MEMBERSHIP NUMBER: 2255

Assignment. 3

Module 2: Law and Practice of Arbitration

9/10/2020

QUESTION 1

Appeal

Section 48 of the Arbitration Act provides that except otherwise provided in the arbitration agreement the arbitrator's decision is final and binding upon the parties. There is therefore no automatic right of appeal and if the parties wish to have this right they must make specific provision for it in the arbitration agreement. If they do so, such appeal must be to another arbitrator or umpire. It cannot be to the courts.

Appeal provisions are very seldom encountered in arbitration agreements. One of the principal reasons why parties take their disputes to arbitration rather to the courts is for a quick and final decision and to a large extent the advantages of finality, speed and economy are lost where either of the parties is free to appeal against an unfavourable award.

It is submitted that the rights of the parties are already extensively protected against unsatisfactory performance by the arbitrator so that provision for an appeal would add little. If the award is incomplete, ambiguous, and obscure or if further evidence has come to light, the Act contains provision for the award to be remitted to the arbitrator. If the arbitrator is guilty of serious misconduct, either during the hearing or in making the award, the award can be set aside.

Review

The arbitrator has no power to make any corrections of his own accord to his award even where it appears to him that the error is a substantial one and the result very different from what he intended. He may only amend the award where his powers have been revived by the parties or by the court.

Section 32(1) provides that the parties may remit any matter which had been referred to arbitration to the arbitrator “for reconsideration and for the making of a further award

or a fresh award or for such other purposes that the parties may specify". Such remittal must be in writing signed by them and must be executed within six weeks after the publication of the award to them. If they do not act within six weeks, they will be stuck with an award however ineffective and unsatisfactory it may be.

This provision would operate where both parties are in agreement that the award is unsatisfactory and the grounds for their dissatisfaction would therefore seem to be non-contentious, such as failure by the arbitrator to deal with all matters referred to him (e.g. failure to make an award in respect of costs) or that he dealt with matters which in fact went beyond his terms of reference and were not the subject of the arbitration agreement, or to clarify ambiguous or uncertain wording used in the award.

QUESTION 2

Specific performance is an order requiring one of the parties to do something such as repair certain defective work. It is submitted that this is a bad award because it lacks finality. Once the contractor has done the remedial work someone will have to inspect it and satisfy himself that it has been correctly performed.

If this inspector contends that it has been unsatisfactorily performed but the party maintains that he has performed correctly another dispute arises. The courts of law are slow to order specific performance when an alternative remedy would be the award of a sum of money in damages and it is suggested that an arbitrator should follow this example. However, there are certain forms of specific performance that are easy to specify, perform and monitor, and which are unlikely to lead to further disputes, such as an order to deliver certain goods, and an order for this sort of specific performance would be an acceptable award.

Section 27 of the Arbitration Act states *that unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have power to do so*.

QUESTION 3

The document only arbitration occurs when the parties do not appear before the arbitrator and he receives the evidence not by listening but by reading. Each party submits to the arbitrator all the documents which he considers convey the facts which support his case. This is supported by a written statement summarising the facts and presenting the argument.

The advantage of such arbitration it may be appropriate in cases where the events and issues are well documented, where the issue may be the interpretation of documents and where there is unlikely to be any issue of the credibility of witnesses

In agreeing to this form of procedure the parties forego their right to call witnesses and to cross-examine each other's witnesses. It is certainly not a procedure that is suitable for every type of dispute but in certain instances where credibility is not an issue, it can be remarkably quick and inexpensive.

The hearing is the procedure in which each party in turn presents to the arbitrator his evidence of the facts in support of his case and the arguments based on these facts why the arbitrator should grant his claim or reject his opponent's. In the vast majority of instances, the hearing involves the parties and their witnesses giving oral evidence, but two other alternative types of hearing are possible: the hearing on documents only, and the "look-sniff' type of hearing.

QUESTION 4

SECTION 15(2) of Arbitration Act 42 of 1965 provides that, If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

There are two requirements which must be met before the arbitrator can proceed.

a. Firstly, he must have given due notice to the parties. This is a duty laid on him by Section 15(1) of the Arbitration Act and should be scrupulously observed.

b. The other requirement is that the defaulting party should fail to show good reason for his failure to attend. He must be given the opportunity to show good reason and this opportunity may present itself only after the event.

The arbitrator should be very cautious of availing himself of his right to proceed, and if one of the parties does not arrive at the appointed time it would be advisable that he allow him reasonable grace to make a late appearance or to send a message through, and a more prudent approach would be to give him the benefit of any doubt and to postpone the hearing for a week or two and submit fresh notices to the parties of the new date and time of the hearing. Should the party fail to attend the postponed hearing without having good reason the arbitrator would be justified in concluding that the party was attempting to frustrate the hearing and he would be entitled to proceed.

QUESTION 5

INTERROGATORIES

This is a list of questions drawn up by the party who had wished to cross-examine the witness and these questions are put by the commissioner to the witness whose replies are confirmed by affidavit. A witness whose evidence may be considered to be of importance may for good and proper reasons be unable to attend the hearing. In such instance, the arbitrator has the right in terms of Section 14(1)(a)(iv) of the Act, to appoint a commissioner to receive his evidence and take it down in writing in the form of a sworn affidavit that it is correct

The objection that may be raised to such evidence is that it cannot be tested by cross-examination. This difficulty can to some extent be overcome by putting interrogatories to the witness. This is a list of questions drawn up by the party who had wished to cross-examine the witness and these questions are put by the commissioner to the witness whose replies are confirmed by affidavit.

SEALED OFFER

Before the start of the arbitration hearing or even during it, the defendant from whom the claimant may be claiming certain payment may make, without in any way admitting his liability, an offer of settlement in terms of Rule 34. This offer is normally lesser than what is claimed, if the offer is not accepted. If, however, the offer is not accepted, the offer and its rejection are not disclosed to the arbitrator. He may, however, be given a sealed envelope containing details of the offer and its rejection with the instruction that this envelope is not to be opened until he has arrived at the award but before costs have been decided. If, on opening the envelope, the arbitrator finds that the amount of the offer is equal to or exceeds that of his award, the award of costs should go against the successful claimant, because he ought to have accepted the offer and so saved the expense of the hearing. If, however, his award exceeds the value of the offer the claimant will be entitled to costs because he was justified in rejecting the offer.

LOOK SNIFF

In certain disputes the issue is whether the goods that have been supplied are equal to specification or to agreed sample. In many instances the goods that are the subject to the dispute are commodities such as grain, tobacco, fabrics and so on, and the arbitrator, by inspecting the goods and where appropriate by smelling them, is able to assess their quality

WITNESS OF FACT

The purpose of giving evidence is to lay the facts of the matter before the arbitrator so that he can able to draw the appropriate conclusions – witnesses re, in general, not permitted to express personal opinions. Evidence may be given either by the parties themselves or by witnesses whom they have brought to the hearing to speak of facts within their particular knowledge. Although evidence usually consists of oral statements and answers to questions, it can also take the form of documents and objects (sometimes called "exhibits").

The purpose of evidence-in-chief is to lay before the arbitrator the relevant facts within the personal knowledge of the witness, which is done by the claimant's attorney or counsel putting questions to him to which he responds. Leading questions are not permitted.

PARTY COSTS

The arbitrator in making his award of costs will either indicate the exact amounts which each party is to pay or give clear and unambiguous directions as to how these amounts are to be determined or calculated. Other costs are known at the time the arbitrator frames his award. It is important to note that the arbitrator is entitled to exclude certain items from the costs that he awards if he considers that the expenditure had been unnecessarily incurred. In case, if one of the parties has employed senior and junior counsel and in the opinion of the arbitrator this was grossly excessive and junior counsel would have sufficed, then he would be entitled to award only the fees of junior counsel, leaving the party concerned to pay the additional fees out of his own pocket. Same applies, where one of the parties engaged expert witnesses which the arbitrator considered were quite unnecessary, he would be entitled to exclude the fees and disbursements payable to the expert witnesses from his award of costs. Furthermore, in a case where he considers that a party although successful in his claim had been unnecessarily elaborate in the presentation of his claim (for example, leading unnecessary evidence or going into excessive detail) he would be entitled to exclude the cost of the unnecessary portion of the party's presentation from his award of costs.

ATTORNEY CLIENT COSTS

Attorney and client costs are all the costs which a party may incur in any aspect of the arbitration. In other words, they will represent all the party and party costs together with fees and expenses that may have been incurred prior to the start of the hearing such as fees for preliminary consultations. Attorney and client costs are only awarded in exceptional circumstances such as where the claimant brought a totally unworthy claim to arbitration or the defendant's defence was totally without any merit and justification.

They might also be awarded in instances where the conduct of one of the parties was particularly reprehensible and the court or arbitrator wished to mark its particular displeasure. It will be seen therefore that attorney and client costs are somewhat penal in nature.

In making his award on costs the arbitrator should either indicate the exact amounts which each party is to pay or give clear and unambiguous directions as to how these amounts are to be determined or calculated

QUESTIONS 6

The arbitrator is not there to assist negotiating settlement between the parties; he is there to resolve the dispute. Once the dispute has been settled between the parties, there is nothing for the arbitrator to determine and his appointment is automatically terminated. It normally happens before the start of the arbitration hearing or even during it, the defendant from whom the claimant may be claiming certain payment may make, without in any way admitting his liability, an offer of settlement in terms of Rule 34. This offer will probably be considerably less than the amount claimed and it will be made by the defendant who may anticipate that the claimant may well be awarded at least part of the amount that he has claimed. This negotiation is conducted without the knowledge of the arbitrator. If the claimant accepts the offer of settlement, that ends the dispute. The arbitrator is informed of the settlement and, because the dispute is now resolved, his appointment automatically comes

Rule 37 Consent Award provides that If, during the arbitration proceedings the parties settle the dispute or any part thereof, the Arbitrator may, if requested by the parties, record the settlement in the form of an Award on agreed terms.

QUESTIONS 7

The arbitrator is allowed to questions witnesses but he should do so with considerable caution and any questions he may wish to put to a witness should preferably be reserved until the end of the witness' testimony.

Mainly in cross-examination, counsel very often work to a particular plan of action to achieve a desired result and this could be upset and counsel considerably disconcerted by the interposing of questions by the arbitrator.

When an arbitrator desires to put questions, these should be put as objectively as possible, so couched as to seek information and not to corroborate or deny what may previously have been said.

QUESTION 8

Seven substantial requirements an award must comply with in order for it to be valid and enforceable.

a. The first requirement is that it must be complete. It must deal with all the matters that were submitted to arbitration and leave no matter unsettled.
b. The performance which the arbitrator directs one or other of the parties to undertake must be capable of bringing the dispute to an end. Normally the award is that one party must pay the other a certain sum of money. Once the money has been paid that brings the dispute to an end
c. The award must be certain. It must be clear and consistent, not vague or ambiguous
d. The award must be possible to perform. If the dispute arose out of the failure of A to deliver certain goods to B, an award requiring A to hand over the goods to B would be invalid if in the meantime A had delivered the goods to C, or the goods, in the interim, had been destroyed.
e. The performances required by the award must be legal and not contrary to public policy. An award requiring A to deliver certain uncut diamonds to B would be illegal because transactions in uncut diamonds are illegal unless the parties are registered diamond merchants. The fact that the parties may have required the arbitrator to decide a point of law and he has decided it incorrectly and not in accordance with the accepted rule of law will not cause the award to be set aside. This was the view expressed in *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 and subsequently frequently confirmed by our courts
f. The award must be intra vires, that is to say the award must be within the scope of the arbitration agreement. "The award must not exceed the scope of the agreement which means that the arbitrator must give a decision on the exact matters referred to him by the parties"

g. There should be a decision as to costs. Failure to deal with costs does not make the award invalid but merely incomplete and on application the courts will refer the award back to the arbitrator in order that he may deal with the matter of costs