

**IN THE MATTER OF AN ARBITRATION**

**UNDER THE ICC DISPUTE RESOLUTION COMMITTEE TERMS OF REFERENCE**

**B E T W E E N:**

**THE PAKISTAN CRICKET BOARD ("PCB")**

Claimant

- and -

**THE BOARD OF CONTROL FOR CRICKET IN INDIA ("BCCI")**

Respondent

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**COSTS AWARD**

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## **INTRODUCTION**

1. On 20 November 2018, the Dispute Panel (“the Panel”) handed down its award in the above arbitration. Concurrently it gave directions to both parties to make submissions on costs. Both parties have faithfully complied with those directions. The Panel has taken each party’s initial and reply submissions fully into account.

## **THE PANEL'S JURISDICTION**

2. The Terms of Reference of the Dispute Resolution Committee (“T/R”) provides, so far as material, as follows:

*“2.1 These Terms of Reference, and .... proceedings before any Dispute Panel hereunder, are governed by English law.*

*2.2 A Dispute Panel formed under these Terms of Reference is intended to operate as an arbitral tribunal within the meaning of the Arbitration Act 1996, and proceedings before a Dispute Panel shall constitute arbitration proceedings with a seat or legal place in London, England, to which the Arbitration Act 1996 applies”.*

3. Section 61 of the Arbitration Act 1996 (“The Act”) provides, so far as material, as follows:

*(1) “The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*

*(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.”*

4. Section 62 of the Act provides:

*“Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable.”*

5. Section 63 of the Act provides:

*(1) “The parties are free to agree what costs of the arbitration are recoverable.*

*(2) If or to the extent there is no such agreement, the following provisions apply.*

*(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit.*

*If it does so, it shall specify –*

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- (a) *the basis on which it has acted, and*
  - (b) *the items of recoverable costs and the amount referable to each.*
- (4) *If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may –*
  - (a) *determine the recoverable costs of the arbitration on such basis as it thinks fit, or*
  - (b) *order that they shall be determined by such means and upon such terms as it may specify.*
- (5) *Unless the tribunal or the court determines otherwise –*
  - (a) *the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a **reasonable amount in respect of all costs reasonably incurred**, and*
  - (b) *any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.*
- (6) *The above provisions have effect subject to section 64 (recoverable fees and expenses of arbitrators).*
- (7) *Nothing in this section affects any right of the arbitrators, any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of their fees and expenses."*

6. Section 64 of the Act provides:

- (1) *"Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.*
- (2) *If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties) –*
  - (a) *determine the matter, or*
  - (b) *order that it be determined by such means and upon such terms as the court may specify.*
- (3) *Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).*
- (4) *Nothing in this section affects any right of the arbitrator to payment of his fees and expenses."*

7. Section 65 of the Act provides

- (1) *"Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount."*

(see generally Halsbury's Laws of England 5<sup>th</sup> ed para 572-574).

8. Paragraph 11.2 of the T/R (reflecting, if not in identical language, section 59 of the Act in its description of recoverable costs), provides, so far as material:

*"The Dispute Panel shall have the power but not the obligation to make such order against one or more of the parties as it considers appropriate as to the costs of the dispute, which may include:*

*11.1.1 the fees and expenses of the members of the Dispute Panel in respect of the dispute;*

*11.1.2 the costs of staging any hearings; and/or*

*11.1.3 the parties' legal and other costs in the dispute, including administrative costs (if any)."*

9. Paragraph 11.3. of the T/R provides:

*"The Dispute Panel shall have the power to assess or determine costs (either summarily or upon detailed representations by the parties) if requested to do so by any party."*

10. Paragraph 11.4 of the T/R provides:

*"Subject to any contrary order of the Dispute Panel for good cause shown, the parties to the dispute shall be equally responsible for all administrative costs and expenses properly incurred directly or indirectly by the Dispute Panel or any member acting in the Dispute Panel."*

11. The Panel interprets the above provisions read together to mean that:

- (i) it has a power, but not a duty, to make an award of costs at the request of either party;
- (ii) such costs may (but need not) include the items set out in paragraphs 11.1.1-11.1.3 of Paragraph 11.2 of the T/R, including the administrative costs and expenses referred to in Paragraph 11.4. of the T/R;
- (iii) the touchstone for the exercise of the discretion so conferred is what the Panel considers appropriate;
- (iv) the default position is that costs follow the event ("the Default Rule");
- (v) however, the Panel may depart from the Default Rule if in the circumstances it considers it appropriate to do so ("the Exception"); and

- (vi) any award of costs must be reasonable and subject always to the arbitrators' general duty under section 33(1)(a) of the Act to act fairly and impartially as between the parties.

12. In this context the Panel found helpful the Practice Guidelines on the drafting of arbitral awards from the Chartered Institute of Arbitrators (the "Practice Guidelines") which were, in its view, entirely consistent with and fleshed out the relevant legal instruments cited in paragraphs 2-10 above:

- (i) *"When allocating costs, arbitrators should take into account the relative success of each party rather than a broad-brush approach as to who won or lost."*
- (ii) *"arbitrators should look at whether parties have won or lost on issues and claims advanced in light of their importance and relevance to the case", noting that "where a generally successful party has failed on issues it unreasonably raised on which significant costs were incurred dealing with them, arbitrators may decide the successful party is not entitled to its costs in respect of those issues; in extreme cases the arbitrators may decide the unsuccessful party is entitled to its costs in respect of those issues."* (emphasis added)
- (iii) *"Factors that may have an adverse impact on costs allocation include instances where a party and/or its counsel has acted unreasonably or has obstructed the proceedings, for example, by advancing spurious arguments or making unreasonable applications for interim measures as a delaying tactic, or presenting grossly exaggerated claims leading to an unnecessarily high cost and unwarranted document production requests. Where a party and/or its counsel has behaved unreasonably, arbitrators should decide whether and to what extent such conduct has led the counterparty to incur additional costs and/or delayed the proceedings. Conversely, arbitrators may also take into account the fact that a party acted reasonably and contributed to the efficient conduct of the proceedings and conclude that their costs claims are reasonable and proportionate"*

(See commentary on article 2, pp 7- 8.)

13. The Panel did not detect in the parties' submissions, both of which requested the Panel to make a costs award, any substantial disagreement with the description of the correct approach. The dispute was as to how that approach should be applied. The BCCI naturally highlighted the Default Rule, the PCB the Exception.

14. In summary, the BCCI claims an order that the PCB shall pay the full amount of the BCCI's legal costs and the costs of these arbitral proceedings including any administrative fees of the ICC, the fees of the Panel, direct costs, and all other costs, fees and expenses incurred by

the BCCI. The PCB submits that there should be no order in respect of own-party costs or the costs of the proceedings (i.e. those of the Panel, and of the hearing).

## ANALYSIS

15. The Panel can dispose of certain preliminary matters at the outset:

- (i) In so far as the BCCI claims its 'actual' (sic) costs, such are irrecoverable. If and in so far as such an extraordinary order, which would embrace all costs incurred by BCCI in full, whether reasonable or otherwise, would ever be appropriate, the present is not such a case;
- (ii) None of the triggers for an award of indemnity costs comprehensively set out in the judgement of Tomlinson J (as he then was) in *Three Rivers DC v the Bank of England* 2006 EWHC 8126 (Comm) at para 25 are activated in this case. The PCB claim was, as the Panel has found, brought in good faith and reasonably (see the Preface to the Award);
- (iii) Accordingly, if an award of costs is to be made at all, and ex concessis it could only be made **against** the PCB, it would have to be reasonable both in terms of items claimed and the quantum of each;
- (iv) The parties, who were advised by the ICC in August 2018 of the Arbitrators' proposed hourly rates, made no objection to them; and
- (v) The other costs and expenses directly and indirectly incurred by the Panel as envisaged in Paragraph 11.4 of the T/R were both unavoidable and properly incurred and reasonable, especially when viewed in the perspective of the BCCI's own claim.

16. The Panel rejects the PCB's claim that there should be no order as to costs at all. The PCB claimed in its Notice of Dispute damages amounting to USD 62,868,070, plus interest and

costs. The Panel, after consideration of the legal principles in play and its findings of fact based on the evidential record, held that:

*"It follows inexorably that the PCB's claim must fail. If there was no obligation on the BCCI to engage in the tours in either 2014 or 2015, its omission to do so was no breach and gave rise to no damages claim".* (Paragraph 43 of the Award).

Moreover the PCBs claim for compensation for the BCCI's tour in 2014 was comprehensively rejected for additional reasons. (Paragraphs 58-64 of the Award).

17. For the BCCI, the victor in the arbitration, to be deprived of all its costs would appear to the Panel to be inappropriate, where the BCCI too had disputed the claim in good faith (see again the Preface to the Award).
18. However, for the BCCI to be granted all of its costs would also be inappropriate, given that there were issues of a more than de minimis dimension in respect of which its arguments did not succeed.
19. The Panel in identifying such issues prefers to take as its point of departure the Award itself rather than any partisan interpretation which either party forensically espoused.
20. The Panel considered that the BCCI failed to make good its contentions that:
  - (i) even taken at face value the April letter could not be read as a contractual document award. (Paragraph 37 of the Award)
  - (ii) the BCCI could rely on material post the April letter as an aid to its interpretation. (Paragraph 49 of the Award)
  - (iii) Any agreement, if any, between the parties contained an implied term that the approval of the Indian government was required before the BCCI toured Pakistan. (Paragraph 51 of the Award)
21. Moreover the Panel, while eventually finding that, even if not part of such agreement, in point of fact such approval was required (Paragraph 46 of the Award), found the journey to such conclusion made unnecessarily tortuous by the BCCI's failure to identify with precision whose approval was required and the basis of the need for such approval (Paragraph 47 ditto). The final position: *"an oral tradition"* of the need for governmental (sic) approval, was

some distance from the pleaded response that the BCCI's obligation to tour "*was subject to BCCIs receipt of necessary approvals, permissions or clearances (including from but not limited to the Government of India) which BCCI did not receive*". Much of what the Panel considered to be the unduly exaggerated and overcomplicated nature (in respect of which neither party was wholly innocent) of the inter-solicitor correspondence, in particular as related to disclosure issues, stemmed from this initial equivocation on the BCCI's part.

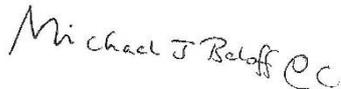
22. The Panel is also impressed by the following further considerations. First, a reasonable person in the PCB's position presented with the April letter tout court would have perceived it to be a binding contract (Paragraph 38 of the Award). Such misapprehension - indeed these proceedings - would have been avoided if the BCCI, who proposed the letter, had - as it could so easily have done - made clear that it was only a declaration of intent. Second, in so far as it created a moral obligation (Paragraph 42 of the Award), that moral obligation was more honoured in the breach than in the observance.
23. The Panel does not find that any of the sums claimed by the BCCI, which are summarised in a series of appendices (appendices 1-10) to the of BCCI's initial costs submission and Appendix 1 of its reply and can be taken as incorporated in this Costs Award, fall rationae materiae outside the categories of recoverable costs identified in the Act and T/R (see Halsbury op.cit para 567). It does not read the provision of the T/R para 9.6 (drawn to its attention by the PCB) as entitling a party to be "*represented or assisted by persons of their choice, such representation to be at their own cost*" as meaning other than that the ICC would not provide funding in a form of legal aid for such representation, not that the costs incurred by a successful party were always irrecoverable from the other party; the latter interpretation would not sit well with T/R 11.1.3. Furthermore, it interprets Mr Kurshid's claim for "*fees for time spent in providing witness evidence*" as compensation for time he could otherwise have spent on his professional activities (see summary in Appendix 5) rather than as payment for his actual testimony.
24. The Panel, in order to achieve a reasonable figure for costs to be paid by the PCB to the BCCI, has a choice between reaching its own conclusion on the material before it or having the assessment function assigned to the Court pursuant to the Act (see above). (It has been advised that the ICC does not have its own taxation system nor has a dispute about the quantum of costs ever arisen in respect of a decision of its adjudicative bodies). The PCB in

its reply beguilingly submits that no order as to costs would “*obviate the need for further time and costs to be incurred scrutinizing (or determining) quantum*” (Paragraph 1.7 Reply). That is undoubtedly so but, in the Panel’s view, it is an invitation to prioritise convenience over justice.

25. The dispute was heavily lawyered on both sides; but in the Panel’s view that simply reflected the complexity and importance of its subject matter. With its own long collective experience of litigation and arbitration, both domestic and international, it cannot conclude that the BCCI lawyers’ fees, while high, were unreasonably so nor that the work claimed for was unreasonably done. In a notional taxation on a standard basis - and as Harris writes in the fifth edition of his commentary on the Act, section 63(5) of the Act “*sets out the equivalent of the standard basis*” - these would be substantially reduced. It also bears in mind that the choice of Dubai as a forum necessarily involved travel, accommodation and associated costs for their lawyers and witnesses from England and India. The Panel naturally assumes that the costs claims including those for expenses are made in good faith, and would in point of fact be vindicated if yet further evidence was made available to that annexed to BCCI’s initial and reply costs submissions. Again, on the basis of the Panel’s own collective experience, they do not appear out of kilter with what might be expected, even if laundry charges might be at the outer boundary of the acceptable in this context.
26. The PCB suggests that the BCCI’s claims are no more than “*bowdlerized and incomplete summaries*” (Reply para 4.2) and has kept its powder dry for a notional assessment, if agreement cannot be reached. The Panel firmly believes that it is not in anyone’s interest that proceedings over this ancillary issue where the sums, though large, pale into insignificance with the sums claimed in the substantive dispute be further protracted with all of the attendant cost, expense, and potential acrimony.
27. As such, taking into account all the circumstances set out above and in the light thereof, the Panel has formed its own judgment on what would be a reasonable sum for the PCB to pay. In doing so, it has utilized the sums claimed in paragraph 7.1 of the BCCI’s claim, updated as per paragraph 7.3 of its Reply i.e. the cumulative total of [REDACTED] [REDACTED] (“the Claimed Costs”) as a point of departure. The Panel has further found it unnecessary in the interests of an overall just result to impose on the PCB

any duty to pay interest thereon at an annual rate of 2% above LIBOR other than from the date of this Costs Award until payment.

28. On the matter of costs, therefore, the Panel has determined that there is no basis established for the reimbursement of costs on an indemnity or full basis, and in consequence, the Panel orders the PCB to pay the BCCI sixty percent (60%) of: (a) the Claimed Costs; and (b) the administrative costs and expenses of the Panel which fall within the scope of paragraph 11.4 of the T/R (including, without limitation, the fees of the Tribunal members, and the costs and expenses they incurred in relation to this matter), the figure whereof is to be supplied to the PCB by the ICC.
29. In consequence of the above, and for clarity, the Panel confirms that the BCCI is consequently liable for forty percent (40%) of the administrative costs and expenses of the Panel which fall within the scope of paragraph 11.4 of the T/R.



**Michael J Beloff QC, Chairman**



**Dr Annabelle Bennett AO SC**



**Jan Paulsson**

**London, 12 December 2018.**