Andrews v Bradshaw — a differing view

*A A de Fina**

The case of *Andrews v Bradshaw* [2000] BLR 6, heard in the English Court of Appeal, was the subject of reporting in Volume 20 No 1 of *The Arbitrator & Mediator*.

Particular attention was focused on the opinion of Mance LJ expressed obiter dicta in the following terms:

> On the face of it, although this was not a point pursued directly as a matter of complaint before us, it was unwise and inappropriate for the arbitrator, after accepting appointment by the President of the Royal Institute of Chartered Surveyors, to enter into a one-sided agreement of this nature and to receive any payment under it from only one party ... He was, of course, quite entitled to ask both parties whether they would agree to such an agreement, but he should not, I think, have entered into such an agreement with only one party once the other party refused to do so.

A possible consequence of following this line of reasoning is that a party, drawn to arbitration against its will, can refuse to agree to either or both the level of the arbitrator's fees or the provision of security for such fees and, as may be, other costs or expenses incurred by the arbitrator in the conduct of the arbitration.

An obvious effect of such refusal will likely be to abort, avoid or delay the arbitration and possibly allow the recalcitrant party to avoid its original agreement to submit to arbitration.

This type of conduct by a party, although not common, is certainly not unknown in Australia.

Training by the Institute of Arbitrators & Mediators Australia reinforces the

---

* AA de Fina (BMech E (Hons), Dip Mech E, Dip Elec E, FIEAust, MSAEAust, FAIM, FIAMA, FRINA (UK), Chartered Engineer (UK), MSNAME (SEA), OAM). AA Fina is a past President of both the Institute of Arbitrators and Mediators and of ACICA and practises full time as an arbitrator and consultant, principally in the international arena. He practices from Melbourne.

necessity of obtaining prior approval from the parties as to the level of fees or reimbursement to an arbitrator and the necessity of securing fees, costs and expenses by the lodging of funds in escrow. The Institution's Practice Notes on the preliminary conference reflect these requirements.

The requirement for prior agreement of fees is soundly based and security for fees, costs and expenses makes sound commercial sense. Both are consistent with the traditional or conventional arbitral practice in most common law jurisdictions.

On the other hand, a party, having subscribed to an agreement to submit to arbitration, should not be able to avoid that agreement, a resulting arbitration and any obligations that might consequentially flow by taking the simple position of refusing to agree the arbitrator's proposed fees or refusing to lodge security.

However, an arbitrator is not necessarily unarmed in such circumstances of lack of agreement or refusal. The 'uniform arbitration Acts' — the arbitration Acts now in force in all States and Territories of the Commonwealth — deal with costs at s 34. By s 34(1), absent a contrary intention expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) are in the discretion of the arbitrator and an arbitrator may:

(a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;
(b) tax or settle the amount of costs to be so 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.

Section 35 of the 'uniform Acts' provides as follows:

35. Taxation of arbitrator's or umpire's fees and expenses

(1) If an arbitrator or umpire refuses to deliver an award except on payment of the fees and expenses demanded by the arbitrator or umpire, the Court may, on application made by a party to the arbitration agreement, order that —

(a) the arbitrator or umpire deliver the award to the applicant on such terms as to the payment of the fees and expenses of the arbitrator or umpire as the Court considers appropriate; and

(b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

(2) Notwithstanding that the amount of the fees or expenses of the arbitrator or umpire may be fixed by the award, those fees or expenses may, on the application of a party to the arbitration agreement or of the arbitrator or umpire, be taxed in the Court.
(3) The arbitrator or umpire and any party to the arbitration agreement shall be entitled to appear and be heard on any taxation under this section.
(4) Where the fees and expenses of an arbitrator or umpire are taxed in the Court, the arbitrator or umpire shall be entitled to be paid by way of fees and expenses only such sum as may be found reasonable on taxation.

In some widely recognised and applied institutional rules there is express provision to overcome circumstances where one party refuses or fails to pay amounts ordered by way of security. For example, the Rules of the International Court of Arbitration of the International Chamber of Commerce at art 30(3) provide, inter alia, as follows:

> The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. ... However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other party fail to pay its share.

The provisions of the ICC Arbitration Rules must be distinguished from the normal circumstances that might arise in Australia in domestic arbitrations, as the monies are payable to the ICC which, at the conclusion of an arbitration, determines in its discretion the fees that shall be payable to an arbitrator consistent with a scale of fees forming part of the Rules. Those fees are paid by the ICC from monies lodged with the ICC.

However, this is not the case in the UNCITRAL Arbitration Rules. The UNCITRAL Rules were created by an arm of the United Nations and are widely recognised and applied as representing neutral and appropriate rules for the conduct of arbitration. These Rules provide, at art 41, as follows.

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

...

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

The costs referred to in art 41 are defined in art 38 which also empowers the arbitral tribunal to set its fees in the following terms.

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The terms 'costs' includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
(b) The travel and other expenses incurred by the arbitrators;
(c) The costs of expert advice and of other assistance required by the arbitral tribunal;
(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Additionally, art 39 provides the basis for the arbitrators' fees and the possibility of independent review in the following terms.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in

international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Under the UNCITRAL Rules it is the tribunal itself making orders in a similar manner to the normal conduct of domestic arbitrations in Australia.

A consequence of failing to obtain agreement on level of fees or the payment of security monies in escrow may be that although the arbitrator may have fees, costs and expenses ultimately settled pursuant to the provisions of s 34 and s 35 of the uniform Acts the arbitrator will, in actuality, be funding the arbitration, even if only by bearing the costs and expenses. An arbitrator may also be denied the opportunity for progressive payment of fees, a facility which may be both reasonable and necessary, at least from the arbitrator's point of view, in long running matters.

If the intention of the recalcitrant party is to avoid the arbitration, then the proposition of Mance LJ in *Andrews v Bradshaw* — that the arbitrator was entitled to ask both parties whether they would agree to an arrangement where only one party agreed the level of fees, costs and expenses and lodged security — would appear to be a futile exercise. The party that did not agree to the arbitrator's fees or to pay security in first instance for the purposes of avoiding or delaying the arbitration would have little reason to agree that the arbitrator could proceed upon agreement for payment made only with the other party and actual payment only by that other party.

While it is open to each arbitrator to determine whether or not they proceed

with an arbitration, the proposal or inference that it would be unwise or incorrect to proceed with an arbitration in circumstances where only one party has agreed fees and/or lodged security monies does not necessarily act to the advancement of arbitration as a dispute resolution mechanism or to ensure justice.

There are legitimate means to overcome any perceived problems if an arbitrator is so minded. Such means may be to rely upon s 34 and s 35 of the 'uniform Acts', to proceed without agreement but to record clearly and precisely the circumstances as they have arisen and the reasons for proceeding, or to adopt a position of refusing to deal with a cross-claim (subject to the particular circumstances allowing such avoidance).

The common wisdom in Australia — that if the arbitrator does not obtain agreement from both of the parties to an arbitration to his terms and conditions of engagement then the arbitrator should withdraw — does little to advance arbitration as an appropriate means of resolution of commercial disputes.

An arbitrator has as much a duty to proceed with an arbitration when it is appropriate to do so as to withdraw from an arbitration, particularly if the reason for withdrawal plays into the hands of the recalcitrant party.

Caution there must be — but not in abrogation of duty. ⌘