Arbitrator Involvement in Taxation Assessment or Settlement of Costs

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Purpose of this Paper

1. The purpose of this paper is to share what I have learned from involving myself in the process of taxation, assessment and settlement of costs of arbitrations, instead of directing that costs be taxed by the court.

Section 34 of the Uniform Commercial Arbitration Acts

2. Discretionary power for an arbitrator to tax, assess or settle costs of an arbitration arises under section 34 (1) of the Uniform Commercial Arbitration Acts, which has similar (but not identical) wording in all states.

3. In Victoria and the Australian Capital Territory, section 34 (1) reads:

Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may:

(a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;

(b) assess or settle the amount of costs to be so paid or any part of those costs; and*

(c) award costs to be taxed or settled as between party and party or as between solicitor and client.

* In Queensland, South Australia, Western Australia, Tasmania and Northern Territory, section 34 (1)(b) uses the word 'tax' instead of 'assess'.

* In New South Wales, section 34 (1)(b) reads:

settle the amount (or any part of the amount) of costs to be so paid, or arrange for the assessment of those costs or any part of them.

4. Section 34 (2) provides for costs of the reference to arbitration (other than the fees and expenses of the arbitrator) not taxed, assessed or settled by the arbitrator, to be taxed or assessed by the court.

Ordinary Practice

5. Ordinary practice is for costs of the reference to be taxed in the court.

6. Ordinary practice is to direct under section 34 (2) that in default of agreement between the parties, costs of the reference be taxed by a taxing master in the relevant court.

7. Even though power to do so clearly exists under section 34 (1)(b), most arbitrators do not involve themselves in the task of taxation, assessment or settlement of costs.

8. The arbitrator must fix costs of the award (arbitrator's fees and expenses).

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Tax, Assess or Settle?

9. Arbitrators have discretionary power to involve themselves in the determination of the quantum of costs, and if they do, to choose the appropriate methodology.

10. Section 34 uses different words: *tax, assess* or *settle* to describe the process of determining the quantum costs of the reference.

11. Reference in section 34 (1)(b) to *tax ... the amount of costs* does not mean that arbitrators must necessarily direct that costs be taxed by a taxing master in the court.

12. It is not suggested that arbitrators should attempt to tax, assess or settle costs replicating procedures adopted by a taxing master.

13. The words *'assess or settle the amount of costs'* clearly connote different methodology to taxation in the court.

14. It is open for arbitrators to assess or settle costs by alternative methodology, such as assessment of a gross sum on a global basis.

Interim Cost Awards

15. Common practice is for arbitrators to direct that costs be reserved for later determination.

16. Interim cost awards can deal with both liability for and assessment of costs of interlocutory arguments such as rulings on jurisdiction, late delivery of pleadings, further and better particulars and inadequate discovery, by interim award at the time of ruling on the issue.

17. My usual practice is to make interim cost awards based on belief that:

a) the arbitrator is in the best position at the time of ruling on liability, having the competing arguments fresh in mind, to determine the issue of costs;
b) the successful party should receive payment for its costs assessed by the arbitrator, sooner rather than later;
c) the losing party should be aware of and accountable for the cost consequences of its actions and be required to pay the costs at the time, particularly resulting from pursuit of frivolous/unmeritorious arguments, or in the case of a recalcitrant party;

unless, of course, it is appropriate that costs should be reserved as 'costs in the cause'.

18. Where it is not appropriate to reserve costs, the approach I normally take is to:

a) make an award on liability for costs, including whether on party/party or solicitor/client basis, the proportion of costs allowed and the relevant court scale (note that no scale applies in the New South Wales Supreme Court);
b) direct the successful party to submit its bill of costs for assessment;
c) direct the losing party to make any written submissions on the bill of costs;
d) direct the successful party to make any written submissions in reply;
e) assess costs on a 'bill of costs' basis on the material provided;
f) publish an interim award, assessing successful party's costs, including fixing arbitrator's costs; and
g) direct that costs be paid by the losing party within a specific period of time.

19. This approach deals in an effective and timely way with interim cost issues and is useful in making an errant party and/or its lawyers accountable at the time for the cost consequences of their actions.

20. The relatively small amounts involved in interim cost awards are usually assessed on a bill of costs, not on a global basis.

Advantages of Global Assessment

21. Potential advantages arising from arbitrators undertaking the assessment of costs on a global basis include:

a) significant savings in time and cost to the parties in determination of the quantum of costs by way of assessment on a global basis, as compared with the time, cost and 'aggravation' involved in 'item by item' taxation in the court;
b) having observed the conduct of the parties in the arbitration and determined the issues in dispute, the arbitrator is in the best position (it is submitted) to assess the quantum of costs of the successful party from the point of view of natural justice;
c) the arbitrator gets to determine **all** issues in the arbitration, including quantum of costs, which is a significant issue in itself for the parties, particularly in cases that go all the way to final award;
d) the arbitrator retains control of and responsibility for the whole arbitration from start to finish; and
e) the arbitration becomes a 'one stop shop'.

Rules of Court

22. Rules of Court (Victorian Supreme Court Rule 63.072(2) for example) provide for award of a gross sum instead of taxed costs:

> *(2) Where the Court orders that costs be paid to a party, the Court may then or thereafter order that as to the whole or any part of the costs specified in the order, instead of taxed costs, that party be entitled to:*
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> *(c) a gross sum specified in the order instead of taxed costs.*

23. While arbitrators are not bound by Rules of Court they can be guided by them insofar as procedure is concerned, together with relevant principles and authorities applicable to those Rules.

Relevant Principles

24. Relevant principles for arbitrator taxation, assessment or settlement of costs are set out in ***Costs in Arbitration Proceedings***, Michael O'Reilly (Lloyds of London Press Ltd 1995) and include (at paragraph 5.4):

- *An arbitrator who taxes or settles costs is clearly not bound by the detailed procedural rules by which the taxing officers of the court operate.*
- *The arbitrator is not bound by the detailed technical procedural rules as to format and proof. For example, he may entertain a bill in any format which clearly identifies what is being requested. He may receive submissions in any way which to him seems convenient, provided that it is consistent with the rules of natural justice.*
- *[The arbitrator] may accept any evidence that costs have been incurred, whether or not such evidence would be acceptable to a taxing officer.*

- *The arbitrator is not bound by the calculation schemes which are habitually employed by the taxing officers of the court. For example, the taxing officers compute a solicitor's entitlement using a specific calculation involving a reasonable basic charge and an uplift for 'care and conduct'. It is submitted that the arbitrator may compute these and any other costs using any calculation or formulation which to him seems proper and fair, with the following provisos:*
  - *that the indemnity principle is observed – that is to say that a party who is entitled to costs cannot recover more than the proceedings have cost him;*
  - *that the arbitrator should, notwithstanding that he has decided to use his own scheme of calculation, entertain reasonable submissions which the parties wish to make as to the practice of the taxing officers and consider properly whether or not such practice should affect his assessment; and*
  - *that the overall result is not so dissimilar from what would be achieved by taxation in court that the parties can be said to have a substantial interest in whether the matter is taxed in court or by the arbitrator.*

25. Dal Pont's ***Law of Costs*** (2005) includes a number of statements regarding the approach for carrying out a global assessment (at paragraph 15.19) in particular:

- *that the judge, in fixing costs, is not to conduct a de facto taxation – this would, after all, defeat the object of avoiding a taxation – it remains relevant to consider what might be determined as a fair and reasonable …*
- *the judge in fixing costs is not assessing costs as if he or she were performing the functions of a taxing officer; it is not an assessment item by item, but the judge's determination of what the services devoted to the motion or other proceeding are worth according to the submissions of counsel, his own experience and with some regard to what could be taxed on the party and party scale …*
- quoting from a decision in ***Murano v Bank of Montreal*** (1998) 163 DRL:

> *… the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which compromise the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.*

- fairness to the parties dictates that any award of lump sum costs made by a judge must accord with the justice of the case – if this concern translates into a process not too much removed from a taxation, it would defeat the object of the jurisdiction.

26. The English Court of Appeal decision in ***Leary v Leary*** (1987) 1 All ER 261 includes discussion on relevant principles upon which the power to award lump sum assessment of costs can be exercised, including:

- *the avoidance of expense, delay and aggravation involved in a protracted litigation arising out of taxation;*
- *the order (for costs) ... does not envisage that any process similar to taxation should take place;*
- *the unlimited discretion ... must be exercised in a judicial manner;*

- *acting unjudicially could include ... clutching a figure out of the air without having any indication of the estimated costs, receiving as to such an estimate without the details being made available to the other side; refusing a request to hear submissions ... on whether a gross figure should be assessed at all and if so, at what figure;*
- *there is no statutory obligation upon the judge to receive such submissions provided he observes the rules of natural justice.*

Relevant Australian Authorities

27. The cases cited below are examples in which the Australian courts have considered assessment of costs on a global basis for a gross sum. They indicate not only how the courts view the process of assessment of costs on a global basis, but also illustrate the nature of the discretion which the process entails and principles which are judicially approved.

28. The Federal Court in ***Beach Petroleum NL v Johnson*** (No. 2) (1995) 57 FCR 119 (at page 120) considered the power to award a gross sum instead of taxed costs:

> *The purpose of the rule is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation. The power is appropriate to be used in complex cases. An order that costs be assessed as a gross sum does not envisage that any process similar to that involved in taxation should take place, but the power must be exercised judicially and after giving the parties an adequate opportunity to make submissions on the matter.*

29. ***Beach Petroleum*** (at page 123) was considered an appropriate case in which to exercise the power as, having regard to the size and complexity of the matter, preparation of a bill of costs in taxable form was an unrealistic demand which would require quite unreasonable time and expense and, if the subject of taxation, the taxation could extend over several months.

30. In ***Canvas Graphic Pty Ltd v Kodak (Australasia) Pty Ltd*** FCA (23 January 1998), O'Loughlin J said at page 18:

> *It is essential that every effort be made to contain costs. Although the trial was complex … it still remained a basic cause of action … It is necessary to keep a firm control on costing issues. They must not be permitted to explode as they have obviously done in this case. In my opinion, in fixing a gross sum for costs in this matter, the Court should take these factors into account so as to ensure that the costs that are awarded bear some relationship to the size of the applicant's victory.*

31. ***Smoothpool & Anor v Pickering & Ors*** (2001) SASC 131 is a decision of Lander J of the South Australian Supreme Court which found that it was appropriate to award costs on a gross sum basis.

32. Lander J (at paragraph 6) stated that the purpose of the relevant rule of court was to avoid the expense and delay occasioned by the preparation and the taxation of a bill of costs.

33. Lander J said (at paragraph 9) that the power to award costs on a lump sum basis may be exercised in cases that are not long and complex, but that it was more obvious to do so when the case was long and complex.

34. ***Harrison & Anor v Schipp*** (2002) NSWCA 213 considered situations where a court may order costs on a gross sum basis. In particular:

- *The power conferred by r6(2) is not confined, and may be exercised whenever the circumstances warrant its exercise. It may appropriately be exercised where the assessment of costs would be protracted and expensive ...*
- *Of its nature, specification of a gross sum is not the result of a process of taxation or assessment of costs. As was said in* ***Beach Petroleum NL v Johnson*** *(at 124), the gross sum 'can only be fixed broadly having regard to the information before the Court'; in* ***Hadid v Lenfest Communications Inc*** *(at *35+) it was said that the evidence enabled fixing a gross sum 'only if I apply a much broader brush than would be applied on taxation, but that … is what the rule contemplates'. The approach taken to estimate costs must be logical, fair and reasonable (****Beach Petroleum NL v Johnson*** *(at 123);* ***Hadid v Lenfest Communications Inc*** *(at [27]).*

35. ***Harrison v Schipp*** makes it clear that:

a) the assessment of costs on a global basis for a gross sum is not the result of a process of taxation and can only be fixed broadly;
b) the costs assessor must have sufficient confidence in arriving at an appropriate sum on the information available; and
c) the approach taken to assess costs must be logical, fair and reasonable.

36. ***Sony Entertainment (Australia) Limited v Smith*** (11 March 2005) FCA 228, Jacobson J made a number of general comments concerning making an award of lump sum costs including references to earlier cases:

> *189 Whilst the power conferred to award lump sum costs has been described as particularly suited to complex litigation, the rule is in general terms and the power is not limited to cases of that type:* ***Australasian Performing Rights Association Limited v Marlin*** *(1999) FCA 1006 per Burchett J. As Giles JA recently observed, in relation to a similar rule in the Supreme Court of NSW, the power to award lump sum costs may be exercised whenever the circumstances warrant its exercise: Harrison v Schipp (2002) 54 NSWLR 738 at (21).*
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> *190 In* ***Beach Petroleum NL v Johnson****, Von Doussa J observed at 120 that the purpose of the rule is to avoid the expense, delay and aggravation arising out of taxation. His Honour referred to the decision of the English Court of Appeal in* ***Leary v Leary*** *(1987) 1 All ER 261, which contains a discussion of the principles upon which the power to award lump sum assessment of costs should be exercised.*

37. The cases cited above indicate that costs may be settled on a global basis without it being necessary to demonstrate that the arbitration was lengthy and complex, or that costs should be taxed as opposed to being settled on a global basis.

38. The cases cited are authority for the general proposition that determining costs on a global basis can be undertaken to: *avoid the expense, delay and aggravation arising from taxation (Beach Petroleum)*.

Methodologies for Quantification on a Global Basis

39. The methodology adopted for quantification must enable the arbitrator to:

a) take a broad approach;
b) be confident the approach taken is logical, fair and reasonable;
c) have sufficient confidence in arriving at a gross sum on the materials available; and
d) prevent, on the one hand, prejudice to the losing party by overestimating costs and, on the other hand, injustice to the successful party by adopting an arbitrary 'fail-safe' discount on the costs claimed.

40. A number of alternative methodologies have been applied in the courts in undertaking quantification of costs on a global basis. If the award is on a court scale, the starting point will need to be the relevant court scale, as costs allowed on a gross sum assessment are related to what would be allowed on a taxation of costs.

41. Decisions in ***Seven Network Limited v News Limited [2007] FCA 2059*** and ***Idoport Pty Ltd v National Australia Bank Ltd [2007] NSWSC 23***, describe various methodologies which have been adopted for quantification on a global basis.

42. The 'adjusted fees methodology' was adopted in the ***Seven Network*** case and has been approved by French J (now French CJ of the High Court) in ***University of Western Australia v Gray*** in the Federal Court (unreported). It is the approach more commonly adopted in the Federal Court.

Adjusted Fees Methodology

43. In this method, the solicitors' time records are reviewed and adjusted to allow only work which a taxing master would hold as recoverable on a party/party basis ('base hours'). The base hours are then multiplied by the appropriate scale hourly rate to achieve a base figure for fees ('base scale fees').

44. A second adjustment is then undertaken to accommodate the different scale rates applicable to different types of work ('adjusted fees').

45. Finally, a loading is applied to the adjusted fees being the loading for general care and conduct which a taxing master would allow on taxation.

46. The advantages of this method are said to be that it is possible from a review of the solicitors' time records alone to form the relevant opinions about appropriate adjustments.

47. There is no need to try and categorise work, or undertake adjustments to accommodate specific scale items.

48. The costs consultants, in explaining reasons for the opinion they are expressing regarding particular adjustments, inform the court about the factors they have taken into account.

49. The court has clear evidence on which it can form a view of the accuracy or otherwise of the cost consultants opinions.

Random Sampling Methodology

50. Cases cited below contain examples of where courts have considered random sampling in global assessments:

- ***Charlick Trading Pty Ltd v Australian National Railways Commission*** (2001) FCA 629 (30 May 2001) at paragraphs 13-28; and
- ***Cornwall & Ors v Rowan*** (No 4) (2006) SASC 111 (13 April 2006).

51. In ***Charlick Trading*** both experts agreed to use random sampling.

52. In ***Cornwall*** the Full Court said at paragraph 21:

> *In most cases it would be desirable that an independent costs expert review the file and the charges made and perhaps perform some random sample checks of the costs charged for work performed against what would have been allowable under the relevant scale. There may be other ways of checking the accuracy of the amounts actually billed by the solicitor. If an estimate is to be made by a Court which is not accustomed to assessing or taxing costs and the estimate is to be logical, fair and reasonable, some expert evidence of that nature will generally be necessary.*

53. It is apparent from authorities cited above that random sampling can be an appropriate approach to global assessment in certain cases.

54. Random sampling is an approach I have adopted for global assessment.

55. In taking a global assessment approach, not all supporting documents relating to the time recorded on costs by the solicitors can be taken into consideration. This would effectively require production of a full bill of costs, as for a taxation in the court.

56. The random sampling method used was broadly as follows:

a) a check by the costs consultants of sample correspondence files of the successful party's solicitors was made with a view to identifying whether the attendances recorded in the timesheets in the relevant time periods (identified by the costs consultants as likely to be allowed on a party/party or solicitor/client taxation (whichever is awarded by the arbitrator) in accordance with relevant items of the relevant court scale (awarded by the arbitrator) are substantiated by file notes;

b) sample files (6) were chosen. A particular file was chosen as being the file covering the first substantive time period after the notice of dispute in the arbitration and every 4th file thereafter;

c) costs consultants based their assessments on an examination of the sample files. From that examination, global assessments were made;

d) assessments based upon the sample files were applied to the whole of the files based upon an underlying assumption that the random sample assessments provided a reasonably accurate indication of the position concerning the whole of the files; and

e) the costs consultants then provided evidence of their respective assessments in a way which allowed the facts and assumptions which led to the opinions expressed in their witness statements/reports to be tested.

57. In large matters, the random sampling method has been said to be too time consuming and expensive to obtain a full picture of likely outcome. It may be of use to check the veracity of the file and the reliability of time records, but the file alone is not the only means of proving costs, in that the solicitor may be in a position to depose to the accuracy of the time records, or attendances proved by reference to counsel's notes/fee slips, or notes that the party has kept.

58. A detailed estimate of costs will not be acceptable as a global assessment. Such an estimate would amount to a quasi taxation of costs, but not a bill of costs in taxable form.

Actual Costs

59. Dal Pont's ***Law of Costs*** states at paragraph 15.18:

> *The starting point will ordinarily be the charges rendered to the party awarded costs by its lawyers (*Mutual Trust Co. v. Stornelli *(1996) 138 DRR (4th) 316 at 335 per Sharpe J. (Gen Div (Ont))) which the Court may discount on a 'failsafe' basis (*Leary v. Leary *(1987) 1 WLR 72 at 76 per Purchas LJ.).*

60. In ***Beach Petroleum*** von Doussa J said (at page 124 paragraph B) the starting point for fixing the gross fee for indemnity costs must be the charges rendered to the Applicants by their solicitors. ***Beach Petroleum*** was a case in which costs were being awarded on an indemnity basis and the court looked at copies of bills rendered to the client

61. In a taxation before a taxing master on court scale, a comparison between actual costs paid by a party for legal costs and a bill of costs assessment would be irrelevant, except in respect of the indemnity principle (see below).

62. An arbitrator is not bound by rules or procedures followed by the taxing master.

63. If evidence of actual costs is before the arbitrator, the arbitrator is not precluded from considering actual costs in a way that a taxing master would be precluded from doing so in a taxation.

64. I have considered it appropriate for the arbitrator to have regard to the successful party's actual costs as a useful barometer in the assessment of costs on a global basis.

65. Cost consultants were called upon to give evidence on estimates of party/party costs or solicitor/client costs on court scale as a percentage of actual costs.

66. Costs consultants were cross-examined on actual costs and it was considered appropriate to take that evidence into consideration in making a global assessment.

67. The arbitrator upon hearing evidence from costs consultants, may apply a rough rule of thumb percentage to the successful party's actual costs in making the global assessment.

68. The percentage ratio of party/party versus solicitor/client (nearer to actual) costs as a very rough rule of thumb may be in the range of 60% -70%. This rough rule of thumb may vary case by case and particularly because of the prevalence of time costing by solicitors nowadays, as opposed to charging on the basis of scale items.

69. 60-70% may apply in straight forward cases, but various other percentage ratios as possible outcomes in other cases may range as wide as between 30% and 100%, depending for example on how a matter was conducted and whether or not the case was a document driven case.

70. A global assessment of costs as a percentage of the successful party's actual costs may be appropriate if the arbitrator decides this outcome to be a logical, fair and reasonable assessment in the circumstances.

Party/Party, Solicitor/Client , Court Scale Indemnity Principle

71. The bases for an award of costs are:

a) party/party;
b) solicitor/client; and
c) indemnity or solicitor/own client

72. If on an indemnity basis, query whether:
    a) an arbitrator has power to award costs on an indemnity basis (Section 34 (1)(c) refers only to party/party and solicitor/client); and
    b) costs are to be calculated by reference to scale or to the cost agreement between the party and solicitor

73. The indemnity principle must be observed in assessment of costs on a global basis. That is: the party who is entitled to costs cannot recover more than the proceedings have cost.

74. An award for liability for costs on a party/party or solicitor/client basis and/or on a court scale (if applicable (no scale applies in the NSW Supreme Court)) need to be taken into account by the arbitrator, even though an assessment is being done on a global basis.

Procedural Matters for Global Assessment

75. The arbitrator must advise the parties in advance of his/her intention to exercise discretionary power to assess or settle costs on a global basis. For example: … *subject to hearing any submissions the parties may wish to make on the issue, I advise by way of indication that I propose to settle costs under Section 34 (1)(b) and to assess costs on a global basis.*

76. Although an arbitrator can advise the parties of the arbitrator's intention to assess or settle costs at any time, the most appropriate time is usually after interim award(s) have been made on all issues in dispute, apart from liability and quantum of costs of the reference and the award.

77. The parties must have opportunity to be heard on how the assessment process should occur before directions are made in respect of the assessment process.

78. Evidence from costs consultants can be sought from parties as to the length of time and the cost involved in preparing a bill of costs in taxable form or the time and cost likely to be involved a taxation generally, as compared with alternative methodologies.

79. It is essential that the arbitrator determine the methodology/approach to be taken by the cost consultants at the time the decision is made to assess costs on a global basis.

80. It is important for the arbitrator to remember that after hearing submissions from the parties, the cost consultants be directed to proceed with the assessment using the same methodology.

81. Once the decision is made to assess costs on a global basis, it may be necessary for a directions hearing to be set down for the purpose of making directions for filing and service of witness statements, written submissions and a hearing if necessary in respect of the quantum of the costs.

82. The assessment process may require cross-examination of witnesses not only lawyers, but also the costs consultants of both parties.

Usual Positions of the Parties

83. Usual positions of the parties in response to arbitrator announcement of intention to assess or settle costs on a global basis:
    a) the successful party (receiving an award for its costs) will likely readily embrace arbitrator assessment on a global basis for a gross sum; and
    b) the losing party (with liability to pay costs) will likely resist assessment on a global basis, seeking taxation in the court.

84. In the event that both parties were to resist arbitrator involvement, an arbitrator should (it is submitted) be slow to, but not necessarily rule out, becoming involved in the taxation of costs, or the assessment or settlement on a global basis.

85. Issues raised by parties resisting assessment on a global basis have included submissions such as:

a) the arbitrator should not assess or settle the amount of costs to be paid. Costs ought be taxed by the taxing master in the court;
b) the arbitrator is bound to follow ordinary practice adopted by the courts;
c) taxation in the court would be more cost effective and expedient;
d) the successful party ought to provide its claim for costs to the losing party for consideration. Only in the absence of agreement should assessment by the arbitrator take place; and
e) the arbitrator was retained by the parties to determine the dispute between them, not to assess costs. Arbitrator assessment of costs falls outside the parameters of the reference.

86. The successful party has an interest in saving time and cost, because interest is not normally awarded on costs, so the longer the process goes on, the more the successful party will be out of pocket.

Awards dealing with Costs of the Reference and Award

87. Costs of the reference and award (other than interim cost awards (see paras 15-19 above)) may be appropriately structured in three awards:

a) an interim award on liability for costs;
b) a penultimate award on quantum of costs; and
c) a final award

Interim Award on Liability

88. An interim award determining liability for costs of the reference and award can be made after the parties have been heard on the question of liability. For example:

- *I award and direct as follows:*

1. *As to costs of the reference:*
   (a) *respondent pay the claimant's costs (including disbursements) of and incidental to the reference including interim award(s), this award and reserved costs;*
   (b) *such costs to be assessed by the Arbitrator pursuant to Section 34(1)(b) on a party and party basis on Supreme Court Scale; and*
   (c) *the assessment of the claimant's costs pursuant to direction (a)(ii) will be done on a global basis for a gross sum after the parties have had the opportunity to make submissions and directions made in respect of how the assessment process should occur, taking into account the findings in this award.*
2. *As to costs of the award (Arbitrator's fees and expenses):*
   (a) *the Respondent pay the costs of the award, including interim award(s), this award and reserved costs; and*
   (b) *costs of the award will be fixed by the Arbitrator after the parties have had the opportunity to make any submissions they may wish to make in respect of such costs, taking into account the findings in this award.*

89. Relevant issues that may need to be addressed in the interim award on liability for costs include:

a) deciding whether the general rule that costs follow the event applies;
b) deciding whether there are special circumstances warranting departure from the general rule;
c) dealing with any offers of compromise (section 34(6));
d) dealing with liability for any reserved costs (if not the subject of previous interim award);
e) deciding whether party/party or solicitor/client costs apply (see section 34 (1)(c));
f) deciding the appropriate court scale of costs;
g) deciding liability for costs of the award (arbitrator's fees and expenses); and
h) deciding whether the arbitrator should assess or settle costs on a global basis

Penultimate Award on Quantum

90. A penultimate award assessing quantum of costs of the reference and fixing costs of the award (arbitrator's fees and expenses) can be made after the parties have been heard on quantum. For example:

I award and direct as follows:

1. *respondent pay the claimant's costs (including disbursements) of and incidental to the reference, including Interim Award(s) and reserved costs assessed on a global basis for a gross sum of $XXXXXX;*
2. *respondent pay the claimant's costs including disbursements of and incidental to the award, including interim award(s) and reserved costs fixed at $XXXXXX;*
3. *costs of and incidental to this award are to be determined by the final award following written submissions from the parties.*

Final Award

91. A final award determining liability and quantum of costs of the penultimate award can then be made to conclude the arbitration.

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