

“Costs and Interest in Arbitration”

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Sec 44 Arbitration Act 2005

- Alternatives
- Parties may agree on how costs are to be shared
- Failing agreement, it is in Tribunal's discretion
- Falls under Part III – in international arbitrations, sec 44 will not apply unless parties have opted in

Discretion

- Who is to bear costs
- How much
- Party & Party or Solicitor-Client Basis
- Party & Party:- Burden on party claiming to show the cost incurred is proper & reasonable
- Solicitor-Client:- Onus on other party to show the cost incurred was not reasonable

Discretion

- Discretion to be judicially exercised
- Normal rule: “Costs follow the event”
- Winner gets costs
- Can depart from normal rule
- But must justify departure
- If departure not properly justified, can argue that Court may review as a question of law (under sec 42 AA 2005) – *Metro-Cammell HK Ltd v FKI Engineering plc* 77 BLR 84

Taxation of Costs

- Taxation – process of going through each item of cost claimed to determine if it should be awarded
 - By Tribunal
- Or
- By High Court if Tribunal has failed to specify how much within 30 days of being asked to do so – sec 44(1)(b) AA 2005

Default Provision

- If arbitrator failed to allocate costs, then each party bears its own costs and equal share of Tribunal's fees & arbitration expenses (rental of venue etc) – sec 44(1)(c) AA 2005
- If Tribunal fails to award costs, does sec 44(1)(c) AA 2005 apply automatically?

Default Provision

- Depends
- If party pleaded for costs and Tribunal overlooked dealing with costs, then can ask for additional award – sec 35(4) AA 2005 or plead an error of law if Tribunal refuses to deal with it – sec 42 AA 2005

Default Provisions

- Quaere:- If party failed to plead for costs and Tribunal didn't award costs?
- Error of law or equal sharing under sec 44(1)(c) AA 2005?

Calderbank Offer

- Sec 44(2) AA 2005 – “sealed offer”
- *Calderbank v Calderbank* [1975] 3 WLR 586
- Departure from normal rule of costs following the event
- Tribunal will know an offer was made but won't know how much till after his Award is delivered

Calderbank Offer

- If awarded sum is same or less than sealed offer, then Tribunal may “take this into account” when awarding costs
- Allows Tribunal to award costs to losing party from the date of offer

Tribunal's Lien On Award

- For unpaid fees
- Typically, Tribunal will seek settlement of its fees for writing the Award before the Award is delivered to parties
- If not settled, Award is not released
- Sec 4(4) AA 2005 allows High Court to direct release of Award on terms and conditions

Review of Taxation

- Sec 44(5) AA 2005
- By High Court Judge in Chambers

Interest

- Sec 33(6) AA 2005
- Tribunal may award interest from date of award till payment – Post-award
- Tribunal may determine rate of interest
- Under RHC Order 42 r12 and PD No. 1/12, interest rate set by CJ is 5% p.a.
- Contractual rate of interest - OK

Interest

- Pre-Award interest
- Sec 33 AA 2005 is silent
- *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710 CA*
- Tribunal has power to award pre-award interest and should follow established court practices when awarding interest
