CANCELLATION FEES

A SYMPTOM OF THE ARBITRATION DILEMMA

By A.A. de Fina, Senior Vice-President
The Institute of Arbitrators Australia

As its traditional roots, arbitration as we know it today, was the process of resolution essentially of commercial disputes by reference to a person or persons deemed by the parties as having particular expertise and standing in the subject matter of the dispute. In referring the dispute, the parties agreed to be bound by the determination.

With some exceptions, commercial arbitration in Australia appears to have developed into two main streams, with differing and distinctive characteristics.

The first follows traditional lines encompassing what are essentially quality/quantity type disputes which are referred to specialist arbitrators in the particular subject matter of the dispute. By far the greatest number of arbitrations fall into this category.

The second group is, by numerical comparison, very much smaller, perhaps amounting to only 3-4% of the total number of arbitrations held in any one year. However, these arbitrations almost inevitably involve large amounts of money and issues of fact and law.

Although small in number, the overall quantum involved in these disputes exceeds by far the total quantum involved in the other disputes.

There is a continuing expectation and demand that arbitrators exhibit ever increasing capacity and ability to act as arbitrators.

This is generally true. However, it is in the large and complex disputes that there is greater scrutiny of the performance of arbitrators.

The Commercial Arbitration Acts throughout the Commonwealth clearly establish the supervisory role of the Courts, in relation both to the performance and the conduct of an arbitrator.

Save for aspects of conduct of proceedings, the prospects of review of an arbitral award in quantity/quality type disputes are very limited.

Conversely, in complex arbitrations where large sums of money are involved, both in respect of the quantum in dispute and the costs, the likelihood of potential challenges to an arbitrator or to an award are greatly increased.

In order to satisfy the demands and requirements both of disputing parties as to the standing, capacity and ability of an arbitrator properly to determine matters in dispute by arbitration, and of the Courts in their

application of the standard of performance deemed necessary to maintain and support the arbitral process, The Institute of Arbitrators has placed almost overwhelming emphasis upon quality and quality control of arbitrators.

There is both a demand and an expectation of the highest performance and capacity to act as an arbitrator which can only be reasonably satisfied by professionalism.

This professionalism can only be achieved and maintained by diligence, continual application and learning of the ever changing character of all aspects of arbitration.

In Australia the number of qualified arbitrators from which disputants may draw in the selection or appointment of an arbitrator or arbitrators for their particular dispute is relatively small. Traditionally, arbitrators have ben selected or appointed on the basis of their eminence in a particular field of practice.

A dedicated expertise in the subject matter of the dispute is seen by parties as a desirable qualification. In practice it is the standing and reputation of the arbitrator which in most instances is paramount in final selection.

Coincidentally, eminence and availability have dictated that such people are approaching, or have reached the end of their earlier professional careers.

Acting as an arbitrator in these circumstances has ordinarily been an adjunct or activity in retirement or semi-retirement where any income so resulting might be welcome but is not necessarily essential.

Where practising as an arbitrator is little more than a part-time activity, the maintenance of skills and abilities, together with the need and capacity to maintain the highest level of professional competence, are very often reduced.

Current experience in Australia is that the demand for highly competent and professional arbitrators is continuing to grow. This demand and growth will be maintained only if parties and the community at large are satisfied with the performance of arbitrators and the arbitral process.

There is a fundamental and essential need to attract younger, professional people into the practice of arbitration.

Paradoxically the very qualities, capacity and abilities that are needed are those which are also consistent with a successful business or professional career which, of itself, would not allow the necessary time or dedication to practise as an arbitrator.

Thus, if arbitration in Australia needs and depends upon such professionals for its development, full cognisance of the commercial and economic demands in practising as an arbitrator other than as a sinecure in retirement must be given.

Such things as general availability, flexibility in timetabling, support and office facilities needed properly to fulfil the role of arbitrator must

be within the capacity of the persons offering themselves as arbitrators, so that, among other things, one of the significant advantages of arbitration over litigation is a reality, viz. that of expedition.

Essentially, the base products people practising in such capacity have to sell are their time and the respect which the parties have for them.

Arbitration, by its very nature, involves, at least in major matters, long lead times and firm commitments to hearing times and availability, in order to satisfy the commercial and legal needs of disputants.

In setting aside time for a hearing, arbitrators must, and do in fact, lock themselves out of other activities which involve forward planning and allocation of time. In the case of persons effectively practising full time as arbitrators, this means denial of other arbitrations.

Normally it is not possible as, for example in the courts, to bring matters for hearing forward where cancellations, settlements or adjournments take place. Nor is it ordinarily possible because of long lead times to take up new matters to fill time available by cancellation, settlement or adjournment.

In a survey conducted by the Institute amongst a number of senior arbitrators in Australia the settlement rate in arbitrations was approximately 92-94%. It appears that this rate of settlement generally reflects the overall settlement rate in all arbitrations.

It follows, therefore, that if a person practices as an arbitrator effectively on a full-time basis, only 5% of total productive time will be eventually utilized in the actual hearing and determination of disputes.

It is unrealistic for the commercial and legal community to expect that in such circumstances arbitrators, in allocating their time and availability, will be reimbursed only for time involved in determination of a dispute.

Leaving aside the possibility of charging fees of an order such that these circumstances would be taken into account as being totally inappropriate and commercially unviable, the only reasonable and practical solution must be the application of cancellation fees.

Where there is not total reliance on arbitration for professional income, various formulae for reduced or non application of cancellation fees are sometimes applied—and reasonably so.

There appears no commonality in the terms applied by various practitioners throughout Australia. Some of the formulae are quite complex.

The scale ranges from no cancellation fees up to payment of full fees for all time set aside.

Whatever the circumstances, it is not reasonable to receive cancellation fees, which are in effect a compensation for time set aside, when in fact other income is earned during the time set aside but otherwise not utilized for a particular arbitration.

In equity, it would seem a proper principle to adopt in accounting

for other fee income and an obligation to attempt to generate fee income during periods of time set aside but otherwise not utilized in order appropriately to reduce liability of parties for cancellation fees.

An example of cancellation fee clauses reflecting these principles is included in the attached Appendix.

There is a further significant matter relating to cancellation fees which might only be overcome, if at all, in the long term.

Courts are a public facility generally and widely available to all persons and, insofar as the court itself is concerned, effectively at no or little cost to disputants.

As a consequence many legal practitioners and some disputants are generally averse to the need to pay an arbitrator and even more so to any practice whereby an arbitrator seeks payment by way of cancellation or adjournment fees.

There is currently considerable discussion and assessment of the court system, with a number of possibilities being canvassed. These include a requirement for commercial disputants to contribute far more towards the cost of the courts in determining their disputes. Whilst it is unlikely that such things as cancellation fees will be introduced, there is a strong possibility that there will be significant charges made for utilisation of courts.

This will certainly reduce criticism of this cost aspect of arbitration.

While there is no doubt that any cost penalty of arbitration when compared with litigation will be detrimental to the cause of arbitration, so too will failure to provide arbitrators of sufficient standing, capacity, ability and availability to detract from, and dissuade disputants from adopting, arbitration as a means of resolving their disputes.

There is no simple answer but the certainty of ever increasing demands of quality and performance in the arbitral process must lead inevitably to requirements of higher and higher levels of professionalism.

These demands can only be properly satisfied and compensated by a reasonable, appropriate and economic return to those persons accepting appointment as arbitrators.

Cancellation fees are an inevitably consequence of this.

It is the proper and reasonable application of cancellation fees that is the salient issue; not whether or not there should be cancellation fees.

APPENDIX: EXAMPLE— CANCELLATION FEE CLAUSES

"Where, after the parties and the Arbitrator have agreed upon a commencement date for a hearing and/or the Arbitrator has set aside such time or time as the parties have indicated to him will be necessary

or required by them for a hearing, whether or not an order has been made by the Arbitrator as to the commencement date of the hearing, then

(a) Cancellation Fee —

In addition to such sum or sums as may be due under the provisions of Clause . . . above where a hearing is cancelled, whether or not having commenced, an amount equal to that set forth in the provisions of Clause . . . above calculated upon all unused days of hearing and/or time set aside for the hearing shall be paid to the Arbitrator.

(b) Postponement or delays in hearing.

(i) Where a hearing is delayed at the request of the parties, either as to a commencement or after proceedings have formally commenced (other than that as provided in sub-clause (ii) below) then a postponement fee amounting to the per diem rate as set forth in Clause . . . for all days of postponement or delay shall be paid to the Arbitrator.

(ii) Where a hearing is delayed either as to commencement or as to proceeding as a result of a court challenge to the proceedings, arbitration or Arbitrator (other than where there is a finding by a court of incompetence, corruption or fraud on the part of the Arbitrator) then a postponement fee amounting to the per diem rate as set forth in Clause . . . for all days of postponement or delay for each and every postponement or delay up to and including the first five days of such postponement or delay shall be paid to the Arbitrator. Thereafter, for the balance of all such time set aside (where the postponement or delay exceeds five days) an amount calculated on one third of the reimbursement due under the provisions of Clause . . . above shall be paid to the Arbitrator.

Where the Arbitrator is required to attend or appear at a court hearing as contemplated in this sub-clause the Arbitrator shall be paid (other than where there is a finding by a court of incompetence, corruption or fraud on the part of the Arbitrator) a fee amounting to the per diem rate as set forth in Clause . . . for all days of attendance or appearance at such court hearing. This provision shall only apply when the days of court attendance or appearance occur in the period subsequent to the five day period of postponement or delay referred to above and are in lieu of and not in addition to the one third fee for such days as may have been set aside as referred to herein.

(c) Notwithstanding the cancellation and delay fee provisions set forth in Paragraphs (a) and (b) supra, where a cancellation or delay as contemplated occurs and a fee would otherwise be payable, the Arbitrator will make reasonable and appropriate efforts to take new matters or to reschedule listed matters within the time set aside but cancelled or delayed. In such circumstances where the Arbitrator does in fact act as Arbitrator in other matters the parties' liability for cancellation or delay fees shall be reduced by the amount of cancellation fees otherwise payable to the Arbitrator for days set aside but otherwise so utilized and the Arbitrator shall so account to the parties in final settlement of the matter.

VISITOR TO AUSTRALIA

During September Mr G.D. Douglas, President of the Arbitrators' Institute of New Zealand, Inc visited Australia during which he met Mr F.J. Shelton and Mr H.C. Ambrose, President and Chief Administrative Officer of The Institute of Arbitrators Australia respectively.

Mr Douglas was particularly interested to learn first hand about the Institute's education and training policy and programmes and its publications. A major objective of the N.Z. Institute is to establish an Arbitration Centre in New Zealand and Mr Douglas was most interested to inspect the facilities at the Australian Centre for International Commercial Arbitration in Melbourne and learn of its operations.

The New Zealand Institute which was incorporated less than three years ago has a membership of almost 300 members.

There will be many opportunities for Institute to co-operate with the New Zealand Institute and the Council of The Institute of Arbitrators Australia looks forward to developing relationships with the Institute across the Tasman. This development will mirror C.E.R. activities being pursued by both the New Zealand and Australian governments.