The Power Of An Arbitrator To Award Costs

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Arbitrators have from time to time puzzled over the precise meaning of section 34(1) of the *Commercial Arbitration Act* (NSW) 1984. For the purposes of discussion it is desirable to set out the text of the section:

> *"Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees or expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may:*
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> *(a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;*
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> *(b) tax or settle the amount of costs to be 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."*

At first reading it appears that the Parliamentary Counsel has drawn a distinction between the costs of the arbitration and the costs of the parties. In addition, the obligation to pay costs as between solicitor and client has been addressed in an unfamiliar way. The question is raised: What does the legislation seek to achieve? At the outset it is suggested that the use of the words "*costs of the arbitration*" is a reference to the legal costs incurred by the parties. The words following in brackets are a reference to the fees and expenses incurred by the arbitrator in the conduct of the arbitration. Marcus Jacobs, *Commercial Arbitration Law and Practice* Law Book Co, Vol 1B page 8153, considers that the two heads of costs must be distinguished, presumably because an arbitrator might wish to deal with each in a different manner. The discretion vested in the arbitrator by subsection (a) is very wide and would allow an arbitrator to do this. Subsection (b) is an authority to the arbitrator to fix the *quantum* of the costs payable as a result of exercising his or her discretion. *Jacobs* points out that the words "*taxed*" and "*settled*" are synonymous, page 8154. One would doubt that many arbitrators would willingly embark on such an exercise unless strenuously entreated to do so by the parties.

It is trite to remind arbitrators that generally an award of costs and expenses is made in favour of the successful party. The use of the expressions "*party and party*" and "*solicitor and client*" in subclause (c) suggest further options available to an arbitrator and also the potential for error. The word "*award*" is used in the sub-clause as a verb and is a reference to the basis on which a party might prepare its bill of costs. The order obliging the unsuccessful party to pay is, of course, made under sub-clause (a). It is, therefore, necessary to know precisely what these expressions mean and the circumstances where orders for costs based on these premises would be justified. There are five bases on which costs might be ordered by a court. Only three, thankfully, have any relevance to commercial arbitration. This discussion will concern the requirement to pay costs assessed on:

- a party and party basis;
- a solicitor and client basis; and
- indemnity costs.

Each category will be described under a separate heading. The descriptions are taken from *Ritchie's Supreme Court Practice.*

Party and Party Costs

The NSW Supreme Court Rules, Part 52, rule 23 provide that: "*[on] a taxation on a party and party basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.*" The notes to the rule continue that costs incurred to allow the proceedings to be conducted more conveniently or through over caution may not be recoverable. This, therefore, is the "*no frills*" costs recovery. Ordinarily, party and party is the appropriate basis on which costs would be awarded to a successful party.

Solicitor and Client Costs

It is not clear whether the theoretical underpinning of the notion of solicitor and client costs is designed to operate where an order for costs is made against an

unsuccessful party. The NSW Supreme Court rules seem more appropriate where the argument over the *quantum* of costs is between a solicitor and his or her client. Yet, the reference in sub-clause 34(c) raises the possibility that in an arbitration, a successful claimant could hope to recover costs on this basis. Part 52, rule 33 of the rules describe solicitor and client costs as "*all costs ... except*" those that are of an "*unreasonable amount*" or "*unreasonably incurred*" unless approved by the client. The rule continues in a vein that clearly refers to a dispute between a solicitor and his or her client as to fees because it makes reference to the costs only being recoverable from the client if the solicitor has warned the client that the costs might not be recoverable from an unsuccessful opponent. A specific direction from a client to incur costs unreasonably or a warning from a solicitor that costs might not be recoverable on a party and party basis seem a dubious basis for the liability of an unsuccessful opponent for a more oppressive costs order. However, the legislation must be taken to mean what it says and, accordingly, an arbitrator has the power under the combined effect of sub-section 34(1)(a) and 34(1)(c) to order an unsuccessful party to pay the successful party's costs settled or taxed as between solicitor and client. This will effectively mean that "*all costs*" are recoverable. Since the unsuccessful party will, if subjected to such an order, have a greater liability it would seem necessary for the order to be made for good reason. It is suggested that some form of contumacious conduct on the part of the unsuccessful party would be needed.

Indemnity Costs

The NSW Supreme Court Rules, Part 52, rule 28A define indemnity costs as:

> "*all costs ... except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts ... shall be resolved in favour of the receiving party.*"

This is essentially the same test as that for solicitor and client costs except that the test as to what is reasonable is resolved differently. Here the successful party is given the benefit of the doubt whereas with solicitor and client costs the test is subjective. It is submitted that the former test is more workable in an adversarial situation. Again, it is suggested that an order for indemnity costs should be reserved for cases where a party's conduct justifies the order. Another circumstance where the order could safely be made is where an offer of compromise has been rejected and the party making the offer has obtained a result "*no less favourable ... than the terms of the offer*". This proposition was upheld in relation to a successful claimant by Cole J in the unreported NSW Supreme Court decision *York Brothers (trading) Pty Limited v Five Star Cruises Pty Limited* (4 December 1992).

In summary, it is hard to see the distinction between solicitor and client and indemnity costs. What is clear is that as a general rule arbitrators should confine themselves to ordering costs on party and party basis. It is only in exceptional circumstances that orders should be made on any other basis. The difficulty being, litigants will mostly feel justified in asking for costs on a more generous basis. To do otherwise is to cast doubt on their own case.

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