



Irish  
Branch

**CI Arb**

# ARBITRATION NEWS

The Newsletter of the Irish Branch of The Chartered Institute of Arbitrators

September 2006

Issue 23

## CHAIRMAN'S ADDRESS



Mr. Dermot Roughan, The Chairman of the Irish Branch of The Chartered Institute of Arbitrators

It is a shame that the superb work which was done in the past in Ireland concerning the promotion of International Arbitration with a view to attracting references to this

country has not resulted in a greater dividend for the CIARB Irish Branch.

There are a number of factors which must exist in order to achieve these references. It would appear to the author that the difficult elements to a large extent have been tackled and overcome and that a further effort should now be undertaken in order to achieve the goal of home grown tribunals. This is something that we should be aware of and there is a need to highlight and foster our resources and not to be found wanting in coming forward.

The first of these is a state of the art purpose built International Arbitration building.

This was constructed in the late 90's and if I could be personal for a moment, I believe I may have been the first person to conduct an arbitration (of the domestic variety) within its hallowed walls. There existed, at that time in the arbitration world, people of vision who didn't shirk the tough route in forwarding their dreams of providing top class facilities in the belief that the Centre would encourage and attract the best practitioners of their craft in the world.

However there was more to be done. This lay in the field of providing a suitable framework of statutory legal articles which were attuned to the International practice of arbitration. After much thought, time and effort on behalf of the Chartered Institute of Arbitrators, the 1998 Act was signed into law by Uachtarán na hÉireann. This act incorporated the UNCITRAL model form which was familiar to and utilised by

the majority of common law jurisdictions in the World, apart of course from the United Kingdom. Two very important and helpful figures in the smooth passage of this legislation through the Bill stage in the Oireachtas were David Byrne, the one time EU Commissioner and Attorney General and Roderick Murphy, now Judge Murphy. Our thanks are due to those two gentlemen and others who acted with them.

The 1998 Act was designed to give confidence to parties in dispute and ensure that they would be treated in the same way as they would expect to be treated by the law in their own countries.

In parallel with this, recent statistics show that less arbitrators awards were being overturned than was the case previously and though some were remitted it gave the arbitrator a chance to reflect over matters.

With all of the above in place, it is surprising that there is not a rush to arbitrate in Ireland. There is obviously some missing ingredient which deters parties from selecting this country. I know that there are people in our Chartered Institute who can assist in altering this imbalance and my mission is to contact as many of them as I can, in seeking guidance as to how we can progress from here. And in saying this, could I also invite anyone who recognises the missing ingredient in themselves or in others, to contact me through the Merchant's House office.

Thanking you,

Dermot Roughan  
Chairman

### Items of Interest in this Issue ...

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## Profiles

### DERMOT ROUGHAN

*BE DipArb DipIntlArb DipEIA(mgmt) FIEI  
FCI Arb MICE MConsEI Chartered Engineer.  
Chairman of the Chartered Institute of Arbitrators -  
Irish Branch.*

In 1974 Dermot Roughan co-founded the Consulting Engineering practice of Roughan and O'Donovan. The firm grew steadily, even during the years of the slump and now enjoys one of the most respected reputations in the fields of Civil, Structural and Environmental Engineering in the country. The practice is particularly renowned for its work on highway structures.

In 1998, Dermot set up the firm of Roughan ADR Services with a particular focus on construction disputes. Since then he has had many appointments acting as an Arbitrator, Conciliator, Adjudicator and Independent Nominated Engineer.

Dermot has qualified to act on panels such as Engineers

Ireland Conciliation and Arbitration panels, Chartered Institute of Arbitrators, Law Society, Construction Industry Federation and the U.K. Sports Dispute Resolution panels.

He is also a member of the Society of Construction Law and the Dispute Resolution Board Foundation of Seattle WA.

He acts as an Interviewer in Engineers Ireland with regard to accession to Chartered Membership and also as an Assessor for the Construction Manager of the Year Award on behalf of the Chartered Institute of Builders of Ireland.

Dermot has travelled widely with GOAL, the Third World Relief Agency and found himself carrying out engineering appraisals in Calcutta, Sudan and Bosnia-Herzegovina. The latter country had just suffered the strife of war and it was chilling to witness the result of long span highway bridge decks, off their bearings and strewn down valleys from the earlier bombing. Sarajevo and Mostar were on the schedule of sites visited at that time.

### JOE BEHAN

*B.E., CEng, F.I.E.I., FCI Arb, Dip. Legal Studies,  
Chartered Engineer*

Joe is the Vice-Chairman of the Chartered Institute of Arbitrators (Irish Branch). He is an experienced Arbitrator and Conciliator and sits on the Arbitration panels of both the Law Society and Construction Industry Federation. Joe is a member of the panel of Mediators of the Chartered Institute of Arbitrators. He acts for the Private Residential Tenancy Board as a mediator and adjudicator. He is a member of the panel of Mediators for Dublin City Council, Mediators Institute Ireland and the Construction Industry Federation.

Joe is an Accredited Mediator and a trainer in Mediation,

Arbitration, Conflict and Dispute Management Training. He facilitates Mediator Training in U.C.D.

Joe is a Partner in Medius Commercial Mediators and more recently has set up Behan Conflict Consultants. He mediates Commercial Mediations, Family Mediations, Personal Injuries and Landlord and Tenant Actions.

He chairs the Mediation and Courses Sub-Committees for the Chartered Institute of Arbitrators (Irish Branch) and previously set up and chaired the Commercial sector in Mediators Institute Ireland.

In addition Joe serves on the council of the Irish Commercial Mediation Association. He has over thirty years experience in Commercial life as a Consulting Engineer and expert witness.

### DUDLEY POTTER

Dudley Potter is a Graduate of Trinity College, Dublin. He was admitted as a Solicitor in 1968 and has been in private practice since then. He practices mainly in the Arbitration, Litigation and Employment areas.

He became a member of the Chartered Institute of Arbitrators in 1989 and did the Diploma in Arbitration Law in D.I.T. in 1991.

He is a member of the Law Society Panel of Arbitrators. Dudley was elected to the Committee of the Branch in 2004 and was elected Honorary Secretary following the A.G.M. of the Branch on the 24<sup>th</sup> of April last.

### CIARAN FAHY

Ciaran Fahy is a Chartered Engineer, a Fellow of Engineers Ireland, a Fellow of the Chartered Institute of Arbitrators, a Registered Consulting Engineer and an Accredited Mediator. He is currently the Treasurer of the Irish Branch.

Ciaran Fahy qualified as a Civil Engineer in UCD in 1971 and gained initial experience with Local Authorities, Contractors and Consultants in Ireland together with overseas work experience in France and Belgium.

He set up in private practice in 1985 and in 1990 founded

Fahy Fitzpatrick, a Civil / Structural Engineering Practice with Michael Fitzpatrick. Since the mid 1990s he has specialised in Expert Witness work and has given evidence in a very broad spectrum of cases in both the Circuit Court and the High Court.

Since 2000 has been involved in Dispute Resolution work and has dealt with several References as Arbitrator. He is a panel member with Engineers Ireland, the Chartered Institute of Arbitrators, the Law Society and the Construction Industry Federation. He is Vice Chairman of the Board of Ethics in Engineers Ireland and is also a member of the Board of Examiners which controls access to the IEI titles in particular that of Chartered Engineer.

## EVENTS

### Breakfast Briefing “Recent Developments in Irish Construction Law”



Breakfast Briefing on the “Recent Developments in Irish Construction Law” was held on 13 June 2006 in association with the Institution of Civil Engineering Surveyors (ICES) and Matheson Ormsby Prentice Solicitors. It was a breakfast seminar for CI Arb, ICES members and the Irish Construction Industry. Presentations were given by Ms. Rhona Henry, Mr. Damien Keogh and Mr. Richard Stowe, solicitors from Matheson Ormsby Prentice.



Mr. Damien Keogh, partner in the Projects and Construction Group of Matheson Ormsby Prentice and Head of Contentious Construction within the group, gave a presentation on Challenging Awards of Public Procurement Contracts. He detailed some of the recent case law in respect of challenges to the award of contracts under the public procurement process.



Ms Rhona Henry, Senior Associate in the Projects and Construction Group at Matheson Ormsby Prentice, outlined the provisions of the proposed legislation on the New Strategic Infrastructure Bill.



Mr Richard Stowe, a partner in the Projects and Construction Group of Matheson Ormsby Prentice and head of Non-Contentious Construction within the group, made a presentation on New GCCC Forms of Contract for Public Works. He reviewed the changes made in the latest issue of documents and outlined some of the issues concerning the industry from a legal perspective.



Ormsby Prentice and head of Contentious Construction within the group; Richard Stowe, a partner in the Projects and Construction Group of Matheson Ormsby Prentice and head of Non-Contentious Construction within the group; Ms Rhona Henry, Senior Associate in the Projects and Construction Group at Matheson Ormsby Prentice.

## MEMBERSHIP

A word of welcome to the following who were recently admitted to the Irish Branch

Mr. P. Brady (Dublin)  
Mr. P. Rochford (Dublin)  
Mr. P. Corrigan (Dublin)  
Mr. M. T. Kane (Dublin)  
Mr. S. J. M. Gunne (Co. Louth)

Mr. S. J. Cullen (Dublin)  
Mr. D. P. Binchy (Co. Tipperary)  
Mr. G.A. Martin (Co. Louth)  
Mr. D. F. Tonge (Kildare)  
Mr. A. P. Hehir (Co. Clare)

Mr. J. D. Brady (Antrim)  
Ms. S. Dalton Duggleby (Co. Cork)  
Mr. J. M. Kahn (Cork)  
Mr. G. A. Bogle (Tyrone)  
Mr. B. Horkan (Dublin)

## EVENTS

### C.P.D. in Mediator Training

A CPD Seminar in Mediator Training was held by the Chairman of the Mediation Sub-Committee of the Irish Branch, Joe Behan, at Mount Clare Hotel, Dublin, on the 7th—8th July, 2006. There was a total of 19 participants from a variety of backgrounds, both members and non-members. The event focused primarily on role plays which were very challenging but enjoyed by all. The seminar covered such topics as co-mediation and assistants, advertising and P.I., panels, peer groups, and role plays to explore and analyse difficult situations in mediation, DVD mediation



*Joe Behan, Chairman of the Mediation Sub-Committee of the Branch (fourth from the left) with some participants of the C.P.D. in Mediator Seminar*



*Training faculty: Julie McAuliffe, Joe Behan and Ruth Behan*

footage of a leading mediator in session and general discussion forum.

Joe Behan was the facilitator. He was assisted by Julie McAuliffe, Ruth Behan and Jim Bridgeman and the Chairman Dermot Roughan dropped in to view the proceedings.

Joe Behan expects to hold a number of these CPD mediator training events over the next year. He has received very positive feedback from the participants from this first ever training event for mediators held by the Irish Branch.

## Diary

Event	Details
<b>Introduction to Mediation Entry Course</b> for Health Care Professionals. Successful candidates will qualify for Associate membership of the Chartered Institute of Arbitrators (ACI Arb)	<b>15<sup>th</sup>-16<sup>th</sup> September, 2006</b> , The Grand Hotel, Malahide. To book places please contact the Branch office.
<b>Young Members' Group Third International Seminar and Dinner.</b> "When is Final really Final?"	<b>15<sup>th</sup> September, 2006</b> , 3.00 pm, The Signet Library, Royal Mile, Edinburgh. Fee: GBP 140 per delegate. For further details contact: Shona Frame tel. +44 (0) 141 332 9988, e-mail: shona.frame@macroberts.com.
<b>Fast Track to Fellowship Assessment</b>	<b>13<sup>th</sup>—14<sup>th</sup> October, 2006</b> , The Grand Hotel, Malahide. To book places please contact the Branch office.
<b>Lecture &amp; Wine Reception.</b> "Mediation. Where is it now?" Speaker—Mr. David Cornes	<b>19<sup>th</sup> October, 2006</b> , 7.00 pm, Royal Irish Automobile Club (RIAC), 34 Dawson Street, Dublin 2
<b>Members' Conference</b>	<b>18<sup>th</sup>—19<sup>th</sup> November, 2006</b> , Selsdon Park Hotel, Surrey, UK. For further information please contact smclaughlin@arbitrators.org.
<b>Annual Dinner</b>	<b>24<sup>th</sup> November, 2006.</b> Further details will follow.

### New Sections of *Arbitration News* Introduced

*Arbitration News* introduces two new sections of the newsletter: "Letters to the Editor" and "Past Chairman's Corner". *A.N.* welcomes everybody to express their views on the topics of concern. The first article in the section *Past Chairman's Corner* was kindly contributed by Mr. David Keane, a distinguished Past Chairman of the Chartered Institute of Arbitrators, Irish Branch.

## Past Chairman's Corner

### AND NOTHING BUT THE TRUTH *by David Keane, Arbitrator, Architect & Building Dispute Consultant*



"What you take for lying in an Irishman is only his attempt to put an herbaceous border on stark reality". Oliver St John Gogarty. Section 19(1) of the Arbitration Act 1954 says that "Unless a contrary intention is expressed therein every arbitration agreement shall, where such a provision is applica-

ble to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation,.....".

Section 7 of the same Act says that "Any person who, upon any examination upon oath or affirmation before an arbitrator or umpire or in any affidavit in proceedings before an arbitrator or umpire, wilfully and corruptly swears or affirms anything which is false, being convicted thereof, shall be liable to the penalties for wilful and corrupt perjury".

I first sat as an arbitrator 30 years ago and I have spent the intervening years listening to a wide variety of people cheerfully perjuring themselves in the hope of a better outcome for their cause. Having grown rather weary of this behaviour I recently suggested to the warring factions that I dispense with the necessity of taking oaths. The reaction was as if I had made an indecent suggestion. How dare I attempt to deprive people of the opportunity to perjure themselves. Oddly enough I think that the seriousness and solemnity of the oath-taking procedure can sometimes of itself make a witness feel that he or she now has a responsibility to make a better case for their cause and to come down on the side of the better evidence whether it is true or not.

Lying in this country has now become an industry. The number of witnesses at the innumerable tribunals who

have been found to be telling lies is very large. It has been suggested that a suitable memorial to these tribunals would be to build a Garden of Forgetfulness. And yet how many of these witnesses have been charged with perjury? Answer: none. I am not suggesting that we as a nation are better liars than anyone else. After all, Winston Churchill said of his adversary Stanley Baldwin that he "occasionally stumbled over the truth, but hastily picked himself up and hurried on as if nothing had happened".

Practising lawyers will tell you that perjury is a very difficult offence to prove. That view would seem to be countered by the regular, and successful, prosecutions that occur in the neighbouring jurisdiction. But surely there is no point in having an offence on the statute book if it is never, or very rarely, invoked. The near certainty that perjury will not be punished must act as an encouragement to those who engage in the activity. I am old fashioned enough to believe that the only real deterrent to any criminal activity is the near certainty that you will be caught.

But if perjury will not be punished in this world, will it be punished in the next? It has been suggested that the decline of religious belief might be a factor in the extent of the offence of perjury. But this cannot be so. It is over half a millennium since Niccolo Machiavelli wrote a handbook on , amongst other things, how to deceive and since Shakespeare said "O, what a goodly outside falsehood hath".

So, finally, what should an arbitrator do when faced with what is clearly false evidence? My experience is that it is very often, if not always, obvious when the evidence cannot be relied upon. This is taken into account when the award is being considered and, thankfully, reasons do not have to be given.

*David Keane, Past Chairman*

## Members of the Committee and Chairmen of the Sub-Committees for the year 2006/2007

### COMMITTEE:

Dermot Roughan, *Chairman*  
Joe Behan, *Vice-Chairman*  
Ciaran Fahy, *Hon. Treasurer*  
Dudley Potter, *Hon. Secretary*  
Johnnie Mc Coy, *Public Relations Officer*  
James Macken SC  
Rowena Mulcahy  
Bernard Gogarty  
James Bridgeman BL  
Brian Anderson  
Emily McCormack  
Mary O'Rourke  
John FFF O'Brien

### CHAIRMEN OF SUB-COMMITTEES:

Emily McCormack, *Chairman, Young Members' Group Sub-Committee*  
Ciaran Fahy, *Chairman, Construction Sub-Committee*  
Joe Behan, *Chairman, Courses Sub-Committee*  
Joe Behan, *Chairman, Mediation Sub-Committee*  
Johnnie McCoy, *Chairman, Public Relations, Newsletter Sub-Committee*  
Brian Anderson, *Chairman, Northern Ire-*

*land Chapter Sub-Committee*  
Rowena Mulcahy, *Chairman, Education, Information, Library Sub-Committee*  
James Macken, *Chairman, Schemes Sub-Committee*  
Dudley Potter, *Chairman, Events Sub-Committee*  
Dudley Potter, *Chairman, Office Administration Sub-Committee*  
Mary O'Rourke, *Chairman, Safety Statement Sub-Committee*

# SOME OBSERVATIONS ON THE ARBITRATOR'S DISCRETION AS TO COSTS

by G. Brian Hutchinson BCL LLM DAL FCIArb BL, Vice Dean and Director of Diploma in Arbitration



## I. How the Courts deal with liability for Costs

### *The ordinary rule*

Remember when Albert Reynolds sued the Sunday Times for calling him a "gombeen man"? He almost lost his claim for damages for defamation at trial – the Jury awarded him nil - but the trial judge substituted an award of 1p. Reynolds was, presumably, relieved. Why? Because he had won his case and was now entitled to recover his legal costs from the other side. All of his (reasonable) costs. Had he lost he would have been paying his own *and* the other side's costs.

That is the ordinary or normal rule as to costs in the courts: "costs follow the event", winner gets all – loser pays. Order 99 (4) of the *Rules of the Superior Courts, 1986* specifically requires it:

"(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

Order 66 of the *Circuit Court Rules* and Order 51 of the *District Court Rules* are not so specific, but the general approach in those courts is the same.

Why do the courts make the loser pay? Sophisticated justifications for the rule are comparatively difficult to find, but the general thrust of the argument in favour of the rule seems to be that it operates as a deterrent and that it encourages compromise or settlement and thus promotes optimum efficiency in the system. It may be of interest to note that not all jurisdictions around the world follow our rule as to costs; indeed much interesting research and debate in the

UK and US questions the real effect of the rule as to costs on the substantive content of the law. Settlement has been claimed to be normatively inferior to litigation; managerial judging has been alleged to undermine inherent values of the judicial system; and even promotion of ADR has been questioned because of its possible adverse effects on deterrence. Still, most people will intuitively agree that it is only fair that an "innocent" party or victim should not be made to bear the cost of vindicating themselves before the courts. The reality may be that there are few completely innocent parties however!

### *Pyrrhic victories and abuse of process*

Is it fair to order the loser to pay where the victory is insubstantial or derisory? For example, in *Reynold's Case*, wasn't winning 1p tantamount to losing? Well, perhaps one could argue that it costs more or less the same to establish a claim for 1p as it does to establish a claim for £1,000,000 - so if one goes into court looking for €1m and ends up with €100 despite one's best and honest efforts, why shouldn't one get one's costs?

On the other hand, in a case where most of the time and expense was spent unsuccessfully trying to establish claims or defences, or to prove injury that could not be proved, one might think differently. The Courts retain discretion to depart from the ordinary rule. Even then our Courts are quite wary about depriving a successful party of some or all of their costs, and they will not normally do so unless they can show that the successful party had acted *unreasonably* to some degree, and only then when they can point to a *justifiable* system for apportioning the liability for costs. Thus, in *Sheila Flannery v. Margo Forbes Dean ISPCA & Meath Branch of ISPCA* where the plaintiff successfully established that her

horses had wrongfully been taken from her without legal title but had advanced a claim for damages which Costello P described as "pure fantasy", and had tendered wholly unreliable evidence, the High Court made "no order as to costs" – meaning each side had to bear its own costs. And in *Molloy v. Shell UK Ltd* where the plaintiff "grossly and deliberately exaggerated" his claim for loss of earnings (he swore he had lost in excess of £300,000 but was awarded less than £20,000) which Lord Justice Laws described as "nothing short of a cynical and dishonest abuse of the court's process," the Lord Justice said:

"For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the defendant's costs."

And in *Siswan Shelly-Morris v Bus Atha Cliath* Denham J warned in the Supreme Court that

"It is important that the minority of plaintiffs who are prepared to engage in abuses such as those described be made aware that, in doing so, they risk losing all their costs, may be made to pay the other side's costs and raise the possibility of more drastic action."

### *Lodgements and Calderbank Offers*

Where there has been a lodgement into court *which hasn't been beaten* by the successful party then the rule shifts - the successful claimants, though they have won,

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## /Cont./ “SOME OBSERVATIONS ON THE ARBITRATOR’S DISCRETION AS TO COSTS”

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only get their costs up to the date of the lodgement or offer. Order 22 rule 6 of the *Rules of the Superior Courts, 1986* provides:

“If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in but proceeds with the action in respect of such claim or cause of action, or any part thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:

(1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.

(2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.

(3) The defendant shall be entitled to the costs of the action from the time such payment into Court was made other than such issues or issue as aforesaid.”

The plaintiff becomes liable for their own and the other side’s costs because the litigation was a waste of time and money from the date the offer was rejected – everyone would have been better off had they just accepted in the first place.

The lodgement procedure under Order 22 is only available in actions for debt or damages at common law, but the English and Irish Courts have upheld the alternative practice of the

“Calderbank letter” where an offer made “without prejudice save as to costs” was held to have the equivalent effect on liability for costs as a lodgement into court. It is important to note, however, that the Calderbank offer must be made in good time and must be capable of being understood: in *Murnaghan v. Markland Holdings Ltd. & Anor* Laffoy J refused to take a Calderbank offer into account because it came too late in the proceedings and, moreover, was drafted so as to leave unclear “the totality of the outcome flowing from either acceptance or non-acceptance - which must be a pre-requisite to penalising the offeree for non-acceptance.” The problem with the offer in question was that it did not state with clarity whether costs up to the date of the offer were included in the amount tendered.

### ***Successful claim and successful counterclaim***

O Floinn and Gannon succinctly state the position in the Irish Courts thus:

“where each party succeeds in part, the application of the general rule as to costs yields rather more complicated results. Each party may be directed to bear their own costs... alternatively, the Court may fix the costs payable in respect of each party ... or reduce the costs *pro rata* by that amount by which the damages claimed by each party have been reduced.”

In simple terms, the courts deal with liability for costs where both sides have been partially successful in a variety of ways – there is no one approach or rule.

## **II. How Arbitrators deal with liability for costs.**

### ***First things first***

The Rules of Court *do not* apply to

arbitrations, so arbitrators are *not* obliged to apply the provisions of Order 99 with respect to costs. Moreover, the lodgement procedure (under Order 22) is not available in arbitrations; but a Calderbank letter or “sealed offer” can be used to similar effect.

Instead, s 29 of the Arbitration Act, 1954 gives the arbitrator discretion as to costs:

“Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator... who may direct to and by whom and in what manner those costs or any part thereof shall be paid...”

The section makes it plain that the parties could agree to something different in the arbitration agreement – eg. that one side shall bear all the costs; or that the parties shall share the costs equally, but care must be taken not to offend against s30 of the Act which prohibits any agreement *prior* to a dispute arising that any party shall in any event bear their own costs.

### ***The Arbitrator’s discretion***

It is firmly established that the arbitrator’s discretion under s29 is not a discretion *whether* to deal with liability for costs: the arbitrator *must* deal with costs, but has a discretion as to *how* to award them.

It is further established that the arbitrator must act “*judicially*” when exercising his or her discretion as to costs. This proposition originates in some fairly arcane case law, but in the modern context it amounts to a requirement that the arbitrator must not act *arbitrarily* or *capriciously* in exercising the discretion as to costs – in other words, the arbitrator must

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base his or her decision on factors connected with the case, and must allow the parties an opportunity to address him or her on the issue of costs.

The grounds relied upon must be ones that the court can see are “proper” or reasonable. In the English case of *Scherer v. Counting Instruments Ltd.* Buckley LJ said:

"The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further."

It may be going too far to suggest that this amounts to a requirement that arbitrators must apply the same principles as the courts to the issue of costs, but that is a convenient approach and is useful as a general rule of thumb. Certainly, it is one that suits the courts – and probably most lawyers – because it is most easily understood and applied by them. The reality, however, is that the courts only enjoy a limited power to interfere with the award of an arbitrator as to costs – the arbitrator would have to be shown to have misconducted himself or the proceedings or otherwise have placed an error of law on the face of the award. An award of costs which complies with the ordinary rules of the courts as to costs is unlikely ever to attract such scrutiny; thereafter, an award that complies with the rules of fair procedure and natural justice is likely to withstand such scrutiny – even if a court would have decided differently on costs in the circumstances.

It is important to remember that arbitrators (like judges) *can* depart from the ordinary rule as to costs if they see fit. Thus, for example, in

*Vogelaar v. Callaghan* Keane CJ observed that an arbitrator could penalise a successful party on costs because of their “contribution to a protracted hearing.” Indeed, the power to penalise an un-cooperative participant on costs is extremely important to arbitrators, more than it is to judges who have a range of other remedies (eg. strike out, summary judgment, contempt etc.) at their disposal to ensure compliance with their orders and directions. The order as to costs is the arbitrator’s only stick, so to speak.

If departing from the ordinary rule as to costs it is advisable to *give reasons* for the departure in the award, or else any court called to review the award will not be able to tell whether they have so acted with good reason. Failure to provide such reasons will almost certainly lead to the award being remitted to the arbitrator, or even set-aside.

### **Offers**

Though the lodgement mechanism is not available to arbitrations, the Calderbank offer is widely used. It is possibly preferable to the old “sealed offer” practice whereby the rejected offer of settlement was placed in a sealed envelope and presented to the arbitrator to be opened after the decision on the substance of the dispute but before the decision as to costs.

### **Successful claim and counterclaim**

As is the case in the courts, there are differing approaches to dealing with costs where the claimant and respondent in an arbitration have each been successful to some degree. Costs can be apportioned on a time or issue basis, in percentages if the arbitrator chooses, but it will be necessary for the arbitrator to point to some justifiable basis for the apportionment – it will hardly be self evident to the court from the

face of the award unless a reason is included in the award. An attractive approach is to award the claimant the costs of their claim and the respondent their counterclaim.

### **Conclusions**

No arbitrator can afford not to be familiar with the general rules as to costs as applied by the courts; and, if in doubt at any stage, should request submissions from the parties on how they should proceed. Yet arbitrators are not hide-bound by those principles, and they can depart from them for good and stated reasons connected with the case. It is submitted that arbitrators should not be afraid to threaten departure from the ordinary rule if either party is uncooperative in the arbitration, nor afraid to depart from the rule if necessary. There is a myth, however, that arbitrators can depart from the ordinary rules for *any reason* as long as the reason is stated in the award – but that is simply *not so*. The reason must be a valid reason connected with the case. In *Lewis v. Haverfordwest Rural District Council* for example, the arbitrator awarded that each party should bear its own costs, despite the fact that the claimant had succeeded in his claim. The arbitrator said:

"I had several reasons for awarding that each party should bear its own costs, and one of those was that I had no evidence that during the long time between the event and the date of the arbitration any serious effort had been made by either party to settle the question."

Lord Chief Justice Goddard wasted no time in setting the award of costs aside on the basis that it showed no good reason for departure from the settled practice that a successful claimant should get his costs.