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DUTIES DURING PRELIMINARY STAGES

Introduction

1. At this point it will be convenient to summarise those arbitrator duties which have particular application from the outset even though many of them continue for the rest of the arbitration.

(a) Duty to avoid unilateral (ex parte) communications

2. Natural justice normally precludes communication between the arbitrator and one of the parties, or that party's representative, without the simultaneous knowledge and participation of the others. To this general rule there are three exceptions.

3. The first is that the rule does not apply to purely administrative communications (organising date of telephone conference, delivery arrangements over documents etc). However even for these, the safest course is to put them in writing so that the other parties can be kept simultaneously informed.

4. The second is that the rule does not apply in those rare circumstances where interim measures for the protection of rights or property would be prejudiced if the other party were given prior notice of an application to the arbitrator. But great caution is needed before accepting one party's claim that it will be irrevocably prejudiced if the other is kept informed. The law reports are replete with cases in which attempts to deal with such matters ex parte have been found to be unjustified, with consequent invalidity of the judgment (or award) which had been obtained ex parte.

5. The third is that the rule does not apply to communications between the arbitrator and counsel, as opposed to the parties, on other matters in other professional or social contexts. There is no prohibition against communications between an arbitrator and counsel representing parties in other contexts while the arbitration is pending so long as they do not discuss the case.[1]

6. These duties apply throughout the formal arbitration process. The reason for mentioning it at this point is that a particular danger arises before the formal arbitration proceedings have commenced. Frequently one party will contact a potential arbitrator to discuss that arbitrators proposed appointment. A danger to guard against is that in outlining the general nature of the dispute, the inquiring party may inadvertently present a particular perspective on it. There is then a risk that this will fatally affect the arbitrators impartiality, or appear to affect his impartiality, during the subsequent arbitration.

(b) Duty to avoid accepting appointment, or continuing, while disqualified.

7. A person approached in connection with possible appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to that persons impartiality or independence (art 12(1)) This duty continues throughout the remainder of the arbitral proceedings (art 12(1)). The sanctions for failure to give effect to this duty include the ignominy of successful opposition to appointment (art 11(5)), removal (arts 12(2) and 13), the setting aside of the award (arts 34(2)(b)(ii) and 6(b)), and refusal of recognition and enforcement (art 36).[2]

(c) Duty to ensure compliance with appointment processes

8. Appointment processes can be complicated, particularly where the parties are unable to agree upon the Arbitral Tribunal, where multiple parties are involved, or where there are multiple members on the Arbitral Tribunal. In such circumstances the process rests upon a complex inter-relationship between the arbitration clause or submission agreement, on the one hand, and arts 10 15 of the First Schedule on the other.

9. The arbitrator should meticulously check that the correct appointment process has been followed. Otherwise the award will be vulnerable to challenge.[3] There is also a risk that the arbitrator will not be paid for his or her services, at least in the absence of some independent contract between one or more of the parties and the arbitrator. It is arguable that where the Arbitral Tribunal has not been validly appointed there is no valid arbitration or arbitral tribunal for the purpose of cl 6 of the Second Schedule.[4]

(d) Duty to give notice of appointment

10. It is a ground for setting aside an arbitral award that a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings (Art 34(2)(a)(ii)). This ground could scarcely arise in the normal case where all parties have joined in the appointment process. The position could be different, however, if the appointment stems from an arbitration clause and the processes which follow from it without the full participation of all the parties. In those circumstances it will be important for the arbitrator to ensure that all parties are given proper notice of his or her appointment and, of course, notice of the arbitral proceedings themselves.

(e) Duties with respect to arbitrators remuneration

11. In a New Zealand domestic arbitration, and assuming that the Second Schedule has not been excluded by contract, an arbitrator appears to have both a statutory right to recover fees and expenses (cl 6(1)) and, if charges had been agreed with the parties, a claim in contract.[5]

12. In the absence of any prior agreement with the parties on his fees, an arbitrator is under no statutory or common law duty to forewarn the parties as to what those charges will be. The first the parties may know of the arbitrators rates is when they are told of the sum required before the award may be uplifted. In those circumstances the right to review the charges under art 34[6] is

more theoretical than real given the unlikelihood that any of the grounds for setting aside could be made out. What can the parties do if the charges are excessive?

13. In law there appear to be only two real constraints upon an arbitrators right to charge. One is the parties right to have the charges reviewed by the High Court under cl 6 of the Second Schedule (assuming, of course, that the Second Schedule has not been excluded by agreement).[7] However, the threshold for review under cl 6 is high: the Court will intervene only if satisfied that the amount is unreasonable in all the circumstances. I do not know of any case in which that jurisdiction has been invoked.

14. The other legal constraint is that arbitrators have a duty to avoid demanding fees in circumstances which amount to the unfair exploitation of an inferior bargaining position. There is no inherent inequality in bargaining position before the appointment is confirmed, since at that stage the parties are free to either accept the arbitrators terms or appoint someone else.

15. Charging rates revealed while the proceedings are still in progress, or after it has concluded, cause more difficulty. While the arbitration is still in progress, none of the parties will wish to alienate the arbitrator by questioning his fees, 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[8] 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.[9] 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.

16. There are therefore severe limitations in the legal controls over an arbitrators fees notwithstanding a clear inequality in bargaining position. This suggests that duties in relation to the inequality are at least partly ethical. Ideally, an arbitrators rates will be agreed upon before he accepts appointment[10] and this would seem to be the normal practice. The basis of the arbitrators remuneration is then contractual. It forms part of the supplementary contract between the parties on the one hand and the arbitrator on the other. Clause 6 of the Second Schedule is curiously drafted in that respect. Although subsections (1) and (2) are preceded by the words unless the parties agree otherwise, there is no such qualification to the Courts review powers under subsections (3) and (4). Nevertheless s 6(2)(b) of the Act provides that a provision of Schedule Two applies to domestic arbitrations unless the parties agree otherwise. If the parties to the dispute have entered into a costs agreement with the arbitrator, the agreement would appear to fall within s 6(2)(b), and thus to override the review powers which would otherwise have arisen under cl 6. As a matter of contract, the arbitrator is then entitled to charge at the rates agreed upon, but of course can charge no more.

17. Although that is undoubtedly the preferable course, it may not always be practicable to agree upon rates before appointment. Sometimes the nomination of a named individual as arbitrator arises by a process of agreement, or judicial or institutional choice, before the proposal is put to the intended arbitrator. Although the nominated arbitrator retains the right to make acceptance of his rates a condition of appointment, insistence on acceptance of rates before accepting the appointment can in some circumstances cause undue delay or obstruction to the process. Respondents, in particular, may decline to agree to rates at that point because they have little incentive to expedite a process which may one day result in an adverse finding in the arbitration proper.

18. In those circumstances a possible alternative is for the arbitrator to accept appointment while simultaneously advising the parties of his rates. This will prevent one party from derailing the process simply by failing to agree to the rates but preserve for the parties as a group the opportunity of rejecting the proposed rates. If the rates are objectively unacceptable, the parties can join in a common statement to that effect, if necessary terminating the arbitrators appointment by agreement. If the parties did choose to continue with the arbitration in the knowledge that the arbitrator would be charging at the stated rate, this would doubtless make it difficult, although not impossible, to argue later that the charges were unreasonable in all the circumstances for the purposes of cl 6.

19. There is no universal practice over arbitrators fees and not all will agree with these views. However the considerations just outlined suggest that an arbitrator has an ethical duty to secure agreement to his rates before accepting appointment or, where that is not practicable, immediately upon accepting appointment. This would also seem to be normal practice.

(f) Duty to resolve difficulties inherent in the arbitration agreement.

20. There is no legal duty on an arbitrator to resolve difficulties inherent in the arbitration agreement. In practice, however, the lay parties, and the great majority of lawyers, look to arbitrators for some level of guidance as to the best means of securing a satisfactory resolution of their dispute. There is a certain irony in the fact that the arbitration agreement is usually executed before it comes into the hands of the one person most qualified to assist in its drafting. Usually this is not an obstacle in that difficulties inherent in the agreement can be resolved by executing a fresh one or a supplementary agreement to deal with particular problems.

21. Not all will agree, but my own view is that immediately upon appointment an arbitrator ought to independently review the arbitration agreement to ensure that there are no obvious difficulties. If there are, he can point this out to the parties and suggest ways in which they might be rectified. This would be consistent with the purposes of the Arbitration Act to encourage the use of arbitration as an agreed method of resolving commercial or other disputes (s 5(a)) and to facilitate the recognition and enforcement of arbitration agreements and arbitral awards (s 5(e)) together with a broader professional duty to assist the parties in satisfactorily resolving their dispute.

22. For that reason I suggest that as soon as the arbitration clause or submission agreement comes into the arbitrators hands he should check it carefully for potential difficulties. Typical in that respect are:

(a) *Defects in the description of the dispute*. There is usually no difficulty if the arbitrators jurisdiction stems directly from an arbitration clause since these are normally prospective and general. Submission agreements are different in that they normally refer to a named arbitrator a dispute which has already arisen. Sometimes submission agreements define the dispute in a way which does not adequately match the real dispute between the parties. Nor is it satisfactory in a submission agreement to define the dispute in terms of pleadings yet to be exchanged. This begs the question since the permissible scope of the pleadings, and in turn the arbitrators jurisdiction, rests upon the submission agreement. This in turn risks future challenge to the award on the ground that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of these submission to arbitration (art 34(2)(b)(iii)). Although the situation may be saved by tacit waiver if the parties allow the proceedings to run on a particular basis, this is a more risky way of attempting to stave off a challenge.

(b) *Unrealistic procedures and time limits*. Sometimes the dates set for timetables in agreements have already expired, could not be sustained by the parties, or are unsuited to the process as it unfolds. Personally I think that detailed procedures are better omitted from the arbitration agreement. Where the arbitrator has a choice in the matter, I think it preferable that detailed procedural timetables should left for directions (nearly always by consent) which can be modified from time to time as the proceedings progress.

(c) *Non-justiciable issue*. Occasionally a question is referred to an arbitrator to be resolved according to law where the way the issue is expressed provides no opportunity to apply the law to the facts. For example the agreement might refer to an arbitrator the question whether the value of certain land is to be included in the price payable by the purchaser where no criteria are provided for resolving something which could only be a matter of negotiation. There is no difficulty if the jurisdiction is to decide whatever is fair but there is a difficulty if the parties seek an award based on the law.

(d) *Non-parties*. An arbitration in which remedies are sought against persons who are not parties to the arbitration agreement will clearly frustrate the claimants intentions.

(e) *Exclusion of natural justice*. An attempt to exclude inalienable procedural rights, in particular the right to natural justice (arts 18, 24 and 34(2)(a)(ii) and (b) and

6(b)) will be ineffective unless the parties are content to switch from an arbitration to an expert determination.

(f) *Failure to address conflict of laws principles*. Some agreements can leave real doubt as to the proper law of the dispute.

(g) *Query arbitration or expert determination*. Some agreements leave ambiguity on this topic.[11]

(h) *Inconsistent ADR clauses*. In some disputes there is more than one contract between the parties to the dispute containing ADR clauses and these clauses may conflict. An example is a dispute arising from a joint venture where the ADR clause in one of the relevant documents (a lease) provided for an expert determination while the ADR clause under another document (the joint venture agreement) provided for an arbitration.

(i) *Failure to make provision for on-going disputes*. Whereas arbitration clauses are wide and prospective, submission agreements are normally addressed to particular disputes which have already arisen. Definition of the dispute in a solely retrospective way (i.e. definition of disputes which have already arisen) can be a mistake in circumstances where the relationship between the parties will foreseeably give rise to on-going disputes while the arbitration is still in progress. Usually the expectation of the parties is that all disputes arising before completion of the arbitration will be determined in the award.

23. On any approach to the matter, the ultimate responsibility for such matters rests with the parties. However, my own view is that the wise arbitrator will at least draw difficulties to the attention of the parties and allow them the opportunity to rectify them.

(g) Duty to stay within the jurisdiction

24. Subject to consensual amendment to the arbitration agreement, an arbitrator must at all times limit both procedural directions and substantive decisions to the jurisdiction conferred upon him by the arbitration agreement. It is easy to overlook this constraint when the arbitration has been in progress over a lengthy period. This is particularly so where the dispute had been defined retrospectively but there is an ongoing relationship e.g. as between lessor and lessee, franchisor and franchisee or owner and builder.

25. The parties will not necessarily agree upon the interpretation of the dispute definition in the arbitration agreement even where it is to the forefront of everyones attention. Faced with a dispute on that topic, the arbitrator may be required to determine his own jurisdiction under art 16 of the First Schedule. In that situation both parties must, of course, be given full opportunity to present evidence and submissions on the scope of the arbitrators jurisdiction. Of significance here is the question whether to give a preliminary ruling on it or include it in the substantive

award. If the arbitrator decides the question as a preliminary issue there is a right of appeal or review by the High Court (art 16(3)). That path may entail more intrusive powers on the courts part than the more limited right to review under art 34 or appeal under cl 5.

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[1] For useful discussion see Newman and Hill *The Leader Arbitrators Guide to International Arbitration*, pp 70 and 71.

[2] This aspect need not be developed here given its comprehensive coverage in the booklet for the AMINZ seminar Arbitrator Impartiality and Disclosure Obligations, Removal of Arbitrators 6 April 2004 by David Williams QC, Graham Christie and John Green.

[3] Article 34(2)(a)(iv) and Article 36(1)(a)(iv).

[4] In the AMINZ arbitration protocol there is an interesting contrast between cl 3.3 (if the parties are unable to agree on Arbitral Tribunal the parties agree that the President of the Arbitrators and Mediators Institute of New Zealand Inc or the Presidents nominee will appoint the Arbitral Tribunal) and cl 3.5 (the appointment will not be completed until it has been agreed by the parties in writing). Given that the AMINZ appointment process is set in train because of failure to agree, query whether the parties would necessarily agree after the AMINZ nomination.

[5] *Hoggins v Gordon* (1842) QB 466, ER 114P 586.

[6] *Budget Builders Ltd v Kiore* (HC Dunedin M 30/01, 10/9/01)

[7] *Cassata Limited v General Distributors Limited* (CA 13 April 2005 CA84/04); *Budget Builders Limited v Kiore* (Unreported HC Dunedin M30/01, 10 September 2001).

[8] *Davies v Underwood* (1857) 2 H&N 570

[9] *Turner v Stevenage Borough Council* [1997] Lloyds Rep 129

[10] 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.

[11] See *Methanex* (supra) and Willy *Arbitration in New Zealand* 2nd Ed at p 24, para 3.7.