Chartered Institute of Arbitrators
CIArb

Practice Guideline 8: Guidelines for Arbitrators who Receive Notice of Arbitration Applications to the Court

1. Introduction

1.1 From time to time an arbitrator will receive notice of an application being made to the Court by one of the parties to an arbitration in which he has acted as arbitrator. Such notices require careful treatment. The arbitrator may wish to ensure that relevant material is placed before the Court; he may wish to go further and contest the application or to resist the order being sought by the applicant. But while an arbitrator may be fully justified in participating in Court proceedings such a course is not without risk. This arises because, if the arbitrator's intervention fails, the Court may decide to make an order for costs against him or her (and, in any event, the arbitrator may have incurred legal expenses). The risk exists since it is unlikely that the immunity of an arbitrator conferred by Section 29 of the Arbitration Act and other legal systems extends so far as to confer immunity against an order for costs.

1.2 This Guideline, therefore, attempts to provide guidance to arbitrators as to the best way to deal with a notice of a current arbitration application being made to the Court. This Guideline focuses on the English legal position. However, many of the same points apply to arbitrators sitting in other jurisdictions.

2. Categories of Arbitration Claim

2.1 The Arbitration Act 1996 and the statutes of the other countries covered by these guidelines list many different situations where the parties to an arbitration may seek an order of the Court in order to support the arbitration process or to remedy some mishap or problem which has occurred in the arbitration or is likely to occur. In some cases, the English Act provides that notice of the application must be given to the other party or parties to the reference. In other cases it provides that notice of the application must also be given to the arbitral tribunal. It is the latter category which is of particular concern to arbitrators.

2.2 There are about 10 sections of the 1996 Act which require notice of the arbitration application to be given to the arbitral tribunal. These in turn, can be divided into tw subcategories as follows:-

(a) cases where the arbitrator must be made a defendant to the proceedings;

(b) other cases where it is sufficient to send the arbitrator a copy of the arbitration claim form and any written evidence in support.

3. Cases where the arbitrator must be made a defendant to the proceedings

3.1 Rule 62.6 of the Civil Procedure Rules provides that in three types of arbitration application each arbitrator must be made a defendant to the claim. These are:

(1) An application to remove an arbitrator under Section 24 of the Act;

(2) An application to consider and adjust the amount of an arbitrators' fees and expenses under Section 28;

(3) An application to compel an arbitral tribunal to deliver its award where the tribunal has refused to deliver it except upon full payment of the tribunal's fees and expenses (Section 56).

3.2 In all three cases the outcome of the application is likely to be of financial importance to the arbitrator. In addition, an adverse decision by the Court may in some instances affect an arbitrator's reputation and prestige. For these reasons he may wish to appear and be heard by the Court.

3.3 An arbitrator who has been made a defendant to the proceedings will be able to ascertain from the claim form that he has been cited as a defendant. He should also be able to ascertain from that form what remedy is being claimed against him and the grounds on which that claim is made. Finally he will be able to see whether an order for costs is being sought against him.

3.4 A form of acknowledgement of service will have been sent with the papers, together with guidance notes to assist in completing the form. The acknowledgement requires an arbitrator who has been made a defendant to the proceedings to state whether he intends to contest the claim and to rely on written evidence.

3.5 It is a matter of great importance that, before completing and filing the acknowledgement of service, the arbitrator should carefully consider his position and what stance he wishes to adopt in connection with the claim. It is essential to obtain qualified independent legal advice before deciding upon the course to adopt.

3.6 An arbitrator who has been made a defendant to the proceedings has three possible choices:

(1) to do nothing (in which case there is no need to return the acknowledgement of service); or

(2) to return the acknowledgment with an indication in Section A that he does not intend to contest the claim; or

(3) to return the acknowledgement with indications in Section B that he intends to contest the Claim and in Section D that he intends to rely on written evidence.

3.7 Generally if an arbitrator follows course (1) (and does not return the acknowledgement) or (2) (by returning the acknowledgement but indicating in it that he does not intend to contest the claim) the applicant will still have the burden of persuading the Court that it ought to grant the relief which has been claimed. The arbitrator however will be depriving himself of the opportunity of placing his case before the Court.

3.8 If the arbitrator follows course (1) or course (2) it is less likely that the Court will make an order for costs against him (irrespective of the outcome of the application) than if he follows course (3). This is because, in the former two cases, any costs incurred by the claimant will generally have been caused by the conduct of the arbitrator in the discharge of his functions as arbitrator (and so be within the immunity granted by Section 29) and not by his conduct in unsuccessfully resisting, or prolonging, legal proceedings.

3.9 There are however certain situations where an arbitrator who has been made a defendant to the proceedings may incur the risk of an order for costs being made against him even if he fails to return to return the acknowledgement or indicates that he does not intend to contest the claim. The risk exists, for example, where one of the parties challenges the fees he has charged and seeks a refund or challenges the fees he proposes to charge as a condition for the release of his award. If the applicant has written a letter before action suggesting an adjustment or reduction of the fee, the arbitrator has not agreed and the Court subsequently upholds the applicant's proposal, it could be argued that the immunity does not apply as the arbitrator had been given an opportunity to correct his mistake and failed to do so.

3.10 If the arbitrator wishes to contest the claim and to rely on written evidence he must normally follow course (3) by completing the acknowledgement in the appropriate way and

returning it by the stipulated date, normally 14 days from the date of service. Any written evidence will have to be filed within 21 days after the date when the arbitrator was required to acknowledge service. Reference should be made to Part 62 of the Civil Procedure Rules and to the Practice Direction to Part 62 for the subsequent procedure.

3.11 It is important that, before deciding to follow course (3) and deciding to take an active part in resisting the application, the arbitrator should bear the following points in mind.

3.11.1 First, it is seldom, if ever, advisable to take an active part in defending legal proceedings unless qualified independent legal advice has first been taken and the arbitrator is advised that he has reasonable prospects of defeating the claim.

3.11.2 Second, the dispute in such a situation may well turn out to be between one or both parties to the arbitration and the arbitrator; consequently the arbitrator cannot rely on either party to put forward his case.

3.11.3 Third, it is seldom a good idea for an arbitrator to argue his own case as a litigant in person. The applicant may well be represented by solicitors or counsel. In any event the arbitrator will be descending into the arena and by this course jeopardising his or her independence and thus capacity to act as arbitrator.

3.11.4 Fourth, if he decides to take an active part in defending legal proceedings an arbitrator risks not only incurring his own legal expenses but also being ordered to pay the costs of the applicant should his intervention fail.

3.11.5 Fifth, where there is a challenge to an arbitrator's fees, it should be regarded as something of a last resort for an arbitrator to contest legal proceedings. Before doing so, he or she should exhaust every available opportunity for negotiating a reasonable settlement of the claim or agreeing to mediation over the matter. If the arbitrator does not settle the matter and the challenge succeeds, there is a risk of an adverse order as to costs being made and this is so even if the arbitrator has not taken an active part in the proceedings or made representations by writing a letter to the Court.

4. Cases where notice of the application must be given to the arbitrator but

where the arbitrator need not be made a defendant

4.1 The following are typical examples:

(1) an application to challenge an award for lack of substantive jurisdiction (Section 67(1));

(2) an application to challenge an award on the ground of serious irregularity (Section 68(1));

(3) an appeal to the Court on a question of law arising out of an award (Section 69(1)); and

(4) an application for an order for the taking or preservation of evidence or for preserving assets (Section 44(4)).

4.2 In all such cases the arbitrator must be sent a copy of the arbitration claim form and any written evidence in support. The documents should however be sent "for information" only and the arbitrator should not be named as a defendant to the proceedings. As before, the arbitrator will be able to ascertain from the claim form whether or not he has been cited as a defendant.

4.3 An arbitrator who has been sent a copy of an arbitration claim form has the right either

(a) to apply to be made a defendant; or

(b) to make representations to the court by filing evidence or writing to the court (See paragraphs 4.1 and 4.3 of the Practice Direction – to Part 62).

4.4 It is thought that only in very exceptional circumstances should an arbitrator apply to be made a defendant to an arbitration application. Normally the arbitrator should follow one of the following two courses:

(1) do nothing, ie. stand back and allow the application to take its course; or

(2) make representations to the Court without applying to be made a defendant.

4.5 An arbitrator may be content to leave it to the other party to the application to defend and support the award. In that event he will follow course (1) and take no action.

4.6 The arbitrator may however feel, on reading the application and the evidence in support, that the claimant is proceeding on a false basis or has failed to present a full and complete picture to the Court. For example, the applicant may be seeking to say that there has been a procedural irregularity in that the arbitrator did not give him a reasonable opportunity of putting his case contrary to Section 33(1), whereas the arbitrator may know of facts which show this allegation to be false. In such circumstances the arbitrator may

properly decide to make representations to the Court so as to ensure that the Court has before it all the facts relevant to the decision it has to take.

4.7 Should the arbitrator decide to make representations it is important that he should do this impartially and with complete accuracy so as not to compromise his independence.

In most cases it will be sufficient for the arbitrator to write a letter to the Court setting out any facts which he considers should be brought to the Court's attention. In rare cases it may be proper for him to file a statement with an appropriate declaration of truth. This should not involve either applying to be made a defendant or taking an active part in resisting the application.

4.8 An arbitrator should bear in mind that if he merely makes informal representations to the Court he is not likely to be at risk as to costs but that, if he is made a defendant and as a result the other parties incur extra costs, there is a risk of an order for costs being made against him if the application should succeed.

4.9 Finally, by making short informal representations where necessary and doing this impartially and with complete accuracy, an arbitrator is normally better able to maintain his independence and thus his capacity to continue to act in the case than if he descends into the arena by applying to be made a defendant to the Court proceedings or argues the case more fully.

5. Some General Comments on When and How to Respond

5.1 As indicated above, a wise arbitrator will exercise some caution before deciding to respond to criticisms of his conduct of the arbitration made by a party in an arbitration application to the Court. It is an occupational hazard of acting as arbitrator that, on occasion, the dissatisfied party will apply to the Court to reverse an award or order which he has made and, in doing so, will criticise his decision or order, often unjustly or in exaggerated terms. It can usually be left to the opposing party to correct any errors or to refer to matters which tend to support the award or order which has been made. In most cases the relevant facts will appear from the documents available to the Court and from the parties' submissions. Provided that the arbitrator is satisfied that all the available material is before the Court, he should normally stand back and resist the temptation to intervene.

5.2 There may however be the odd occasion where the relevant material is unlikely to come to the attention of the Court unless the arbitrator responds. In a few cases the

arbitrator may see the need to intervene to protect his reputation where it might be damaged by inaccurate statements made by one or both parties to the Court. On other occasions, however rare, the arbitrator may find it necessary to intervene to fulfil his duty to the parties or to the arbitral process so as to ensure that the Court is not misinformed, that any errors or inaccuracies in the parties' submissions are corrected or to put matters in a proper perspective. The cardinal rule is to respond only where this is absolutely necessary, do so objectively and confine any response to statements which can be verified from the contemporary documents.

5.3 The Civil Procedure Rules provide little guidance as to the form in which representations or evidence from arbitrators should be made. In cases where the arbitrator need not be made a defendant, the Rules permit the arbitrator to make representations by filing evidence or writing to the Court. It is not however clear that the practice of writing to the Court is suited to all situations. The Rules normally require that any party who wishes to tender evidence to the Court should provide a witness statement and be prepared to be orally examined and cross-examined on it. Some latitude is likely to be extended to arbitrators but the extent of this cannot be predicted with any confidence.

5.4 The situation may be different according to whether the relevant arbitration application is one where the arbitrator must be made a defendant to the proceedings (see paragraph 3 above). In those cases it could be difficult to argue that an arbitrator who has been made a defendant and who wishes to provide evidence or make representations should not have to do so by supplying a witness statement which can be considered with the other evidence tendered to the Court.

5.5 Should the arbitrator write informally to the Court and should his version of events be challenged, then the Court may take the view that, so far as the relevant facts are concerned, it cannot act on material which has not been presented in the form provided by the Rules.

5.6 In other cases where there is no need to join the arbitrator as defendant (see paragraph 4 above), the documents will have been sent to the arbitrator "for information" and he is not bound by the Rules applying to the parties to the litigation. Here the best course is to confine any response to matters which can be made out by reference only to the contemporary documents. If this is done, the arbitrator should write a letter setting out the facts by reference to the documents and attaching copies of them. The letter, if written to

the Court, should of course be copied to both parties. Alternatively it may be addressed to the parties with a request that a copy be placed before the Court. Provided that the material does not substantially extend beyond what can be verified from the attached documents or from other documentation before the Court, it is unlikely that the arbitrator would be required to provide his comments in the form of a witness statement or to appear to give evidence in person.