) itself,[2] decisions on the so-called slip rule applicable to High Court decisions,[3] and the wording and implied purpose of the provision.

4. The critical feature of art 33(1)(a) appears to be that it can be used to correct only errors of a mechanical nature as distinct from those which had involved the exercise of judgment on the arbitrators part. The implicit policy is to bring finality to litigation by preventing parties from revisiting the dispute while at the same time allowing for the correction of superficial and demonstrable errors. It does not permit the arbitral tribunal to revisit conclusions based on the

exercise of a value judgment, assessment of a matter of degree, finding of fact or choice of a principle.

5. Examples falling within art 33(1)(a) could therefore include situations in which, having chosen to accept certain figures as the basis of its award, the arbitral tribunal has inadvertently misquoted or transposed them when transferring them to a calculation; or where, having correctly inserted the chosen numbers into a calculation, it made an arithmetical error in the calculation itself; or where the actual reasons or directions made by an arbitrator were incorrectly recorded or typed; or where some of the pages intended to form part of the award were omitted or stapled together in the wrong order. These all seem to qualify as errors in computation, any clerical or typographical errors, or any errors of similar nature.

(c) Claims presented but omitted from award

6. In the absence of agreement to the contrary, a party may, within 30 days of receipt of the award, apply to the arbitrator to make an additional award as to claims presented in the arbitral proceedings but omitted from the award (art 33(3)). If this procedure is followed the arbitrator must make the additional award within 60 days (ibid).

7. Art 33(3) is an important provision. Frequently an award will deal with the principal issue or issues but not exhaust the issues raised in the arbitration agreement or pleadings. Even if all the substantive issues have been addressed the arbitrator may omit to decide or reserve supplementary matters such as remedies or costs. On a matter such as costs a party will normally be able to apply for a ruling under this provision.[4]

(d) In the principal award express reservation of jurisdiction to determine further questions.

8. The chief disadvantage of art 33(3) is the time limits. A party must apply within 30 days of the issue of the principal award and the arbitrator must give a ruling on it within a further 60 days of party requests.[5] By far the safest course is for the arbitrator to expressly reserve in the principal award itself any further jurisdiction required to complete the matter. If there are other substantive issues the principal award should state that it is merely a partial award and that other issues are reserved for further consideration. The arbitration process then continues with respect to all outstanding issues. Alternatively the award can specifically identify those further matters such as costs still to be addressed.

(e) Issues remitted back to the arbitrator by the Court.

9. On appeals on questions of law the Court can, instead of confirming, varying or set aside the award, remit the award, together with the High Courts opinion on the question of law, to the arbitrator for reconsideration (Second Schedule cl 5(4)(b)). In those circumstances the arbitrator

must, in the absence of order to the contrary, make the award within a further three months from the date of the order.

10. The power conferred by cl 5(4)(b)) seems reasonably clear. More troublesome is the provision in art 34(4) which arises on applications to set aside an award. Under that provision the High Court, when asked to set aside an award, can suspend the setting aside proceedings in order to give the Arbitral Tribunal the opportunity to resume the arbitral proceedings or to take such other action as will eliminate the grounds for setting aside. The same provision is incorporated into appeals by virtue of cl 5(8). An unresolved question is whether this provision is limited to purely interlocutory orders which do not finally determine substantive rights or whether, by implication, it overrides the functus officio principles which would normally apply once an award had been given.

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[1] A surprising example is *Opotiki Packing and Coolstore Ltd v Opotiki Fruitgrowers Co-op Ltd (In Receivership)* (Auckland CL 32/98, Fisher J, 2 November 1998) where a very distinguished arbitrator allowed the parties to continue to correspond with him over alleged errors in the arbitration award from 22 December 1997 until 2 September 1998 during which 28 letters passed and there was a telephone conference with the arbitrator before the arbitrator issued a document which he referred to as a final award on 2 September 1998. After the various queries raised concerning the original award the arbitrator concluded for these reasons, I think it best that I should now declare my award finalI declare my award of 10 December 1997 to be final. At no point in these exchanges does counsel or the arbitrator appear to have given any consideration to the functus officio principle. It was subsequently held in the High Court, and confirmed on Appeal, that most of these efforts were legal nullities, the arbitrators original award of 10 December 1997 having been final from its inception. Application to correct two computational errors was made within 30 days and thus came within the exception provided for in art 33 to the first schedule but all that followed was functus officio. It also followed that the three months time limit imposed by art 34(3) for an application to set aside the award began to run on 26 February 1998 when the arbitrator gave his decision on the correction. An application to review lodged on 16 October 1998 was well outside the three months time limit specified in art 34.

[2] *Opotiki Packing and Coolstore Ltd* supra.

[3] R 12 of the High Court Rules is arguably wider in that it provides for the correction of a clerical mistake or an error arising from *any accidental slip or omission*or if any judgment or order is so drawn up as not to express what was actually decided and intended. This rule has been invoked to allow omitted interest to be added to a judgment sum (*Henmore v Ganley* (1995) 9 PRNZ 25) or to add disbursements inadvertently omitted from a costs award (*Nash v Nash* (1995) 8 PRNZ 575 (CA)). Even R 12, however, can not be used to correct a situation in which the court has already given judgment for a single sum which the plaintiff then wants to split into two separate components (*BNZ v Mulholland* (1991) 4 PRNZ 299), to vary an order in a fundamental way (*R v Cripps ex parte Muldoon* [1983] 3 All ER 72), or to improve upon the judgment obtained (*Broadview Investments Co. Pty Limited v Corporate Interiors (NZ) Limited* 12/8/98, Neazor J, HC Wellington CP123/92).

[4] *Casata Ltd v General Distributors Ltd* (CA84/04 13 April 2005 per Chambers J, para 127, 128, 138 although note the doubts expressed by the majority at paras 95, 101, 105.

[5] In the absence of agreement to the contrary an arbitrator has a general power to amend time limits (cl 3(1)(e) of the Second Schedule) which probably extends to steps taken under Art 33 on the basis that they are still steps in the arbitral proceedings.