HOW ARBITRATORS GET PAID

Paper for AMINZ Annual Conference 3 5 August 2007
by the Hon Robert Fisher QC

Introduction

1. Most arbitrators enjoy their work. Even more enjoyable is being paid for it. In most cases this can be achieved by withholding the award until paid. But sometimes it is not that simple. The object of this paper is to consider the situations in which an arbitrator in a domestic arbitration will need to take special precautions to avoid being left unpaid.

2. An arbitrators ace in the hole is, of course, the lien he or she has over the award (you can have the award when I am paid). However this works only if matters reach the point that at least one party wants to uplift an award and is prepared to pay for the privilege. Matters may never reach that point. The proceedings may be settled or abandoned. During the hearing the claimant may get wind of an adverse award. One of the parties may be adjudicated bankrupt or enter into liquidation. Consolidation orders may result in transfer to another arbitral tribunal.[1] An unsuspected conflict of interest or other disqualification may emerge.[2] The proceedings may be restrained by an injunction based upon a successful challenge to the validity of the contract. These are just some of the situations in which an award is never uplifted.

3. As the arbitral proceedings progress there can also be unforeseen changes in the circumstances of the parties, or in the nature or magnitude of the proceedings. This may prompt the arbitrator to seek interim payments, security, cancellation fees or increased fees.

4. These are all situations in which getting paid becomes more problematic. The object of this paper is to explore the steps that can be legitimately be taken by arbitrators to protect themselves against such predicaments. Unfortunately two factors make the subject an unexpectedly difficult one. One is that from a lawyers point of view the nature of the relationship between an arbitrator and the parties remains strangely undeveloped (is it a matter of contract, statute, status or restitution?). The other is that in any negotiation with the parties after appointment, the fact that the negotiating power is loaded in favour of the arbitrator creates a trap for arbitrators. They may or may not realise that they are exploiting an unequal bargaining power and exposing themselves to allegations of bias. The arbitrators removal or loss of remuneration may be the unhappy outcome.[3]

5. The topic therefore requires a consideration of an arbitrators substantive right to charge the parties, supplementary rights in relation to quantum, cancellation, security and interim payments, the way in which those rights may be enforced, and the extent to which arbitrators can change arrangements surrounding their remuneration after accepting appointment. After those topics have been considered it will be possible to draw some practical conclusions.

Where do arbitrator rights come from?

6. The relationship between an arbitrator and the parties is affected by four distinct branches of the law: contract,[4] statute,[5] status[6] and restitution.[7] The precise way in which they interact has always been a matter of debate.[8] One school favours the view that the arbitrators role is primarily a matter of status from which quasi-judicial powers and duties flow.[9] Another takes the view that the arbitrators relationship to the parties is primarily contractual.[10]

7. I am in the latter camp. My own view is that at least in the context of arbitrators remuneration, the foundation for the relationship between an arbitrator and the parties is contract, even though the terms of that contract remain subject to certain qualifications drawn from statute and status. As between the disputing parties, the arbitration agreement is a bilateral contract. On accepting appointment, the arbitrator becomes a third party to that arbitration agreement, and the agreement becomes a trilateral one. From the trilateral contract flow the obligations of the parties to pay for the services of the arbitrator.[11] In this context it will be convenient to refer to the bilateral agreement as the party agreement and the trilateral agreement as the arbitrator agreement.

8. Analysing the matter in terms of contract, when the parties to the dispute approach a prospective arbitrator they are making the arbitrator an offer. The offer is to conduct an arbitration on the terms specified in the party agreement with or without express additional terms of appointment. If, as is common, the arbitrator accepts appointment without seeing the party agreement, he or she will presumably be taken to accept its terms sight unseen unless they include something unforeseeable.

9. The offer from the parties may be accompanied by express terms of appointment (e.g. rate of remuneration, security, cancellation fees, interim payments etc). If nothing is said as to the arbitrators remuneration, certain terms will be implied (remuneration to be reasonable in all the circumstances and other terms to be as specified in Second Schedule).

10. The offer from the parties becomes contractually binding if and when the arbitrator accepts appointment. If the arbitrator responds with different or additional terms, this is in contractual terms a counter-offer. If and when the parties and the arbitrator finally agree upon the terms of the appointment, a trilateral agreement comes into effect at that point. Either the arbitrator, or any other party, may then sue on the agreement under the law of contract.

11. All other situations leading to the appointment of an arbitrator can similarly be analysed in contractual terms. Where an arbitration clause makes provision for each party to nominate an arbitrator, each of whom then agrees to a third member of the arbitral panel, both the original arbitrator and the third member are essentially accepting an offer when they accept appointment. The same is true where the appointment is made through the default mechanism provided for in Art 10(3) or (4) or where an institution approaches the proposed arbitrator in the context of an institutional arbitration. In all these cases the parties have at an earlier point authorised another

person or agency to make an offer on their behalf which the prospective arbitrator is free to accept or reject. Of course it is not open to a prospective arbitrator to both reject the terms on which the offer is made and yet accept the offer.

12. That fundamentally contractual foundation for the arbitrator-party relationship is not diminished by the fact that in certain respects the resultant contract remains subject to qualifications drawn from statute and status. There is nothing new in this. All contracts are subject to statutes of a general[12] or specific[13] nature. Similarly arbitration contracts are subject to statute, in some cases the statutory provisions being inalienable[14] and in others their being subject to the parties right to contract out.[15]

13. Nor is there anything conceptually difficult in the notion that by agreeing to arbitration the parties impliedly intend to confer on the arbitrator fundamental powers and duties of a quasi-judicial nature e.g. the duty to act fairly and impartially.[16] Thus the status of an arbitrator as a person required to act impartially is inconsistent with any attempt by the arbitrator to enforce the right to remuneration or security against one of the parties while the arbitral proceedings are still in progress.

14. In short, the fact that the relationship between the parties and the arbitrator is qualified in various respects by statute and status does not detract from the conclusion that the relationship is fundamentally contractual. Without a contract there would be no relationship on to which various features from statute and status could be engrafted.

15. Against that background it is necessary to consider cl 6 of the Second Schedule which has a special impact upon arbitrators remuneration.

How does clause 6 affect arbitrator rights?

16. The terms of the arbitrator agreement will be clear if there had been a formal submission agreement specifically defining the terms on which the arbitrator would be paid. If there is no formal agreement, the terms of the arbitrator agreement will usually be ascertainable from the correspondence between the arbitrator and the parties during the process leading up to the appointment of the arbitrator. But if, as is often the case, the subject of the arbitrators remuneration has been left wholly or partly undefined, it will be necessary to turn to cl 6 of the Second Schedule.

17. Pursuant to s 6 of the Act, the Second Schedule applies to domestic arbitrations in the absence of specific contracting out. Clause 6 materially provides:

> **6 Costs and expenses of an arbitration** - (1) Unless the parties agree otherwise, -
>
> > (a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated

by the arbitral tribunal in its award under article 31 of the Schedule 1, or any additional award under article 33(3) of the Schedule 1; or

(b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that [Calderbank provisions to apply]

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where (a) An arbitral tribunal refuses to deliver its award before the payment of its fees and expenses; and

(b) An application has been made under subclause (3), -

the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.

18. Although cl 6 is found in a statute, its role appears to be at least primarily contractual in the sense that its application or lack of application is governed by the joint will of the parties. If there is nothing in their agreement to the contrary, the parties to a domestic arbitration are taken to have agreed to the application of cl 6 to their arbitration. And if the arbitrator has accepted appointment against that background, the arbitrator has, by implication, acceded to the terms set out in cl 6. These include limitation of each partys liability for the arbitrators remuneration to an equal share in the absence of an award (cl 6(1)(b)), the Courts power to review the arbitrators remuneration under cl 6(3), and the Courts power to override the award lien under cl 6(4).

19. As between the disputing parties, the application of cl 6 is controlled at two levels. They can contract out of the whole of the Second Schedule (see s 6(2)(b)) or they can contract out of cl 6(1) and (2) alone (see in each sub-clause the introductory words unless the parties agree otherwise).

20. As between the arbitrator and the parties, there is no express power to contract out but the arbitrator can potentially achieve the same effect by requiring appropriate agreement between the parties as a condition of accepting appointment. This has particular significance for cl 6(1)(b). Where there is no award, and cl 6(1)(b) has been left intact, each party is liable for only an equal share of the arbitrators remuneration. In this respect New Zealand arbitrators do not fare

as well as their English counterparts.[17] That can have important consequences given the risk that remuneration will prove to be irrecoverable from one of the parties due to insolvency or debt collection difficulties. By requiring the parties to substitute other terms, the arbitrator can make each party jointly and severally liable for the full remuneration.

21. It would also seem to be possible for an arbitrator to escape the supervisory powers the Court otherwise has over an arbitrators remuneration. Prima facie the Court has the power to review the reasonableness of an arbitrators remuneration under cl 6(3) and/or to override his or her award lien under cl 6(4). However s 6(2)(b) of the Act provides that a provision of Schedule Two appliesto every other arbitrationunless the parties agree otherwise. As a condition of appointment the arbitrator could therefore require the parties to contract out from the whole of cl 6. This would seem to shield the arbitrator from Court intervention under cl 6(3) and (4).

22. In practice, however, it seems unlikely that any arbitrators would seek to protect themselves in that way, still less that the parties would agree to it. What is more common is that the parties agree that the arbitrator is to be remunerated on stated terms which include a specified hourly or daily rate. By doing so the parties impliedly contract out of the Courts review jurisdiction under cl 6(3) in relation to the aspects agreed upon (e.g. $200 per hour) while preserving the jurisdiction in relation to other aspects such as the reasonableness of the total hours or days devoted to the task (e.g. 43 hours to and including delivery of award).

What if there is no arbitrator agreement?

23. In a few situations it will turn out that there never was any applicable contract. This can arise where, notwithstanding purported arbitration proceedings, it is later discovered that there had been no binding agreement to arbitrate; that the arbitrator lacked the qualification necessary for a contractually binding arbitration; that the dispute referred to the arbitrator fell outside the scope of the agreement to arbitrate; or that the agreement to arbitrate is successfully challenged under one of the many avenues by which a contract can be held to be void from the beginning. Grounds for the latter include duress, absence of consideration, lack of agents authority or rectification in a way which abrogates the arbitration clause.

24. In all such situations the arbitrator is left to try to recover his or her remuneration by some means which is not reliant upon a contract. It seems probable that the arbitrator could not rely upon cl 6 of the Second Schedule to the Act. Clause 6 applies to parties. The definitions of party and arbitration agreement in s 2 to the Act seem to confine the scope of cl 6 to parties to a contractually binding agreement.

25. It appears that where there is no valid contract the arbitrator must resort to a claim in restitution. Such a claim is founded upon the legal principle that where work is carried out at the request of one or more persons the person carrying out the work will be entitled to reasonable remuneration for that work in the absence of agreement to the contrary.[18]

Foundations for the right to charge

26. The consequence would seem to be a hierarchy of legal sources to which an arbitrator may look in order to establish the right to remuneration. The primary source is contract. In the absence of a formal written submission agreement it will normally be possible to spell out a contract between the parties on the one hand and the arbitrator on the other. Subject to any agreement to the contrary, the arbitrators rights, and the limitation upon those rights, will be found in cl 6 of the Second Schedule to the Act together with certain quasi-judicial characteristics impliedly adopted by agreement. In those rare cases where there was no applicable contract an arbitrator will normally be able to recover reasonable recompense for work performed in an action for restitution based upon the value of those services.

27. Up to this point we have been discussing the arbitrators right to charge in principle. Now requiring consideration are controls over arbitrators fees with respect to quantum, cancellation fees, security, and interim payment.

Controls over quantum

28. Where the arbitrator has entered into an agreement with the parties over his or her charges before accepting appointment, the agreed terms are binding on all sides. Notwithstanding the courts prima facie power to review the arbitrators remuneration under cl 6(3), the better view would seem to be that agreement on specified terms impliedly excludes the power to revisit their reasonableness.[19]

29. With some arbitrations, particularly institutional ones, the arbitrators remuneration can be defined in a comprehensive way which leaves no room for debatable variables. Thus the fee might be fixed as a specified sum for resolving the dispute, or on a scale based upon the value of the dispute, without regard to the time involved.

30. More commonly, however, there is either no applicable agreement as to rates or quantum or the agreement is limited to specified rates as opposed to the total payable. The jurisdiction to review the reasonableness of the arbitrators charges then arises in a number of contexts.

31. First, in the absence of any agreement over arbitrators remuneration the starting point will normally be an implied agreement that the parties will pay a reasonable fee plus all expenses reasonably incurred. Technically this is a contractual form of quantum meruit in that the parties have agreed to pay a reasonable price for the supply of services but no precise sum has been fixed by agreement.[20] It would seem that whatever the substantive basis for the charge sought by the arbitrator, short of an agreement covering not only rates but the ultimate sum payable, any costs claimed by the arbitrator will remain subject to review under cl 6(3) or, where necessary, an order for the release of an award on conditions under cl 6(4).[21] The arbitrators decision fixing his or her own costs also remains subject to the possibility of challenge under Article 34, although the limited grounds for review under that provision make that avenue more theoretical than real.

32. Secondly, the agreement may fix an hourly or daily rate but say nothing as to the total time which may be spent. In those circumstances there will be room for the Court to revisit the reasonableness of the total time expended by the arbitrator exercising its powers under cl 6(3).

33. Thirdly, in circumstances in which the arbitrator purported to act under an agreement which later turns out to have been invalid, the arbitrator can bring an action for quantum meruit in restitution.[22] Again the sum fixed will effectively be such remuneration as is considered to be reasonable in all the circumstances.

34. Fourthly, in cases in which the contract under which the arbitrator had expected to be paid has been cancelled for the purposes of the Contractual Remedies Act 1979, the arbitrator can claim discretionary compensation under s 9 of that Act. Section 9 confers on the court a discretion to direct one party to pay to the other such sum as the court thinks just taking into account, among other things, the value of any work performed and any benefit already conferred.[23] In practice the result is likely to differ little from the assessment of a reasonable remuneration under the heads previously discussed.

35. Those are all situations in which the Court will be required to assess the reasonableness of the arbitrators fee, whether as a whole or more narrowly as to the amount of time expended on the proceedings. The degree of readiness to intervene may differ according to the legal context. Under cl 6 the court will intervene only if satisfied that the amount is unreasonable in all the circumstances. Under the other jurisdictions the Court begins without any such presumption. But in all cases the Court must evaluate the appropriateness of the proposed charge.

36. The reasonableness of the fee will no doubt take into account a number of factors. These would seem to include the magnitude and complexity of the issues at stake in the arbitral proceedings along with the professional and vocational characteristics of the arbitrator which in most cases will have been known by the parties at the time they agreed upon the arbitrator. The magnitude and complexity of the dispute (particularly the monetary value of the sums at stake and the legal or technical complexity of the issues) are a component of costs commonly taken into account in the analogous exercise of awarding party and party costs in arbitration proceedings and also in court proceedings which are not controlled by any scale of costs.

37. As to the vocational and professional characteristics of the arbitrator known at the time of appointment, some regard is likely to be paid by the court to the fees which one would normally expect to pay for a person in the particular occupation or profession of the arbitrator and the level of seniority, experience, and expertise, of the arbitrator within that occupation or profession. A dairy owner chosen as an arbitrator for his experience in matters relating to dairies is unlikely to command the level of remuneration which would be appropriate for an architect or engineer chosen for his or her experience in those fields.[24] Similarly a newly qualified valuer is likely to command a lower rate than one with several decades of experience.

Security for arbitrators fees

38. The right to call for security for an arbitrators remuneration is straightforward if the right had been stipulated for in the terms of an agreement made with the arbitrator at the time of appointment. The security may take the form of a payment to the arbitrator to be held on trust pending the incurring of an actual liability, payment to a third party stake-holder, a charge over property, or payment to the parties respective solicitors to be held by them as effective stakeholders.

39. The position is more complicated if the security had not been provided for in the agreed terms of appointment. In arbitrations to which the Second Schedule applies, cl 3(1)(d) provides that subject to the agreement of the parties to the contrary, the arbitral tribunal has the power to order the giving of security for costs. This would seem to extend to the power to order the giving of security for the arbitrators remuneration.

40. However securing compliance with an order for security of that kind may be less straightforward. While claimants normally have an incentive to comply voluntarily with orders of this nature as a means of ultimately obtaining an award in their favour, respondents will typically have little incentive to cooperate beyond, perhaps, the perception that it would be wise to preserve some measure of goodwill with the arbitrator.

41. In the event of non-cooperation from either or both parties, an arbitrator could theoretically enforce the order for security through the court in the exercise of the right to court assistance under cl 3(2). Clause 3(2) specifically includes the arbitral tribunal as a potential applicant. In practice, however, it would seem invidious for an arbitrator to personally enforce an order for security against a party given the arbitrators ongoing duty to determine the dispute between the parties in an impartial manner. The price of any attempt to enforce the security against one party alone might well be the arbitrators removal under Art 12(2). The ground for removal could be that by bringing court proceedings against a party to enforce the order for security, the arbitrator had irrevocably compromised his or her impartiality.

42. A more practical means by which an arbitrator can secure compliance with a direction to provide security for the arbitrators costs is to decline to take any further steps in the proceedings until the parties had between them taken adequate steps to provide the security.

43. Of course the first requirement in that respect is to treat the parties with scrupulous equality. This is expressly required by Art 18 (the parties shall be treated with equality). It is also a consequence of the broader requirements of impartiality (Art 12(2)) and natural justice (Arts 34 and 36). Any order for security must therefore impact upon the parties in exactly the same way. For example both could be required to lodge a stated sum of money in the trust account of their respective solicitors by way of security for costs.

44. Where it becomes apparent to the arbitrator that there is a real risk of non-recovery from one of the parties (e.g. due to insolvency or overseas residency) the arbitrator must resist the temptation to impose greater security requirements on the claimant than the respondent. In addition to contravention of the obligation to treat the parties equally (Art 18) it would seem that

the power to require each party to give security under cl 3(a)(d) of the Second Schedule is impliedly limited to security for only such sum as might be due to the arbitrator from the party in question. Security for the full amount from each could be appropriate only if the agreement specifically imposes joint and several liability on both. Otherwise cl 6(1)(b) limits the liability of each party to half the arbitrators costs. In that situation neither party could be required to give security in terms which required it to pay more than half in the event of the other parties liquidation or a settlement or an abandonment of the proceedings.

45. If a party fails to comply with an order to provide security, or for that matter any other order given by the arbitrator, there appears to be no equivalent to rule 258(2)(b) of the High Court Rules which permits the court to order that the defence be struck out for non-compliance with an interlocutory order. In an arbitration, the default provisions of Art 25 of the First Schedule are confined to failure to provide pleadings, failure to appear, or failure to prosecute the claim. Article 19(2) authorises procedural directions as to the conduct of the arbitration but does not appear to authorise the exclusion of a party from further participation in the arbitration even after that partys default in complying with an interlocutory order.

46. If in that situation either or both of the parties failed to provide security which, in combination with the security provided by the other party or parties, was sufficient to provide an adequate shield for the arbitrators present and anticipated costs and expenses the arbitrator could in appropriate circumstances decline to act further until adequate security is provided.

47. It is in the nature of litigation that a respondent has little incentive to do anything which might promote or expedite a process which may ultimately lead to an award requiring a respondent to pay something to the claimant. Consequently respondents often refuse to comply with an arbitrators order to give security. The claimant, on the other hand, wants to do everything possible to expedite the arbitration. Faced with the respondents lack of cooperation, and the arbitrators refusal to proceed until adequate security is provided to cover all of the arbitrators costs, from whatever source, what are the options available to the claimant?

48. In that situation the claimant would appear to have two options. One is for the claimant to apply to the High Court for its assistance in enforcing the order for security against the respondent pursuant to cl 3(2) of the Second Schedule in combination with cl 3(1)(d). The other is to voluntarily make up that portion of the security which had been required of the defaulting party. In that situation the burden of the security would be unequal between the parties but there is no breach of Art 18 since the inequality is voluntarily assumed. It does not stem from any order of the arbitrator impacting unequally upon the parties.

Interim payments

49. At least in the context of substantial New Zealand litigation, the practice of interim billing by arbitrators would now seem to be standard practice. Typically, arbitration proceedings extend over a period of months (and in some cases years) during which there is an ongoing series of conferences, interlocutory applications, correspondence, rulings and directions before the

substantive hearing. It is not expected that the arbitrator will have to wait until the end of the proceedings before receiving any fee. Usual practice is that the arbitrator issues interim accounts either at regular intervals or after various procedural waypoints in the course of the proceedings. In the absence of anything express to the contrary, the practice would now seem sufficiently established to support implication into the arbitrator agreement as a matter of usage.

50. It would be interesting to know whether the practice has also become established in other types of arbitration, for example those which are relatively short and procedurally simple (e.g. sharemilking, valuation) or those in which professional arbitrators are not involved (specialised trade disputes). Practices, and therefore the understanding of those involved, may differ in those situations which in turn will affect implication through usage.

51. To place the matter beyond doubt, the right to render interim accounts should be contained in the contract entered into between the parties and the arbitrator at the time of appointment. To comply with Art 18 as to equal treatment, the interim accounts must, of course, be payable by the parties in equal shares in the first instance, albeit subject to ultimate costs orders as to the final instances of party and party costs.

52. Even where the type of arbitration may make interim accounts questionable as a matter of usage, there is of course no difficulty in an arbitrator requesting the parties to make interim payments so long as it is clearly seen to be a mere request and not a demand.[25]

Cancellation fees

53. There is no inherent or implied right for an arbitrator to charge cancellation fees (sometimes referred to as commitment fees). Accordingly, if an arbitrator seeks to have provision for such fees this must be stipulated for in the terms agreed upon at the time of appointment. Without prior agreement there is no right to such a charge.

54. This does not preclude an arbitrator from asking for cancellation fees on a voluntary basis after accepting appointment so long as no pressure is placed upon the parties to agree to it. As was said in *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002):

> There is no impropriety as such in arbitrators requesting cancellation or commitment fees: *Johnson v Johnson* (2000) 201 CLR 488. Impropriety has the potential to arise when arbitrators attempt unilaterally to vary arbitration agreements without the consent of all the parties. To insist upon a fee without the consent of all parties constitutes misconduct: *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] 1 QB 863.

Enforcing arbitrator rights

55. To have the substantive right to remuneration is one thing; to enforce it, another. The five main avenues open to an arbitrator to enforce substantive rights against parties are (i) to exercise a lien over the award, (ii) to enforce any security obtained from the parties, (iii) to take court action, (iv) to prove for the debt in the defaulting partys liquidation or bankruptcy and (v)

to decline to progress the arbitration pending compliance. These will be discussed in more detail.

56. (i) *Lien over award.* The conventional means of enforcing the right to remuneration is to exercise the arbitrators lien over the award. The lien has been long recognised.[26] Clause 6(4) of the Second Schedule (power of the High Court to override the lien by a specific order on conditions) tacitly recognises the existence of the lien in New Zealand.

57. Usual practice is for the arbitrator to advise the parties that the order is available for uplifting upon payment of a specified sum by way of fee and expenses. This advice, and the award itself, will normally provide that although in the first instance the arbitrators costs are to be paid in equal shares, if either party chooses to pay more than its share in the first instance this will be taken into account in the ultimate determination of party and party costs. Subject to ultimate enforcement of the award, one party (usually the claimant) is therefore not prejudiced in the long run if in the first instance it pays the whole of the arbitrators remuneration.

58. *(ii) Enforcing security*. If the arbitration proceedings do not proceed to the stage that the arbitrators remuneration is paid as the price of uplifting the award, the arbitrator will usually be in a position to turn to the security which by that stage should be in place to cover his or her remuneration. Only if there is no such security must the arbitrator turn to the other avenues which follow.

59. *(iii) Court action.* An arbitrator can take court action for recovery of his or her fees from the defaulting party. In cases governed by cl 6(1)(b), this will usually require an action against the defaulting party to recover half the fees. The position will be different, of course, if there is an extant arbitration agreement imposing liability that is joint and several. Curiously, joint and several liability also appears to apply where, due to contracting out or the international nature of the arbitration, cl 6(1)(b) is not applicable.[27] Court action by the arbitrator is also theoretically possible under cl 3(2) to enforce an order that the parties give security in specified terms, but this will normally be inconsistent with the arbitrators duties of impartiality with respect to the conduct of that part of the proceedings yet to unfold.

60. *(iv) Prove in liquidation or bankruptcy.* As a creditor of the defaulting party an arbitrator can prove in that partys liquidation or bankruptcy. Of course this is not a satisfactory solution given the usual risks and delay associated with insolvent debtors.

61. *(iv) Inaction pending compliance*. This topic warrants separate consideration which now follows.

Inaction pending compliance

62. In certain circumstances an arbitrator is justified in declining to progress the arbitration pending compliance with directions already given or payment of legitimate interim accounts

already rendered. In the absence of an enforceable lien or security this is the most effective means an arbitrator has of securing compliance.

63. There appear to be three limits to an arbitrators reliance upon this form of enforcement. The first is that inaction on the arbitrators part could never mean insisting on proceeding with a fixture against the wishes of the parties. The argument that the arbitrator is merely declining to take the active step of granting an adjournment is specious.[28] Any inaction on the arbitrators part must be genuinely passive.

64. Secondly an arbitrator is justified in declining to progress an arbitration pending compliance only where there remains time for the parties to exercise the option of jointly terminating the arbitrators appointment and appointing a substitute without undue loss of time and expense.[29] As Mustill & Boyd point out: [30]

> Whether he is justified in refusing to continue with the reference if a request for security is refused will depend on the circumstances of the case, and in particular on the stage which the arbitration has reached. If nothing has so far happened apart from routine interlocutory hearings, there is nothing morally or legally objectionable in the arbitrator refusing to act, since the proceedings can be transferred without difficulty to another arbitrator. If, on the other hand, the parties have already adduced evidence or argument, they will suffer hardship as they have to begin again with a new arbitrator. In such a situation, even if, as may well be the case the parties have no legal ground of redress, the arbitrator ought not to take such a drastic step. Indeed, he may have only himself to blame for his difficulty. By the time the pleadings have closed and discovery has been completed, he should be able to form his own estimate of the likely duration of the hearing. If he concludes that the matter is so substantial that he does not wish to go ahead without security, he should say so then, and not at a time when it is too late to find someone else to act.

65. In *Sea Containers Ltd v ICT Pty Ltd*[31] other factors obviously played their part but emphasis was also placed upon the timing of arbitrators demands in requiring non-contractual cancellation fees at a late stage in the process. In that respect the Court noted:

> The demand for payment of the per diem rates for the time set aside made on 9 May 2000 came at a time well after the setting of the hearing dates for 4 weeks from 9 October 2000 at the preliminary conference on 21 February 2000. By that stage I may infer that the parties were committed to preparation for hearing with consequent cost implications if the matter did not proceed.

66. Thirdly inaction can not be used as a means of obtaining something contrary to the terms of an extant and applicable arbitrator agreement. It is not legitimate, for example, to use the threat of inaction in order to pressure the parties into agreeing to cancellation fees where the contract had made no provision for them, or to obtain agreement to an unreasonably high rate of charging where the rate had originally been left open.

67. Subject to those limits, however, an arbitrator is justified in declining to progress the arbitration pending compliance with a legitimate direction or payment of a legitimate interim account.

68. The primary occasion for inaction pending compliance is failure to comply with an arbitrators direction to provide security. In that situation an arbitrator is justified in declining to progress the arbitration until the direction has been complied with, from whatever source. If one party elects to cover for the defaulting party by performing that partys obligation in addition to the former party, the arbitrator can not be criticised for unequal treatment or bias because the partys unilateral action did not stem from any direction from the arbitrator. This is important because typically it will be the claimant alone who has an incentive to progress the arbitration.

69. Similar reasoning seems applicable to the payment of interim accounts. Typically, any default in payment is likely to come from the respondent. In that situation the claimant may elect to meet the account in the knowledge that this will keep the arbitration moving and that the outlay should one day form part of the ultimate accounting between the parties when party and party costs are determined.

70. A further situation in which inaction would seem justified in principle arises where there are developments beyond those that had been in the contemplation of the arbitrator and the parties at the time of the arbitrators appointment. As Mustill & Boyd point out:

> It is when the arbitration is already under way that problems may arise. The reference may develop into something on a larger scale than the arbitrator had been led to believe; there may be signs that the parties are contemplating the settlement of their disputes without providing for his fees; or he may begin to have doubts as to the readiness or ability of the parties to pay for any award which may be made.[32]

71. It is not enough that the arbitrator thinks of a term which he or she would now like but in fact overlooked when accepting appointment. To be free of the original agreement the arbitrator must be in a position to argue that the situation the parties now face falls outside its scope. But if the current situation does fall outside its scope, in the sense that the parties simply did not turn their minds to the possibility that has eventuated, the arbitrator can properly argue that he or she is no longer bound by the original agreement. In those circumstances the arbitrator is free to negotiate fresh terms with the parties subject, of course, to the parties option of jointly terminating their relationship with the current arbitrator and appointing a new one.

Traps for arbitrators

72. In a number of situations arbitrators will be tempted to review the arrangements they already have with the parties. The originally quoted hourly rate may have failed to keep pace with rising costs. It may come to the arbitrators attention that one of the parties is likely to go into liquidation or be adjudicated bankrupt. The claimant may abandon the proceedings through inertia or through a growing appreciation of the weakness of his or her claim. The arbitrator may belatedly realise that if the case settles or is adjourned he or she will have no work with which to fill the weeks set aside for the hearing. These are all situations in which the arbitrator may wish to raise with the parties the delicate question of varying the original arrangement.

73. Renegotiating the original terms of the arbitrator agreement is an exercise which must be handled with great delicacy. The arbitrator must avoid the pitfalls of unequal treatment,

exploitation of an unequal bargaining power, or perceived bias if he or she is to avoid unfortunate outcomes ranging from being required to refund arbitrator fees[33] to removal for bias.[34]

74. There are broadly two traps to avoid. The simpler one is unequal treatment of the parties. This tends to arise where it appears that one of the parties is unlikely to meet the arbitrators fees. In that situation the temptation will be to order the creditworthy party (usually the claimant) to make payments, or increase the level of its security, in a way which is not matched by identical terms impacting upon the other party. An unequal direction of that nature overlooks the need for equal treatment of the parties.[35]

75. The more serious hazard, however, is that the arbitrator may inadvertently pressure the parties into complying with the arbitrators requests solely because of a perceived need to stay on good terms with the arbitrator.

76. There is unlikely to be a difficulty if the arbitrator advises that he or she will no longer be bound by terms originally agreed upon in circumstances where, due to the sheer passage of time or other unforeseeable change in circumstances, it has become apparent that the original agreement as to fees and other terms was not intended to extend to the circumstances that have now developed. Considering that aspect, Stuart-Smith LJ observed in *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 3 All ER 211 (CA), at pp 225-226, :

> At the time of his appointment an arbitrator can, if he wishes, stipulate for a commitment fee, that is to say a fee payable in any event even if the arbitration does not take place so as to provide some recompense in case he is unable to obtain other equally remunerative work in the time set aside for the arbitration. If those seeking to appoint him do not like his terms, they can negotiate a smaller fee or appoint someone else. But once appointed an arbitrator cannot unilaterally change the terms of his appointment and demand a commitment fee any more than any other party to a contract can change the terms of the contract, *unless there is a significant and substantial change in the commitment required of him such as to justify the payment of further consideration*. (emphasis added)

77. There is also unlikely to be any difficulty if the arbitrator expresses the new proposal in a form which makes it clear that it is no more than a suggestion which the parties are free to accept or reject at their option. As was said in *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002):

> There is no impropriety as such in arbitrators requesting cancellation or commitment fees: *Johnson v Johnson* (2000) 201 CLR 488. Impropriety has the potential to arise when arbitrators attempt unilaterally to vary arbitration agreements without the consent of all the parties. To insist upon a fee without the consent of all parties constitutes misconduct: *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] 1 QB 863.

78. However, attempts to elevate a request into a demand can land arbitrators in trouble. As was pointed out by Sheller JA in In *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002), para 11:

> In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Limited* [1981] AC 909 at 980 Lord Diplock observed that the concept of arbitration as a method of settling disputes carried with it by necessary implication that the person appointed as arbitrator to decide the dispute should be and should remain throughout free from all bias for or against any of the parties. As this case starkly illustrates, attempts by an arbitrator to renegotiate his contract after appointment can easily undermine the confidence of one or more of the parties in the arbitrators ability to perform the task he has agreed and is being paid to perform.

79. The courts have sometimes referred to such conduct as simply misconduct making the arbitrator liable to removal e.g. as in *K/S Norjarl A/S v Hyundai Heavy Industries Limited*, where Leggatt J stated at 877:

> Once an arbitrator has accepted an appointment, no term can be implied that entitles him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties. To insist on such a fee in those circumstances would therefore constitute misconduct, making the arbitrator liable to removal.

80. However at a more analytical level, there appear to be two independent rationales for challenging demands from an arbitrator that his or her original terms be changed or added to after appointment.

81. One is the inherently unequal bargaining position between an arbitrator, on the one hand, and the parties, on the other. While the arbitration is still in progress, none of the parties will wish to alienate the arbitrator by questioning his terms, still less seeking a review under cl 6, given that he is still in a position to influence the outcome. Where fees are demanded as a condition for uplifting an award the position is not quite so invidious, in that by then the arbitrator has given his decision. Even then, however, there are difficulties. Frequently the arbitrator will still have supplementary matters on which to rule after the principal award is uplifted. Theoretically the parties could pay the amount sought by the arbitrator and then seek a refund for the excess on an action for moneys had and received[36] but it seems that there would have to be something extreme, such as a demand to one party but not to others, before the court would intervene.[37] The parties could seek an order under cl 6(4) that the arbitrator release the award under appropriate conditions but as already noted, the threshold for court intervention under cl 6 is a high one.

82. The other risk is actual or perceived bias. This can arise where the responses of the parties to pressure placed on them differ. Bias was the objection identified by Sheller JA in *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002) at para 11, when he said:

> Parties choose and appoint arbitrators from candidates who are entrepreneurs engaged in practice as barristers or solicitors or in other fields of endeavour. The candidates compete in the market place for work, no doubt quoting fees likely to attract it. But once appointed, an arbitrator is no longer an entrepreneur so far as the parties are concerned. The arbitrator accepts a quasi judicial position

> governed by law. Like a judge, not only must the arbitrator be impartial, the arbitrator must not give the appearance of bias.

83. In most cases, as in *Sea Containers*, one of the parties (usually the claimant) will succumb to the arbitrators demands while the other will resist. In that situation the resisting party will then have cause to fear that in future rulings the arbitrator will favour the party who had acted more cooperatively. Thus in*Sea Containers*, one of the parties, ICT, had consistently agreed to the arbitrators proposals while the other party had not. The Court of Appeal accepted ICTs submission that:

> the arbitrators would be unable to adjudicate fairly upon the dispute under reference in circumstances where ICT, as one of the parties to the dispute, was in conflict with the arbitrators themselves as to whether any binding agreement existed for the payment of cancellation fees in respect of the vacated hearing dates of 21 May 2001 to 15 June 2001 or in respect of any further hearing dates which might be fixed.[38]

84. Alternatively, the court seems to have been prepared to approach impartiality on the more general level that the arbitrator is no longer able to deal with the two parties impartially given a conflict between the arbitrator on the one hand and the parties on the other. Thus in *Sea Containers*, para 13, the Court of Appeal cited with apparent approval the submission that:

> the arbitrators would be unable to adjudicate fairly and impartially upon both substantive and procedural matters arising in the reference and in particular any questions of adjournment or vacation of hearing dates. This inability arose by reason of conflict between the arbitrators own interest to secure payment for hearing dates set aside and their obligation to fix and/or vacate hearing dates in such a way as to ensure that the parties have a reasonable opportunity to be heard.

85. In *Sea Containers* the entire arbitral panel of three was removed. Equivalent powers are available in New Zealand under Art 12(2).

Practical implications

86. A number of practical implications follow. The first is that if at all possible, an arbitrators rates and terms ought to be agreed upon before the arbitrator accepts appointment.[39] The basis of the arbitrators remuneration and terms is then contractual. It forms part of the tripartite contract between the parties and the arbitrator.

87. Although that is undoubtedly the preferable course, it will not always be practicable. Sometimes the nomination of the proposed arbitrator arises by a process of agreement, or judicial or institutional choice, before the proposal is put to the nominated arbitrator. Although the nominated arbitrator retains the right to make acceptance of his or her terms a condition of appointment, insistence on this can in some circumstances cause undue delay or obstruction. Respondents, in particular, may decline to agree to the arbitrators terms because they have little incentive to expedite a process the ultimate object of which is to produce

a remedy against them. In some circumstances there can also be a degree of urgency due to impending expiry of time limits or the need for urgent interim relief.

88. In those circumstances a possible alternative is for the arbitrator to accept appointment while immediately advising both parties of his or her terms. So long as the terms simply define in greater detail the rights and powers which an arbitrator would have under an open contract in any event, there is no inconsistency between acceptance of appointment and declaration of the terms on which the arbitrator will act. Thus the arbitrator can after appointment stipulate a reasonable rate of charging, the form of security required, and proposals for the rendering of interim accounts.

89. So long as this is done at an early stage it will both prevent the respondent from derailing the process by rejecting the arbitrators terms but preserve for the parties as a group the opportunity of jointly rejecting those terms and if necessary terminating the arbitrators appointment by agreement. If the parties choose to continue with the original arbitrator with knowledge of that arbitrators terms it would be difficult for them to sensibly challenge the reasonableness of those terms at a later date. In particular any court subsequently reviewing the reasonableness of the fee under cl 6(3) is unlikely to intervene if the fees have fallen within the hourly or daily rate foreshadowed by the arbitrator.

90. If the arbitrators terms have not been particularised at the outset, it would certainly seem important that this occur as early as possible in the process. Rendering interim accounts will also highlight any disagreement over rates of charging and bring to light any need for alternative security arrangements.

91. It is imperative that the arbitrator should not leave these arrangements to the last minute. Once the parties have invested heavily in the arbitrators knowledge and understanding of the evidence and argument, it may be too late to economically replace the arbitrator. That in turn may inhibit the power the arbitrator would otherwise have to decline to progress the arbitration pending compliance with his or her requirements.

Conclusions

92. A number of conclusions can be drawn:

(a) The lien which an arbitrator has over the award does not adequately protect arbitrators given the many situations in which no award may be uplifted.

(b) If at all possible an arbitrators terms should be defined prior to appointment. These should include express provision as to the arbitrators fee or rates, security, provision for interim billing and, if desired, cancellation fees.

(c) If agreement on express terms is not practicable prior to appointment, the arbitrator should define the terms on which he or she proposes to act as soon as possible after appointment.

(d) Leaving definition of rates, security, and interim billing requirements, until later can eventually lead to loss of the rights an arbitrator would otherwise have, since it may become too late for the parties to exercise the alternative of appointing a substitute arbitrator without undue loss.

(e) It is always open to an arbitrator to propose fresh arrangements, whether or not within the scope of the original agreement, but great care must be taken to advance these in the form of suggestions as opposed to demands. Demands can lead to an arbitrators removal for exploitation or bias.

---

[1] See Arbitration Act 1996 Second Sch cl 2(3).

[2] First Sch Arts 13-15.

[3] For one such horror story see *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 200l)

[4] *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 3 All ER 211 (CA), at p 228. In *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002) the Court of Appeal cited (p 33 para 90) with apparent approval the decision of Gzell J in the court below that: 28 Since an arbitrators fee is primarily a matter of tripartite contact between the arbitrator and the parties, there can be no impropriety in an arbitrator requesting a commitment fee or a cancellation fee. The issue in this case is as to the manner in which the arbitrators persisted in their request after rejection by one of the parties.

[5] See for example Arbitration Act 1996 2nd Sch cl 6 as to controls over arbitrators remuneration.

[6] *Arbitrators Institute of NZ Inc v Legal Services Board* [1995] 2 NZLR 202; [1995] NZAR 49; *Interact v McKay* 14/7/03, Master Thomson, HC Wellington CP51/03; CIV-2003-485-209; *Burnett Transport Ltd v Davidson* [1991] 1 NZLR 121; (1990) 3 PRNZ 296; *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 3 All ER 211 (CA), at p 228.

[7] Mustill & Boyd at pp 220 and 221 All that is required to found such a remedy is a request by one party that the other shall perform a service in circumstances where it is contemplated that the service will be rewarded in reliance upon Gough & Jones, *The Law of Restitution* (2nd Ed) 1.

[8] The differing views are captured in *Green & Hunt on Arbitration Law and Practice*(Brookers) at paras DA4.9.01 and DA4.14.05.

[9] Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed), London, Butterworths, 1989, pp 219-223; But somewhat inconsistently note the following passage at 233:

> Where the parties have expressly agreed with the arbitrator that he shall be paid, he is entitled upon publication of an award to bring an action on the agreement for the amount of his remuneration.[9] If the amount has been agreed in advance, either as a single inclusive fee, or as a rate per hour or per day, the arbitrator may recover accordingly. If not, the arbitrator is entitled to a reasonable fee. Even if the parties and the arbitrator do not expressly agree amongst themselves for payment, it may be possible to imply a promise from the terms of the agreement between the parties.
>
> Even when the parties have not made any specific provision for the arbitrator to be paid, an arbitrator appointed to decide a commercial dispute has a right to be paid a reasonable fee.[9] This is so whether the arbitrator is a lawyer or a layman.

[10] D St John Sutton and J Gill, *Russell on the Law of Arbitration* (22nd ed), London, Sweet & Maxwell, 2003, p 153

[11] *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 3 All ER 211 (CA), at p 228; In *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002) the Court of Appeal cited (p 33 para 90) with apparent approval the decision of Gzell J in the court below that: 28 Since an arbitrators fee is primarily a matter of tripartite contact between the arbitrator and the parties, there can be no impropriety in an arbitrator requesting a commitment fee or a cancellation fee. The issue in this case is as to the manner in which the arbitrators persisted in their request after rejection by one of the parties.

[12] E.g. Illegal Contracts Act 1970; Contractual Remedies Act 1979

[13] E.g. Credit Contracts Act 1981; Land Settlement and Land Acquisitions Act 1952

[14] e.g. equal treatment of parties (Art 18), curial review (Art 34) and recognition and enforcement of awards (Arts 35 and 36)
[15] In the case of domestic arbitrations see s 6(2)(b) of the Act while, for the Second Schedule, international arbitrations require contracting in: s 6(2)(a)
[16] See further Mustill & Boyd supra at pp 220-223.
[17] Apparently in England the parties are jointly and severally liable: see Mustill and Boyd citing *Crampton and Holt v Ridley & Co* (1887) 20 QBD 48, per AL Smith J at 54; *Brown v Llandovery Terra Cotta etc Co Ltd* (1909)25 TLR 625.
[18] See Mustill & Boyd as pp 220 and 221
[19] Even if that view were not accepted, it is difficult to imagine the court striking down the costs and expenses of an arbitrator as unreasonable in all the circumstances for the purposes of cl 6(3) if the parties had expressly agreed to them.
[20] e.g. *Powell v Braun* [1954] 1 All ER 484; *Boote v Brake* (1992) 2 NZ Conv C 191274
[21] For authorities recognising the right to review in general terms see *Casata Ltd v General Distributors Ltd* [2005] 3 NZLR 156 (CA), [2006] 2 NZLR 721 (SC) reviewed [2006] NZ Law Review 313 by D A R Williams QC; *Budget Builders Ltd v Kiori* (Unreported HC Dunedin M30/01, 10 September 2001).
[22] *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066 (Managing Director of company appointed by agreement provided services to the company pursuant to the supposed agreement which was ultimately held to be void due to lack of compliance with articles of association but reasonable remuneration awarded in restitution (formerly called quasi-contract).
[23] *Brown and Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63; *Newmans Tours Ltd v Rainier Investments Ltd* [1992] 2 NZLR 58.

[24] Mustill & Boyd at pp 236 and 237 has a useful discussion as to reasonable levels of remuneration for arbitrators taking into account such matters as the arbitrators skill, qualifications and status and the complexity of the dispute and its importance to the parties. It must be read, however, bearing in mind the need to consider specifically New Zealand conditions and practices.

[25] Willy *Arbitration in New Zealand* 2nd Ed at p 62 notes that in practice many arbitrators submit interim bills as the arbitration proceeds and that this is acceptable unless the manner and timing of the demand for fees is made in such a way as to put a party to the arbitration in an inferior bargaining position.

[26] *Re Coombs and Freshfield and Fernley* (1850) 4 Exch 839; *Roberts v Eberhardt* (1857) 3 CBNS 482, 28 LJCP 74.
[27] See Mustill & Boyd supra at p 235; *Crampton and Holt v Ridley & Co* (1887) 20 QBD 48, per AL Smith J at 54; *Brown v Llandovery Terra Cotta etc Co Ltd* (1909) 25 TLR 625.
[28] *Sea Containers Ltd v ICT Pty Ltd* [2002] NSWCA 84 (18 April 2002)
[29] See Mustill & Boyd supra at pp 241 242.
[30] Mustill & Boyd supra a p 242.
[31] [2002] NSWCA 84 (18 April 200l) (quoting the decision of Gzell J at first instance in para 98 of the Court of Appeal judgment of Shelford JA).
[32] at p 241
[33] Exploitation of an inferior bargaining position in this situation can give rise to an action for money had and received: *Davies v Underwood* (1857) 2 H&N 570; *Turner v Stevenage Borough Council* (1997) Lloyds Rep 129 cited *Willy* supra at p 63
[34] Arts 12 and 13
[35] Cf equality requirements under Art 18 and, indirectly, Art 34(2)(b)(ii) and (6)(b).
[36] *Davies v Underwood* (1857) 2 H&N 570.
[37] *Turner v Stevenage Borough Council* [1997] Lloyds Rep 129 supra
[38] *Sea Containers* at para 13
[39] Rule 8 of the AMINZ Code of Ethics provides that A member should fully disclose and explain the basis of fees and charges before accepting appointment.