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Comments on Financial Arrangements with Arbitrators

I offer the following thoughts and suggestions on this sensitive topic.

Communications about Money

Where no arbitral institution is involved it is entirely proper for counsel in representing the interests of their clients to raise any issues regarding rates, deposits and cancellation fees with the tribunal and no arbitrator should be offended by such discussions. It is my experience that counsel are always respectful in relation to financial matters given the role to be played by the tribunal in the resolution of the dispute and the very fact that an issue is being raised for discussion in those circumstances should be treated with the utmost respect by the arbitrators. Equally, it is often the case that counsel, especially those who are new to arbitration, are not aware of the role that particular financial arrangements play in ensuring that the arbitration is conducted in a manner that is fair to both sides.

When the arbitration is to be conducted by a single arbitrator, any discussion with the arbitrator or potential arbitrator as to financial arrangements should of course be conducted when all parties are present for the discussion. Ideally, counsel for the parties have spoken to each other in advance of the discussion with the arbitrator so that any issues can be raised without attribution to any one party to the dispute. Following the discussion with the arbitrator, the parties should have an opportunity to confer to see if they can reach a joint position. No arbitrator wishes to be put in a position of having to decide between conflicting positions among the parties relating to his or her own compensation. Counsel should try to avoid that situation.

When the arbitration is to be conducted by a tribunal consisting of three arbitrators, a party may well have discussions with a candidate for appointment by that party before the appointment takes place. Provided all references to the merits of the case at hand are avoided, there is nothing wrong with a brief communication which addresses such matters as willingness to serve, conflicts, availability and rates. However, with respect to financial matters it should be remembered that this topic may have to be revisited when the tribunal as a whole is constituted. It is not wise for one party to have agreed an hourly rate with its appointee which is significantly different from the rate that will apply to the other members of the tribunal. Apart from questions of pay equity, such divergences may cause problems in the administration of the arbitration in terms of how work is assigned among members of the tribunal. For the same reasons, it is not uncommon, and in my view it is good practice, for a tribunal to replace whatever arrangements have been made with the party appointees with a system whereby all members of the tribunal co-ordinate their invoices through the Chair or a third party agency (such as the facility provided by LCIA) with all parties to the arbitration paying equal shares of all members of the tribunal. Similarly, it makes sense that all members of the tribunal should enjoy equally the benefits of immunity provisions in a common agreement with all parties to the arbitration.

Deposits and Liability for Payment

The question of who is liable to pay the fees and disbursements of arbitrators is one on which there can be surprising differences of opinion. Some arbitrators take the view that counsel are personally liable and therefore do not concern themselves with taking or maintaining deposits. I do not operate on that assumption.

Any counsel who has been in the position of having to pay a large account from an arbitrator and then been left to seek reimbursement from an irate client who just lost the case knows that this is not a satisfactory solution. If counsel liability is not the answer, the idea that a tribunal would be left to collect a portion of its fee directly from one or more parties who may be unhappy with the result is obviously not a practical solution. Furthermore, the last thing anyone should want is a situation in which there might be mischievous speculation that an award was influenced by such considerations on the part of the tribunal.

It is therefore better practice for arbitrators to work from deposits. For this reason the UNCITRAL Arbitration Rules (Rule 43) make specific provision for arbitral tribunals to direct that initial and ongoing deposits on account of fees and expenses be made by the parties. While the Ontario Arbitration Act does not make any specific reference to deposits one way or the other, it does contain an important related provision (s. 56) to the effect that arbitrators' fees are subject to the same assessment process as a lawyer's bill under the Solicitors Act.

At a minimum, counsel and the tribunal need to have an explicit understanding, reduced to writing, as to who is liable to pay the tribunal.

Cancellation Fees

Cancellation fees can be a source of confusion and unease, especially because counsel and their clients tend to equate fees paid to arbitrators with fees paid to counsel. Typically, counsel do not expect to get paid for a trial they did not have to do because the case settled. They are simply expected to turn to other matters. When lawyers who have a large counsel practice sit occasionally as an arbitrator, they may see no problem in taking the same approach. However, a professional arbitrator cannot operate on that basis.

In the absence of cancellation fees, it is all too easy for parties to an arbitration to book more time than is required for an arbitration that may never take place and simply advise the arbitrator shortly before the scheduled hearing dates that the parties are not ready to proceed. This comes at a very real cost to the arbitrator who has set aside time in his or her calendar for the matter and as a result has been unavailable for other appointments. Given the number of parties involved in an arbitration, it is very unusual for replacement matters to be scheduled on short notice. Parties to other disputes, who may have used members of the same tribunal for one or more other arbitrations are also disadvantaged.

Cancellation fees should properly be viewed not as adding cost but as adding a discipline to the process, and this is how they actually function in my experience. They are easily avoided if parties do not exaggerate the need for long hearings, take deadlines seriously and address the possibility of settlement in a timely fashion. I believe that these are the reasons why, despite the seemingly draconian nature of cancellation fees, they are not frequently applied in practice.

Over the years, I have modified and adapted my cancellation fee policy a number of times as I have had beneficial discussions with counsel as to what is fair in various circumstances. This is a process I hope to continue. Interestingly virtually all of these have been theoretical discussions which have never had to be applied in practice. This bears out my overall observation that, as an arbitrator, if you have a cancellation fee you are not likely to need it, but if you don't have it you will need it much of the time.