



Practice Guideline 3: Guidelines for Arbitrators as to how to formulate their terms of remuneration

1. Introduction

1.1 The remuneration of arbitrators depends in each case on the law governing the arbitration, the agreed arbitration rules (if any) and the ethical/professional rules which govern the arbitrator(s) (if any). Unless the arbitrators' remuneration is to be determined in accordance with the applicable institutional rules, the basis of remuneration should be agreed between the parties and the arbitrator(s). If no agreement is reached arbitrators may have to rely upon their entitlement to reasonable remuneration, for instance, under section 28 of the English Arbitration Act 1996, section 37(1) of the Swedish Lag om Skiljemän (Arbitration Act) and section 78 of the Hong Kong Arbitration Ordinance 2010 or the ordinary law.

1.2 Section 37(1) of the Swedish Act expressly provides that an arbitrator has a right to reasonable remuneration in the absence of any agreement with the parties. Under section 39(2), "an agreement regarding compensation to the arbitrators that is not entered into with the parties jointly is void." The UNCITRAL Model Law and other legislation surveyed here are silent on this subject.

1.3 It is essential that arbitrators should agree the basis of their remuneration and expenses before appointment or, at the latest, at the beginning of the arbitration procedure. Whenever possible, the sole arbitrator or the tribunal should deal with all issues of arbitrators' remuneration and expenses openly and in writing.

2. Appointments by Parties

2.1 Appointment of a Sole Arbitrator

2.1.1 It is desirable that the arbitrator's terms of appointment are agreed with the parties before he accepts appointment. However, there is nothing preventing an arbitrator from

accepting the appointment in principle, subject to clarification at a preliminary meeting. The agreed terms should be reduced to writing and signed by the appointing parties and the arbitrator(s). Any later amendments should also be reduced to writing and signed.

2.1.2 All parties are jointly and severally liable to pay the reasonable fees and expenses of the arbitrator, as are appropriate in the circumstances: for an express provision on this see section 78 of the Hong Kong Arbitration Ordinance.

2.2 Appointment of a Multi-Arbitrator Tribunal

2.2.1 In some instances, particularly in international arbitrations, the parties will agree to the constitution of a three person arbitral tribunal, unless the amount in dispute is small. In these instances, it is common for each of the parties to nominate or appoint an individual arbitrator and for the two party-appointed arbitrators to appoint the chairman or the umpire of the tribunal. (The parties may also agree to three individual arbitrators.) It is considered advisable for the arbitrator appointed by each party to advise the other party of his appointment. It is appropriate for the party-appointed arbitrators to agree their terms of appointment solely with the party that appointed them, in accordance with the same principles highlighted above. To the extent that there is a contractual fee agreement between an arbitrator and a single party, the latter is contractually bound to pay the arbitrator's full remuneration. Each party-appointed arbitrator should ensure that the terms of his appointment are disclosed to the other party concerned and the other arbitrators. The two party-appointed arbitrators will then appoint the chairman or the umpire, who will agree terms of appointment with both parties.

2.2.2 In a multi-arbitrator tribunal, it is not unusual for the arbitrators to charge different rates, although they customarily charge on the same basis (hourly, fixed fee, and the like).

2.3 Terms to be covered

2.3.1 Irrespective of whether the tribunal is composed of a sole arbitrator or whether it is a multi-arbitrator tribunal, the arbitrators' terms of remuneration should cover the following:

Fees

Cancellation charges

Disbursements

Value Added Tax

Interim payments

Security for fees and disbursement Arrangements in case of settlement

Period for payment and interest on delayed payments

Periodic adjustment of rates

Interest

Costs of collection (in the USA)

2.4 Prohibited compensation terms

2.4.1 An arbitrator may not make a fee agreement which depends on the outcome of the arbitration. For instance, a party appointed arbitrator may not agree to an enhanced fee if the party appointing the arbitrator prevails.

2.5 Factors to be considered in setting fees

2.5.1 Fees may be determined in a number of ways, such as a fixed fee, a fee based upon the amount in dispute or an hourly fee. In setting a fee, the arbitrator should consider:

(1) The time and labour required. Although hours claimed or spent on an arbitration should not be the sole basis for determining a fee, they are a necessary ingredient to be considered.

(2) The novelty and difficulty of the questions presented. Arbitrations of first impression generally require more time and effort on the arbitrator's part. Although this greater expenditure of time in research and preparation is an investment by an arbitrator in obtaining knowledge which can be used in similar later cases, he should not be penalized for undertaking an arbitration case which may "make new law." Instead, he should be appropriately compensated for accepting the challenge.

(3) The skill requisite to perform the arbitration properly.

(4) The preclusion of other employment by the arbitrator due to acceptance of the arbitration.

(5) The customary fee for similar work in the community should be considered.

(6) Time limitations imposed by the arbitration or the circumstances. Priority work that delays the arbitrator's other work is entitled to some premium. An arbitrator who fails to move a case along should generally charge less than an arbitrator who ensures a case moves appropriately. (7) The amount involved.

(7) The experience, reputation, and ability of the arbitrator.

(8) The "undesirability" of the arbitration (if any).

3. Appointments by Institutions

3.1 Some arbitral institutions, such as the ICC, themselves fix the remuneration of arbitrators appointed by them. In that case, of course, there is no need for the arbitrators so appointed to take any action themselves. However, other institutions may leave it to the arbitrators so appointed to fix their terms of engagement with the parties. In other arbitral institutions, such as the International Centre for Dispute Resolution, compensation is generally disclosed as part of the biographical material of each arbitrator.

3.2 Generally, the appointment becomes effective when the arbitrator signifies his acceptance to the appointing institution or the institution gives notice of appointment. In such cases there may be no opportunity for the arbitrators to agree their terms with the parties.

4. Matters to be Covered

4.1 Fees

4.1.1 It may sometimes be possible to fix a lump sum fee on very simple disputes where the time required may be estimated with reasonable accuracy. Normally, however, provision may be made for payment at an hourly rate for time spent on the matter generally and/or a daily rate for e.g. hearings or all-day meetings. Travelling time may be charged at a proportion of the hourly rate. Where the matter requires hearings and/or meetings to be attended at a distance from the arbitrator's home and office, involving overnight stays,

provision may be made for adjustment of the daily rate to allow for this. If hearings or meetings are to be held abroad involving days necessarily being spent at that location during which no actual work may be done on the arbitration, arbitrators may think it appropriate to fix a reduced rate for such unproductive days. Where the location to be attended is a considerable distance away involving long travel by air it may also be appropriate to make specific allowance for rest days before and after the event attended and for weekends.

4.1.2 Some arbitrators stipulate a lump sum to be paid on appointment, either by the claimant or by the parties equally, to cover the opening of the file, time spent on the acceptance of the appointment and possibly, say, the preliminary meeting and first order for directions. It is suggested that this should normally be non-returnable but to be credited against fees actually earned if those fees equal or exceed the lump sum.

4.2 Cancellation charges

4.2.1 While not entirely certain it is probable that arbitrators would only be entitled, as a general matter of law, to payment for time actually spent on the arbitration in the absence of agreement to the contrary. If arbitrators wish to protect themselves against the consequences of hearings or meetings being cancelled at relatively short notice they should make provision for this in their terms.

4.2.2 This may be done in a number of ways. Some arbitrators stipulate a non-returnable booking fee at a proportion of the full daily rate for the time set aside to be paid at the time the hearing is firmly fixed. Others stipulate a sliding scale of percentages of the total fee for the hearing to be paid according to the period of notice of cancellation.

4.3 Disbursements

It is advisable to make specific provision for reimbursement of out-of-pocket expenses at net cost.

4.4 Value Added Tax or similar taxes

4.4.1 Arbitrators must deal appropriately with VAT, where applicable. They should therefore make specific provision for the addition of VAT as appropriate to their fees and disbursements. With respect to institutional appointments, arbitrators should ensure that

VAT is properly dealt with. Where appropriate, the arbitrators may wish to seek security to cover the VAT payable on their fees.

4.5 Interim payments

4.5.1 In the absence of provision to the contrary Arbitrators generally become entitled to payment upon making an award or when the matter is otherwise concluded. It may be advisable to provide for interim payments of fees and disbursements. The terms should stipulate when interim payments are to be made and which party shall pay these interim amounts.

4.6 Security for fees and expenses

4.6.1 It is advisable that arbitrators should make specific provision for security for their own fees in their terms of appointment so that this is dealt with separately from any question of security for the parties' costs. Arbitrators may wish to secure their fees and expenses after taking into account the financial credibility or otherwise of the parties. Sometimes, the specific procedure is detailed in the applicable arbitration rules. It may also be unfair, in the circumstances of the arbitration, for the claimant only to be required to provide such security and the arbitrators may wish to give themselves the discretion to decide in what proportions both or all parties should provide the security.

4.6.2 The most appropriate form of security may be a cash sum to be lodged with a stakeholder, such as the arbitrators' solicitor(s), or in a special deposit account at the arbitrators' bank(s), on terms that it may be drawn upon on the arbitrators' signatures alone. The Institute provides facilities for the holding of cash security. Provision should be made for dealing with any interest earned; the best course is probably to provide that it will accrue to the benefit of the party or parties providing the security.

4.6.3 Arbitrators may consider it prudent to require a cash sum by way of security to be paid when the hearing is firmly fixed, to provide a sum against which they can draw their cancellation fees in the event of settlement.

4.7 Arrangements in case of settlement or a consent

4.7.1 It is advisable to make specific provision for a time limit for payments of outstanding fees and disbursements in the event of the parties reaching a settlement of the issues, whether or not in the context of an agreed or consent award.

4.8 Period for payment and interest on delayed payments

4.8.1 It is also advisable to specify a time limit for payment of fees following a request for interim payment and to specify a rate of interest at a percentage above a specified clearing bank's base lending rate for payments made after the expiry of the time limit.

4.8.2 Despite any power to withhold an award in case of non-payment as in provisions such as section 56 of the Arbitration Act 1996 or section 77 of Hong Kong Arbitration Ordinance or the applicable arbitration rules, it may also be advisable for the arbitrators to make specific provision for this in their terms and/or in the award itself.

4.9 Periodic adjustment of rates

4.9.1 If it appears likely that the arbitration will continue for more than 12 months, provision may be made for adjustment of the rates of fees, according to a specific formula.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

30 October 2011