



the
arbitrator[®]
&
mediator

*Volume 23
Number 2
August 2004*


The Journal of

THE
INSTITUTE of
ARBITRATORS & MEDIATORS


AUSTRALIA



THE
INSTITUTE *of*
ARBITRATORS & MEDIATORS
—  —
AUSTRALIA

the
_____ 
arbitrator
&
mediator

Volume 23 Number 2 August 2004

This issue may be cited as
(2004) 23(2)

ISSN 1446-0548

© 2004 The Institute of Arbitrators & Mediators Australia

Publisher

The Institute of Arbitrators & Mediators Australia
(Inc in the Australian Capital Territory)
ABN 80 008 520 045
Level 1, 190 Queen Street, Melbourne Vic 3000 Australia
PO Box 13064, Law Courts Vic 8010

Editor

Russell Thirgood is a senior associate of McCullough Robertson Lawyers and President of Amnesty International Australia. He is the author of "Alternative Dispute Resolution" in *The Australian Encyclopaedia of Forms and Precedents*, and holds a Masters of Laws with First Class Honours from the University of Sydney, majoring in dispute resolution.

Editorial Office

Gianna Totaro
The Institute of Arbitrators & Mediators Australia
Level 1, 190 Queen Street, Melbourne Vic 3000 Australia
Tel: (03) 9607 6908, Fax: (03) 9602 2833
Email: national@iama.org.au

Journal Committee

D Campbell-Williams, GW Charlton, JA David, NJ Floreani,
RW Hunt (Chair), LE James, AT Kincaid, GL Robinson, WT (Tim)
Sullivan, RJ Thirgood, GA Totaro, V Wayne.

Printed in Australia

Disclaimer

Views expressed by contributors are not necessarily endorsed by the Institute. No responsibility is accepted by the Institute, the Editor, or the printers for the accuracy of information contained in the text and advertisements.

The Institute of Arbitrators & Mediators Australia

National Office

Level 1, 190 Queen Street
Melbourne Vic 3000 Australia
PO Box 13064
Law Courts Vic 8010

Chief Executive:

GORDON TIPPETT

Executive Assistant:

GIANNA TOTARO

Tel: (03) 9607 6908

Fax: (03) 9602 2833

Email: national@iama.org.au

Website: www.iama.org.au

New South Wales Chapter

Level 9, 52 Phillip Street
Sydney NSW 2000

Chair:

PETER CALLAGHAN SC

Administrator:

MARGARET MACKAY

Tel: (02) 9241 1188

Fax: (02) 9252 2911

Email:

nsw.chapter@iama.org.au

South Australian Chapter

GPO Box 2922
Adelaide SA 5001

Chair:

PETER BATTERSBY

Administrator:

ANDREW ROBERTSON

Tel: (08) 8227 2111

Fax: (08) 8205 3300

Email:

sa.chapter@iama.org.au

Western Australia Chapter

PO Box 518
Como WA 6152

Chair:

CLIVE RAYMOND

Administrator:

SUE DOHERTY

Tel: (08) 9368 4755

Fax: (08) 9368 4744

Email:

wa.chapter@iama.org.au

Queensland Chapter

PO Box 10525
Adelaide Street
Brisbane Qld 4000

Chair:

ERIC PRATT QC

Administrator:

JENNIFER WINZAR

Tel: (07) 3220 2122

Fax: (07) 3220 2133

Email:

qld.chapter@iama.org.au

Australian Capital Territory Chapter

PO Box 5013
Kingston ACT 2604

Chair:

ALYSOUN BOYLE

Administrator:

ANNE FARRELL

Tel: (02) 6260 7117

Fax: (02) 6260 7118

Email:

act.chapter@iama.org.au

Northern Territory Group

1st Floor Centrepont
Building
PO Box 1134
Darwin NT 0801

Chair:

SIMON (CRIS) CURETON

Tel: (08) 8981 7273

Fax: (08) 8981 2500

Tasmanian Group

C/- GPO Box 20
Hobart Tas 7001

Chair:

DAVID BESSELL

Secretary:

CRAIG DOHERTY

Tel: (03) 6220 6220

Fax: (03) 6223 6633

Victorian Chapter

PO Box 4134
Melbourne Vic 3000

Chair:

ANDREW KINCAID

Administrator:

ELISABETH SIECKER

Tel: (03) 9602 1711

Fax: (03) 9607 6969

Email:

vic.chapter@iama.org.au

THE
INSTITUTE of
ARBITRATORS & MEDIATORS
——
AUSTRALIA

President:

Tim Sullivan, Dip Law (LPAB), MIAMA

Senior Vice President:

Laurie James, LLB (1st Class Hons) FIAMA

Vice President:

Ian Bailey, BArch, Dip Law (BAB), FIAMA

Hon Treasurer:

Kenneth Stout, Dip Business, Post Grad Dip Business (Accounting), MIAMA

Immediate Past President:

Ian Nosworthy, BA, LLB, FIAMA, FCIArb, AIPM

Councillors:

Bryan Ahern, (Civil) Hons, MEngSc (Civil), Grad Dip Legal Studies, MIEAust, CPEng, MIAMA,

Warren Fischer, B E (Civil), RPEQ, MIAMA

Stephen Hibbert, Eng (Civil), LLM, MIAMA

Robert Hunt, LLM, DipLaws, BSc(Eng), MIEAust, FIAMA, FCIArb, CPEng

Angela O'Brien, BA, LLB (Hons), Litt B, MA, PhD, DipEd, GradDip Ed Admin, FTCL, LSDA, MIAMA

Sandy Policansky, BA Social Work; Dip SocSc.; PostGradDip Conflict Resolution,

Clive Raymond, BA (Econ), LLB

Karyn Reardon, B Com, LLB, MIAMA

Chief Executive Officer:

Gordon Tippett, Dip Bus Stud (Acc)

Honorary Fellows:

Hon Mr Justice John Batt, BA (Hons), LLB (Hons)

Hon Mr Justice David Byrne, BA, LLB (Hons)

Rt Hon Sir Harry Gibbs, GCMC, AC, KBE, BA, LLM,

Hon LLD (Queensland), Hon D University (Griffith)

Hon Christopher Legoe, QC

Hon Barry SJ O'Keefe, AM, QC

Hon Mr Justice William Ormiston, LLB (Hons)

Hon Andrew Rogers, QC

His Honour Judge Frank J Shelton, BA, LLB

Rt Hon Sir Ninian Stephen, AK, GCMG, GCVO, KBE, KStJ, Hon LLD (Sydney & Melbourne)

Hon Sir Laurence Street, AC, KCMG, KStJ, Hon LLD

(Macquarie, Sydney & UTS), LLB (Hons)

Contents

Office Bearers and Honorary Fellows	iii
President's Message <i>Tim Sullivan</i>	vi
Editor's Commentary <i>Russell Thirgood</i>	viii
Articles	
Statutes of Limitation and ADR Processes <i>Dr Paul Obo Idornigie</i>	1
Dispute Resolution Boards <i>Robert Hunt</i>	13
The Cost Benefits of Alternative Dispute Resolution Revisited <i>Dr Tom Altobelli</i>	23
Restoring Respectability – Providing a Service in Domestic Arbitration and Dispute Resolution <i>Ian Bailey</i>	39
A Critique of ICC Arbitration <i>Russell Thirgood</i>	69
Improving Arbitration in the New Millenium <i>Ian D Nosworthy</i>	93
Practice Update	
Adjudication at the Coal Face <i>Bill Taylor</i>	103
Case Notes	
Final and Binding: It means what it says, <i>and</i> Stay of Proceedings and Expert Determination Agreements: A review of issues raised by the recent decision in <i>Ipoh v TPS Property No. 2 Logan Campbell</i>	109
<i>Auburn Council v Austin Australia Pty Ltd Bill Morrissey/Sarah Connell</i>	123
<i>Mond and Mond v Dayan Rabbi Isaac Dov Berger Bill Morrissey/Sarah Connell</i>	127
<i>Wiki v Atlantis Relocations (NSW) Pty Ltd Robert Hunt</i>	133
<i>Jones v Bradley (No 2) Robert Hunt</i>	141
<i>John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors</i> <i>David Campbell-Williams and Graeme Robinson</i>	145
Notes for Contributors	153
Advertising Rates	155
Notes	156



President's Message

Tim Sullivan, President

It is a privilege to have the opportunity to serve the Institute as National President for the next two years.

As we approach the 30th anniversary of the Institute's formation, there is much to reflect upon. Readers of *The Arbitrator & Mediator* will have observed that since it was launched in 1981, the Journal has developed and maintained its pre-eminence as a learned publication. This reflects the talents and diligence of our Editor, Russell Thirgood, and the Journal Committee, ably led by its Chairman, Robert Hunt. The expansion of the Journal's distribution and subscriber base is reflected in the broad range of issues covered, from cross-cultural disputes to practice-related material, including the developments of a wide range of non-curial dispute resolution processes.

One such development is the emergence of adjudication in the construction industry both nationally and internationally.

The Institute's standing in alternative dispute resolution has led to its selection as an Authorised Nominating Authority by Australian State Governments for the new adjudication processes under the respective state legislations. [Readers may recall the article by David Campbell-Williams, 'The Building and Construction Industry Security of Payment Act' published in the April 2004 issue.]

Adjudication has arisen from matters with disputed claims and delay in payments. Those delays sometimes, but not always, manifest themselves in disputes. Some disputes go to Court and others to the alternative processes. Adjudication under the statutes deals solely with disputed progress payments in the construction industry. The adjudicator determines the amount (if any) of the progress payment to be made. The process enables the parties to flush out the real disputed issues at an early stage and then, if the party is to have any success in adjudication, it requires the party to particularise and support its position. The parties may still follow the arbitration, litigation, mediation or expert determination path if they are not satisfied with the result.

The process is almost entirely fixed by the relevant state legislation. In the construction industry it has been demonstrated to adapt well to a range of disputes. In New South Wales, for example, adjudication in the last 12 months, dealt with over 700 claims; the smallest being under \$1,000, with the largest being over \$33,000,000.

THE ARBITRATOR & MEDIATOR AUGUST 2004

The impact on the Institute has already been significant. Adjudication is one of the most positive statutory steps taken in alternative dispute resolution since the introduction of the Uniform Commercial Arbitration Acts.

As foundation Chairman of the National Adjudication Committee, I am pleased to report that the Institute's role as a pre-eminent educator in arbitration and mediation has extended to include adjudication, with the Institute embarking on a national training program for members, industry and professional bodies.

Finally, in noting with much pride that the Institute is Australia's leading and only nationally represented ADR organisation, I thank our present national Council, in particular, former Presidents, Robert Hunt and Laurie James, as well as past Councillors, the Council Committees and Chapter Committees for their contribution. I also thank our hardworking administrative staff at National Office, the Chapter Offices and the CEO for their support, and convey a special thank you and tribute to my predecessor, Ian Nosworthy, who made a valuable contribution during his term particularly in unifying and promoting the Institute as a national organisation.



Editor's Commentary

Russell Thirgood, Editor

Disputes are an inevitable by-product of commerce. Although they cannot be avoided they can be managed and resolved satisfactorily to the mutual benefit of the parties and the society in which we live. In previous editions of *The Arbitrator & Mediator* we have read about techniques that have been employed across a broad range of cultures and civilisations from Sun Tzu's China, modern Islam to corporate Australia.

The quest for improved ways of managing and resolving conflict continues. At its recent national conference, 'New Directions In ADR', the Institute of Arbitrators and Mediators Australia confronted this challenge. A number of papers were presented by leading academics and practitioners of ADR that examined how our community, and particularly business, can be better served in the important discipline of Alternative Dispute Resolution.

In this August edition of *The Arbitrator & Mediator* we profile a broad range of conference material from Ian Nosworthy's keynote address, 'Improving Arbitration in the New Millenium', to Robert Hunt's paper on how Dispute Resolution Boards are used in managing conflict in large-scale projects. Bill Taylor provides a practice update on the utilisation of adjudication, which, in many respects, is the latest and most exciting development of rapid resolution of disputes in the building and construction industry. Dr Tom Altobelli offers an interesting statistical analysis of the costs and time involved in ADR procedures, while Ian Bailey outlines various views with respect to potential reform of domestic arbitration in Australia.

On the international front, Nigerian Professor of Law, Dr Paul Obo Idornigie, provides an analysis regarding the application of the statute of limitations to ADR processes while 'A Critique of the ICC Arbitration' explores in detail the manner in which the International Chamber of Commerce (ICC) conducts its dispute resolution business and how it fares against its international competitors. It is hoped that this critique will serve as a catalyst for providers of private dispute resolution in Australia to re-examine, and possibly revise, their own procedures.

As with all editions of the Journal, a range of case notes covering the latest decisions of our Courts pertaining to alternative dispute resolution have been included.

Finally, I would like to welcome our newly appointed Journal Committee and President, Tim Sullivan. We look forward to providing you with an interesting and informative journal.

Statutes of Limitation and ADR Processes

Dr Paul Obo Idornigie, PhD, FCIS, MCI Arb¹

INTRODUCTION

A statute of limitation is any statute which imposes a limitation of time upon an existing right of action. It is settled law that the reasons for the existence of such statutes are threefold: that long dormant claims have more of cruelty than justice in them; that a defendant might have lost the evidence to disprove a stale claim; and that persons with good causes of actions should pursue them with reasonable diligence.² The consequence of this is that those who go to sleep on their claims should not be assisted by the courts in recovering their property and that there should be an end to stale demands. When such stale actions are filed in court, they are usually declared incompetent and statute-barred. An action is statute-barred when no proceedings can be brought in respect of it because the period laid down by the Statute of Limitation has lapsed. However, in determining when a right of action is statute-barred, the issue as to when the right of action arose is very fundamental. This is so because time begins to run when there is in existence a person who can sue and another who can be sued and a cause of action has arisen. A cause of action is the fact or facts which establish or give rise to a right of action. It is the factual situation which gives a person a right to a judicial relief.

In litigation, it is trite law that the Statute of Limitation applies to judicial proceedings. However, it is uncertain whether the statute applies to the alternative dispute resolution (ADR) processes. The aim of this article, therefore, is to examine whether or to what extent if at all, the statute applies to any ADR process.

ADR PROCESSES

Alternative Dispute Resolution (ADR) is the term which identifies a group of processes through which disputes, conflicts, and cases are resolved outside of formal litigation procedures. It developed formally in the United States primarily as an adjunct to the legal system.³ In Nigeria, it is a re-statement of customary jurisprudence. It generally involves the intercession and assistance of a neutral and impartial third party. We can also define ADR as a system of dispute resolution which is non-binding and serves either as alternatives or supplementary to litigation. By 'non-binding' is meant the absence of imposed decisions.

-
1. Barrister-at-Law and Senior Lecturer, Department of Company Law & Practice, Nigerian Law School, Abuja, Nigeria: Currently on Leave of Absence at the Bureau of Public Enterprises, Abuja, Nigeria, where is the General Counsel.
 2. *Nwadiaro v Shell Development Company Ltd* (1990) 5 NWLR (Pt 150) 322 at 337-338. See also *Egbe v Yusuf* (1992) 6 NWLR (Pt 245) 1 at 13, and *UBN Ltd v Oki* (1999) 8 NWLR (Pt 614) 244 at 253-254.
 3. Kovash KK. *Mediation: Principles and Practice*, 2nd ed, (Minn, St Paul: West Group, 2000) p. 6.
-

Thus a proper ADR procedure does not guarantee a binding result that could be coercively enforced by action, although it can lead to a result. The main distinction between ADR and arbitration lies in this respect. For purposes of this article, however, ADR procedures include arbitration,⁴ mediation/conciliation⁵ and negotiation.⁶

COMMENCEMENT OF ADR PROCEEDINGS

In most if not all jurisdictions, there are enactments⁷ or rules⁸ regulating the conduct of either arbitration or mediation/conciliation: whether *ad hoc* or institutional. However, in the case of negotiation, there are no formalised rules on the procedures to be followed. This is left to the parties to decide. Generally the parties are free to agree when arbitral or conciliation proceedings are to be regarded as commenced and where they fail the default procedures⁹ provided for in the enactments/rules will apply. Accordingly, section 17 of the ACA provides thus:

-
4. See generally Brown H and Marriott. A *ADR Principles and Practice*, 2nd ed (London: Sweet & Maxwell, 1999), p. 12; Mackie, K *et al. The ADR Practice Guide: Commercial Dispute Resolution*, 2nd ed (London: Butterworths, 2000) p. 8; Asouzu A A. *International Commercial Arbitration and African States* (Cambridge: Cambridge University Press, 2001) pp. 11-21, and Macfarelane J (ed) *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing Ltd, 1997) p. 2.
 5. See generally Sutton, David St John and Gill, J. *Russell on Arbitration*, 22nd ed (London: Sweet & Maxwell, 2003) p. 41; Asouzu, *ibid.* Orojo JO and Ajomo MA. *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates (Nig) Ltd, 1990) p. 4; Redfern A and Hunter M. *Law and Practice of International Commercial Arbitration*, 3rd ed (London: Sweet & Maxwell, 2003) p. 4; and Tackaberry J and Marriott A. *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*. 4th ed, vol.I (London: Sweet & Maxwell, 2003) p. 12.
 6. See Fisher R and Ury W. *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed (New York: Penguin Books 1991) p. xvii; Fisher R and Brown S. *Getting Together: Building Relationships as We Negotiate* (New York: Penguin Books, 1989) p. 133; and Ury W. *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* rev ed (New York: Bantam Books, 1993) p. 3; Maddeux R. *Successful Negotiation*, 2nd ed, 1999, p. 5; and Halpern A. *Negotiation Skills* (London: Blackstone Press Ltd, 1992) p. 3.
 7. See Article 21 of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), United Nations Document A/40/17, annex I; See also section 14 of the English Arbitration Act, 1996 and section 17 of the Arbitration and Conciliation Act, Cap 19, Laws of the Federation of Nigeria, 1990 ('ACA'). Nigeria is a Model Law country. See Binder P. *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London: Sweet & Maxwell, 2000) pp. 241-313.
 8. UNCITRAL Arbitration Rules, UN General Assembly Resolution 31/98 of 15 December, 1976 ('Arbitration Rules'), and UNCITRAL Conciliation Rules, UN General Assembly Resolution 35/52 of 4 December, 1980 ('Conciliation Rules').
 9. This is also referred to as the 'two-level system' which is a way of drafting a provision where the first part of the law grants the parties general freedom in regulating an issue, and the second part sets out the default rules which apply only when no such party stipulation is made. See Binder P, *op. cit.* at 71.
-

*Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.*¹⁰

This is one way of commencing arbitral proceedings. Other enactments or rules may prescribe that a particular step be taken before the proceedings commence.¹¹ In arbitration, the commencement date is very fundamental both for the purposes of the provisions of the enactment and for limitation purposes. In the words of the learned authors of *Russell on Arbitration*,¹² 'identification of the date of commencement may be of critical importance to the parties in view of contractual or statutory time limits for commencement of the arbitration'. This statutory provision is usually reinforced by arbitration rules and the rules of arbitral institutions.¹³ In the absence of any agreement as to when the proceedings are deemed to have commenced, resort to these rules will cure any lacuna. Whereas the ACA does not expressly provide for situations where the parties fail to agree on the date of commencement of proceedings after the appointment of arbitrator(s), section 14(4) of the English Arbitration Act provides thus:

Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

Similarly, if the arbitrator(s) are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.¹⁴

In the case of mediation, section 39 of the ACA provides that the conciliation proceedings shall commence on the date the request to conciliate is accepted by the other party. The provision is also supplemented by the rules. Accordingly, Article 2 of the Conciliation Rules provides thus:

-
10. See also 60 of the Limitation Act, Cap 522, Laws of the Federation of Nigeria, 1990, 1990 applicable to the Federal Capital Territory, Abuja. All the other states of the Federation have their various statutes of limitation. For Lagos State, see Cap 118, Laws of Lagos State, 1994. See also the English Limitation Act, 1980, Section 14 of the English Arbitration Act, 1996, and section 1044 of the German Code of Civil Procedure. Compare section 18 of the Sri Lankan Arbitration Act which does not grant the parties the freedom of choosing which point in time they determine for the commencement while section 32 of the Hungarian Arbitration Act, LXXI of 1994 draws a time frame between *ad hoc* and institutional arbitration.
 11. This may be the making of claim, the appointment of an arbitrator, the notification of such appointment to the other party, the sending of a notice to the other party requiring him to agree to the appointment of an arbitrator, etc.
 12. Sutton and Gill, *op. cit.* at 160.
 13. See Article 3 of the Arbitration Rules, Article 1.2 of the London Court of International Arbitration (LCIA) Rules, 1998, and Article 4 of the Rules of Arbitration of the International Chamber of Commerce (ICC), 1998. See also the First Schedule to the ACA.
 14. See section 14(5) of the English Arbitration Act. See also section 34 of the English Limitation Act 1980; and Prime T and Scanlan G. *The Law of Limitation*, 2nd ed (Oxford: Oxford University Press, 2001) p. 332.
-

THE ARBITRATOR & MEDIATOR AUGUST 2004

- (1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.
- (2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.
- (3) If the other party rejects the invitation, there will be no conciliation proceedings.
- (4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.¹⁵

Where the conciliation is to be administered by an institution, the request is made to that institution.¹⁶ The date of commencement of the mediation is usually the date on which the request for mediation is received by the institution.

STATUTORY AND CONTRACTUAL TIME LIMITS

Statutory time limits, whether imposed by the Limitation Act¹⁷ or any other limitation enactment, apply to arbitrations as they do to legal proceedings.¹⁸ The issue is when does time start to run? Is it from the date of the accrual of the cause of action or from the date of the making of the award?¹⁹ More fundamentally, does the publication of an award extinguish any right of action in respect of the former matters in difference and thus give rise to a new cause of action based on the arbitration agreement? In *Murmansk State Steamship Line v Kano Oil Millers Ltd*,²⁰ the plaintiff brought his action on the award less than six years after the date of the award but more than six years after the defendant's breach of the charter party. The Supreme Court, affirming the judgment of the court of first instance, dismissed the claim as statute-barred. The Court further held that the period of limitation runs after the date of award only when a party has by his own contract waived his right to sue as soon as the cause of action had accrued, but, 'if there is no such *Scot v Avery* clause, the limitation period begins to run immediately (that is, from the breach of the substantive contract)'.²¹ However, in *Kano*

15. See also the Third Schedule to the ACA.

16. See the ICC Rules of Conciliation, 1988. See also Article 3 of the WIPO Mediation Rules, 1994.

17. See sections 59-66 of the Limitation Act, Cap 522, Laws of the Federation. See also section 13(1) of the English Arbitration Act.

18. See section 61 of the Limitation Act (Nigeria).

19. Section 7(1)(d) of the Limitation Act (Nigeria) provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

20. (1974) 1 ALR Comm 1 at 4 and 7, or (1974) 12 SC 1.

21. See also Asouzu AA, 'The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards' (1999) *J.B.L.* March Issue, P. 185-204.

State Urban Development Board v Fanz Construction Ltd,²² Agbaje JSC quoted with approval Halsburys Laws of England, Fourth Edition, paragraph 611, page 323 thus:

The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.

In other words, time starts to run from the date of the award. This decision is in accord with the law and practice in other jurisdictions.²³ In England, section 13(2) of the Arbitration Act, 1996, empowers a court to order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter (a) of an award which the court orders to be set aside or declares to be of no effect, or (b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect, the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.²⁴

However, section 7(1) of the Limitation Act²⁵ provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation Act shall not be brought after the expiration of six years from the date on which the cause of action accrued. This is a rather curious provision. This is so because the provision fails to draw a line between actions founded on simple contract or quasi-contract and those regulated by arbitration agreement. Arbitration agreements generally involve two contracts, namely, the main or principal contract which is regulated by the proper law of the contract and the collateral or ancillary contract which is regulated by the *lex arbitri*.²⁶ This has led to the emergence of the doctrine of separability. The reasoning behind the doctrine is that the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or 'main' contract.²⁷ However, the provisions of the Limitation Acts in the various States in Nigeria do not seem to take this distinction into account. It makes sense to provide that in the case of a simple contract, time begins to run from the date on which the cause of action accrued because it is a single contract. It does not make sense to have a similar provision for arbitration where commencement of arbitral proceedings is different from an application to enforce or set aside an award. Different statutory periods generally govern such actions.

22. (1990) 4 NWLR (Pt 142) 1 at 37.

23. See *Agromet Motorimport v Maulden Engineering Co.* (1985) 1 WLR 762, and Sutton and Gill, *op. cit.* at 367.

24. See also section 34(5) of the English Limitation Act, 1980 and section 63 of the Limitation Act of the Federal Capital Territory, Abuja and similar provisions in the States of the Federation.

25. This provision is the same in all the States of the Federation of Nigeria and the Federal Capital Territory of Abuja.

26. See Sutton and Gill, *op. cit.* at 64, and Asouzu, *op. cit.* at 433.

27. See *Bremer Vulkan Schiffbau und Maschinenfabrik v South Indian Shipping Corporation Ltd* (1981) 1 Lloyd's Rep 253 at 259.

In *City Engineering Nigeria Ltd v Federal Housing Authority*,²⁸ the issue before the court was when time began to run for the purpose of the enforcement of an arbitration award. In that case, there was a breach of contract on 12 December 1980, arbitral proceedings started on 11 December 1981 and ended in November 1985, and application to enforce the award was made in November 1988. There was no counter-affidavit praying for an order of the court to set aside the award. The Supreme Court, in replying on the provisions of sections 8(1)(d) and 63 of the Limitation Law of Lagos State,²⁹ held that the limitation period ran from 12 December 1980 when the cause of action accrued and not November 1985, the date of the making of the arbitration award. Consequently, the action was statute-barred. In the words of Asouzu:

*The court distinguished and refused to apply Agromet Motorimport v Maulden Engineering (1985) 2 All E.R. 436 and Mustill & Boyd, Commercial Arbitration (1982) p.162 whilst holding that KSUDB v Fanz Construction Ltd (1990) 4 N.W.L.R. (Pt 142) p.1 was not relevant to the question in issue.*³⁰

Instead the court applied the *ratio* in *Murmansk State Steamship Line v Kano Oil Millers Ltd*, supra. Based on the provisions of section 8(1)(d) of the Limitation Law of Lagos State, this is a correct interpretation of the provision. However, if the drafters of the law had adverted their minds to the doctrine of separability, the provisions would have been different. The parties have agreed that in the event of a dispute arising out of or under the contract, it should be resolved by arbitration. Consequently, for purposes of commencement of action, time runs from the date when the cause of action accrued while in the case of challenging an award, time runs from the date of the award. The distinction between commencement of action and setting aside or challenging an award is very important for ease of appreciation of the issues.

In *Araka v Ereagwu*,³¹ one of the issues for determination was when to apply to set aside an arbitral award either under section 29 or section 30 of the ACA. Section 29(1), ACA³² provides that a party who is aggrieved by an arbitral award may, within three months from the date of the award, request the court to set aside the award if the applicant furnishes proof that the arbitrator exceeded his jurisdiction. Similarly, section 30, ACA³³ provides that where an arbitrator misconducts himself or where the proceedings or award has been improperly procured, the court may, on the application of a party, set aside the award. Section 30, ACA makes no reference to a time limit. In that case, the award was made on 8 September 1994 and an application was made on 6 February 1995 to enforce. On 21 April 1995, a counter-affidavit was filed seeking to set aside the award while on 25 April 1995, a fresh application was filed under section 30, ACA for an order of the court to set aside the award on the ground that the arbitrator misconducted himself. At the trial it was argued that since there was no statutory

28. (1997) 9 NWLR 224.

29. Which is the same thing as sections 7(1)(d) and 62 of the Limitation Act of the Federal Capital Territory, Abuja.

30. Asouzu, *op. cit.* no. 28 at 189. See also Uba Nwangwu. 'Enforcement of Arbitration Awards and Limitation of Actions' (1990) 2 *Justice* 9 cited in Asouzu, *ibid.*

31. (2000) 15 NWLR (Pt 692) 684 at 706.

32. See also Article 34(4) of the Model Law.

33. This is not expressly provided for in the Model Law but see generally the grounds in Articles 34 and 36 of the Model Law.

time limit under section 30, the time limit of three months in section 29 was inapplicable. The Supreme Court held thus:

*The prescribed time within which to make an application to set aside an arbitral award under the Arbitration and Conciliation Act, 1988 (now, Cap 19) is three months from the date of the award irrespective of whether the application is predicated under section 29 or section 30 of the Act.*³⁴

We submit, therefore, that at the earliest opportunity, the provision in section 8(1)(d) and similar provisions should be amended in line with the practice in other jurisdictions.

It is noteworthy that the effect of a statutory time limit is to provide a procedural bar to the remedy which has to be raised by way of defence to the claim. It does not go to the jurisdiction of the arbitral tribunal but merely proves a defence to the claim: *Leif Hoegh & Co A/S Petrolsea Inc. (The 'World Era')*.³⁵ However, the existence of a time bar does not deprive the arbitrator of jurisdiction, but in the context of a party seeking to expand his existing claim in the arbitration after the time limit has elapsed, there may well also be want of jurisdiction because the relevant cause of action was not included in the original reference. Where a reference to arbitration is contractual and a statutory time limit is raised, the onus is on the claimant to show the date on which the arbitration is commenced and when the right of action arose. Although section 36 of the ACA provides that the arbitral tribunal may, if it considers it necessary, extend the time specified for the performance of any act under the Act, this does not extend to statutory time limits. Although this power is not expressly given to the courts in Nigeria under the ACA, even in England where the power is given, section 12(5) of the Arbitration Act (English) provides that an order made under the section does not affect the operation of the Limitation Act. Indeed section 13(1) of the Arbitration Act (English) expressly provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.³⁶ The consequence of this is that the limitation periods are extended in case of the disability of a party, acknowledgement, part payment, fraud and mistake.³⁷

Other than statutory time limits, there are contractual time limits. According to the learned authors of *Russell on Arbitration*:

*A time limit in an arbitration clause (or in arbitration rules incorporated by reference) may (1) impose a time limit for commencing arbitration proceedings, and /or (2) provide that a claim shall be barred or extinguished if arbitration is not commenced within the time limit. These provisions are not necessarily found together.*³⁸

The effect of such a clause or rule seems to be that the dispute is removed from the jurisdiction of the court. However, since such provisions are not necessarily found together, the contract may limit the time for commencing arbitration without barring or extinguishing

34. See also *Commerce Assurance Ltd v Alli* (1992) 3 NWLR (Pt 232) 710 and *Home Development Ltd v Scancila Contracting Co Ltd* (1994) 8 NWLR (Pt 362) 252.

35. (1992) 1 Lloyd's Rep 45.

36. See also section 61 of the Limitation Act (Nigeria) which provides that the Act and any other limitation enactment shall apply to arbitrations as they apply to actions in the court.

37. See sections 34-58 of the Limitation Act (Nigeria).

38. Sutton and Gill, *op. cit.* at 160.

the claim, depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts.³⁹ Alternatively, such a clause may make compliance with a time limit, a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred.

In *Smeaton Hanscomb & Co Ltd v Sasson I Setty, Son & Co (No. 1)*,⁴⁰ a contract for the sale of mahogany logs had a clause requiring any dispute arising with respect to any matter connected with the contract to be referred to arbitration and provided "any claim must be made within 14 days from the final discharge of the goods before they are removed". After the 14 days had elapsed, the buyers put forward a claim in respect of shortage and defective quality. On a special case being stated it was held that the buyers could not maintain the claim as the clause went not to the appointment of the arbitration, but to the making of the claim which the arbitrator had to determine, and it had been left to the arbitrator and not to the court to determine the point finally so far as it was a question of fact.⁴¹ Like the *contra preferentem* rule, time bar clauses are construed strictly against the party relying upon them.⁴² Similarly, a time bar clause can be unilateral. In other words, even where there is no mutuality where arbitrators found that the time bar clause plainly deals with buyers' complaint and not sellers', a request for arbitration by sellers even when made outside the contractual time limit is not statute-barred.⁴³

In analysing the effect of the law on contractual time bars which provide that arbitration must be commenced within a specified time limit, it is pertinent to consider the *Scot v Avery Clauses*.⁴⁴ Such contractual clauses are usually inserted in an arbitration agreement to the effect that no cause of action shall accrue until an award is made. In other words, the arbitration of disputes is a condition precedent to any court action.⁴⁵ Such clauses are ineffective to extend the limitation period in respect of the matter to be referred to

39. Such clauses are usually referred to as *Atlantic Shipping Clause*. See *Atlantic Shipping & Trading Co v Louis Dreyfus & Co* (1922) 2 AC 250. See also *Pinnock Brothers v Lewis & Peat Limited* (1923) 1 KB 690.

40. (1953) 1 WLR 1468.

41. See also *A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financiere D'Investissements Transatlantiques S.A. (Compafina) (The "Himmerland")* (1965) 2 Lloyd's Rep 353 where the Centrocon arbitration clause provided that 'Any claim must be made in writing and the Claimant's Arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred ...' A claim was made out of time and the court held that the claim was barred even though the cause of action giving rise to the claim had not arisen or come to the knowledge of the claimant until too late to enable him to comply with the clause.

42. *Minister of Materials v Steel Brothers & Co Ltd* (1952) 1 TLR 499.

43. *W J Alan and Co Ltd v El Nasr Export and Import Co* (1971) 1 Lloyd's Rep 401.

44. *Scot v Avery* (1856) 25 LJ Ex 308.

45. See also *Board of Trade v Cayzer, Irvine & Co Ltd* (1927) AC 610.

arbitration.⁴⁶ Thus the cause of action is deemed to have accrued in respect of the matter at the time when it would have accrued but for that term in the submission. The consequence is that such a provision is completely disregarded for limitation purposes.

It is abundantly clear, therefore, that the statutes of limitation apply to arbitration. However, do they apply to negotiation and mediation? In all the enactments on statute of limitation, there is no reference to negotiation or mediation. Does this mean, therefore, that when a dispute is being negotiated or referred to mediation, time does not run? Since there appears to be no statutory provisions on this, reliance will be placed on case law. It should be borne in mind that the ADR processes take place 'in the shadow of the law' as the parties appraise the types of outcome likely to be imposed by a court, and develop criteria which both sides can accept as fair for reaching an agreement.⁴⁷ Thus the issue of legal proceedings has a significant impact on all negotiations and mediation.⁴⁸

In *Hewlett v London County Council*,⁴⁹ the parties addressed several letters to each other which contained suggestions for a settlement, the sum which the plaintiff would be willing to accept and requests for more particulars. When negotiations broke down, the plaintiff instituted an action and the defendant relied on section 1(a) of the Public Authorities Protection Act, 1893 which prescribed a limitation period of six months. It was held, on appeal, that the defendant was not estopped from relying on the Act. In other words, negotiation did not stop the time from running.

In *Lahan v The Attorney-General of Western Nigeria*⁵⁰ attempts were also made at negotiations but the issue was whether such negotiations would stop the time from running. The court, per Fatayi Williams J (as he then was) relied on *Hewlett v London County Council*, *supra* and held that negotiations between the parties will not stop the time from running.

In *Nwadiaro v Shell Development Company Ltd*,⁵¹ the issue before the Court of Appeal was whether the action of the plaintiff was statute-barred. The claim of the plaintiff against the defendant at the Oguta Judicial Division of Imo State High Court was for N100,000.00 (one hundred thousand naira):

*being compensation for the blockade by the defendant of the plaintiffs "UTU IYI EFI CREEKS AND PONDS" along the access road to well 3 location, lying and situate at Oguta farmland in the Oguta Judicial Division from 1966 till date.*⁵²

46. See section 62 of the Limitation Act (Nigeria) which provides thus: 'Notwithstanding a term in a submission to the effect that no cause of action shall accrue in respect of a matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Act and of any other limitation enactment (whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of the matter at the time when it would have accrued but for that term in the submission'. See also section 13(3) of the Arbitration Act (English), 1996.

47. Macfarlane, *op. cit.* at 7.

48. Mackie et al. *op. cit.* at 23.

49. (1908) 24 JLR 331.

50. (1961) WNLR 39. See also *Inco Beverages Ltd v Class W Brons & Ors* (1990-93) Vol. 4 NSCC 123 and *Inlaks Ltd v Polish Ocean Lines* (1980-1986) Vol.2 NSC 501.

51. (1990) 5 NWLR (Pt 150) 322.

52. Emphasis added.

The writ of summons was dated 23 May 1985 but filed in court on 27 May 1985 and the Statement of Claim was filed on 17 June 1985. Instead of filing a Statement of Defence, the defendant filed a motion for an order of court dismissing the action on the ground that it was statute-barred, the suit having been commenced more than six years after the cause of action had arisen. In the counter-affidavit, the plaintiff deposed that the blockade was a continuous one and that the negotiation between the parties, which started in November 1984, continued till April 1985. The High Court held that since the cause of action arose in 1966, the action was statute-barred. Dissatisfied with the decision, the plaintiff appealed to the Court of Appeal. One of the issues for determination was when the cause of action arose. The Court held that since the cause of action arose from 1966 till date, that is, when the writ of summons was issued on 27 May 1985, the action was not statute-barred. In distinguishing the facts of the case from that of *Lahan v The Attorney-General of Western Nigeria, supra*, the Court held that the fact that negotiations between the parties will not stop the time from running is subject to a qualification. The Court held further:

It obviously must depend upon the stage which the negotiation had reached. It must also be qualified in one other way; if there has been admission of liability during negotiation and all that remains is fulfillment of the agreement, it cannot be just and equitable that the action would be barred after the statutory period of limitation giving rise to the action if the defendant were to resile from his agreement during the negotiation.

The import of this judgment is that although negotiations do not *per se* stop the time from running, this is subject to some qualifications especially where there is an admission which is like an acknowledgment.⁵³ Such an acknowledgement is one of the exceptions to the limitation statutes.⁵⁴ The Court of Appeal's decision was affirmed by the Supreme Court in *Eboigbe v The Nigerian National Petroleum Corporation*,⁵⁵ where the Court, per Adio JSC, held thus:

Although the law does not prohibit parties to a dispute from engaging in negotiation for the purpose of settling the dispute, generally such a negotiation by parties does not prevent or stop the period of limitation stipulated by a statute from running. The law is that when in respect of a cause of action, the period of limitation begins to run, it is not broken and it does not cease to run merely because the parties engaged in negotiation. The best cause for a person to whom a right of action has accrued is to institute an action against the other party so as to protect his interest or right in case the negotiation fails. If, as in this case, the negotiation does not result in a settlement or in an admission of liability, the law will not allow the time devoted to negotiation to be excluded from the period which should be taken into consideration for the determination of the question whether claim has become statute-barred.

53. Under section 36 of the Limitation Act (Nigeria), an acknowledgment means acknowledgment of indebtedness, a claim, title, or a right. See also sections 37-43 of the Limitation Act.

54. Under section 44, every acknowledgment shall be in writing and signed by the person making it or his agent. There is no legal requirement that the acknowledgment must be stamped as a deed.

55. (1994) 5 NWLR (Pt 347) 649 at 659-660.

It is submitted, therefore, that where one stands the risk of running out of time, the proper approach is to institute an action in court and apply for an adjournment to enable the negotiations to take place and where there is a proper ADR clause, apply for a stay of proceedings until the process is completed. If in the course of the negotiations, admissions are made, then such admissions will extend the limitation period but such admissions are privileged.⁵⁶ Such admissions are one of the qualifications to the general rule and akin to an acknowledgement. An acknowledgment is one of the exceptions to the limitation statutes. To be effective, the acknowledgment must be made in writing and signed by the party or his agent (including a personal representative). However, where the negotiations break down, then the court proceedings will resume.

It is also submitted that in the case of mediation, the process will not stop the time from running. A safety valve, therefore, is to adopt the ratio in *Eboigbe v Nigeria National Petroleum Corporation, supra*. Support for the need to institute an action can also be found in Article 16 of the Conciliation Rules which provides thus:

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

One other way of protecting the interest of the party engaged in conciliation who wants to benefit from his right to judicial proceedings should the conciliation break down is that in the course of the conciliation proceedings he must endeavour to get the other party to agree to an extension of time. If the proceedings are conducted under the Mediation Rules of the World Intellectual Property Organisation (WIPO) the provisions of Article 27 of the Rules will apply. The provisions will suspend the running of limitation period under the statute of limitation while the mediation/conciliation proceedings are being conducted from the date of the commencement of the mediation until the date of the termination of the mediation. Article 1(2) of the Conciliation Rules allows the parties to exclude or vary any of the rules at any time. If the proceedings are conducted under the Conciliation Rules, reliance can be placed on this provision to add an article similar to Article 27 of the Mediation Rules of WIPO.

Given the growing importance of the ADR processes, the limitation statutes should be extended to the processes. It is conceded, however, that in most jurisdictions, there is no legal regime regulating mediation.

56. See Article 20 of the Conciliation Rules and section 25 of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990, as amended. This section deals with 'without prejudice' proceedings.

CONCLUSION

In this article, we have highlighted the point that the statutes of limitation apply to arbitral proceedings the same way that they apply to judicial proceedings. However, while in judicial proceedings time begins to run from the date of the accrual of the cause of action, that of arbitral proceedings appear out of tune in Nigeria in view of the provisions of the statutes of limitation. At the moment, therefore, it is advisable that parties to arbitral proceedings should initiate court proceedings and seek an adjournment to enable them arbitrate so that they are not caught by the provisions of the statute. We submitted that in arbitral proceedings, a line should be drawn between the statutory time for commencement of an action and that for setting aside an arbitral award. This is so because for commencement of action, the statutory time limit is six years from when the cause of action accrued, that for setting aside an award is three months from the date of the award. There are also contractual time limits as in *Atlantic Shipping* and *Scot v Avery Clauses* though the provisions of the statutes of limitation make the *Scot v Avery Clause* ineffective. Where parties resort to the ADR processes like mediation and negotiation, there is no statutory provision on this. The general rule is that the processes do not stop time from running. Reliance was, therefore, placed on case law and it was established that in the case of negotiation, the general rule applies subject to some qualifications like an admission of liability. Such admission is akin to an acknowledgment that normally extends the limitation period. This position was extended to mediation.

It is advisable, therefore, that parties adopting the ADR processes should go to court, within the limitation period, to institute an action and apply for an adjournment to enable the processes to be fully exploited. If there is a proper ADR clause, the parties can apply for a stay of proceedings. This is to ensure that where there is breakdown in the process, the action will not be statute-barred. Indeed if this procedure is adopted and there is settlement, this will be entered by the court as consent judgment. This is an aspect of case management. Thus as a court judgment, enforcement will be easier than enforcing mediation initiated by the parties themselves. In other words, this procedure will cure one of the drawbacks of the ADR processes, namely, that of enforcement.

Dispute Resolution Boards

Robert Hunt¹

"A Stitch in time saves nine." (Old English proverb)

SYNOPSIS

The various dispute resolution processes all suffer two particular disadvantages, which arise from the fact that these processes only come into play when a dispute has crystallised. One disadvantage is that, during the dispute resolution process, trust between the parties may be sorely tested, or even destroyed. The other disadvantage is that the time and cost of resolving a dispute may well be significantly greater than preventative measures aimed at avoiding the occurrence of disputes in the first place, or at least minimising the scope of any disputes which arise.

In contrast, Dispute Resolution Boards (DRBs) seek to avoid or minimise the incidence of disputes by a timely and relatively informal process which takes place while the work is in progress. Used effectively, they can lead to a reinforcement and enhancement of trust, with a positive impact on the project as it progresses.

HISTORICAL BACKGROUND

The Dispute Resolution Board² process is believed to have originated on a tunnel project in the USA in 1975. The process reportedly worked extremely well, and was used on another nine projects in the decade to 1985. One of these, a hydro project in Honduras, was the first use on an international project.

The growth in use of the process has been dramatic. In the years between 1988 and 2001, the number of projects reported to have used the process has grown from 18 to 800.

-
1. Robert Hunt is a Barrister, Arbitrator, Mediator, Past President of the Institute of Arbitrators & Mediators Australia (IAMA), and is a director of the Australian Centre for International Commercial Arbitration (ACICA). He drafted the IAMA *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)* 1999, the IAMA *Expert Determination Rules* 2001, the IAMA *Mediation and Conciliation Rules* 2001, and the IAMA *Industry and Consumer Scheme Rules* 2001, in addition to writing various IAMA Practice Notes. He is the author of 'Establishing the Basis for Arbitration and ADR' and 'The Trade Practices Act and Associated Legislation' in *A Guide to Arbitration Practice in Australia* (University of Adelaide), and many published articles on arbitration and ADR in Australia and elsewhere.
 2. Sometimes DRBs are called Dispute Review Boards.
-

WHAT IS A DRB

A DRB is a purely contractual institution. The clause providing for the DRB in a contract needs to specify precisely how it is constituted and how it operates, including all necessary administrative arrangements.³ Planning and forethought will lead to smoother implementation.

A DRB has two primary functions. The first is to become familiar with the project during its construction (on the assumption that the contract involves construction). The second is to resolve, efficiently and cost-effectively, any disputes referred to it during that phase.

The DRB is usually set up at the commencement of the project. However, some DRBs have been constituted at other stages of a project. For example, I was a member of a DRB on a major BOOT⁴ infrastructure project in Australia, which was constituted to deal with disputes arising during the operation phase after construction works were completed.

The usual sort of 'model' for a DRB involves the following:

- 1 The process commences with a call for a nomination from each party of an independent person experienced in the work being undertaken.
- 2 The nominees must usually be acceptable to both parties. The nominees, once appointed, choose a third person to be the chairman or chairwoman.
- 3 Once appointed, members of the DRB do not act as advocates or representatives of the parties who nominated them. They participate as independent, impartial members.
- 4 How the DRB is to operate is specified in the contract documents, or any procedural rules incorporated by reference (e.g. the DRBF guidelines). The matters which should be specified include:
 - (a) duration and timetable for visits of the DRB to the project (e.g. two days per visit, at least one visit per quarter);
 - (b) the procedure for visits;
 - (c) information to be provided to DRB members (usually the project documents, all site meeting minutes and progress reports as they come to hand);
 - (d) the procedure for dealing with disputes, including when and how they are to be presented and considered, in what circumstances the DRB's decision become binding, and in what circumstances reasons are or are not required;
 - (e) administrative matters, including remuneration of the DRB members.

3. The Dispute Resolution Board Foundation (DRBF) has developed a suite of documents for the operation of DRBs, which can be incorporated into a contract by reference, including draft contract clauses, DRB Operating Procedures and draft Three-Party Agreements (between parties and DRB members).

4. BOOT is an acronym for Build / Own / Operate / Transfer.

ADVANTAGES OFFERED BY THE DRB PROCESS

The DRB process is aimed at dispute avoidance or dispute minimisation, rather than dispute resolution. The advantages can be summed up in the old adage that *'prevention is better than cure'*.

It is a truism that the time and cost involved in resolving disputes on modern construction projects is substantial. The sense of frustration can be exacerbated when further time and cost is spent on arguments between disputants about form and forum.

Traditional methods of handling disputes on large construction projects range from adjudicative processes in which a determination is made by a third party (e.g. litigation, arbitration and expert determination) to consensual processes in which a neutral third party assists the parties in reaching a resolution which is agreed rather than imposed (e.g. mediation, conciliation, facilitation, expert appraisal). All these methods have achieved varying degrees of success over time.

This is not the time or place for a detailed analysis of the respective advantages and disadvantages of the various dispute resolution processes. However, regardless of whether the resolution is imposed or agreed, all of these processes suffer a significant disadvantage in that they come into play only when the dispute has crystallised and the parties are unable to come to a resolution themselves.

Often, during the course of the dispute resolution process, trust between the disputants is sorely tested, or destroyed. As ongoing trust between contracting parties is an extremely important ingredient of healthy and efficient project delivery, this can be a significant disadvantage.

HOW THE DRB PROCESS WORKS

The first meeting of the DRB should take place soon after the implementation of the project commences. For a construction project, this would be when construction is just getting under way.

At the first meeting:

- the DRB should be fully briefed on the Owner's expectations for the project, the Contractor's plans and expectations, and the concerns of other stakeholders (if any);⁵
- details of the procedure will need to be finalised, including such things as procedures for meetings, minutes to be kept, attendance (usually senior site representatives of the parties and their off-site superiors);
- the objectives of the DRB should be outlined, namely to fairly and equitably deal with differences and disputes, on the basis of the facts observed on the visits by the DRB and material provided to the DRB members, and their own experience.

5. For example, financiers of a BOOT project, operators of the project (if different to the Owner), consultants or contractors for inter-dependent works.

The DRB should ensure that the ordinary principles of natural justice are observed during their dealings with representatives of the parties. At all times during visits, the DRB members should be accompanied by representatives of both parties and should not meet separately with either party. Communications to DRB members should be in writing, with a copy provided to the other party.

The periodic visits to the site and briefing of the DRB members occurs regardless of whether or not differences or disputes have arisen between the parties. As a result, when a difference does arise requiring resolution by the DRB, its members are already familiar with what is occurring on site, and should have gained the trust and respect of the on-site personnel, such that they can quickly come to grips with the problem and recommend a solution before adversarial attitudes take hold.

The dynamics of the DRB process ensures that the DRB members view and keep abreast of all developments on the project. Preferably, as differences emerge, they can be brought to the DRB for resolution. Occasionally, differences will be elevated to disputes before the DRB has an opportunity to consider them. In these situations, the DRB will receive submissions on the respective positions of the parties, and should be able to give a timely decision.

In comparison with the formal processes and the ADR processes previously mentioned, the DRB effectively provides a dispute avoidance mechanism. Experience suggests that, in most cases, the parties are likely to accept the DRB's decision, and there the dispute ends. Some project DRB procedures provide for parties to be able to refer disputes to arbitration if they are not satisfied with the DRB's decision. However, even with this option open to them, experience indicates that few parties do so. This may possibly be explained by the fact that, in doing so, a party will be going against a decision of a panel of people who were appointed by them, under procedures agreed to by them, and who (hopefully) they will have come to trust and respect. Another factor weighing strongly against challenging the DRB's decision is where it is admissible in the arbitration.

COST EFFECTIVENESS OF DRBS

An important factor in considering whether to adopt the DRB process for projects is the issue of cost effectiveness.

As indicated above, the effectiveness of the process in avoiding disputes is based on periodic visits to the site and briefing of the DRB members, which occur regardless of whether or not differences or disputes have arisen.

Experience has shown that the DRB process is cost effective on projects with a value in excess of approximately US\$50 million. For a project of two years duration, with meetings

each quarter, the cost without hearings will be less than 0.5% of the contract value. Based on the record of DRBs worldwide, with about a 99% success rate, this represents quite economical protection against the time and cost of becoming embroiled in lengthy, expensive litigation or arbitration.

EXPERIENCE IN THE USE OF DRBS

The World Bank now requires projects with an estimated construction value in excess of US\$50 million to provide for three-person DRBs. The FIDC 'Red Book' for international civil engineering projects, provides for the setting up of three-person Dispute Adjudication Boards (DABs) for projects over US\$25 million.⁶

The introduction of DRBs has had a significant impact on the number of arbitrations on major construction projects for the Californian Department of Transportation (Caltrans), which is responsible for about US\$2 billion worth of projects each year. California law requires that the ultimate method of dispute resolution on state projects be arbitration. Caltrans initiated DRBs on eight projects in 1994, while retaining the right to arbitration if a party is dissatisfied with the DRB's decision. There are currently 110 Caltrans projects with DRBs. Since 1994, 282 disputes have been decided by DRBs. Of those, the decision was accepted in more than 60% of cases. Of the remainder, most were either settled or dropped. Only 4 of the 282 disputes (1.4%) have remained unresolved and required arbitration.⁷

Some examples of the operation of DRBs on large dam and similar projects outside the USA are set out in the Appendix to this paper, to illustrate some of the features of how they operate.⁸

The Hong Kong Airport project illustrates how the process can be streamlined to yield savings in cost and time where there are multiple contracts on the one project. The project DRB was constituted before any contracts were let. The Principal and the Contractor's Association each chose three mutually acceptable nominee members and a non-sitting convenor. As each contract was let, the successful contractor and the principal each chose one of the nominee members and they in turn chose the chairman from the other members to form the DRB for that particular contract. The seven members of the various DRBs then made visits to site for the project, each DRB sitting to examine progress and features of the contract it was concerned with. These arrangements saved travel time and expenses as each member sat on multiple boards.

A similar arrangement was put in place for the Central Artery Project in Boston, involving bridges across the Charles River and a new tunnel under Boston Harbour.⁹ Total value of the project is in excess of US\$10 billion spread out over 14 years from 1991 to 2004, involving 70

6. DABs are essentially the same as DRBs, except decisions are binding unless reversed by subsequent litigation, which is very rare.

7. See 'DRBs Overtake Arbitration in California', *DRBF Forum*, August 2003, p. 1.

8. See 'Worldwide Application of the Dispute Review Board Method of Dispute Resolution', P. H. J. Chapman.

9. See 'Central Artery/Tunnel Project Implements Use of Consolidated DRBs', *DRBF Forum*, January 1998, p. 6.

distinct contracts. The Principal, the Massachusetts Highway Department, had a key project objective to avoid litigation on this challenging project that involved complex and intricate work. It made an early decision to use DRBs on major construction packages (those over US\$20 million). Consequently, there was potential for DRBs to be used on 45 distinct packages involving 135 individual DRB members.

After lengthy and detailed discussions, the Principal and contractor community arrived at a model for consolidating DRBs. The Principal and the contractor each have the option on a newly awarded contract of using the same DRB that was in place on another contract with the same contractor, provided the DRB members were willing to serve in this expanded role.

This procedure commenced in 1997 and the results have reportedly been very positive. There have been eight 'consolidated' DRBs appointed, with appointees of the Principal and each of the general contractors (or lead joint venture partners) overseeing 22 separate contracts. The DRBs meet quarterly in Boston for two to three days as necessary, when they are briefed on the status of the work by the Resident Engineer and the contractor's Project Manager and are then taken on a site visit, for each of the contracts overseen by that DRB. As a result, the administration of the DRB process has been reduced by two thirds and operational savings (particularly travel) have been significant.

DRBs are not a guaranteed recipe for a trouble-free, litigation-free project. An example of what can go wrong was the project for the construction of a portion of a subway for the Los Angeles County Metropolitan Transportation Authority, which has embroiled the process in unwelcome litigation.¹⁰ For two years, the Authority and its contractor litigated the status and authority of the DRB following the purported termination of the contract by the Authority.

The parties had had numerous disagreements prior to the termination. The contractor requested a DRB hearing following the notice of termination. The Authority did not participate in the hearing and argued that the DRB no longer existed by virtue of the termination of the contract. The DRB conducted a hearing without the Authority at which the DRB found that the Authority's purported termination was in breach of the contract. For a variety of reasons, including the behaviour of one member of the DRB, the California Court of Appeals upheld the decision of a lower Court to remove the DRB.

The behaviour which was criticised by the Court in that case provides a useful checklist for appropriate conduct of DRB members, namely:

1. **Private communications:** communications with DRB members must be made in the presence of both parties.
2. **Perceived bias or lack of objectivity:** DRBs have been successful primarily because of the integrity, knowledge and experience of the members and the faith of the principal and contractor in the objectivity and integrity of the members of the DRB, whose members must therefore avoid any appearance of partiality or subjectivity.
3. **Appearance of prejudgment of issues:** Members of DRBs must decide disputes or differences which come before them based on the facts and circumstances of each particular dispute or difference.

10. See 'California Court of Appeals Upholds Removal of DRB Member on LA Project', *DRBF Forum*, January 1998, p.1.

4. **Advice beyond the scope of the referred dispute or difference:** Members of DRBs should limit their advice or recommendations to the particular dispute or difference formally referred to the DRB. Members of DRBs are not consultants, peer reviewers or construction managers. Furnishing technical or legal advice is not the function of a DRB.

CHOOSING THE MEMBERS OF THE DRB

In much the same way that arbitrators, mediators, adjudicators and other dispute resolvers must have an appropriate level of competence to be nominated for matters, potential members of DRBs need to have a sufficient level of understanding and experience of the DRB process, the principles of cost-effective dispute resolution, as well as qualifications and experience in the technical issues involved.

For construction projects, sound, extensive (at least 15 years management) experience on major construction works of the type being undertaken is an important quality for potential members of DRBs, particularly those appointed by the parties.¹¹ Extensive knowledge and experience with contract management and cost-effective dispute management and resolution is another important quality. An extensive knowledge of the workings of the DRB process and its many possible variants is also desirable essential so that the DRB can adapt the process to particular features of the project so that the process is made to fit the project and not *vice versa*.

The Dispute Resolution Board Foundation has played a prominent role in promoting the concept of DRBs and supporting its use in the construction industry, both through its own training and promotion and promotion conducted through affiliations with other bodies such as the Institute of Arbitrators & Mediators Australia. Some of these bodies maintain lists of potential appointees to DRBs and will make lists available for consideration by interested parties.¹²

11. This quality is less important in the choice, by the appointees of the parties, of the DRB chairperson, who is usually chosen for his or her qualities in the other two aspects referred to in this paragraph.

12. The Institute of Arbitrators and Mediators Australia provides services for Dispute Resolution Boards on request. Further details are available from the Institute's National Office (email: national@iama.org.au).

CONCLUSION

Major infrastructure projects such as dams, hydro-electric facilities, irrigation projects and similar projects have been dogged over the years by complex and costly disputes.

The use of DRBs and similar processes has emerged as an effective, constructive means to minimise the harmful impact of disputes on these projects as far as possible. They also serve to ensure that, where differences between parties escalate into disputes, the issues are resolved equitably and as expeditiously and cost-effectively as possible, so that relationships are enhanced (rather than harmed) for the future.

Appendix – Examples of Use of DRBs

CHINA - CONCRETE ARCH DAM AND HYDROPOWER PLANT

Approx. Value: US\$2 billion (civil works alone)

Employer: Chinese State Organisation

Contract: FIDIC 4th Edition

Construction Period: 1991 to 2000

Contractors: International Joint Ventures with local partners

Number of Main Contracts subject to DRBs: 2

Number on the DRB: 3

How Chosen: Parties each chose one, members chose chairman

Frequency of visits: about 4 monthly

Total number of visit to site: about 20

Nature of DRB's determinations: Recommendations, not automatically final and not binding

Number of disputes referred to DRB: 40

Number of disputes that went to arbitration: Nil

Special Factors: First DRB in China. For most of the participants this was their first exposure to DRBs. Parties developed confidence in the DRB and realised that it could help the project by resolving difficult issues. Over the years, the DRB became more proactive and assisted the project in an informal capacity as well as operating formally. At the end of the project, DRB assisted in securing the parties consent to the final account.

HONG KONG – INTERNATIONAL AIRPORT

Approx. value: US\$ 15 billion

Employer: Airport Authority

Contract: Similar to H K Government standard

Construction Period: 1994 to 1998

Contractors: International, some Joint Ventures with local partners, many specialists (e.g. Air Traffic Control Systems)

Number of Main Contracts subject to DRBs: 22

Number on the DRB: Convenor (non-sitting) plus 6 others of various disciplines

How Chosen: Agreement between Authority and Contractor's Association, members selected prior to contract award

Frequency of visits: exactly 3 monthly

HONG KONG – INTERNATIONAL AIRPORT (CTD)

Total number of visit to site: about 16

Nature of DRB's determinations: Decisions, not automatically final but binding in the interim

Number of disputes referred to DRB: 6

Number of disputes that went to arbitration: 1 (DRB decision upheld)

Special Factors: DRB covered all main airport contracts. Visits were with all main contractors at pre-scheduled quarterly review meetings, each DRB member was selected for his specialist knowledge and experience, hearings were formal and parties' positions were well presented by engineers, not lawyers, draft decisions given for party comments before finalisation. DRB ended too soon for maximum benefit but principal parties, retrospectively, have stated on record that the DRB was an excellent idea but not fully utilised by the parties during the construction period.

LESOTHO (SOUTHERN AFRICA) – CONCRETE ARCH DAM

Approx. Value: US\$1.5 billion (civil works)

Employer: State Authority

Contract: FIDIC 4th Edition.

Construction Period: 1993 to 1998

Contractors: International Joint Ventures with local partners

Number of Main Contracts subject to DRB: 1

Number on the DRB: 3

How Chosen: All three selected jointly by parties

Frequency of visits: about 5 monthly

Total number of visits to site: about 16

Nature of DB's determinations: Recommendations, not automatically final and not binding

Number of disputes referred to DRB: 12 (56 day determinations).

Number of disputes that went to arbitration: 1 (Still to be determined)

Special Factors: First DRB in Africa. Party representatives all new to the DRB process.

Referrals to the DRB had to follow formal notice of arbitration.

LESOTHO – ROCK-FILL DAM, HYDROPOWER PLANT AND ANCILLARY WORKS

Approx. value: \$US4 billion

Employer: State Authority

Contract Construction Period: 1999 to 2003

Contractors: Various international

Number of Main Contracts subject to DRB: 3

Number on the DRB: 3

How Chosen: One by each party, one by the members. Members selected who would be chairman

Frequency of visits: 6 months

Total number of visit to site: 3 (to 2001)

Nature of DRB's determinations: Recommendations

Number of disputes referred to DRB: first two referrals withdrawn, further referral anticipates late 2001

Number of disputes that went to arbitration: nil (to 2001)

Special Factors: One DRB covers three large contracts, claimant must refer to arbitration before DRB can operate, possibility for DB to act informally to help avoid disputes.

* This paper was delivered at the IAMA 2004 National Conference, *New Directions In ADR*, Sydney, 22 May 2004.

The Cost Benefits of Alternative Dispute Resolution Revisited

Dr Tom Altobelli¹

1. INTRODUCTION AND OVERVIEW

One of the defining features of a healthy new body of knowledge and practice such as Alternative Dispute Resolution (ADR) is its ability to ask difficult questions of itself and, indeed, to question its own dogma. A dogma is a basic belief, principle, doctrine or code. Questioning dogma is a good thing. It makes our knowledge and practice as ADR practitioners sharper and deeper. It also makes our field more transparent and accountable and this, of course, greatly enhances the credibility of our field. This paper examines one of the dogmas of ADR, and questions the validity of that dogma. That dogma, broadly stated, is that there are costs saving and benefits associated with the use of ADR. This paper examines a threshold issue before that assertion can be tested and that is: *compared to what?* In other words: *what* are the costs of the conflict or dispute that are supposed to be saved as a result of the application of ADR? This paper looks at the two sources of information or data available to study the costs of conflict. The first source is empirical data where those costs have been measured and recorded by independent sources. The second source is purely circumstantial – it is evidence of the very widespread use of ADR in the commercial sector in circumstances where the inference can reasonably be drawn that there are cost savings and benefits derived from ADR and where *some* evidence is available, though it is not always very reliable. The paper will conclude that very little is, in fact, known about the costs of conflict. More contemporary Australian research is needed in this regard. Without a proper understanding of what are the costs associated with conflict and disputes, it is very difficult indeed to measure the benefits of ADR.

2. EXISTING EVALUATIONS AND DATA

2.1 ADR in US Attorney Cases

One of the very helpful contemporary studies of the cost benefits of ADR is a study conducted of 328 civil cases in which Assistant United States Attorneys used ADR over a five

1. Dr Tom Altobelli LL.M (Syd), SJD (UTS) Special Counsel Watts McCray Lawyers. Associate Professor School of Law University of Western Sydney. Accredited Specialist Mediation.
2. See <<http://www.usdoj.gov/odr/article3.pdf>> as at 16 May 2004.

year period. The results were published in the November 2000 United States' *Attorney's Bulletin* in an article by Jeffrey M Serger, Deputy Senior Counsel for Dispute Resolution, entitled 'Evaluation of ADR in United States Attorney Cases'.² This study is very helpful because it compares ADR to litigation. When a case was completed, the Assistant US Attorneys (AUSAs) were asked to complete an evaluation form that measured information on many aspects of the ADR process but, for present purposes, the focus will be on cost savings and benefits. In terms of the types of disputes that were covered in this evaluation, they included medical malpractice, employment discrimination, personal injury tort and other civil cases. Measuring cost, and thus determining benefits, was greatly facilitated because of the relatively high level of authority of the person collecting the data, and the fact that the organisation was, almost invariably, a governmental bureaucracy with high levels of record keeping.

The AUSAs reported in the costs of ADR as follows:

COSTS OF ADR	
Average fees paid to the Mediators'	\$867*
Average time spent in preparation	12 hours
Average time spent in mediation	7 hours

Table 1

It is interesting to note that the costs of ADR depended on the type of case. Thus employment discrimination cases were far more expensive to mediate than motor vehicle tort mediations, whilst medical malpractice cases required the most preparation time.

The AUSAs were asked to report on the benefits of ADR in terms of time and cost savings. These are summarised below:

BENEFITS FROM ADR	
Average Litigation costs Saved	\$10,700
Average Staff Time Saved	89 hours
Average Litigation Time Saved	6 months

Table 2

This data is very interesting but, as will be seen, it is quite incomplete. Thus the staff time saved was defined as the number of hours the AUSA and that staff would have spent if ADR had not been used. It does not cover indirect staff time costs such as the cost of staff within the governmental department or instrumentality directly involved in the litigation, e.g. the parties directly involved in the alleged medical malpractice, the direct and indirect

3. See <<http://www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69B4A256904001FE4B6>> as at 16 May 2004.

THE ARBITRATOR & MEDIATOR AUGUST 2004

management costs associated with a medical malpractice claim etc. Litigation time saved is the number of months it would have taken to achieve final resolution of the case if ADR had not been used. Litigation cost saved includes all the money that would have been spent preparing and litigating this case. These latter calculations were based on data collected in other cases that did proceed to litigation, but it should be noted, focuses on out of pocket expenses not the value of time.

Thus whilst the data is incomplete, it is nonetheless quite impressive as the following table indicates:

BENEFITS FROM ADR	
Average Litigation Costs Saved	\$10,700
Average Staff Time Saved	89 hours
Average Litigation Time Saved	6 months

COSTS OF ADR	
Average Fees Paid to the Mediators	\$867*
Average Time Spent in Preparation	12 hours
Average Time Spent in Mediation	7 hours

Table 3 benefits/comparison

In a very simple arithmetical sense, the net cost saving of ADR is $\$10,700 - 867 = \9833 .

In a very simple sense, the preparation time saving benefit of ADR is $89 \text{ hours} - 12 \text{ hours} = 77 \text{ hours}$.

The time savings are harder to compare because the research compares time spent in mediation to the time before which the case would have been litigated.

If we hypothesise briefly about the value of the staff time, using very conservative measures, it is possible to move one tentative step closer to understanding the true costs of the conflict. The value of staff time can be calculated as follows:

Salary plus on-costs $\div 52 \div 40$.

If we assume a comparatively modest salary of \$50,000 p.a. as an average of what would invariably be diverse staff salaries, and also conservatively assume 30% on costs and a 40 hour week, the calculation is as follows:

$$\begin{aligned}
 (50,000 \times 1.30) \div 52 & \div 40 \\
 (65,000 \div 52) & \div 40 \\
 \$1,250 & \div 40 \\
 & = \$31.25 \text{ per hour}
 \end{aligned}$$

On this conservative calculation, the cost-benefit of the average staff time saved per dispute is:

$$89 \times 31.25 = \$2,781.25$$

When this benefit is added to the litigation cost saved per case of \$10,700, the total quantifiable benefit is \$13,481.25 per case. Remember that this is the cost in the US Assistant Attorney's office – it does not pick up the cost of the persons and the institutions directly involved in the discrete case involved. It should also be noted that these costs are measured in US, not Australian, dollars.

Clearly, in this particular study, the known costs of the conflict and the benefits of ADR were very significant indeed. The other benefits of these savings cannot be measured.

2.2 Redress of grievances in the Australian Defence Force

In this Australian example of an attempt to measure the costs of conflict, a brief glimpse into some interesting cost data is available. The source of this information is the Auditor-General's Audit Report No. 46, 1998-99 entitled '*Redress of Grievances in the Australian Defence Force*'.³ This auditor's report examines the systems used within the Australian Defence Force (ADF) to address grievances, both formally and informally. Members of the ADF are encouraged to seek resolution of their grievances at the lowest possible level through normal command and administrative channels, but failing this, there is a Redress of Grievance (ROG) system to submit a formal complaint to the commanding officer, and then upwards through a hierarchy. A Complaint's Resolution Agency (CRA) acts in a coordinating capacity. Paragraphs 1.15 and 1.16 of the auditor's report are set out in full below. A number of other acronyms are used: AROG means an Application for Redress of Grievance and ANAO means Australian National Audit Office.

Number and nature of complaints

1.15 Complaints may be made in relation to such matters as employment conditions, allowances, accommodation, postings, promotions, discharges and disciplinary action. CRA does not have a tri-Service database for registering and classifying AROGs and recording the outcomes. Each of the Services keeps some records on the nature of AROGs submitted although this varies between the Services. A summary of AROGs for the three Services over a five-year period is presented in Table 1. This information only relates to those ROGs that have been processed by CRA or its single-service predecessors.

4. *Academy of Management Journal*, June 1976.

Table 1

Number and nature of complaints processed by the Complaint Resolution Agency (or by its predecessors in each of the three Services) by Service, 1993–97.

	Conditions of Service (b)	Discharge (c)	Discipline (d)	Workforce (e)	Other	Total complaints	Total ADF members 93–97
Army (a)	73	68	6	102	13	262	26 458
Navy	42	60	0	151	12	265	14 721
Air Force	168	55	12	235	23	493 (f)	17 699
TOTAL	283	183	18	488	48	1020	58 878 (g)

Source: Complaint Resolution Agency databases.

The cost of CRA

1.16 Using Defence’s Commercial Support Program Ready Reckoner, the ANAO sought to estimate the cost of CRA in an attempt to cost the processing AROGs at this level. This is only a relatively minor component of the cost of processing AROGs across the ADF but, even at this level, significant costs are incurred for each AROG. The full cost of those staff in CRA concerned with processing AROGs is around \$1.2 million per annum (or \$6000 per AROG). When the amount of time spent on AROGs by ADF personnel at all levels outside CRA is taken into account, it is apparent that the real cost of the ROG system is much greater. However, Defence systems do not provide sufficient detail of resource usage to quantify this cost in even an indicative manner.

It is interesting to note what is probably a source of intense frustration for those collecting this data – that the known cost of \$6,000 per AROG is nowhere near the *real* cost of the report of grievance system. This is further reflected better in the report, as can be seen below:

Cost of processing AROGs and extra investigation for CDF

5.8 As noted earlier in this report there are significant costs associated with the ROG system in terms of time lost and distraction of military personnel from their primary work. AROGs can also consume considerable in resources in undertaking the various processes involved in their resolution. (See paragraph 1.16.) Redress officers, RAAs, investigating officers, legal resources and those personnel involved in supplying information about the subject matter of the grievance are all expensive resources. Some of the files reviewed by the ANAO comprised a number of parts and hundreds of pages, including minutes and reports from senior officers. The ANAO attempted to cost the processing of some of these AROGs but found there was insufficient evidence available. By the time an AROG reaches CDF it has involved a large number of members at a variety of ranks. Although most of the personnel involved in investigating and resolving an AROG are permanent military officers, and therefore could be said to

represent a sunk cost, the additional workload placed on these personnel can result in a real 'opportunity' cost to the ADE.

5.9 This cost comes about in two ways: firstly, because the additional stress placed on these personnel can result in inefficient practices and errors; and secondly, because they are liable to try and pass on some of their workload to subordinates which may eventually result in work being passed on to reserve personnel who may not otherwise need to be paid. Additionally, in many cases the Investigating Officer (IO) will be a Reserve Officer, who may also involve an additional variable cost.

Again it needs to be remembered that the cost of trying to resolve the dispute is not the full cost of the conflict – it is only but one dimension of it.

2.3 Management Literature

There is some limited literature in the discipline of management that gives some insight into the costs of disputes and conflict based on the amount of time management spends dealing with these issues. In 'A Survey of Managerial Interests with respect to Conflict',⁴ KW Thomas and WH Schmidt found that up to 30% of a typical manager's time was spent dealing with conflict. In 'Managers as Negotiators',⁵ C Watson and R Hoffman found that 42% of manager's time is spent reaching agreements with others when conflict occurs.

In 'Commercial disputes survey – impact on UK Business',⁶ a research report commissioned by BDO Stoy Hayward, British Chartered Accountants, the perception that a dispute was taking up a lot of management time was the main reason for settling a dispute, slightly ahead of the desire to minimise the costs to the business. This confirms the earlier studies that management tends to spend a substantial amount of time dealing with disputes.

Commonsense and experience confirms this data. Anyone who is involved in either managing people, or in dealing with the public knows that a considerable percentage of their time is spent managing conflicts. It need not necessarily be consistent, or evenly spread across the manager's time. Indeed, when disputes do arise they tend to take up large amounts of time over short periods. While it is probably quite easy to measure the costs of conflict by reference to a manager's time, the frustration is, again, that this presents but a tiny fragment of the time costs of conflict for that business or organisation. Nevertheless, if we take as a case study a smaller business employing 20 staff such as a professional service or retail enterprise, and assume that there is three managerial staff that spends only 20% of their time dealing with conflict, the cost is still high. Assume average manager's salary with on-costs is \$90,000 p.a. That means the cost to that business of dealing with conflict is:

$$90,000 \times 20\% \times 3 = \$54,000 \text{ per annum}$$

This, of course, is a conservative figure, but it is also a tiny fragment of what the actual cost of the conflict must be.

5. *Leadership Quarterly*, (1976) 7(1).

6. Reference unavailable.

7. See <<http://www.adr.org/dw/DW.pdf>> as at 16 May 2004.

3. CIRCUMSTANTIAL DATA

As the empirical data is incomplete and to that extent unreliable, it is worth exploring the circumstantial data suggesting that because the cost of conflict are so high, businesses have embraced ADR.

A very useful recent research study in this regard is the American Arbitration Association 2003 report entitled 'Dispute Wise Management – Improving Economic and Non-Economic Outcomes in Managing Business Conflicts'.⁷ The survey was conducted by an independent market research firm and consisted of interviews with 254 corporate general counsel or equivalent positions of seniority within corporate legal departments. The interviews were drawn from:

- 101 Fortune 1000 companies with mean revenues of \$9.09 billion;
- 103 mid-sized public companies with mean revenues of \$384m; and
- 50 privately held companies with mean revenues of \$690m.

The actual industries represented in this research were very diverse and seem to cover most areas of commercial and industry including the professions. Of passing interest is the data in the mean total budgets for legal services - \$10,306,000 with \$4,046,000 for in-house legal services, and \$6,260,000 for external legal services.

The first table looks at general trends in dispute management over the preceding three years:

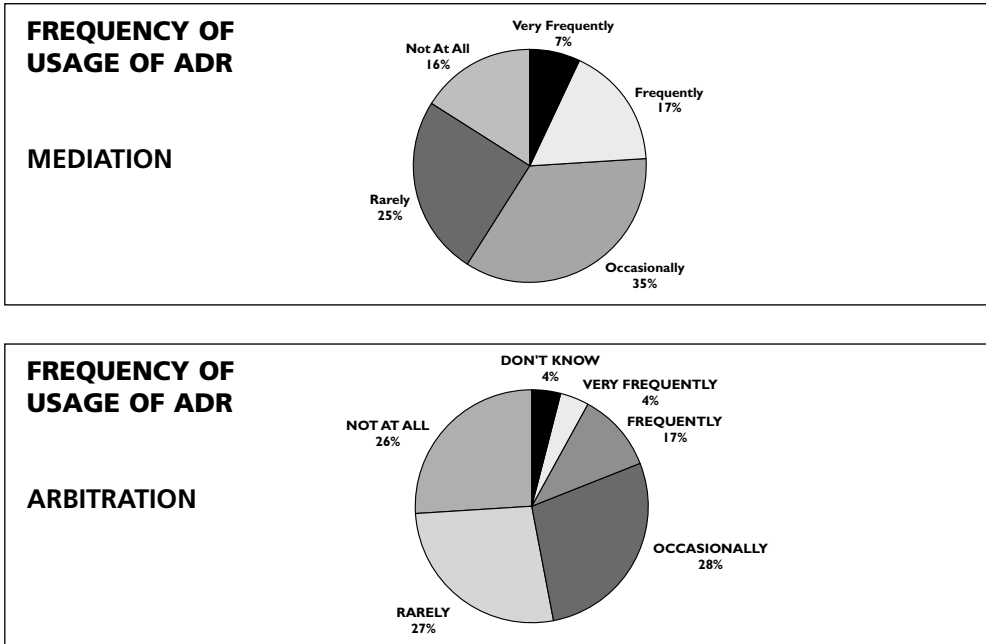
*ADR Procedures Used in Past Three Years
(Base: Total)*

	<i>Total</i>	<i>Fortune</i>	<i>Mid-Size</i>	<i>Private</i>
Army	95%	95%	95%	94%
Mediation	85%	91%	81%	882%
Arbitration	72%	80%	66%	71%
In-house grievance	23%	27%	20%	22%
"Med-Arb" – combined mediation with arbitration	20%	25%	20%	12%
Fact finding	12%	14%	10%	12%
Mini-trials	11%	20%	6%	8%
Ombudsperson	5%	6%	5%	4%
None of the above	5%	4%	5%	6%
Don't know/refused	*	1%	–	–

8. The Dana Measure is found at <<http://www.mediationworks.com>> as at 16 May 2004 and is adapted from Chapter 3 in

It is interesting to note the very high use of some form of ADR, with mediation having precedence over arbitration. Perhaps of more interest though is the frequency of usage of ADR and mediation, as opposed to merely whether it was used.

Figure 8



These figures indicate that mediation is either frequently or very frequently used in only 23% of corporations, and only 15% for arbitration. This does suggest continued very high usages of direct negotiation and/or litigation by these companies. Of particular interest in the present context is seeking to understand the reasons for the use of ADR.

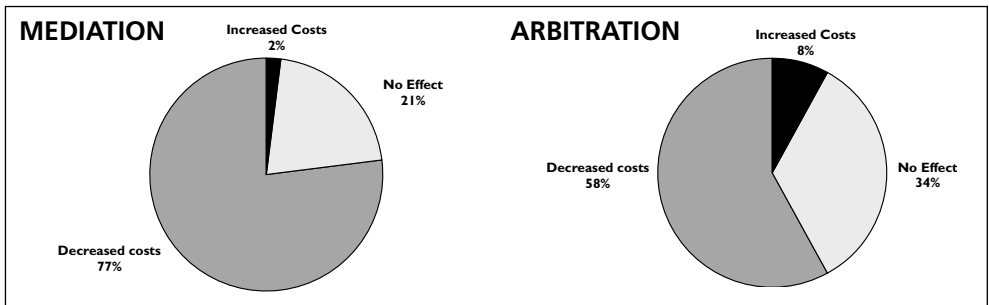
THE ARBITRATOR & MEDIATOR AUGUST 2004

The primary reasons for using mediation or arbitration include saving money and saving time.

	<i>Mediation</i>	<i>Arbitration</i>
Saves money	91%	71%
Saves time	84%	73%
Provides a more satisfactory process	83%	66%
Allows parties to resolve disputes themselves	81%	60%
Has limited discovery	68%	66%
Is court mandated	63%	45%
Uses expertise of mediators/arbitrators	61%	49%
Gives more satisfactory settlements	61%	41%
Preserves good relationships between disputing parties	56%	38%
Is required by contract	54%	87%
Is desired by senior management	48%	37%
Preserves confidentiality	47%	54%
Is a managerial or technically complex dispute	36%	37%
Avoids establishing legal precedents	36%	32%
Provides more durable resolution compared to litigation	31%	25%
Is an international dispute	16%	25%
Became standard practice in industry	14%	21%

The reasons clearly point, at least inferentially, to cost and other savings attributable to ADR but, if this is so, why isn't the frequency of the usage of ADR more pronounced? It is also clear that the respondents could see the very positive benefits that ADR had on the cost of resolving a dispute compared to litigation.

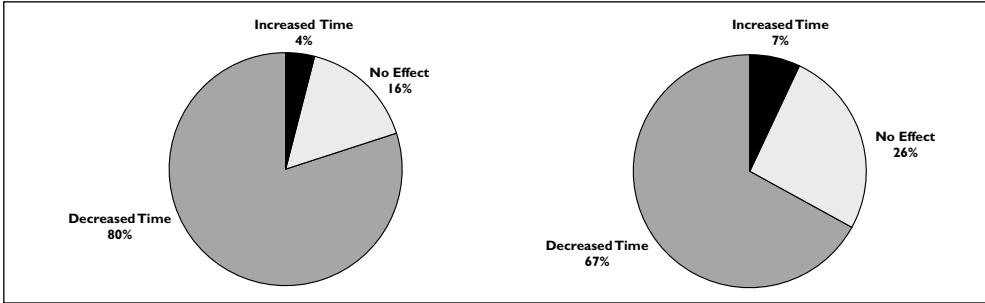
Effect Mediation and Arbitration Have on Costs to Resolve Disputes Compared to Litigation (Base: Use Mediation or Arbitration Respectively)



THE ARBITRATOR & MEDIATOR AUGUST 2004

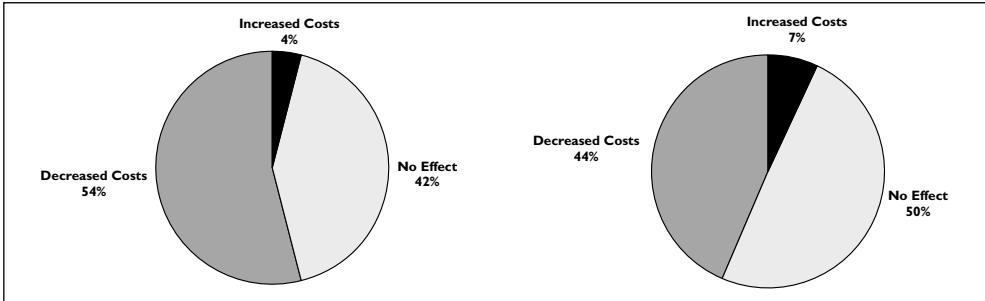
So too as regards time to resolve disputes compared to litigation.

*Effect Mediation and Arbitration Have on Time to Resolve Disputes Compared to Litigation
(Base: Use Mediation or Arbitration Respectively)*

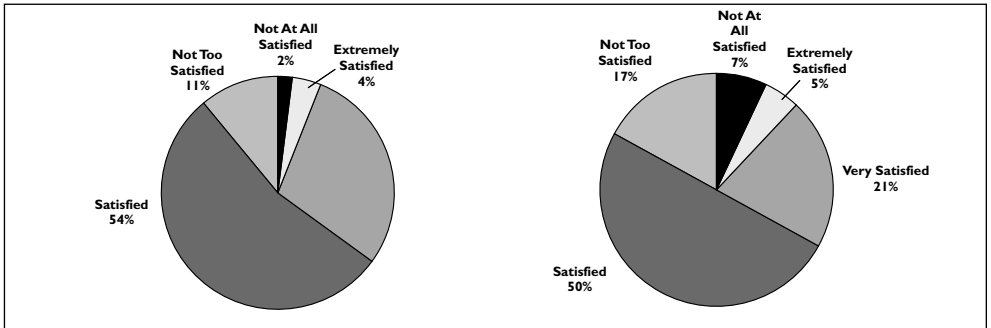


Turning now to the question of outcomes, that is, whether the use of ADR had an impact on judgment costs or verdicts against the companies, only a tiny majority thought that it increased those costs.

*Effect Mediation and Arbitration Have on Judgments/Awards Compared to Litigation for resolving Disputes
(Base: Use Mediation or Arbitration Respectively)*



Company Satisfaction with Mediation and Arbitration



Overall, satisfaction rates for ADR were extremely high.

A strong inference may be drawn from this research study that large corporations believe there to be cost savings and other benefits attributable to the use of ADR. Be that as it may, the question must again be asked: why is the frequency of usage not higher?

4. AN HYPOTHETICAL CASE STUDY

Whilst the data presented above has been interesting, is certainly useful, and helps one to gain an impression about the true costs of conflict and disputes, it is also very frustrating. One is left with a lasting impression that all of this is but a fragment – and that the real costs of conflict are yet to be truly measured. In this section one attempt to systematise and measure the cost of organisation conflict is applied to our hypothetical case study. The Dana Measure of Financial Cost of Organisational Conflict is used for this purpose.⁸ As will be seen below, the Dana Measure certainly appears to have its limitations. Nonetheless, it is a useful starting point in this exercise.

CASE STUDY⁹

There is deep ideological conflict within the School of Mediation and Peace Studies at the National University of New South Wales. The new Head of School, a Professor, wishes to introduce a new core curriculum that is founded upon what has popularly become known as transformative mediation. The immediate past Head of School, also a Professor, is totally against such a move. She regards it as retrograde and faddish, and believes that it would

Dana Daniel *Managing Differences: How to Build Better Relationships at Work and Home* (revised 2nd ed 1997) MTI Publications.

9. The names are purely fictitious, of course.

deconstruct what she regards as the solid foundation for the core curriculum based on classical evaluative mediation theory. But the new Head of School has her way at the school meeting last month, gaining a 55% majority in support of the curriculum change. Curiously, however, the immediate past Head of School was elected by a majority of just one vote to the powerful position of Chair of the School Research Committee. Even though the Head of School is responsible for the overall management and direction of the school, under the school's formal constitution, the Chair of the Research Committee controls vital areas such as allocation of research and higher degree students, distribution of conference monies and signing-off on academic workload agreements providing for more than 30% research. Within the first few months of this year the Head of School has been actively enrolling PhD students to research in aspects of transformative mediation, but the Head of the Research Committee keeps allocating them to academics with an evaluative mediation ideological inclination. Worst still, when one of the academics did a quick calculation of how conference monies have been allocated to staff so far this year, 75% of applications from colleagues within the evaluative mediation camp were approved, but only 45% from the transformative camp. Moreover, each academic from the evaluative camp is found to have received, on average, 20% more money to attend conferences than academics from the transformative camp. The Chair of the Research Committee, when challenged about this, simply relies on the criteria for allocation of research funds. Currently, two academics have taken stress-leave and whilst they do not specifically attribute that stress to the ideological tensions existing within the school, there is little doubt in the minds of most academics within the school that these two have been caught in the crossfire between the two opposing ideological camps.

The Dana Measure uses eight factors, each of which could be applied to the conflict described in the case study above.

Factor 1: Wasted time

This involves estimating the amount of time wasted by each person who is affected by the conflict. It is an ideological conflict that has caused deep division. The ideological conflict is not the presenting issue in all of the disagreements that occur within the school, but more often than not it is the underlying cause of the disagreement. At least half of all the time spent in school and committee meetings is spent discussing hotly contested issues that have as their underlying cause the ideological conflict within the school. Let us conservatively estimate, and attempt to cost, the wasted time as follows:

THE ARBITRATOR & MEDIATOR AUGUST 2004

No. of Staff	Academic Level	Salary	On-Cost	Total cost to the University	% Time lost through conflict	Estimated cost per annum
2	Professor	110,000	30%	143,000	50%	143,000
2	Professor	110,000	30%	143,000	20%	57,200
6	Associate Professor	95,000	30%	123,500	20%	148,200
10	Senior Lecturer	95,000	30%	84,500	10%	84,500
15	Lecturer	55,000	30%	71,500	10%	167,250
8	Associate Lecturer	40,000	30%	52,000	10%	41,600
Total estimated cost of wasted time:						\$581,750

These figures are actually quite conservative. It assumes that only 50% of the time of the two protagonists is wasted because of that conflict. Because they are distracted from their other duties, those duties were delegated to other senior academics (the other two professors and six associate professors) that, because they too are caught up in the conflict, waste time and are distracted from their duties. There is a ripple effect of the conflict down the academic levels so that time is wasted not just because of the conflict itself, but the impact of the conflict on others.

Factor 2: Reduced decision quality

The Dana Measure makes the reasonable assertion that decisions made under conditions of conflict are always inferior to decisions made when cooperation prevails. This is because the conflict affects the quantity and quality of information upon which decisions are made. Moreover, the actual decision-making process is contaminated by the conflict itself. In an academic institution such as this school, decisions are made under two broad headings: academic and administrative. Experience indicates that both areas will be adversely affected by reduced decision quality. Measuring the cost, however, is very difficult, but the impacts of this factor are potentially far-reaching. For example, a poorly designed curriculum may discourage existing students from completing their studies and deter future students from studying at the school, even years after the problem has actually been resolved. The adverse impact of poor administrative decision-making can lead to diminished efficiencies enduring over long periods of time. Whilst all of these impacts are tangible, they are not easily measurable. Perhaps an arbitrary but probably conservative measure is to express this cost as a fraction of the total budget of the organisation. A school this size would easily have an annual budget of \$5m. A conservative figure of 10% will be adopted as the measure of the loss.

∴ Estimated cost of reduced decision quality: 10% x 5m = \$500,000

Factor 3: Loss of skilled employees

The Dana Measure points out that when skilled employees leave an organisation there is a substantial cost in re-hiring and re-training. For example, Raytheon Corporation estimates that replacing engineer costs 150% of his/her total annual compensation. Experience suggests that having regard to the deep ideological conflict this school is experiencing, there is a high probability that at least two academics will leave to find work elsewhere. For present purposes, let us assume that they were both senior lecturers, and that exit interviews determine that the conflict was only half the reason why they left. This means that the estimated cost of that departure is:

$$2 \times 84,500 \times 150\% \times 50\% = \$126,750$$

This is actually quite conservative. The cost of the recruitment process is very high, both in terms of staff-time and advertising. Conflict within a school tarnishes the reputation, and news of this spreads rapidly thus often discouraging good candidates from applying. In the meanwhile casual academics need to be employed to cover the departed academic's workload. While casual staff is actually cheaper to engage as they are merely paid per hour, they are very expensive to maintain in terms of supervision and support. The real impact of a staff academic leaving can be quite profound, and it is not surprising that the cost can be so high.

Factor 4: Restructuring

The Dana Measure points out that often design of workflow is altered in an attempt to reduce the amount of interaction required between employees in conflict, resulting in inefficiencies. They suggest a subjective assessment based on 10% of combined salaries of staff. However, the writer believes that this is double dipping with Factors 1 and 2, in the circumstances of this case, and proposes to discount it. In other situations, it might be a legitimate adjustment to make.

Factor 5: Sabotage/theft/damage

Here the measure points to the studies that reveal a direct correlation between employee's conflict and damage and theft of inventory and equipment. It is usually covert and is the manifestation of anger towards other employees or, more often, towards the employer for not dealing with the issue. The application of this Factor to a school within a university is probably limited. If courses are, for example, sabotaged in the sense of not being taught properly or misrepresented in word-of-mouth marketing, this cost is probably picked up in Factor 2.

Factor 6: Lowered job motivation

The Dana Measure asserts that conflict leads to erosion of job motivation due to the stresses of simply trying to get along with people with whom they are in conflict. This loss manifests itself in loss of productivity. In an academic unit such as the school referred to in the cast study, the loss of productivity reflected in terms of time lost as captured by Factor 1. However, experience indicates that there is another output that is adversely impacted, and that is research output, research degree completions and scholarly outputs such as the one in

the case study, could easily be as high as \$250,000 annually. If we adopt a very conservative figure of 30% as the reduced productivity attributable to lowered job motivation, then the estimated cost of the conflict attributable to lowered job motivation but not captured under other factors is:

$$30\% \times 250,000 = \$75,000$$

Factor 7: Lost work time

The Dana Measure uses this in the context of absenteeism derived from the stress associated with conflict. However, this must be distinguished from health costs being the actual cost of treatment. In our case study, two academics are on stress leave arising out of the conflict and for present purposes we will assume that one was a lecturer and was away for two months, whilst the other was an associate lecturer and was away for three months. The cost attributable to this is as follows:

Lecturer:	$71,500 \times 2 \div 12$	=	\$11,916
Assoc Lect:	$52,000 \times 3 \div 12$	=	13,000
			\$24,916

Indeed, often the actual cost is higher – not only do the absent academics receive their salaries, but casuals need to be employed to cover their absence.

Factor 8: Health costs

The Dana Measure looks on this factor at the costs of treating such employees, or the cost of insurance premiums to cover such costs, as an indirect cost of such workplace conflict. In Australia, most such costs would be covered by workers compensation insurance. It is unlikely that the cost of this insurance in an institution as large as a university would be adversely impacted by the illness of two staff. Hence, no adjustment is proposed to be made.

Total cost of conflict:

Using the conservative measures and calculations adapted above, the annual cost to The School of Mediation and Peace Studies for each year that the ideological conflict subsists is \$1,308,116, or just over a quarter of its likely annual budget.

5. Conclusion

The application of the Dana Measure of the costs of conflict is a useful and interesting mechanism but still has its limitations. For one thing, its primary purpose seems to be organisational conflicts, but the world of conflict is much more diverse than that. Clearly more research is needed; preferably research that is both quantitative and qualitative in nature and that seeks to compare the use of ADR to the use of litigation. Nonetheless, there is some evidence to indicate both directly and by inference that there are cost benefits associated with the use of ADR in certain contexts.

* This paper was delivered at the IAMA 2004 National Conference, *New Directions In ADR*, Sydney, 22 May 2004.

Restoring Respectability – Providing a Service in Domestic Arbitration and Dispute Resolution

Ian Bailey¹

1. INTRODUCTION

Arbitration has long had a proud place within the legal system to resolve disputes. In the Middle Ages, English merchants resorted to arbitration to settle disputes long before the Kings Courts found ways to enforce contractual obligations.

In 1698, the first Arbitration Act was passed:

An Act for determining differences by Arbitration, ... It shall and may be lawful for all merchants and traders and others desiring to end any controversy, suit or quarrel ... by a personal action or suit in equity, by arbitration whereby they oblige themselves to submit to the award or umpirage of any person or persons ... so agreed.

Intended as resolution of commercial disputes by an expert in accordance with the standards of that trade or profession, over the centuries, and increasingly so recently, the law has interfered with, regulated, and some would say overtaken arbitration so as to subvert its purpose.

The historic notion underlying the process is that members of a trade, industry or profession are content to have their disputes determined by an expert member of their commercial peers. Whilst arbitration remained an acceptable means of dispute resolution in these circumstances, developments in other areas have, to some extent, overtaken it as a time and cost effective procedure. The need to set aside some of the constraints upon efficiency in arbitration has long been recognised, and a great deal of thought and effort has been directed to procedural reform.

Improvement to court practice and procedures and the development of a variety of alternative resolution methods has cast a shadow over arbitration. Aspects of these developments can be turned to advantage in the review of arbitral practice. Further, the historic models for dispute resolution, in particular, arbitration, need to be seen as subject to refinement, redefinition and redesign. The sources of inspiration in this process have to be as wide as possible.

1. Barrister at Law; National Vice-President IAMA 2004-5; Chairman of the NSW Chapter 2000 to 2003. Senior Fellow of the University of Melbourne and Co-Director of Studies for the Construction Law Graduate Program, and Adjunct Professor in the Faculty of Law at UTS, Sydney.

2. BACKGROUND

The present place of arbitration in dispute resolution and the immediate possibilities for changes to practice can best be viewed with an understanding of recent history.

A. *Uniform Commercial Arbitration Acts*

The *Uniform Commercial Arbitration Acts* ('UCA Acts') were enacted in 1984 (NSW) through to 1990 (Qld) with a touch of optimism. The expectation was that, although modest, the incitement to procedural flexibility in some of their provisions would produce a sea change in the approach of arbitrators to their role and the use of the process by parties and their legal advisers.

The intended flexibility and procedural independence of arbitrators in the UCA Acts was not always met in practice. In theory arbitration could be streamlined as the arbitrator and parties thought appropriate.

The provisions of the *Uniform Commercial Arbitration Acts* dealing with procedure are ss 14, 19(3), 22 and 37, which provide:

S 14 Procedure of arbitrator or umpire

Subject to this Act and to the arbitration agreement, an arbitrator or umpire may conduct proceedings under that agreement in such a manner as the arbitrator or umpire thinks fit.

S 19 Evidence before arbitrator or umpire

(3) *Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by the rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.*

S 22 Determination to be made according to law or as amiable compositeur or ex aequo et bono (See UNCITRAL Arbitration Rules Article 33, paragraph 2)

(1) *Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.*

(2) *If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.*

S 37 Duties of parties

The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made.

The terms of ss 14 and 19(3) are found in many pieces of legislation dealing with administrative tribunals and prescribe a limited concept of independence, without guidance as to what may be appropriate. A careful review of many appeals from such tribunals

indicates that the apparent flexibility and procedural freedom is often constrained by demands for justice and procedural fairness that are not always productive of economy and efficiency.

Critics of the manner in which domestic arbitrations are conducted often fail to recognise that the parties and their legal advisers have played a significant role in the resistance to reform. There are still many legal practitioners, even those with an appreciation of the distinction between commercial arbitrations and litigious procedure, who seek to impose the rigours and constraints of the latter upon the former. The concept of an efficient and expeditious arbitral procedure, let alone a *quasi* inquisitorial arbitral process remains an anathema to adherents to traditional procedural concepts.

The terms of the UCA Acts encourage adherence to the notion of the parties' ownership of the process and the requirement or perception that the arbitrator be submissive rather than directive.

Whilst the 1990 amendments, particularly to s 38 of the UCA Acts limiting judicial review of awards, generated a degree of finality, they have produced a redirection of the focus of attacks on arbitral awards by applications under s 42 to set aside awards for misconduct,² or s 44 to remove the arbitrator on the grounds of misconduct.³

This approach to challenging the process is not unique. Experience with both the UK adjudication scheme and international arbitrations indicates that the best, or last, avenue to undermine a decision is to find fault in the way in which it was produced. Notwithstanding legislative and contractual entreaties to speed and economy, a failure to adhere to an 'agreed' or 'foreshadowed' procedure will be a hazardous path for arbitrators. In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation*,⁴ Lord Justice Roskill said:

Indeed an arbitrator or umpire, who in the absence of express agreement that he should do so, attempting to conduct an arbitration along inquisitorial lines might expose himself to criticism and possible removal.

Not all applications to set aside awards for misconduct are successful but the spectre of such an application undoubtedly haunts every arbitrator, and is hardly productive of procedural boldness and vigour. The inclination to finality in judicial review of awards does not extend, in many cases, to an acceptance of a right in the arbitrator to assume authority over the manner in which the arbitration will be conducted; that is, notwithstanding the apparent authority conferred by ss 14, 19, and the requirements of s 37.

It is no easy task for an arbitrator to reconcile the competing concepts of efficiency and finality within the demands of perceived justice and fairness. Is an arbitrator, when confronted by an application to amend a claim, to ignore what the High Court said in *JL*

-
2. See, eg *Mond v Berger* [2004] VSC 45; *Rocci v Diploma Construction Pty Ltd* [2004] WASC 18; *Milligan Contractors Pty Ltd v Jaxon Construction Pty Ltd* [2003] WASC 220; *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd* [2002] WASC 118; *Giles v GRS Constructions Pty Ltd* (2002) 81 SASR 575; *Sea Containers Ltd v ICI Pty Ltd* [2002] NSWCA 84; *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2002] WASC 255.
 3. See *WMC Resources Ltd v Leighton Contractors Pty Ltd* [2002] WASC 388.
 4. [1980] 2 WLR 905 at 923.
-

Holdings,⁵ to the effect that amendments to pleadings ought to be permitted except in limited circumstances, or likewise to refuse a request for an adjournment to file further evidence which will cause 'no prejudice that cannot be compensated with an order for costs or interest'? The answer will invariably be that they cannot, or at least if they do, a challenge is inevitable.

The bending to the will of the parties is seen by many critics as a weakness on the part of the arbitrator or a fault of the process. Without adequate procedural control or authority either in the rules of procedure or by agreement of the parties, the arbitrator and the process is inevitably restricted.

B. The Arbitration Act 1996 (UK)

The necessity to alter the balance of procedural control within the legislation regulating arbitration was recognised in the 1990s in the United Kingdom. The reform process in Australia has been a little more lethargic.

The Arbitration Act 1996 (UK) ('the 1996 UK Act') was produced after reviews in 1989 by a Committee chaired by Lord Mustill and, more influentially, by an Advisory Committee chaired by Lord Saville, and an extensive consultative process. The significant reforms contained in the 1996 Act have been reviewed in detail in Robert Hunt's article 'The Uniform Commercial Arbitration Acts: Time for a Change Part 1'.⁶ This article alone highlights the inadequacies of the UCA Acts.

The statement of the statutory duty imposed on the tribunal in s 33 of the 1996 UK Act is an example of the wider procedural controls conferred on the arbitrator by the legislation.

S 33 General Duty of the tribunal

- (1) *The tribunal shall –*
 - (a) *act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
 - (b) *adopt procedures suitable to the circumstances of that particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*
- (1) *The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decision of matters or procedure and evidence and in the exercise of all other powers conferred on it.*

The 1996 UK Act, whilst permitting freedom for agreement as to procedure by s 4, made many provisions mandatory, having effect notwithstanding any agreement to the contrary. Significantly for our purposes, these include s 33 and s 40 that sets out the general duty of the parties to comply with procedural orders of the tribunal.

5. *State of Queensland and Anor v JL Holdings Pty Ltd* (1997) 189 CLR 146; (1997) 141 ALR 353.

6. *The Arbitrator* (1999) 17 at 200.

S 40 General duty of parties

(1) *The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*

(2) *This includes -*

(a) *complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and*

(b) *where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).*

A number of sections in 1996 UK Act set out comprehensive provisions which deal with procedure:

- S 33 General duty of the tribunal
- S 34 Procedural and evidential matters
- S 37 Power to appoint experts, legal advisers or assessors
- S 38 General powers exercisable by the tribunal
- S 39 Power to make provisional awards

The extensive authority and procedural rigour which such provisions allow stand in stark contrast to the terms of ss 14, 19(3) and 37 of the UCA Acts. The clearest example is the difference between s 14 of the UCA Acts and s 33(1)(b) of the 1996 UK Act, the latter imposing a duty to adopt procedures intended to reduce delay and expense. Section 14 of the UCA Acts offers this as an option 'subject to the arbitration agreement'. Moreover, s 34(2)(g) also identifies as a procedural and evidential matter that the tribunal is to decide 'whether and to what extent the tribunal itself takes the initiative in ascertaining the facts and the law'.

C. New Zealand Arbitration Act 1996

New Zealand introduced a new Arbitration Act based on the UNICTRAL model, as was the UK Act of the same year. It was designed to bring international and domestic arbitration within the one statute. The New Zealand Act has recently been the subject of a review by the New Zealand Law Commission, in which The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) was very active.⁷

D. The 1999 IAMA Rules for the Conduct of Commercial Arbitration

In 1999, the Council of the Institute approved Rules for the Conduct of Commercial Arbitrations, incorporating the Expedited Commercial Arbitration Rules ('the 1999 Rules'). Since then, proceedings where the parties have agreed that the arbitration be conducted in accordance with these Rules have, or should have benefited from the significant, though subtle changes the 1999 Rules introduce. The 1999 Rules echo many of the concepts of procedural control and flexibility embodied in the 1996 UK Act. Clearly these procedural initiatives are still subject to the UCA Acts and the regulation of the practice of commercial arbitration by the Courts.

7. See New Zealand Law Commission, *Report 83 Improving the Arbitration Act 1996* (February 2003).

The 1999 Rules, in Part II The Arbitral Procedure, include these key provisions:

RULE 10: General Duty of Arbitrator

1. *The Arbitrator shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the matters in dispute.*
2. *The Arbitrator shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to be heard on the procedure adopted by the Arbitrator.*

RULE 11: General Duty of Parties

1. *The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the arbitral proceedings.*
2. *Without limiting the generality of the foregoing, the parties shall comply without delay with any direction or ruling by the Arbitrator as to procedural or evidentiary matters and shall, where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law.*

RULE 13: Procedural Directions

1. *Subject to any Statute Law or prior written agreement of the parties, and the requirements of Rule 10, the Arbitrator shall make such directions or rulings in respect of procedural and evidentiary matters as he or she sees fit.*
2. *Subject to any agreement of the parties to the contrary, and without limiting the generality of the foregoing:*
 - a. *unless the arbitration is to be conducted in accordance with The Institute of Arbitrators & Mediators Australia Expedited Commercial Arbitration Rules, the provisions of Schedule 1 shall apply;*
 - b. *where the arbitration is to be conducted in accordance with The Institute of Arbitrators & Mediators Australia Expedited Commercial Arbitration Rules, the provisions of Schedule 2 shall apply.*

These contain a substantial departure from the historic notion of the parties' ownership of the dispute and the process. The 1999 Rules impose obligations on the arbitrator and the parties respectively to comply with directions, and to avoid delay and expense. The provisions of Schedule 1 permit the arbitrator to make procedural directions or rulings, with several options given in the Schedule, that he or she considers 'reasonably appropriate' which, if adopted, could produce the 'expeditious cost-effective and fair means of determining the matters in dispute' as required by Rule 10. When the Expedited Rules apply, then the arbitration 'shall be conducted' in accordance with the procedure in Schedule 2 which prescribes in detail a tight timetable.

The procedural benefits only apply if the agreement to arbitrate states that the dispute will be determined in accordance with the Rules of the Institute. Not all contracts will include

such a provision in the disputes clause. The major standard form building contracts include procedural compliance with these Rules: AS 2124 (1992) cl 47; AS 4000 cl 42; PC 1 cl 15 and ABIC Section P. When the arbitration agreement does not so provide then the parties may agree, possibly at a Preliminary Conference, to adopt the Rules or the Expedited Rules.

It is not entirely clear, at least to me, why arbitrators have not taken up the challenge and opportunity provided by the Rules; or at least why there is a perception that they have not. My own experience has been that parties to disputes referred to arbitration would embrace the opportunity and do so when it is offered to them. In NSW 'procedural backbone' developed by use of the Court reference system, under Part 72 of the Supreme Court Rules and Part 28B of the District Court Rules with the benefit of judicial sideline umpires, is being transferred to arbitral practice.

The inadequacies of procedural guidance in the legislative background, and the application of the UCA Acts as it has been by some Courts, has played no small part in the slow progress to efficiency and economy in arbitration.

E. Review of the Uniform Commercial Arbitration Acts

In 2002, SCAG (The Standing Committee of Attorneys-General) agreed to NSW conducting a review of the *Uniform Commercial Arbitration Acts*, having regard to the Arbitration Acts of England and New Zealand and the UNICTRAL Model Law on international commercial arbitration. IAMA has urged many amendments to the UCA Acts that would improve the viability and efficiency of the arbitration process. The matters under consideration most relevant to achieving procedural efficiency are that the UCA Acts incorporate powers of arbitrators to:

- permit them to appoint experts, legal advisers and assessors, subject to the rights of the parties to be given a reasonable opportunity to comment on that information;
- give the arbitral tribunal the initiative in ascertaining the facts and the law, to adopt inquisitorial processes, and draw on its own knowledge and expertise; and
- require arbitrators to act fairly and impartially, giving the parties a reasonable opportunity to put their case and adopting procedures suitable for the particular case;

3. FACTORS INFLUENCING, OR TO BE RECOGNISED WHEN CONSIDERING, PROCEDURAL REFORM

Apart from the motivation from within the Institute to reform arbitral procedure there are a number of external considerations, which relate to, or will impact upon, the process of reform.

One consideration will be to assess the demands or expectations of those using the Institute's processes, and to consider the attributes of alternative procedures, which might be pursued by disputants. In this respect the development of court procedures for reference out

in NSW⁸ and court annexed ADR in many jurisdictions⁹ impact upon disputants' choice of the best process to be employed.

The development of administrative tribunals, such as VCAT in Victoria and the CTTT in NSW, to determine disputes which might previously have been suitable for resolution by arbitration or other ADR processes also has to be considered. The motivation or considerations that were applied by legislatures to reject or avoid arbitration or other ADR processes need to be recognised and, where possible, addressed in the process of procedural reform.

Apart from the obvious aspects of procedure and practice that impact upon arbitration, there are two matters that need particular consideration.

Apportionment and Contributory Negligence

Significant consideration for the future conduct of domestic arbitrations are reforms recently introduced in New South Wales, Victoria and Queensland, and foreshadowed elsewhere, for the apportionment of liability for economic loss and for contributory negligence to be accounted for in contract. Precisely how these reforms are to be applied by the Courts is uncertain. Their possible impact on arbitral practice is even more unpredictable.

In the 1990s, governments in Victoria and New South Wales (at least) amended the law concerning development or planning approvals, and the approval or certification of the satisfactory completion of building work by other than the local government bodies that had previously had this responsibility. In allowing for such matters to be dealt with by private 'practitioners' or 'consultants' a requirement for compulsory professional indemnity insurance was introduced, along with provisions allowing for proportionate liability.¹⁰

The provision for apportionment in NSW was in Part IVC of the *Environmental Planning and Assessment Act 1979* (NSW) ('E P & A Act 1979') ss 109ZI and 109ZJ and are set out in an attachment to this paper. *The Building Act 1993* (Vic) was in similar terms.

The rush to reform the civil liability laws following the insurance and public liability 'crises' in the last few years has extended the scope of proportionate liability to other actions for economic loss or damage to property. As a consequence of these very recent 'reforms' to the law of civil liability, s 109ZJ E P & A Act 1979 will be repealed, as will s 131 *Building Act 1993* (Vic). These reforms will have a substantial impact on any proceedings where economic loss, whatever that means in each case, is being claimed by way of damages. In Victoria the provisions of the *Wrongs Act 1958* (Vic) Part IVAA – Proportionate Liability are now in operation, as are, I understand, the similar provisions, ss 28 and 30, of the *Queensland Civil Liability Act 2003* (Qld). In NSW, the amendments introduced by Part 4 Proportionate Liability to the *Civil Liability Act 2002* (NSW) are enacted but not commenced as yet, as are provisions in the *Civil Liability Act 2002* (WA). The provisions of Part 4 of the *Civil Liability Act 2002*

8. Part 72 Supreme Court Rules, Part 28B District Court Rules.

9. Both the Supreme and District Courts in NSW have developed procedures for court ordered mediation. Civil claims arbitration also are directed in both Courts. Similar procedures apply in Queensland and some other jurisdictions or courts.

10. S 109ZJ *Environmental Planning and Assessment Act 1979* (NSW); s 131 *Building Act 1993* (Vic).

(NSW) are set out in an attachment to this paper. Similar legislative 'reform' is proposed in other States.¹¹

Whilst substantially uniform, the provisions for apportionment do vary as between the different jurisdictions. In particular there is a difference between NSW and Victoria as to whether the 'concurrent wrongdoer', against whom an apportionment by way of a reduction in damages may be sought is required to be a 'defendant' or a party to the proceedings. In NSW they do not need to be a party (see s 35(3)(b)) and further, it does not matter that a concurrent wrongdoer is 'insolvent, is being wound up or has ceased to exist or died' (s 34 (4)). In Victoria the position is different. The *Wrongs Act 1958* (Vic) s 24AI (3) only permits apportionment against non-parties if they are dead or being wound up.

Using the NSW Act as a guide, apportionable claims are defined in s 34 (1)(a) generally as:

a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury:

and by s 34 (1)(a) include (though other statutory definitions do differ):

a claim for economic loss or damage to property in an action under the Fair Trading Act 1987 for a contravention of section 42 of that Act (ie for misleading and deceptive conduct).

In relation to building actions (see s 109ZJ E P & A Act 1979 (NSW) and s 131 *Building Act* 1993 (Vic)) the definition included an action:

for loss or damage arising out of or concerning defective building work.

Whilst in less prescriptive terms, the definition of 'economic loss in an action for damages (whether in contract, tort or otherwise)' is wide enough to include claims for damages by principals against contractors. How the concept for economic loss will extend into claims for damages, even for breach of contract, is uncertain. As was contemplated by s 109ZJ E P & A Act 1979 (NSW), a defendant to a building action concerning defective building work is entitled to a 'just and equitable' reduction in damages having regard to their responsibility for the loss or damage. A contractor may wish to assert that there were others, including the designers or contract administrators who were also responsible, at least in part, for the loss that is claimed. Presumably that responsibility would need to be founded on some legal liability also 'in contract, tort or otherwise'.

The issues for arbitration and parties to arbitrations will be, first, whether the legislation applies to the proceedings, and then, if so, can an apportionment be made so as to reduce the liability of one party, the contractor for example, by reference to the responsibility of others.

As to the first question, the issue is uncertain. The definition of 'court' in s 24AE Part IVAA *Wrongs Act 1958* (Vic) and s 3 *Civil Liability Act 2002* (NSW) refers to 'any court or tribunal by or before which the claim falls to be determined'. It is doubtful that an arbitration under the UCA Acts could be regarded as a 'court'. This issue arose recently where the

11. The reforms are digested in Commonwealth of Australia, Treasury, *Reform of Liability Insurance Law in Australia* ID: 799 (27 February 2004) at <www.treasury.gov.au/> at Publications.

question was whether an arbitration was a court for the purposes of the corporations law, so that a stay of arbitration proceedings might not be effected under s 440D of the Corporations Law when an administrator is appointed.¹² The issue of whether an arbitrator was a 'court or tribunal' that made a costs order, when considering objections to an assessment of costs under the *Legal Profession Act 1987* (NSW) was raised, but not decided in *Steve Watt Constructions Pty Ltd v Formscan Pty Ltd*.¹³

It may well be that the wider reference in the definition of court to the body 'by or before which the claim falls to be determined' is sufficiently wide as to include a commercial arbitration as being a tribunal for the purposes of the apportionment legislation.

If, therefore, arbitrators are able, in a narrow jurisdictional sense, to make an apportionment of damages, then a number of considerations arise. Theoretically at least, in NSW an arbitrator can allow an apportioned reduction in damages for the responsibility of others who are not parties to the proceedings, and arbitrators in NSW, Victoria and Queensland can apportion against non-parties who are either deceased or insolvent corporations.

Arbitration is inherently limited as between the parties to an arbitration agreement. Provision for joinder exists under s 25 and s 26 of the UCA Acts for disputes between the same parties, or for consolidation of arbitration proceedings. Even if these were extended in any future amendment to the UCA Acts, it is likely that such amendments would be limited to disputes between the parties or to other arbitrations to which one party was also a party.

Apart from the 'reform' providing for apportionment of damages, most States have legislated to permit a reduction in damages by claimants in proceedings having regard to their own 'contribution' to the loss they have suffered even where the claim is in contract. Since the High Court decision in *Astley v Austrust Limited*,¹⁴ States introduced legislation that dealt with the right for contributory negligence to be accounted for in claims for breach of contract.

An entitlement to rely on contributory negligence by principals might be extended to defective design and buildability issues or other devices to achieve some of the objectives of the apportionment reforms.

The ultimate impact of apportionment and contributory negligence as ingredients in commercial disputation and assessment of damages has yet to be resolved, that is even when confined to a litigious process. The effect and complications these will add to arbitral proceedings is even more difficult to predict, but the potential hazards, and the need for account to be made cannot be avoided. In some senses there may be benefits to the exclusivity of arbitration if the web of complexity is eventually excluded.

12. *Auburn Council v Austin Australia Pty Ltd* (Admin App) [2004] NSWSC 141, 8 March 2004, Bergin J.

13. NSWSC No BC20004936, Malpass M, 24 August 2000, unreported.

14. (1999) 197 CLR 1.

Changes in Court Procedure

In the last decade great progress has been made by courts throughout Australia to improve the administration of justice and case management procedures have been adopted by courts to ensure speedy and economic determinations. The emphasis on case management and improvements in the provision of legal services provides an opportunity for a flow-on effect for arbitrators to strengthen their own procedures to the same ends. The expectations from courts of arbitrators with respect to providing expeditious, cost-effective and fair procedures should be no less than they expect of themselves.

The focus of courts in NSW, particularly since *Makita (Australia) Pty Ltd v Sprowles*,¹⁵ on problems associated with the reliability and admissibility of expert evidence, to say nothing of its cost, has provided guidance for arbitral procedure. In fact, many of the practices of experienced arbitrators and court referees for dealing with expert evidence have now found their way into rules of court. Conferences of experts, joint reports and conclaves are almost invariably used in arbitrations today. What may also be of value for arbitrators is to adopt an *Expert Witness Code of Conduct*, such as that found in the Federal Court and the NSW Supreme and District Courts, that emphasises that the expert's ultimate duty is to the tribunal, not the engaging party.

Another impact on arbitration and ADR practices generally has been courts throughout Australia embracing court-ordered mediation as part of case management. It should be recognised that arbitrators have a capacity to direct or manage the resolution of disputes before them by the adoption of the power (authority) offered by s 27 of the UCA Acts. The facility the section provides is often ignored because of the reference to the arbitrator acting as a 'mediator'. The section also refers to the role of the 'non-arbitral intermediary' which might be assumed. This, in addition to the procedural authority under the Rules, ought to permit an arbitrator to advise or to act in effect as a case manager and address particular issues in alternative procedures outside the arbitral process.

The practice of arbitration needs to develop, having regard to the changes in court practices, but so as to highlight the differences and benefits that arbitration offers. These lie in particular areas where the qualifications and expertise of the arbitrators can be exploited in a way that courts cannot. It is hoped that the amendments to the UCA Acts will address this aspect and emphasise the facility of using the skill and experience of the arbitrator even in the absence of expert evidence. A greater emphasis and reliance upon the arbitrator's own training and expertise should reduce or at least control the misuse and substantial cost of expert evidence that has so bedevilled the courts.

15. (2001) 52 NSWLR 705.

4. GUIDANCE AND INSPIRATIONS FOR REFORM

The process of reform of arbitral procedure and the development and refinement of the Institute's other ADR processes should draw upon the widest possible sources of inspiration, and be informed by the widest possible experience of forms of dispute resolution. Accordingly, this section of the paper looks to a number of substantial changes in dispute resolution which bear upon the future direction of arbitration as we practice it, and the focus and application of the services proffered by the Institute and its members.

Adjudication of progress payment disputes in the construction industry under statutory schemes operates (or very soon will do) across four Australian States and New Zealand. The *Building and Construction Industry Security of Payment Act 1999* (NSW), especially since the 2002 amendments, has had a substantial impact upon the resolution of disputes generally in the construction industry in this State. Similar consequences can be predicted elsewhere. The Australian adjudication process was based on a wider construction disputes adjudication scheme in the United Kingdom, which likewise has dramatically affected the use of arbitration (and litigation) as the default processes for resolution of disputes. One recent development in the UK, probably as a result of the pressure for reform produced by the use of adjudication, is the 100 day Arbitration process being developed by the Society of Construction Arbitrators.

Another statutory dispute resolution procedure to which the Institute should have regard is the procedure adopted by the Workers Compensation Commission in NSW, of which Justice Terry Sheahan is the inaugural President. Its radical procedure might provide some inspiration for a new process to deal with small consumer or business claims.

A. English Adjudication Scheme

Since May 1998 construction disputes in the United Kingdom have been dealt with under a compulsory statutory scheme that provides for a 'short, sharp' provisional determination. The scheme of adjudication of construction disputes arose from recommendations in Sir Michael Latham's massive 1994 report *Constructing the Team*.¹⁶ In response to the 'perceived complexity, slowness and expense' and 'constant spectre of appeal' that made arbitration an unattractive method for resolving disputes in the construction industry, he proposed an adjudication process that would permit speedy resolution of disputes, essentially as soon as they arose.

The *Housing Grants, Construction and Regeneration Act 1996* created a mandatory right to refer any dispute to adjudication.¹⁷ The basic features are:

16. Latham, M. *Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO, London, 1994) Chapter 9.

17. Housing Grants, Construction and Regeneration Act 1996 (UK) Part II, ss 104-117. See <<http://www.hmso.gov.uk/acts/acts>1996/1996053.htm>.

- It applies to ‘construction contracts’ as defined.
- Every such contract must provide for adjudication in conformity with the Act.
- In the absence of complying contractual provisions the statutory Scheme applies.¹⁸
- Unless otherwise agreed, the adjudicator’s decision is binding until the dispute is finally resolved by arbitration, litigation or agreement.
- The decision is (rapidly) enforceable though the Court.
- A strict timetable is imposed on the appointment and making of an adjudication.
- The adjudicator has extensive powers to determine in each case the procedure to be used, but must act impartially.
- The process adopted may, and often is, inquisitorial and investigatory.

The Scheme for adjudication is supported by the Technology and Construction Court (TCC), a Division of the High Court, to which applications for enforcement of adjudicators’ decisions are made. The TCC hears these matters promptly, takes a robust stance against challenges to valid adjudicator’s decisions save where there was no jurisdiction, or the rules of natural justice have not been observed and rejects attempts to undermine enforcement by claims, e.g. for set-off, or stay for arbitration.¹⁹

An interesting aspect of the TCC approach to natural justice challenges is the acceptance that the system was unworkable unless ‘some breaches of the rules of natural justice which have no demonstrable consequence are disregarded’.²⁰ The Court has also recognised that:

[I]t is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit.²¹

In order to avoid adjudicator conduct that will provide opportunity for parties to challenge the determination on the grounds of natural justice, *Guidance for Adjudicators* has been published that highlights issues that can arise in the conduct of adjudications and offers suggestions rather than rules.²²

It has been described, even in judgments, as a rough and ready process, a ‘quick and dirty fix’. It is said that the timetable is unreasonably tight and likely to result in injustice because parties do not have enough time to present their case. Injustice can also flow from the flexible procedures, which can be inquisitorial, investigatory, adversarial or a mixture of all three.

But it does appear to work. The Chief Judge of the TCC considers adjudication to be the single most significant development in the last several decades in construction law.²³ Reviews

18. The *Scheme for Construction Contracts (England and Wales) Regulations 1998*, and the *Scheme for Construction Contracts (Scotland) Regulations 1998*, known as ‘the Scheme’.

19. See *Macob v Morrison* (1999) BLR 93; *Bouygues v Dahl-Jensen* (2000) BLR 49.

20. See *Discain Project Services Ltd v Opecprime Development Ltd* (2000) BLR 402.

21. *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors Ltd)* (2001) BLR 207 at 218.

22. Construction Umbrella Bodies Adjudication Task Group, *Guidance for Adjudicators* (July 2000).

23. Mr Justice Thyne Forbes, ‘Recent Trends in the TCC’ Paper presented to the Chartered Institute of Arbitrators South East Branch, 20 March 2002.

seem to confirm that the scheme is working well in meeting its objectives,²⁴ and practitioners appear to be generally satisfied with the scheme.²⁵ 'Experience indicates that most disputes stop once the adjudication has been decided', with losing parties feeling that they have 'had their day in court'.²⁶ Costs to parties to adjudication have been minimal.²⁷ It has been claimed that adjudication now supersedes arbitration and litigation as the most popular dispute resolution mechanism in the construction industry.²⁸ The experience to 2001 showed that it was more successfully used in disposing of smaller cases, particularly where both parties were awarded some monies though, contrary to expectations, some very large final account disputes have been referred. In larger projects where multiple references to adjudication have been made in the course of the work, litigation or arbitration has been initiated to challenge the adjudicators' decisions.²⁹

Seemingly endless ruminating about how the processes of adjudication are working and how they may be improved emanates from government, the construction industry and practitioners of adjudication in the United Kingdom.³⁰ These discussions provide fertile examples of the permutations and combinations of procedure that could be incorporated in any proposals for the development of a construction industry dispute adjudication scheme in Australia that I discuss below.

B. Australian Security For Payment Acts

The British legislative model provided the basis for those Australian jurisdictions that have legislated the process of adjudication for parties to obtain progress payment under construction contracts. New South Wales was the pioneer with the *Building & Construction Industry Security of Payment Act 1999*,³¹ Victoria followed with the *Building and Construction Industry Security of Payment Act 2002* (Vic). In Queensland the *Building and Construction Industry Payments Bill 2004* (Qld) modelled on the NSW legislation has been introduced into

24. See, e.g. *Review of the Scheme for Construction Contracts: A CIB Report to the Construction Minister*, December 2000, available at www.ciboard.org.uk; Construction Industry Council Adjudication Board, *Adjudication The First Forty Months* (August 2002).

25. See eg The Adjudication Society www.adjudication.co.uk.

26. See Gaitskell, R, 'Adjudication – A Wish List' *Paper for the Society of Construction Law*, Dec 2001 at 1.

27. About 3% of the sums in dispute: see Kennedy P and J L Milligan, 'Research Analysis of the Progress of Adjudication Based on Questionnaires Returned From Adjudication Nominating Bodies (ANBs) and Practising Adjudicators' (2001) 17 *Const LJ* 231.

28. See Burns, M, 'Adjudication Legislative Changes' *The Adjudication Society Newsletter*, February 2003 at 6.

29. Gaitskell, *op. cit.* at 3.

30. See, e.g. The CIB Report note above; Department of the Environment, Transport and the Regions, *Improving Adjudication in the Construction Industry*, Consultation Paper (April 2001); Paterson F A and P Britton (eds) *The Construction Act: Time for Review* (Centre for Construction Law & Management, London, 2000); Construction Industry Council Adjudication Board, *Adjudication The First Forty Months* (August 2002); Scottish Executive Improving Adjudication in the Construction Industry Report Of Consultation And Proposals (May 2004).

31. Amended in 2002 to improve the enforceability and prompt payment of the adjudicated amounts, and to prevent abuses of the legislation's intent by both claimants and respondents: *Building and Construction Industry Security of Payment Act 2002* (NSW). Currently a review of the objects of the Act is being undertaken, and further, minor, amendment to the scheme is likely.

Parliament and awaits debate. In Western Australia the Construction Contracts Bill 2004 now before the Upper House embodies a different approach to that adopted in the eastern States. It seems that South Australia and the Territory Governments may be showing some interest in similar schemes.

Across the Tasman, the Construction Contracts Act 2002 (NZ) implements a similar system, applicable as in the UK to all disputes arising under relevant construction contracts, with a variant of adjudication as an alternative to mediation created within the Weathertight Homes Resolution Services Act 2002 (NZ). The Institute's partner body, AMINZ, is authorised nominating authority and members are adjudicators under the legislation.

The legislative schemes are intended to reform the law relating to progress payments under construction contracts, particularly to:

- facilitate timely payments between the parties;
- provide for the rapid resolution of payment disputes; and
- provide mechanisms for the rapid recovery of payments.

Though relatively minor differences characterise each enactment,³² there are many commonalities:³³

- Legislatively enshrined entitlement to payment for work done under a construction contract, and the provision of a means of rapidly securing and enforceable entitlement to payment.
- Adjudication being the central pillar for resolving disputes and obtaining security of payment.
- A speedy and relatively simple process specified in the legislation.
- Strict mandatory time limits for the initiation, conduct and finalisation of the adjudication process.
- Binding interim adjudication decisions which secure payment, unless and until overturned by adjudication or litigation.
- Adjudicator has limited duty to observe natural justice.
- Limited rights of appeal from the adjudication process.
- Statutory disallowance of 'pay when paid' clauses.

The NSW legislation was introduced in 1999 with only a limited number of adjudications being conducted in the first few years of its operation. Following a review by Government in 2001 amendments were made in 2002 which substantially improved the operation and enforceability of the adjudication process. A further review is presently being undertaken by the Department of Commerce that is looking at several possible improvements to the process,

32. An extensive analysis of the differences can be found in Queensland Parliamentary Library, *Rapid Adjudication of Payment Disputes under the Building and Construction Industry Payments Bill 2004(Qld)*, Research Brief 2004/05, at <www.parliament.qld.gov.au/Parlib/Publications_pdfs/books/200405.pdf>.

33. I am indebted to the analysis in P Adams, 'Security of Payment and Adjudication: A UK Perspective' (2002) 21(3) *The Arbitrator and Mediator* 73 at 75.

and, significantly, whether to extend the object and scope of the Act to cater for all non payment disputes under a construction contract.³⁴

In *TransGrid v Walter Construction Group Ltd*,³⁵ McDougall J said that:

the requirements of natural justice must accommodate both the provisions of the legislative scheme and, more generally, the evident legislative intention underlying the Act

From a practical viewpoint the adjudication process since early 2003 has been successful. It seems that to a large degree the participants in the process have benefited from the requirement to focus on the matters in dispute and in a sense are forced to seek a resolution that otherwise might be postponed. The substantial shift in the commercial risk allocation after an adjudication determination and payment is, it would seem, beneficial to the resolution of the disputes underlying the claim for payment. Another lesson from the experience of participation in the process is that advisers to the parties and adjudicators have found that it is possible to comply with a short sharp timetable for the preparation of and response to claims and determining them, albeit at the risk of physical exhaustion!

C. Cole Building Royal Commission

The Cole Building Royal Commission addressed the question of security for payment in the construction industry and considered, *inter alia*, contract clauses and rapid adjudication.³⁶ Discussion Paper 12 contained a draft of Commissioner Cole's proposed national security of payments legislation, which received overwhelming support in submissions, though there was debate about how to achieve national consistency in security of payment reform, and over specific details of the draft bill. The Final Report recommended the Commonwealth enact the bill, as in the Final Report though subject to further consideration of detailed submissions made to the Royal Commission by nominated parties.

The Commonwealth legislation was intended to replace existing state and territory legislation where no adequate alternative is available, that is, a system for rapid adjudication of disputes concerning construction contracts comparable to the system created by the Act. The system focuses on mechanisms for rapid recovery of monies not paid when due for performance of work under the contract and for rapid resolution of disputes on the value of and payment for work arising under a construction contract.

34. See <www.construction.nsw.gov.au/sop/#SOP2004Review> Issues for consideration in the Review of the Act that summarises the issues raised during the review process.

35. [2004] NSW SC 21.

36. See Royal Commission Into The Building And Construction Industry, Discussion Paper Twelve: Security of Payments in the Building and Construction Industry. Royal Commission Into The Building And Construction Industry, The Hon TRH Cole, RFD, QC Royal Commissioner, *Final Report* (February 2003) vol. 8 Reform - National Issues Part 2 Chapter 14.

Following the broad concepts of the model already in operation, it establishes a regime by which parties are entitled to adjudication in accordance with a strict timetable. The adjudicator would have powers to conduct the procedure with flexibility, use an expert adviser, test or inspect any work, and call a conference, and determine whether legal representation was appropriate.

It is presently considered unlikely that the Commonwealth will introduce legislation creating a national scheme as Cole proposed, at least in the foreseeable future. So long as the State schemes are able to operate successfully, as the process has in NSW since the 2002 amendments, there is little impetus for a national scheme.

D. NSW Workers Compensation Commission Procedures

Since January 2002 the Workers Compensation Commission has been the independent dispute resolution service for disputes arising under the Workers Compensation Acts, replacing the Compensation Court. Its objectives are to provide a timely, fair and cost effective system for the resolution of disputes. The financial ill health of the Scheme prior to 2002 meant that it was designed to dramatically reduce the costs associated with litigation. The consensual methods of mediation and conciliation are favoured as the first step in resolution; should these fail, disputes are determined by arbitration. The same person conducts both processes. The arbitrators are experienced in compensation law, injury management, and/or dispute resolution.

The process of conciliation/arbitration is tailored to the particular nature of the disputes, the prevailing culture, and the statutory scheme³⁷ within which it must operate. Obligations and powers of parties and arbitrators have statutory force in many instances.

Features of the system include:³⁸

- All information to be used must be provided and exchanged at the beginning of the process (s 290).
- Settlement facilitated and encouraged at every stage (s 355).
- Arbitrators play an inquisitorial role, and the limited adversarial procedures are exercised in an informal manner.
- Hearing proceedings are informal and non-adversarial, legal representation is permitted, and it is recorded (as are preliminary teleconferences) and open to the public.
- Reliance on predominantly written evidence; where possible disputes are determined 'on the papers'.
- Unsuccessful conciliation conference is followed by an arbitration on the same day.
- Time limits apply to each stage of the process.
- Questions of law are referable to the Commission President for determination, and medical assessments are made by an independent Approved Medical Specialist.
- Time limits and quantum conditions govern the right to appeal.

37. *Workers Compensation Act 1987; Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act); Workers Compensation Commission Rules 2003.

38. See Guidelines, Practice Directions at <www.wcc.nsw.gov.au>.

Recognising the potential injustices that could occur in a speedy informal, settlement-focused dispute resolution process, especially replacing one with a strong litigious approach, the Commission holds that:

parties are entitled to procedural fairness consistent with the inherently inquisitorial character of the process and the Commission's objectives (S 367 (1)(a) and (2) of the 1998 Act. Timeliness and consistency of procedure are strong elements of fairness in this method of dispute resolution.³⁹

The difficulty in selling such a radical process to commercial parties is probably identified in this quotation. The Commission's scheme is designed for the particular disputes and their context and there may be those who argue that it is too sharp and fast for the interests of justice in commerce.

E. London Marine Arbitrators' Association FALCA Rules

The London Marine Arbitrators have implemented a scheme of Fast and Low Cost Arbitration (FALCA). It is an intermediate stage between its Small Claims Procedure and its normal process. The FALCA Rules will be applicable to claims between US\$50,000 and US\$250,000 which comprise the majority of LMAA's business. The main components of the FALCA Rules are:

- A sole arbitrator will be agreed to by the parties.
- A strict timetable for exchange of submissions, with no pleadings. Submissions can be in any form.
- Discovery will be limited to relevant documents.
- Exchange of witness statements and experts' reports subject to a tight timetable.
- Time limits apply to the arbitrator making the award.
- No oral hearing unless the arbitrator deems it fitting.
- The Rules exclude, so far as possible, any right of appeal to the Court.
- The arbitrator is entitled to exercise appropriate powers if any party fails to observe the FALCA procedures.

F. Small Business-Specific Dispute Resolution Schemes

The Institute has developed a set of Industry/Consumer Dispute Resolution Scheme Rules for adoption by industry associations for the quick and cost-effective resolution of claims by consumers against suppliers of goods and services who are members of the industry association. The intention is that the particular association appoint the Institute to provide dispute resolution services under a scheme adopted by the association. IAMA has recently been registered as a provider of dispute resolution services by .auDA, the organisation which administers the 'au' domain name. Supplemental rules have been developed appropriate to the way this activity operates, e.g. electronic communication. The Industry/Consumer Dispute Resolution Scheme procedures provide for a two stage process of conciliation, and if unsuccessful, arbitration.

39. The Practice of the Conciliation/Arbitration Process in the Workers Compensation Commission, WCC Guideline at 1.

A range of dispute resolution schemes have developed under the guidance of government. ASIC, for example, has approved a number of external dispute resolution schemes in the company and financial services areas of commerce. These include the Financial Industry Complaints Services, Insurance Inquiries and Complaints, Banking and Financial Services Ombudsman, Credit Union Dispute Resolution Centre, and the Credit Ombudsman Service Ltd.⁴⁰ These Schemes deal with complaints and claims in a variety of ways, some of which are binding and others merely use mediation or conciliation methods.

There are also a plethora of schemes developed under self-regulation of industry and commerce. Those operating at a national level are included in the Directory of National Self-Regulatory Schemes.⁴¹ Many of the industry schemes involve a complaints handling procedure and not dispute resolution. Further, there are many small disputes arising within small business and the professions for which no process is available except for the Local Courts or a consumer claims tribunal.

The Chartered Institute of Arbitrators in the United Kingdom operates several industry-specific dispute resolution schemes that are offered as quick and cost-effective alternatives to litigation in courts or tribunals. The processes are conducted by their arbitrator members, with tailor-made rules that specify the procedure and powers of the arbitrator, sometimes with reference to the arbitrator's jurisdiction and power to direct the procedure in s 34 Arbitration Act 1996 (UK). Some term the process an adjudication.

As with the Institute's Industry/consumer scheme, mediation or conciliation precedes arbitration or adjudication, which will preferably be conducted on written documents only. As with .auDA the scheme for the British Institute of Architectural Technologists actively promotes the use of the internet for online dispute resolution. Common features of the schemes are strict time limits and guillotine clauses, and immunity for arbitrators. Fees are usually fixed, according to the value of the matters in dispute and kept low for consumers. Decisions are binding, non-reviewable decisions, at least on the trader party. Limited appeal is available on a point of law to the High Court. An appeal by way of internal review is available through the Chartered Institute of Arbitrators Consumer Arbitration Scheme Review Procedure.

A wide range of trade and industry schemes exist, including for motor traders, communications and internet services, funeral directors, heating and ventilator contractors, architectural technologists, surveyors, travel agents and mortgage providers.

G Construction Industry Arbitrations – The 100 Day Arbitration

In recognition of the difficulties of applying even the best general procedural rules to a range of sometimes complex disputes, a number of dispute resolution bodies have developed construction industry-specific rules for arbitral proceedings.

40. See <www.asic.gov.au/Financial_Services_Dispute_Resolution> for details of all approved Schemes.

41. See <www.selfregulation.gov.au/dir_nat_schemes.asp>.

AAA Construction Industry Arbitration Rules

The American Arbitration Association (AAA) in the 1990s developed and recently refined its Construction Industry Arbitration Rules, that are accepted as standard practice by the construction industry.⁴² These Rules allow three discrete tracks for cases of different sizes and levels of complexity:

- **Regular Track Procedures** which are applied to the administration of all arbitration cases, unless they conflict with any portion of the other Procedures.
- **Fast Track Procedures** designed for cases involving claims of no more than \$75,000 and two parties; parties may also agree to use these procedures in larger cases.
- **Procedures for Large, Complex Construction Disputes** suitable for cases administered by the AAA under the Construction Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$500,000.00 (reduced in 2003 from \$1,000,000) exclusive of claimed interest, arbitration fees and costs.

The Fast Track Procedures were designed for cases involving claims of no more than \$75,000. The highlights of this system are:

- a 60-day 'time standard' for case completion;
- presumption that cases involving \$10,000 or less will be decided on a documents only basis;
- requirement of a hearing within 30 calendar days of the arbitrator's appointment;
- a single day of hearing in most cases; and
- an award in no more than 14 calendar days after completion of the hearing.

100 day Arbitration

Following on the introduction of the Arbitration Act 1996 (UK), in 1998 the Society of Construction Arbitrators (SCA) in the UK developed the Construction Industry Model Arbitration Rules (CIMAR), endorsed by numerous bodies representing the construction industry. Simultaneously, a Review Body chaired by his Honour Judge Humphrey Lloyd QC monitored their implementation and use, and guidance for use of the Rules is published with Notes issued by SCA.⁴³

Possibly due to the pressure upon arbitration as a dispute resolution procedure after the introduction of construction adjudication in the UK, SCA is in the process of developing rules for accelerated arbitration that has come to be known as the 100 day arbitration. It will operate as an additional alternative procedure within the CIMAR. The general concept is that the arbitration process will be accelerated, and that where parties agree to this procedure, from commencement of the arbitration or adoption of the procedure to final award the elapsed time will be 100 days.

42. Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes) Amended and Effective July 1, 2003 at <www.adr.org>. See Rules and Procedures.

43. See *CIMAR 1st Edition February 1998 Notes Issued by the Society of Construction Arbitrators - Updated January 2002* at <www.arbitrators-society.org>.

The Rules have gone through several drafts, and the SCA is in the process of finalising the preferred version.⁴⁴ From the details made public it will have features like these:

- The arbitrator has a duty to make the award within 100 days from delivery of the statement of defence (in effect the close of pleadings).
- The parties only may agree to extend this period; if they agree, the arbitrator can direct shorter time periods and the 100 days is reduced accordingly.
- Submissions and an award on costs are made to fixed time limits applying after the main award is given.
- Time limits apply to service of documents, conduct of a hearing, written submissions, with the arbitrator setting the timetable at the outset.
- A maximum time will apply to an oral hearing, if one is held.
- The arbitrator has wide powers to give directions about conduct of the hearing, be inquisitorial, investigative, and use his or her own initiative in ascertaining the facts and the law.
- The parties commit to cooperating in order to make the process speedy.

The enforceability of the process is suggested to be the contractual commitment of the parties and the arbitrator.

It is clear that the process of developing this procedure has seen much discussion and negotiation. Some of the perplexing questions they have been grappling with include:

- Reconciling the arbitrator's conflicting obligations of duty of fairness under the Arbitration Act 1996 and the duty to comply with the time limits.
- On which basis are days counted – calendar or working?
- What to do about costs, and when?
- What can be done about parties reluctant to comply with their obligations under the model?
- How is failure to comply with time limits of the part of the parties and the arbitrator to be dealt with?

5. THE FUTURE – REFORM AND DEVELOPMENT

There have been a number of papers presented at this conference that have addressed the way in which procedural reform in the practice of commercial arbitration might be improved in Australia. There has been guidance as to the lessons which might be learnt from international arbitration practices, and extensive practical advice as to how the policies and authority in the IAMA Rules might be implemented. A great contribution to the process will be an effective legislative background under hoped-for amendments to the UCA Acts which will reinforce the Institute's procedural Rules.

44. I have been provided with a copy of the most recent draft, but in deference to the SCA I have not distributed these with the conference papers.

The process of 'stiffening the backbone' of arbitrators is ongoing, and will be addressed by the various Chapters' CPD programs. The development of a greater appreciation by arbitrators of what the Rules require of them, and the procedural authority they permit them to exercise will be essential if arbitration is to remain the cost-effective and timely process it can be.

There are, however, three areas outside considerations of improvements in the practice of arbitration that I propose should be addressed by the Institute:

- The first is a binding programmed procedure for construction arbitration based on the SCA 100 day arbitration concept and other time limited models.
- The second area, and one of more general relevance to the commercial community and membership of the Institute is the development of a scheme, not necessarily by way of arbitration, providing for the speedy and economic resolution of small business and consumer claims.
- The last area in which I believe the Institute should focus some attention is as yet unresolved issue of whether an adjudication process should be implemented to include all construction disputes as provided in the UK. Such a scheme could develop in a number of ways and it would be sensible to ensure that the Institute is at the forefront of discussions and decision-making in this regard.

A. Construction Arbitration Binding Programed Process

The problem with timetables in arbitration is that too often they are, as Kruschev said of promises, 'like piecrusts, made to be broken'. The sting in the tail of the IAMA Expedited Commercial Arbitration Rules, which are intended to be a fast-track process, is the facility in cl 10 of Schedule 2 for time limits to be extended by agreement or at the discretion of the arbitrator 'on proper cause being shown' and subject to a possible costs penalty. How many expedited proceedings, or for that matter expert determinations, ever finish on time?

Experience has shown that the very short and sharp time limitations under adjudications of progress claims, and under the UK scheme can be met. Further, Courts, certainly in NSW, are developing a hitherto unseen rigour with respect to timetables and case management directions.

There is absolutely no reason why a process could not be developed for a complete pre-set or agreed timetable to be imposed that could not be extended at all insofar as it applied to the parties and their legal advisers, and only in extenuating circumstances insofar as it bound the arbitrator.

A procedure could be introduced by adding an extra paragraph to the introduction to the Rules:

3. *The Institute of Arbitrators and Mediators Australia Programed Construction Arbitration Rules.*

Rule 13 could be amended to add to subclause 2:

c. *Where the arbitration is to be conducted in accordance with Institute of Arbitrators and Mediators Australia Programed Construction Arbitration Rules, the provisions of Schedule 3 shall apply.*

The drafting of Schedule 3 may take a little time, and ought to follow a process of consultation with the construction industry and the legal profession. The essential ingredients would include a requirement for the arbitrator to settle with the parties a binding timetable, including fixing a date for a hearing. The hearing time could be allocated in the same manner as occurs in international arbitrations.

If a scheme were to be developed by the Institute for Binding Programed Construction Arbitration along the lines of the SCA 100 day arbitration and possibly the AAA Fast Track process, the procedures adopted would need to address issues such as:

- What is the jurisdiction? i.e. what disputes are appropriate or eligible for resolution in this manner?
- What are the conditions precedent to invoking the procedure?
- Establishing when the time period applies, and what must be/can be achieved with that period.
- What the internal timetable will be, e.g. time limits and interrelated limits for the conduct of the separate procedural steps, e.g. service of documents, hearing, written submissions, making of award?
- Whether, and in what circumstances will any extension of the time periods occur?
- What happens should a party or the arbitrator not comply with the time limits?
- Exclusion of documentation provided outside time limits.
- Duties imposed upon the parties, e.g. to cooperate and act expeditiously.
- Duties to be imposed upon the arbitrator.
- Powers conferred upon the arbitrator.
- Basis for an enforceability in the contractual commitments of the parties and the arbitrator.
- Arrangements for payment of and security for arbitrator's fees.
- Status of the award – provisional or binding, grounds of, or any exclusion of appeal.
- Dealing with errors on the face of the award or slip rule.
- Enforcement of awards and exclusion, by agreement, of judicial review.
- Interaction with the *Uniform Commercial Arbitration Acts*.

B. *Small Business Dispute Resolution Service*

The need for some form of small claims dispute resolution or adjudication process has been recognised by a number of organisations and individuals in Australia. The schemes in place illustrate the creative and adventurous approach that is required to provide a modern and effective process to resolve small, but personally significant claims arising in commerce, industry and by consumers.

SPAN Services has introduced a dispute management and resolution service for the

service providers industry association conducted by Shirli Kirshner.⁴⁵ Adjudicate Today offers a Small Claims Adjudication Service for a fixed (graded) fee,⁴⁶ and the Australian Branch of the Chartered Institute of Arbitrators has introduced a new Chartered Arbitration Scheme.⁴⁷ The Scheme allows an arbitrator to implement a facilitated negotiation which, if unsuccessful, is followed by an arbitral process.

Without being too conclusive as to the model which the Institute might, but must, adopt, I suggest a binding, fixed (graded) fee fast track lawyer free process that is not arbitration. The process could allow a prescribed limited review of any matter of law arising from the determination. There is no reason why a tight process could not be developed that provided a quality of service seen in no consumer tribunal.

Further, I suggest that such a process ought to be based on the streamlined Workers Compensation Commission system. If you pause to reflect, how much would you spend pursuing a claim for less than \$50,000?

The possible ingredients for a scheme to resolve small business disputes might be:

- Fixed but graded fee
- Prescribed process with time limits
- Documents exchanged with timetable
- Short 'hearing' one day only
- No lawyers
- Timetabled progression at the 'hearing conference' from facilitated negotiation (mediation) through to a determination
- An internal (within IAMA) review process and no fee if review is successful

C. Construction industry Adjudication Scheme

A scheme for adjudication of all construction disputes ought to be investigated by the Institute, even if the proposal is ultimately not pursued. The simple reason why the Institute should be at the forefront of such an inquiry is because it is the only organisation which is involved nationally in the training and accreditation of adjudicators and the administration of payment claim adjudications. The Institute is therefore in a unique position to consult, consider and advise on the process. Another reason why the Institute would want to lead this consideration is because if we do not, it may happen without the Institute being in a position to influence many aspects of the process, in particular the role its membership may have in the process as adjudicators.

There are a number of ways in which construction disputes adjudication might be introduced in Australia. The procedures and means for its introduction will clearly depend upon which method was adopted for its implementation. There are vast differences between what might be required in the expression of a mandatory statutory scheme as opposed to a set of procedural rules adopted by a nominating body such as the Institute. The possibilities

45. See <www.span.net.au>

46. See <www.adjudicate.com.au>

47. See <www.arbitrators.org.au>

and hazards of each method would need to be considered. There is, of course, no necessity or reason for the Institute to design and implement a scheme either for a national approach or as an amendment or appendage to state legislation.

The preferred option, I suggest, is for the Institute to draft and issue for comment a set of Rules for Adjudication by way of non-binding determination of all disputes arising in the construction industry.

A model which could be proposed would provide for the following:

- Prescribed timetable for submissions
 - ◆ Graded by quantum
 - ◆ Tight but fairer than the NSW Security of Payment Act
 - ◆ Balanced 'equal' opportunity for both sides
 - ◆ Possible provision for once only agreed timetable
 - ◆ Extensions expressly excluded (guillotine) or limited to adjudicator's discretion
- Joinder of parties
 - ◆ Claims under related contracts – sub- and head contracts
 - ◆ default timetable for joinder
- Expertise of Adjudicator
 - ◆ Expressly to be relied on
 - ◆ Alternative, with the assistance of one expert or assessor engaged by adjudicator
 - ◆ Expert evidence to be limited
- Possibility of Conference/Hearing
 - ◆ For clarification of submissions
 - ◆ Allocation of time – to parties or issues as predetermined by adjudicator
- Adjudicator to determine procedures
 - ◆ Guideline alternatives in rules of procedure
 - ◆ Statements of issues and findings to form basis of determination
 - ◆ Written submissions
 - ◆ Adjudicator discretion for further submissions
 - ◆ Inquisitorial process permitted
- Procedural fairness
 - ◆ Recognised limitations
 - ◆ Generally at the discretion of adjudicator
- Determination to be provisional
 - ◆ Subject to formal determination by arbitration or litigation or agreement of the parties
 - ◆ Provision for agreement by parties for determination to be final and binding
- Enforcement of determination
 - ◆ Form of determination
 - ◆ Express exclusion of judicial review in enforcement proceedings
 - ◆ Slip rule exception

The introduction of such an adjudication process would necessarily involve consultation with the construction industry and professions, and with the legal profession and the Courts. It may not be welcomed by all but the water, if there is any left, should be tested.

ATTACHMENT

Environmental Planning and Assessment Act 1979 (NSW) No 203

109ZI Definitions

In this Part:

building action means an action (including a counter-claim) for loss or damage arising out of or concerning defective building work.

building work includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work.

subdivision action means an action (including a counter-claim) for loss or damage arising out of or concerning defective subdivision work.

subdivision work includes the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of subdivision work.

109ZJ Apportionment of liability

- (1) After determining an award of damages in a building action or subdivision action, a court must give judgment against each contributing party for such proportion of the total amount of damages as the court considers to be just and equitable, having regard to the extent of that party's responsibility for the loss or damage in respect of which the award is made.
- (2) Despite any Act or law to the contrary, the liability for damages of a contributing party is limited to the amount for which judgment is given against that party by the court.
- (3) A contributing party cannot be required:
 - (a) to contribute to the damages apportioned to any other person in the same building action or subdivision action, or
 - (b) to indemnify any such other person in respect of those damages.
- (4) In this section contributing party, in relation to a building action or subdivision action, means a defendant or other party to the action found by the court to be jointly or severally liable for the damages awarded, or to be awarded, in the action.

Civil Liability Act 2002 (NSW) No 22

as amended by the

Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW) No 92

and the

Civil Liability Amendment Act 2003 (NSW) No 94

Part 4 Proportionate liability (not yet commenced)

34 Application of Part

- (1) This Part applies to the following claims (apportionable claims):
 - (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

- (b) a claim for economic loss or damage to property in an action under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.
- (1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (2) In this Part, a concurrent wrongdoer, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

34A Certain concurrent wrongdoers not to have benefit of apportionment

- (1) Nothing in this Part operates to limit the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:
 - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim, or
 - (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim, or
 - (c) the civil liability of the concurrent wrongdoer was otherwise of a kind excluded from the operation of this Part by section 3B.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Part.

35 Proportionate liability for apportionable claims

- (1) In any proceedings involving an apportionable claim:
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and
 - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
 - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part, and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

- (3) In apportioning responsibility between defendants in the proceedings:
 - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law, and
 - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

35A Duty of defendant to inform plaintiff about concurrent wrongdoers

- (1) If:
 - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim, and
 - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
 - (i) the identity of the other person, and
 - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and
 - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

36 Contribution not recoverable from defendant

A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
- (b) cannot be required to indemnify any such wrongdoer.

37 Subsequent actions

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

- (2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

38 Joining non-party concurrent wrongdoer in the action

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

39 Application of Part

Nothing in this Part:

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or
- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable, or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

* This paper was delivered at the IAMA 2004 National Conference, *New Directions In ADR*, Sydney, 22 May 2004.

A Critique of ICC Arbitration

Russell Thirgood¹

Introduction

Since its establishment in 1923 much has been said and written about the International Chamber of Commerce's International Court of Arbitration. Critics have stated that 'it has failed to change apace with the field of international arbitration' and that it 'has many features that are antiquated holdovers of the past'.² Conversely, the International Chamber of Commerce (ICC) has itself proclaimed that the 'ICC International Court of Arbitration is the world's foremost institution in the resolution of international business disputes' and that there are clear reasons why '[a]mong the available dispute resolution alternatives to the courts, arbitration is by far the most commonly used internationally'.³ The truth is that the ICC competes very well in the international justice business. Its complex structure has undergone constant revision to ensure that it is well equipped to meet the demands of international commerce and dispense private justice in a fair and efficient manner. Furthermore, it is innovative, expanding its product range and offering services in untapped markets.

With respect to its core arbitral function, the ICC is able to maintain control of the process and ensure that matters are resolved expeditiously through a sophisticated system of management. This article explores in detail the manner in which the ICC conducts its dispute resolution business and how it fares against its international competitors. In doing so, it is hoped that this critique of the strength and weaknesses of the ICC will serve as a catalyst for domestic suppliers of private disputes resolution and particularly arbitration to re-examine, and possibly revive their own procedures.

History of ICC's Growth

Whatever the perception of the ICC, its history points to an impressive growth of its arbitration business in the twentieth century. The Court of Arbitration was created in 1923, only four years after the birth of the ICC itself. The ICC was founded in France for the purpose of encouraging international trade, industry and commerce. It recognised that the

-
1. Russell Thirgood is a senior associate of McCullough Robertson Lawyers. He is the author of the Alternative Dispute Resolution Chapter of the Australian Encyclopaedia of Forms and Precedents; edits *The Arbitrator & Mediator* and holds a Masters of Laws with First Class Honours majoring in dispute resolution from the University of Sydney.
 2. Wetter JG. 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 *American Review of International Arbitration* 91 at pp. 95-96.
 3. ICC Website <www.iccwbo.org/court/english/arbitration/introduction.asp> *International Court of Arbitration*.

lack of an effective international dispute resolution mechanism would be a substantial barrier to achieving its objectives. Initially, the International Court of Arbitration was used by a small close-knit international community of businessmen.⁴ The suppliers of the arbitral services were initially French law professors who maintained social prestige and academic freedom. France proved to provide a suitable environment for international arbitration, assisted, in part, by the disdainful lack of interest that the French courts (and lawyers) paid to the ICC's activities.⁵ At that time there was considerable doubt as to the possibility of obtaining legally binding and enforceable awards. Accordingly, the only effective means of enforcement was through peer pressure. As the demand for international arbitration increased, members of the ICC realised the need to produce legally effective awards that had international currency. The ICC played a prominent role in lobbying for national legislation and international treaties that would support the international arbitration process and recognise foreign awards. A major step forward for international commercial arbitration was the ratification of the New York Convention which is today the principal vehicle for the enforcement of arbitration agreements and awards. Since the end of the Second World War the growth of international arbitration has mirrored the growth in international trade and investment. A major development for ICC arbitration occurred in the 1970s with the arrival of major American law firms.⁶ These US law firms (who were later joined by some large English law firms and in more recent times Australian law firms) treated arbitration like litigation, employing sophisticated case and document management techniques and pursuing procedural strategies to advance their clients' interests. They also brought with them promises of efficiency and cost effectiveness. This infiltration meant that the ICC needed to professionalise and review its procedures, revise its rules and provide training for its arbitrators.⁷

The statistical data provided by the ICC demonstrates the success of its business. The demand for ICC arbitration services has increased tenfold over the last five decades. The geographical scope for ICC arbitration is also very wide. Parties from almost every country of every continent now resort to ICC arbitration to settle their business disputes. During the year 2000, 812 arbitrators were appointed from 58 different countries and 541 cases were registered with the ICC Court involving 1398 parties from 120 countries representing every continent. The demand for ICC arbitration in 2001 was even greater. Five hundred and sixty-six requests for arbitration were received, bringing the total number of cases pending at the year-end to 1058, involving 1492 parties. The 948 arbitrators appointed in 2001 came from 61

-
4. Craig WL. 'International ambition and national restraints in ICC Arbitration' (1985) 1 *Arbitration International* 19 at p.50.
 5. Nottage L. 'The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery' (2000) 16, 1, *Arb. Int.* 53 at p.59.
 6. Dezalay Y, and Garth BG. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) The University of Chicago.
 7. Nottage L. 'The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery' (2000) 16, 1, *Arb. Int.* 53 at pp.59-60.
-

different countries. In 2001, ICC arbitrations took place in 42 different countries.⁸

To achieve its growth the ICC has needed to maintain and improve its service. ICC arbitration is essentially comprised of a number of main features that include the Court, the Secretariat, the Arbitrators and the Rules. In order to meet the demands of its consumers and to compete for its share of the international arbitration business the ICC has paid great attention to these key components of its business.

The Court

The International Court of Arbitration is an autonomous body that is attached to the International Chamber of Commerce.⁹ It carries out its functions independently from the ICC, ICC organs and ICC National Committees.¹⁰ Members of the Court are nominated by each National Committee and appointed by the ICC Council, the supreme governing body within the ICC.¹¹ There are about ninety members and alternate members representing developed and developing countries and all cultures and legal systems. In 2001, the Court comprised members from 77 different countries.¹² Dr Horacio A. Grigera Naon, former Secretary General of the International Court of Arbitration, has contended that '[t]hese characteristics ensure the cultural neutrality and openness and the impartiality and independence of the Court in the carrying out of its functions and discharging its duties.'¹³ In marketing itself, the ICC also boasts that its Court 'is able to draw upon the collective experience of distinguished jurists from a diversity of backgrounds and legal cultures as varied as that of the participants in the arbitral process.'¹⁴

The Court does not itself hear or settle disputes.¹⁵ Rather, its function is to administer and supervise arbitrations conducted under the ICC Arbitration Rules. It is charged with the general responsibility of ensuring the application of the ICC Arbitration Rules¹⁶ and it exercises quality control over the arbitral process and the rendering of awards. In doing so, it strives to balance professional supervision with party autonomy.¹⁷ With the assistance of the Secretariat, the Court aims at making both the conduct of the arbitration and the outcome neutral, impartial and reliable so as to prompt the parties to spontaneously abide by the determinations of the arbitral tribunal and, if need be, to ensure that the award is enforceable

8. ICC International Court of Arbitration Bulletin 2001 *Statistical Report (2002)* 13 No 1.

9. Rule 1(1) *1998 ICC Arbitration Rules*.

10. Rule 1(2) & (3) of Appendix I and Rule 3(1) of Appendix II *1998 ICC Arbitration Rules*.

11. Rule 3 (3) of Appendix I *1998 ICC Arbitration Rules*.

12. ICC International Court of Arbitration Bulletin 2001 *Statistical Report (2002)* 13 No 1.

13. Naón HG. 'The Administration of Arbitral Cases Under the 1998 Rules of Arbitration of the International Chamber of Commerce', *Biennial IFCAI Conference* (October 24 1997) p.2.

14. ICC website <www.iccwbo.org/court/english/arbitration/introduction.asp>.

15. Rule 1(2) *1998 ICC Arbitration Rules*.

16. Rule 1(1) of Appendix I *1998 ICC Arbitration Rules*.

17. Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.332.

at law before national courts.¹⁸ The Court has a number of specific functions including:

- (a) appointing an arbitrator should any party fail to nominate its arbitrator or should the parties not agree on the sole arbitrator or the chairman of an arbitral panel. The Court is assisted in this task by the Secretariat which will seek proposals from National Committees.¹⁹ The Court will also determine the number of arbitrators, failing a stipulation or agreement between the parties in this respect.²¹
- (b) hearing and deciding any challenges against an arbitrator for lack of impartiality or independence.²¹ The Court may also, after hearing from the parties and the arbitrators, remove at its own initiative an arbitrator who is prevented *de jure* or *de facto* from fulfilling his or her functions.²²
- (c) fixing the place or seat of arbitration when the parties have not agreed on it.²³ This is a vital function because, amongst other things, the place of arbitration determines the national or external law supervising the conduct of the arbitration and the enforceability of the award under international conventions including the New York Convention. (The award is rendered at the place of the arbitration.)²⁴
- (d) determining, on a *prima facie* basis, the existence, validity or scope of an ICC arbitration clause when one of the parties raises such doubts. Decisions by the Court in this regard are of an administrative nature only and do not prevent the arbitral panel from finally ruling on these matters. Further, should the Court conclude that *prima facie* there is no arbitration agreement the parties retain the right to ask the appropriate national court whether or not there exists a binding arbitration agreement.²⁵
- (e) fixing advances to cover arbitration costs and expenses. The Court does this by applying the fee tables set out in Appendix III of the *1998 ICC Arbitration Rules* to the amount in dispute. This is important because it ensures that the parties and the arbitrators are not exposed to potential animosities or painful bargaining that may be associated with negotiating the financial costs of an arbitration. Direct dealings by the parties and arbitrators in this respect may be counterproductive and lead to delays in the commencement of the arbitration.
- (f) approving the terms of reference if signed by the arbitrators when one of the parties has failed to do so.²⁶ This is important because it allows an arbitration to proceed despite the sabotaging tactics that may be adopted by a recalcitrant party. An

18. Rule 35 *1998 ICC Arbitration Rules*.

19. Rule 8 *1998 ICC Arbitration Rules*.

20. Rule 8(2) *1998 ICC Arbitration Rules*.

21. Rule 11 *1998 ICC Arbitration Rules*.

22. Rule 12(2) *1998 ICC Arbitration Rules*.

23. Rule 14(1) *1998 ICC Arbitration Rules*.

24. Rule 25(3) *1998 ICC Arbitration Rules*.

25. Rule 6(2) *1998 ICC Arbitration Rules*.

26. Rule 18(3) *1998 ICC Arbitration Rules*.

arbitration will proceed notwithstanding the refusal or failure of a party to take part in it.²⁷ However, this does not relieve the participating party from the burden of arguing and proving its case nor the arbitral panel from its duty to 'establish the case by all appropriate means.'²⁸

- (g) scrutinising the draft arbitral award as to both form and substance. The purpose of this control is to ensure the quality of the final product so as to render it enforceable at law²⁹ and as invulnerable to attack as possible in any subsequent judicial proceedings.³⁰ The arbitral tribunal is obliged to modify its award in accordance with the Court's comments as to form; however is free to determine for itself whether to follow the Court's suggestions as to substance. In regard to matters of substance, arbitrators generally pay respectful attention to the Court's comments.³¹ In evaluating the importance of the Court in providing scrutiny of draft awards it is difficult not to applaud anything that is done to help ensure the enforceability of an award. National Courts have also been comforted by this function of the Court. McMullin J of New Zealand's Court of Appeal stated:

*The whole process of arbitration under ICC Rules is one which imposes its own safeguards against erroneous awards whereby the appointment of the arbitrator and any award which he makes is subject to supervision.*³²

Despite the functions noted above,³³ which most commentators and practitioners regard as conducive to the smooth progress of an arbitration, the Court has attracted some criticism. Firstly, it has been argued that whilst the Court exercises an essentially negative or controlling function it does not provide substantive or constructive support. Wetter has contended that:

*[A]rbitrators faced with complex procedural problems (whether or not they must be resolved with reference to local law and practice or to previous practice among ICC tribunals) are not likely to obtain high-powered and truly experienced guidance from the executive arm of the ICC (ie the Secretariat), much less legal research or office support staff.*³⁴

Secondly, it has been stipulated that the Court has many antiquated features. Its size is unwieldy. Members receive no remuneration, which limits the appeal of the position given

27. Rule 6(3) 1998 ICC Arbitration Rules.

28. Rule 20(1) 1998 ICC Arbitration Rules.

29. Rule 27 1998 ICC Arbitration Rules.

30. Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.333.

31. *Ibid.*

32. *CBI New Zealand Ltd v Badger BV and Chiyada Chemical Co Ltd* [1982] 2 NZLR 669 at p.689.

33. Due to its increasing workload, the Court now meets more frequently than in the past. During 2001, it met 46 times in committee form and held 12 plenary sessions. See ICC International Court of Arbitration Bulletin 2001 *Statistical Report* (2002) 13 No 1.

34. Wetter JG. 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 *American Review of International Arbitration* 91 p.95.

the high workload. Thirdly, frustration has been expressed at the Court's 'anonymous character and from its total insulation from the tribunals, parties and their legal advisors'.³⁵ These issues have led to the calling for 'a fundamental restructuring of the ICC Court itself, a re-organisation of its work, and a thorough revision of the standards of recruitment and the level of remuneration'.³⁶

While the Court should listen to and learn from constructive criticism, a fundamental restructuring is not required. Should the Court provide arbitrators with more substantive guidance there would be a number of undesired consequences. Firstly, this would increase its workload which has already been recognised as being high. Secondly, and more importantly, it would erode the autonomy of the arbitral tribunal, the body which hears directly from the parties and their advisors and is in the best position to make binding decisions that affect the parties' rights and obligations. Should the Court reduce its size to enable a small number of paid professionals to undertake its workload the immediate effect would be to reduce the international, multi-cultural and widely representative nature of ICC arbitration which the ICC regards as being at the very core of its business. The competitive market advantage that the ICC has over other foreign arbitral institutions such as the China International Economic and Trade Arbitration Commission (CIETAC) and the Japan Commercial Arbitration Association (JCAA) is that it is truly international and appeals to businesspeople who wish to entrust their disputes to an organisation that is independent, impartial and neutral.³⁷ These are critical characteristics that should not be regarded too lightly, simply for the sake of administrative efficiency. The Court should maintain its quality control and supervisory functions. As it can only make non-binding recommendations to the arbitral tribunal on matters of substance there is no need for it to be open to scrutiny from the parties and their advisors. The Court's role is not to decide particular cases but rather to concern itself with the 'big picture' to ensure that the most appropriate people are selected as arbitrators, that those who are unsuited to resolving a dispute are removed, that arbitrators are paid by reference to a scale, that a suitable place of arbitration is selected and that awards are properly scrutinised so that they are enforceable. If the Court performs these important tasks well and its awards retain their international currency, the ICC will remain an attractive forum for resolving international business disputes.³⁸

35. Ibid. at p.97.

36. Ibid.

37. CIETAC and JCAA are examined later in this paper.

38. It is the author's view that domestic arbitral institutions, such as the Institute of Arbitrators & Mediators Australia (IAMA), could learn from the way the International Court of Arbitration provides quality control through reviewing arbitral awards and maintaining the terms of reference procedure. (The author is an executive member of the Queensland Chapter of IAMA and the editor of IAMA's journal, *The Arbitrator & Mediator*.)

The Secretariat

The Secretariat's fundamental role is to assist the Court in the performance of its functions.³⁹ It acts as both 'clerk of the court' during the arbitral process and as an advisor to the Court to assist in decision making. The Secretariat is located at ICC headquarters in Paris.⁴⁰ It has a staff of over 50 including 30 lawyers. Its members are of 20 different nationalities and speak a similar number of languages.⁴¹ When an arbitration request is filed, the Secretary General will assign it to one of six teams which will then be in charge of the administration of the case. From the beginning of the case the Secretariat is in direct contact with the parties, the arbitrators and the National Committees of the ICC. It acts throughout the process as the interface between the arbitral tribunal and parties on one hand and the Court on the other. The Court will be kept informed by the Secretariat of the pace and other aspects of the conduct of the arbitration while (to avoid ambiguity) the parties are provided with general assistance and information in a dozen different languages. Further, each time the Court is required to make a decision in the exercise of its powers under the ICC Arbitration Rules it is provided with a briefing from the Secretariat outlining the legal and factual context together with a recommendation as to the decisions to be taken.⁴² Accordingly, the Secretariat is required to closely follow each case to assist the Court in the decision-making process. The Secretariat is critical to the internal functioning of the ICC's arbitration business and acts as the engine that keeps the whole process in motion.

The Arbitrators

It is a common saying that an arbitration can only be as good as the arbitrator. Unlike other international arbitral bodies, the ICC does not maintain a list of ICC arbitrators. Rather, the Court, with the assistance of ICC National Committees, identifies, nominates and appoints arbitrators with appropriate qualifications on a case by case basis. The ICC contends that this open method ensures 'the greatest possible freedom of choice and flexibility in the constitution of the Arbitral Tribunal.'⁴³ The tribunal is composed of one or more arbitrators. When one arbitrator is designated he or she is appointed by the Court, unless the parties otherwise agree. When three arbitrators are designated, each party appoints an arbitrator with the third arbitrator, who chairs the panel, being appointed by the Court, unless the parties or co-arbitrators otherwise agree.

Once the arbitral tribunal is formed it takes the lead role in directing the arbitration. Typically, an ICC arbitral tribunal will provide the parties with directions in relation to the following:⁴⁴

39. Rule 2 of Appendix I 1998 ICC Arbitration Rules.

40. ICC website <www.iccwbo.org/court/english/arbitration/introduction.asp>.

41. ICC International Court of Arbitration Bulletin 2001 Statistical Report (2002) 13 No 1.

42. Naón HG. 'The Administration of Arbitral Cases Under the 1998 Rules of Arbitration of the International Chamber of Commerce', *Biennial IFCAI Conference* (October 24 1997) p. 5.

43. ICC website <www.iccwbo.org/court/english/arbitration/introduction.asp>.

44. These directions have been taken from ICC Case Reference No 10631/BWD. (The author represented the Claimant in this arbitration.)

THE ARBITRATOR & MEDIATOR AUGUST 2004

- (a) the delivery of pleadings and any subsequent amendments to pleadings;
- (b) applications in relation to security for costs;
- (c) requests for further particularisation of pleadings;
- (d) production of documents (it is common for an arbitral tribunal to request that the parties provide to each other a list of specific documents or clearly defined categories of documents which it wishes to inspect. This is in contrast to the practice of discovery of documents in most common law countries where parties themselves have an ongoing duty to disclose all relevant documentation that is not privileged. The common law process has to be justified if it is to apply to an ICC arbitration. It does not otherwise have a place);
- (e) delivery of written statements of witnesses of fact;
- (f) exchange of draft expert reports, meetings between experts and exchange of final expert reports;
- (g) exchange of written opening submissions;
- (h) compilation of an agreed paginated bundle of documents to be used at the hearing;
- (i) dates and times for the hearing;
- (j) ordering of a transcript of the hearing; and
- (k) exchange of written closing submissions.

There are a number of safeguards that preserve the independence and neutrality of the arbitral tribunal.⁴⁵ Rule 7(1) provides that an ICC arbitrator must be independent from all parties to the dispute, including the one who nominated him or her. Rule 15(2) provides that an arbitral tribunal must act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. Further, the arbitrator must also be available and have the ability to conduct the reference.⁴⁶ Calvo contends that the terms 'availability and ability' that are used in Rule 9(1) signify that the arbitral tribunal is to act diligently.⁴⁷ He also submits that the obligations of the tribunal to complete its mission, act fairly and impartially and ensure that each party has the opportunity to present its case are concepts that are in line with the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR).

Article 10 UDHR provides:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations ...

Article 14 ICCPR provides:

All persons shall be equal before courts and tribunals. In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal established by law.

It is important that arbitrators are independent and seen to be independent. The 1998

45. For more detail about these safeguards see Bond S. 'The Selection of ICC Arbitrators and the Requirement of Independence' (1988) 4 *Arbitration International* 300. See also the case note of the English Court of Appeal in *ATT & T v SCC* [2000] 2 Lloyd's Law Reports 127 contained in Appendix G.

46. Rule 9(1) *ICC Arbitration Rules*.

47. Calvo M. 'The Challenge of the ICC Arbitrators, Theory and Practice' (1998) 15 *Journal of International Arbitration* 63 at p.65.

Arbitration ICC Rules oblige a prospective arbitrator to 'sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.'⁴⁸ Further, the arbitrator has a duty of disclosure throughout the course of the arbitration to 'immediately disclose in writing to the Secretariat and to the parties any facts or circumstances' that may call into question his or her independence.⁴⁹ The Court is empowered to make final decisions regarding the 'appointment, confirmation, challenge or replacement of an arbitrator.'⁵⁰ The question as to whether the arbitrator or prospective arbitrator has a relationship that compromises his or her independence is subjective and complex. Calvo states that it would include 'family or social relationships with the parties or their lawyers and relationships involving members of families or their current employers, partners or business associates.'⁵¹ It is important that the ICC maintains strong safeguards over this part of its business operations. Despite the existence of safeguards, mistakes can still be made as was demonstrated by the English Court of Appeal's decision in *AT&T v SCC*.⁵² As the ICC and other suppliers of arbitration provide a private service (unlike national courts) and are dependent upon consumer satisfaction for repeat work there may be a temptation not to 'punish' the losing party. Arbitrators have been subjected to criticism that they tend to 'split the baby in the middle' in order not to humiliate the defeated party.⁵³ Should such a habit develop within the ICC there is a grave danger that the entire system will be discredited. Accordingly, the ICC may wish to consider having a watching brief over its arbitrators to ensure that cases are decided entirely on their merits.

The Rules

The ICC is able to ensure that its arbitration is a uniform product that bears the ICC trademark of quality through the application of its rules of procedure. The present ICC Rules of Arbitration came into effect on 1 January 1998 following an intensive consultation process.⁵⁴ Over the years there have been a number of major and minor revisions to the rules

48. Rule 7(2) *ICC Arbitration Rules*.

49. Rule 7(3) *ICC Arbitration Rules*.

50. Rule 7(4) *ICC Arbitration Rules*.

51. Calvo M. 'The Challenge of the ICC Arbitrators, Theory and Practice' (1998) 15 *Journal of International Arbitration* 63 at pp. 67-68.

52. See casenote in Thirgood R. 'AT & T v SCC : Independence of Arbitrators' (2002) 21(2) *The Arbitrator & Mediator*, p.77.

53. It should be noted that this practice of 'splitting the baby' is not the author's experience of ICC arbitration. In an ICC arbitration that the author was involved with, the author's client was awarded virtually the full amount of its claims together with interest at 11.5% for four years and indemnity costs. All of the opponent's counterclaims were defeated. See also Naimark RW. and Keer SE. 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People' (2002) 21 *The Arbitrator & Mediator* 47, where the authors report the findings of a survey of the perceptions and expectations of both attorneys and their clients in private commercial international arbitrations.

54. International Chamber of Commerce, *International Court of Arbitration Rules of Arbitration in force as from 1 January 1998* at p.6.

including changes in 1955, 1975 and 1988. The previous 1988 rules were criticised for being antiquated and in essence a patchwork quilt of cutting and pasting efforts. Further, there existed a number of gaps that presented tactical opportunities for the experienced user and pitfalls for the novice.⁵⁵ At the same time, 'competitor' institutions had matured, been rejuvenated or were created offering their customers different and sometimes superior rules of procedure. This proved to be a powerful impetus for change and accordingly the ICC completely rewrote and restructured its arbitral rules. While the basic features of ICC arbitration have remained, including the role of the Court in administering cases and the terms of reference in setting the framework of a case, there have been substantial modifications. The working group that was charged with the responsibility of revising the rules took a middle path between a common law approach of having rules that can deal with every possible contingency and a civil law approach of providing broad guidelines that are flexible enough to deal with any situation.⁵⁶

In redrafting the rules, the ICC was guided by the desire to reduce delays and uncertainties and also to eliminate the perceived lacunae.⁵⁷ Changes that have been made to expedite the process include allowing the arbitration to proceed once the Claimant has paid the provisional advance on costs,⁵⁸ requiring the arbitral tribunal to draft and circulate a provisional timetable for the proceedings,⁵⁹ and allowing the Secretary General (rather than the Court) to confirm the appointment of arbitrators where no issue is raised as to their independence.⁶⁰ Measures taken to reduce uncertainty and ambiguity include allowing the Court to decide on a *prima facie* basis whether an arbitration agreement exists,⁶¹ explicitly authorising the arbitral tribunal to order interim or conservatory measures,⁶² and allowing the arbitral tribunal to admit additional claims and counterclaims after the terms of reference have been finalised.⁶³ To fill the perceived lacunae the ICC has added new provisions including:

- (a) rule 20(7) which allows the arbitral tribunal to protect trade secrets and confidentiality;⁶⁴

55. Kreindler RH. 'Opportunities and hazards for experienced and inexperienced users alike' (1997) 13 *Journal of International Arbitration* 45 at p.46.

56. Seppala CR. 'The new (1998) Rules of Arbitration of the International Chamber of Commerce', (1997) 4 *The International Construction Law Review* 589 at p.590.

57. Seppala CR. 'The new (1998) Rules of Arbitration of the International Chamber of Commerce', (1997) 4 *The International Construction Law Review* 589.

58. Rule 30(1) *ICC Arbitration Rules*.

59. Rule 18(4) *ICC Arbitration Rules*.

60. Rule 9(2) *ICC Arbitration Rules*.

61. Rule 6(2) *ICC Arbitration Rules*.

62. Rule 23(1) *ICC Arbitration Rules*.

63. Rule 19 *ICC Arbitration Rules*.

64. This provision is particularly relevant given the 1995 decision of the Australian High Court in *Esso Australia Resources Pty Ltd v Plowman* [1995] 183 CLR 10 which concluded that parties are not bound by an implied duty of absolute confidentiality regarding documentation and information obtained in private arbitration.

- (b) rule 33 which waives a party's right to object to the conduct of the proceedings once that party proceeds with the arbitration without raising objection; and
- (c) rule 29 which allows the arbitral tribunal a limited amount of time in which it can correct or interpret its award.

The efforts of the ICC in revising its rules have been successful. An analysis that Calvo has performed concludes that the new rules work more efficiently and lead to better justice.⁶⁵ Others have noted that the changes 'make the ICC Rules among the most modern and advanced rules of international arbitration, thereby representing the state of the art in the field.'⁶⁶ The revised rules ensure that the ICC is well placed to compete with rival institutions.

The 1998 ICC Arbitration Rules compare favourably with the Arbitration Rules of CIETAC.⁶⁷ The ICC Rules provide parties with greater autonomy. Under the CIETAC Rules, parties are only permitted to select arbitrators from an approved panel,⁶⁸ whereas under the ICC rules, parties may choose any arbitrator of any nationality without limitation to a panel.⁶⁹ A closed list restricts the parties' ability to choose a person whom they trust and believe is capable of determining the issues at hand. This is particularly problematic in highly technical cases. Although the CIETAC list comprises many Chinese nationals and foreigners who have technical expertise, no list could exhaustively cover expertise in every possible field. Both the CIETAC and ICC Rules allow the parties to agree upon the applicable language and the place of arbitration. However, under the CIETAC Rules, when the parties cannot agree (which is common) the default language is Chinese⁷⁰ and the default location Beijing.⁷¹ Under the ICC Rules there are no such default provisions. Rather, when there is no agreement between the parties, the arbitral tribunal determines the language⁷² and the Court the location.⁷³ There are other aspects of the CIETAC Rules that may be distasteful to potential customers. The power to determine the validity of the arbitration agreement remains vested with the CIETAC Commission, a government body, rather than with a neutral arbitrator.⁷⁴ In contrast, while the ICC Court has the power to *prima facie* determine the existence of an arbitration agreement, the final determination as to the validity of an arbitration agreement rests with the arbitral tribunal.⁷⁵ The CIETAC Rules provide that experts are to be appointed by the Commission,⁷⁶

65. Calvo MA. 'The New ICC Rules of Arbitration' (1998) 14 *Journal of International Arbitration* 41-52. Calvo provides a detailed analysis of the modifications to the ICC Arbitration Rules.

66. Seppala CR. 'The new (1998) Rules of Arbitration of the International Chamber of Commerce', (1997) 4 *The International Construction Law Review* 589 at p.595.

67. For a more detailed critique of CIETAC arbitration see Thirgood RJ. 'A Critique of Foreign Arbitration in China' (2000) 17 *Journal of International Arbitration* 89.

68. Article 10 and Chapter 2 Section 2 2000 CIETAC Rules.

69. Rule 9 *ICC Arbitration Rules*.

70. Article 85 CIETAC Rules.

71. Article 35 CIETAC Rules.

72. Rule 16 *ICC Arbitration Rules*.

73. Rule 14 *ICC Arbitration Rules*.

74. Article 4 CIETAC Rules.

75. Rule 6(2) *ICC Arbitration Rules*.

76. Article 39 CIETAC Rules.

whereas under the ICC Rules the parties are empowered to appoint their own experts. The CIETAC Rules and ICC Rules also differ with respect to how evidence can be gathered. CIETAC, like the Chinese legal system, follows the civil-law tradition in relation to evidence gathering. Article 38 of the CIETAC Rules empowers the arbitral tribunal to investigate and collect evidence on its own initiative. Article 39 enables the tribunal to consult an expert or appoint an appraiser for the clarification of special questions. This sizeable amount of discretionary authority has the potential to lead to abuses of natural justice.⁷⁷

The ICC's Competitors

The ICC is not the only institution administering international commercial arbitrations that has recognised the need to modernise its rules to attract business. As noted above, CIETAC's rules were updated in 2000. Further, the JCAA updated its rules in 1997, the LCIA's new rules commenced operation on 1 January 1998 and the International Arbitration Rules of the AAA were amended taking effect on 1 November 2001. There are hundreds of institutions throughout the world that offer their services and which compete, to varying degrees, with the ICC. While historically the ICC has been the dominant institution, in more recent times rivals have pointed to their remarkable growth as evidence that the world of arbitration is not ruled by one superpower.⁷⁸

The American Arbitration Association / International Centre for Dispute Resolution

The American Arbitration Association (AAA) has had considerable success in transforming itself from an institution that was primarily known for its domestic arbitration work to a body that has a division which is a leading international arbitration service provider. In the late 1980s and early 1990s, the AAA had an annual domestic case load of over 50 000 disputes together with an international load fluctuating between 200 and 250 cases.⁷⁹ The AAA has always been highly regarded and has had a reputation for being at the 'cutting edge' of the alternative dispute resolution movement.⁸⁰ A survey conducted in the 1980s concluded that:

77. Peck SC. 'Playing by a new set of rules: will China's new arbitration laws and recent membership in the ICC improve trade with China?' (1997) 12 *Journal of International Arbitration* 51 at pp. 59-60.

78. There are hundreds of arbitral institutions throughout the world that offer an international arbitration service and effectively compete with the ICC. A full list of institutions that deal with international commercial arbitration can be found in the *Yearbook of Commercial Arbitration* that is produced by the International Council for Commercial Arbitration. It is not possible to analyse all of the competitor institutions in this paper. See also Dezalay Y and Garth BG. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) The University of Chicago, Chicago.

79. Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.336; Wetter JG. 'The Internationalization of International Arbitration' (1995) 11 *Arb. Int.* 117 at p.127; and Slate II WK. 'International Arbitration: Do Institutions Make a Difference?' (1996) 31 *Wake Forest L. Rev.* 41 at p.48.

*International commercial arbitrations administered by the AAA, conducted under either AAA or UNCITRAL rules and subject to US arbitration laws, are (the) best ... to provide the parties with the most efficient and effective system for alternative dispute resolution that will achieve the orderliness and predictability essential to any international business transaction.*⁸¹

Published criticism of the AAA is almost non-existent. However, it should be recognised that it is difficult to formalise generalised weaknesses of the AAA because it has traditionally adopted a highly unstructured or 'laissez-faire' approach. Complaints are more discrete concerning particular arbitrations.⁸² The practice of serving as a 'ministerial mailbox' has itself been sharply criticised.⁸³

In 1996, the International Centre for Dispute Resolution (ICDR) was established as a separate division of the AAA to further enhance the delivery of conflict resolution services internationally. This initiative of the AAA has had spectacular results. In May 2002, the AAA issued press releases claiming that the ICDR had become the 'largest international commercial arbitral institution in the world.' The Senior Vice-President for the AAA asserted:

*The tremendous growth of international trade has fuelled the need for businesses to find effective methods to resolve disputes with their trading partners around the world. The ICDR has not only met this need, but has been catapulted into the premier position among international commercial arbitral institutions.*⁸⁴

The statistical evidence relied upon by the AAA in the making of this claim is impressive. In 2001, the ICDR administered 649 cases involving arbitrators and parties from 63 nations, and over US \$10 billion in claims and counterclaims. The AAA also note that the ICDR's average resolution time is ten months from filing to award. A key difference between ICDR and ICC arbitration is that ICDR arbitration does not involve detailed scrutiny of the award by an institution before it is released to the parties.⁸⁵

-
80. Graving R.J. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.337.
81. Stein S, and Wotman D. 'International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules', (1983) 38 *Bus. Law.* 1685, 1687-88.
82. Graving R.J. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.340.
83. Smit H. 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986) 25 *Colum J. Transnat'l L.* 9 at pp. 26-27.
84. Gallagher S. Senior Vice-President, American Arbitration Association, 'ICDR Becomes Largest International Commercial Arbitral Institution' 16 May 2002 Press Release <www.adr.org>. Interestingly, the CIETAC has made similar claims.
85. Slate II WK. 'International Arbitration: Do Institutions Make a Difference?' (1996) 31 *Wake Forest L. Rev.* 41 at p.49.
-

London Court of International Arbitration

The London Court of International Arbitration is also a competitor to ICC arbitration. The LCIA prides itself on being both 'the longest-established of all the major international institutions for commercial dispute resolution' and also 'one of the most modern and forward looking'.⁸⁶ London's popularity and suitability as a venue for international arbitration was damaged in the 1970s when the Court of Appeal ruled that an arbitrator had to submit to the courts a 'special case' if there existed a substantial and clear-cut point of law to be resolved.⁸⁷ However, since then much has been accomplished, commencing with the enactment of the Arbitration Act 1979, to ensure that the London malaise was addressed. The *English Arbitration Act 1996* has now ensured that England is an attractive venue for international arbitration. An arbitral award made in an English seat can only be challenged as of right on the grounds that the arbitral tribunal lacked substantial jurisdiction or that there exists some serious irregularity.

The LCIA has taken advantage of the new and improved legislation to market its product. The LCIA operates under a three-tier structure comprising the Company, the Arbitration Court and the Secretariat. The Company's board does not play an active role in the administration of arbitrations. Rather, it is concerned with the operation and development of the LCIA's business. The Court, which was established in 1985, has as its principal functions the appointment of arbitral tribunals, the determination of challenges to arbitrators and the control of costs. Unlike the ICC Court, it does not scrutinise awards. The Secretariat, which is based at the International Dispute Resolution Centre in London, is (like the ICC's Secretariat) responsible for the day to day administration of cases. While the Court has a database of suitable arbitrators (mainly consisting of English Queen's Counsel) the parties are not confined to select their arbitrators from that database. Like the ICC, the AAA and other modern arbitral associations, the LCIA has rules that combine the best features of the civil and common law systems and that focus upon ensuring party autonomy, speed and efficiency.⁸⁸ The LCIA is at a competitive disadvantage to the ICC in that its name leaves the impression that it may not truly be international. However, the LCIA is at pains to point out that, '[a]lthough based in London, the LCIA is a genuinely international institution, providing efficient, flexible and impartial administration of dispute resolution proceedings for all parties, regardless of their location, and under any system of law.'⁸⁹ Initiatives that the LCIA have implemented to promote its product include offering a 'fast track' arbitration option, advertising its standard dispute resolution clauses and combining its arbitral service with 'other tailor-made dispute resolution services.' In order to overcome its 'London based' stigma and in an effort to promote its worldwide services the LCIA has formed five Users'

86. <www.lcia-arbitration.com/lcia/lcia/>

87. Graving RJ. "The International Commercial Arbitration Institutions: How good a job are they doing?" (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.345.

88. The new LCIA Rules were adopted to take effect on 1 January 1998. They can be downloaded from the LCIA's website at <www.lcia-arbitration.com/arb/>.

Councils in: Europe and the Middle East; North America and adjacent countries; South East Asia and the Pacific Rim; Central and South America and the Caribbean; and Africa. Each Council has been set up with its own officers and devises its own programme of activity appropriate to the needs of the region. The number of international cases that the LCIA administers has increased from 29 in 1994, to 88 in 2002.⁹⁰

Competition from Asia – CIETAC and JCAA

Asian nations such as China and Japan have also established their own arbitral institutions and have gained a portion of the market's share of work. The most prominent Asian institution is CIETAC which has been cited as one of the largest commercial arbitration institutions in the world.⁹¹ Despite the shortcomings of CIETAC's rules, which are noted above, CIETAC nevertheless has attracted a heavy case load of international cases involving parties from more than forty countries and regions. According to CIETAC's webpage, 'China has become one of the world's major commercial arbitration centres.'⁹² CIETAC was established under the auspices of the China Council for Promotion of International Trade (CCPIT). It consists of an arbitration commission, a Secretariat and an official panel of arbitrators. The CCPIT was founded in 1952 and was modelled on its Soviet counterpart, the Soviet All Union Chamber of Commerce. It has since changed its name to the China Chamber of International Commerce (CCOIC). The CCOIC works closely with CIETAC, providing research assistance and general support. Importantly, the CCOIC appoints the members of CIETAC together with the members of the official panels of arbitrators. The headquarters are located in Beijing, although there are two sub-commissions in Shenzhen and Shanghai. The Secretariat is responsible for handling the day-to-day administrative affairs of the Commission. The Commissions are required to establish a panel of arbitrators. Membership of the panels is open to both Chinese and foreign arbitrators.⁹³

CIETAC has handled thousands of arbitrations involving foreign interests and has emerged as a major force in international commercial dispute resolution. Due to its tremendous case load, CIETAC has been catapulted into the ranks of the ICC, AAA and LCIA as one of the most important arbitration bodies in the world.⁹⁴ A glance at its history clearly shows the steady evolution of CIETAC in the direction of greater internationalisation and conformity with international practice and standards.⁹⁵ To some extent this has paralleled China's rapid economic growth. Established in 1956 as the Foreign Arbitration Commission,

89. See the 'About the LCIA' section at the LCIA's website <www.lcia-arbitration.com/lcia/lcia>.

90. This statistical information was provided to the author from the Registrar of the LCIA in an email dated 7 January 2003.

91. Liu G, and A Lourie. 'International Commercial Arbitration in China: History, New Developments and Current Practice', (1995) 28 *J Marshall L Rev* 539 at p.541.

92. <www.cietac.org>.

93. Dejun, Moser and Shengchang. *International Arbitration in the People's Republic of China æ Commentary, Cases and Materials* (1995) Butterworths, Hong Kong at p.13-18.

94. Moser M. 'CIETAC Arbitration: A Success Story?' (1998) 15 *Journal of International Arbitration* 27 at p.27.

95. *Ibid.* p.28.

CIETAC operated under a meagre 38 articles. Since then, changes to its name, jurisdiction and rules of procedure⁹⁶ have ensured that CIETAC has been able to establish itself within the Chinese and world business community. Some have even commented that CIETAC is 'one of the best pieces of news as far as doing business in China goes. It has some of the most forward looking people within the Chinese bureaucracy'.⁹⁷ Regardless of its flaws, CIETAC's evolution has represented a large step forward for China in adopting international practice in commercial dispute resolution. At the same time, it has managed to maintain a distinct Chinese flavour.

Perhaps the most striking aspect of CIETAC arbitration, which distinguishes it from ICC arbitration is the combination of conciliation and arbitration. The CIETAC Rules outline some very broad and basic guidelines with regard to conciliation.⁹⁸ An arbitrator can play the role of a conciliator during the hearing and then revert back to the arbitrator role. Article 46 stipulates that '[t]he arbitration tribunal may conciliate cases in the manner it deems appropriate.' Arbitrators are therefore free to determine the most effective way to conduct the conciliation proceeding. In practice, conciliation is conducted by either the arbitrators consulting with the parties together, arbitrators consulting with the parties individually, the parties consulting with each other without the arbitrators present or a combination of these techniques.⁹⁹ Any agreement that the parties reach during conciliation will form the basis of an arbitral award unless the parties agree otherwise.¹⁰⁰ Should the conciliation fail, any statements made by the parties during the conciliation cannot later be invoked in subsequent arbitral or judicial proceedings.¹⁰¹ Conciliation is only an option for the parties and must be based upon their free will.¹⁰² Some commentators have noted that CIETAC strongly encourages conciliation of arbitration cases under its cognisance.¹⁰³ More than 70% of the parties agree to have their cases conciliated and 30% of cases end in a successful conciliation.¹⁰⁴

96. CIETAC has revised its arbitration rules in 1988, 1994, 1995, 1998 and 2000.

97. Hapole S. 'China's Arbitration Law Draws a Mixed Response' (1994) *S China Morning Post*, 28 November at p.20.

98. Articles 44–50 CIETAC Rules.

99. Chen L. 'Some Reflections on International Commercial Arbitration in China' (1996) 13 *Journal of International Arbitration* 121 at p.150.

100. Article 49 CIETAC Rules.

101. Article 50 CIETAC Rules.

102. Articles 45 and 47 CIETAC Rules.

103. Chen L. 'Some Reflections on International Commercial Arbitration in China' (1996) 13 *Journal of International Arbitration* 121 at p.150.

104. Wang C. 'Arbitrating Business Disputes in Beijing – An Examination Focusing on CIETAC's New Arbitration Rules' (1994) 1 *Commercial Dispute Resolution Journal* 39 at p.48. It should be noted that these statistics were recorded in 1994.

The JCAA also strongly embraces conciliation.¹⁰⁵ The JCAA was established in 1950 after the enactment of the Trade Association Law of 1948. It is affiliated with the Japan Chamber of Commerce and overseen by the Ministry of International Trade and Industry.¹⁰⁶ The headquarters of the JCAA are in Tokyo with branch offices in Osaka, Kobe and Nagoya.¹⁰⁷ The JCAA operates under its Commercial Arbitration Rules as amended on 28 May 1997, effective 1 October 1997. The JCAA's basic services connected with arbitration are the receipt and transmittal of documents; appointment of the arbitrator or a panel of arbitrators; provision of conference rooms, interpreters and stenographers, and the basic administration of hearings.¹⁰⁸ Compared with other international arbitral bodies (such as the ICC, the AAA, LCIA and CIETAC), the case load for the JCAA is small but may be slowly increasing. In 1997, the JCAA received ten new cases and had nine cases pending from previous years.¹⁰⁹ In 1998, fifteen new cases were received with ten pending.¹¹⁰ The JCAA Rules allow an arbitral tribunal to conciliate a settlement at the request of both parties or at the arbitral tribunal's own initiative where the consent of both parties is obtained.¹¹¹ If the arbitral tribunal is successful in assisting the parties to achieve a settlement, the claimant may withdraw its request for arbitration provided that the respondent has consented to that withdrawal in writing.¹¹² The parties may set out their settlement in an arbitral award to ensure that it is legally enforceable.¹¹³ In many ways the combined use of conciliation with arbitration reflects the Japanese courts' practice, under which a judge can switch from the litigation or adjudication mode to the settlement mode and then back again.¹¹⁴

-
105. The Deputy General Manager of the JCAA in a response to an article published by the author in the *Journal of International Arbitration* was at pains to point out that '[t]he JCAA has no policy of positively commending settlement.' See Nakamura T. 'Continuing Misconceptions of International Commercial Arbitration in Japan' (2001) 18 *Journal of International Arbitration* 641 at p. 642. There is a debate amongst leading arbitration practitioners in Japan concerning the extent to which an arbitrator should commend settlement. Dr Luke Nottage has noted that 'if parties want an arbitrator who actively encourages settlement, they could select Emeritus Professor and ICC Court Vice-President Toshio Sawada ... If they want someone who is cautious about this role, they could select Professor Yasuhei Taniguchi, now a Judge on the Appellate Body of the WTO; Tatsuya Nakamura ... ; or, most obviously, Associate Professor Yoshihisa Hayakawa.' See Nottage L. 'Is (International Commercial) Arbitration ADR?' (2002) 21 *The Arbitrator and Mediator* 83 at p.88-89.
106. Pardieck A. 'Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan' (1997) 11 *Temple International and Comparative Law Journal* 31 at p.48.
107. Davis J. *Dispute Resolution in Japan* (1996) Kluwer Law International, Cambridge at p.157.
108. Sawada T. 'International Commercial Arbitration - Practice of Arbitral Institutions in Japan' (1987) 30 *The Japanese Annual of International Law* 69 at p.70.
109. 2000 CCH Asia Pty Limited, *Doing Business in Asia*, JPN 70-101 to JPN 70-401 at p.70-101.
110. Ibid.
111. Rule 39 JCAA Rules.
112. Rule 19(2) JCAA Rules.
113. Rule 49(2) JCAA Rules.
114. Iwai N. 'Alternative Dispute Resolution in Court: The Japanese Experience' (1991) 6 *Ohio State Journal on Dispute Resolution* 201 at pp. 201 – 241.

Other Competition

Apart from the institutions that are mentioned above there is a plethora of established and emerging arbitral bodies that compete for business. These include the Stockholm Chamber of Commerce, which has been successful in establishing a reputation for 'neutrality' suitable for handling 'East-West' disputes;¹¹⁵ the World Bank-sponsored International Centre for Settlement of Investment Disputes (ICSID), which handles investment disputes between a state and a national of another state;¹¹⁶ the World Intellectual Property Organisation's (WIPO) Arbitration Centre which commenced operations in October 1994 offering specialised services for the resolution of international intellectual property disputes;¹¹⁷ the Hong Kong International Arbitration Centre, which achieved a 100% growth rate in the early 1990s;¹¹⁸ and the Vienna International Arbitral Centre.¹¹⁹ In addition to choosing among these arbitral institutions it is also possible for parties to choose '*ad hoc*' arbitration where no organisation is specified to administer the case. The formulation and adoption of the UNCITRAL¹²⁰ Arbitration Rules in 1976 by the UN General Assembly has provided parties with a widely accepted set of procedures which can readily be adopted to guide an *ad hoc* arbitration.

Strengths of the ICC's business

While it is evident that the ICC does not enjoy a monopoly over the international arbitration business it is equally clear that it has maintained its position in the market as a dominant player for a considerable period of time. In the face of growing competition from other institutions, the ICC has still managed to grow its own business and has increased the number of cases that it handles. It has achieved this due to the strengths of its business. Like other institutions, the ICC enjoys the inherent advantages of institutional arbitration (over *ad hoc* arbitration). It has implemented an astute business plan that incorporates sophisticated marketing and promotional activities. Further, the ICC has developed and is continuing to develop innovative services such as a 'med-arb' process.

Advantages of Institutional Arbitration

The ICC and consumers of its arbitration product enjoy all of the advantages that are associated with having the arbitral process administered and supervised by an institution. While *ad hoc* arbitration is possible (especially in light of the UNCITRAL Arbitration Rules being readily available and extensively interpreted by the Iran-US Claims Tribunal), it places considerably more burden on the parties and their advisors to manage the process. This

115. Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.349.

116. *Ibid.* p.360.

117. Slate II WK. 'International Arbitration: Do Institutions Make a Difference?' (1996) 31 *Wake Forest L. Rev.* 41 at p.51.

118. Wetter JG. 'The Internationalization of International Arbitration' (1995) 11 *Arb. Int.* 117 at p.127.

119. *Ibid.* p.128.

120. United Nations Commission on International Trade Law.

burden can be particularly problematic when one of the parties is recalcitrant. Generally, all of the major international commercial arbitration institutions are doing a good job. Their rules and practices are becoming more and more similar with the passing of time as knowledge and experience is accumulated and shared.¹²¹ This has resulted in a number of benefits for the user of institutional commercial arbitration including the provision of:

- (a) time-tested rules and procedures that are periodically reviewed and revised. Compliance with the rules can be monitored to ensure that the dispute is being resolved in an expeditious and cost effective manner.¹²² Further, institutions are more than willing to provide parties with guidance on how to draft an arbitration clause.¹²³
- (b) a level of quality control that is invaluable to the parties. In this regard the ICC is a leading institution because its Court (unlike the LCIA or AAA) reviews arbitral awards.
- (c) administrative assistance including the use of hearing rooms and other facilities. As most institutions have cooperative agreements with each other they are able to utilise each other's hearing facilities at a minimal or no cost to the parties. The administrative support that is given allows the arbitral tribunal to devote its full time to resolving the claims of the parties.
- (d) assistance to the parties in overcoming deadlocks concerning the place of arbitration and the appointment of arbitrators.
- (e) appropriate handling of setting the arbitrators' fees. It can be awkward for an arbitrator (who is entrusted to resolve a sensitive and important dispute) to have as the arbitrator's first task the negotiation with the parties directly of his or her fees.
- (f) post award assistance such as informing the parties about enforcement.
- (g) educational seminars, courses and materials to arbitrators.¹²⁴

121. Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.368 and 370.

122. In this respect it should be noted that institutions have no control over the fees of parties' advisors such as legal counsel. However, most advisors charge on a time basis. Therefore, if the arbitral institution is able to ensure that the matter is resolved speedily this will result in cost savings for the parties.

123. The websites of the major arbitral institutions include model arbitration clauses that parties can easily cut and paste into their contracts. See <www.iccwbo.org>; <www.adr.org>; <www.cietac.org>; <www.lcia-arbitration.com>.

124. For more detailed information concerning the benefits of institutional arbitration see Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at pp. 367-372; Slate II WK. 'International Arbitration: Do Institutions Make a Difference?' (1996) 31 *Wake Forest L. Rev.* 41 at pp. 52-59; Smit H. 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986) 25 *Colum. J. Transnat'l L.* 9 at pp. 14-29; and McClelland A. 'International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes' (1978) 12 *International Lawyer* 83 at p.89.

The support which institutions are able to provide ensures that there is a far greater chance that awards will be voluntarily complied with or enforced by national courts. The ICC has reported that 92% of its awards are voluntarily complied with, rendering enforcement proceedings unnecessary.¹²⁵

Business Plan

The ICC has a sophisticated business plan that includes strategic promotional and marketing activities in relation to its product. The ICC takes the opportunity to promote itself through numerous conferences and educational seminars which are attended by people from all over the world who are duly informed of the importance and usefulness of ICC arbitration.¹²⁶ Further, the ICC produces an extensive range of publications that all praise the virtues of international commercial arbitration.¹²⁷ Much of the ICC's marketing is performed by its national committees. By working this way, the ICC ensures that its own efforts are multiplied and that its national committees are able to address the particular cultural sensitivities of their respective countries. The consistent message that the ICC disseminates is that the ICC is a truly international, universal, neutral and impartial organisation that has a wealth of expertise in the resolution of commercial disputes.¹²⁸ The Secretary-General of the ICC Court of Arbitration in 1980, Mr Yves Derains, explained his plan of improving the ICC's business by 'strengthening its successful features, including (a) its international as opposed to regional character; (b) its universal nature in terms of the kinds of disputes arbitrated before the court; and (c) its institutional rather than ad hoc form of proceedings.' Mr Derains also examined the ICC's progress in 'actively upgrading its educational programs in the international business and legal communities.'¹²⁹ Other Secretary-Generals, including Stephen Bond in 1991, have emphasised the international character of the ICC noting that 'some 3500 arbitration cases have been submitted to the ICC Court (itself composed of experienced lawyers from some forty-seven nationalities) involving many thousands of parties from over 100 countries around the world.'¹³⁰ Like other arbitral institutions, the ICC grasps the opportunity of publishing its model arbitration clause in at least 18 different languages.¹³¹ Furthermore, the ICC has identified and established some key relationships. FIDIC (which is the French acronym for their international federation of national associations

125. Ibid.

126. The author was informed of these business activities by counsel and special counsel of the ICC.

127. A list of ICC publications is available at <www.cyworks.co.uk/iccaustralia/www/icc/mailorder.html>.

128. Polkinghorne M, JC Najjar. 'An introduction to ICC arbitration in Australia: some current issues in international arbitration' (1997) *Bond Law Review* 3 no. 1, 43. See also ICC website. The author was consistently reminded of these qualities when interviewing members of the ICC.

129. Derains Y. 'The Future of ICC Arbitration' (1997) 14 *Journal of International Law and Economics* 437-442.

130. Bond S. 'Current Issues in International Commercial Arbitration - The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991) 12 *J. Intl. L. Bus.* 1 at p.2.

131. The standard ICC Arbitration Clause in English is: 'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'

of consulting engineers) has a number of standard construction contracts which are widely used in the international construction industry. The ICC has managed to ensure that its arbitration clause is generally found in the FIDIC standard contracts. To maintain this relationship, conferences concerning the resolution of disputes under international construction contracts are co-hosted by the ICC and FIDIC.¹³²

While the ICC is keen to note that any type of dispute may be submitted to it for arbitration it has targeted certain markets such as the construction industry. In 2001, the ICC issued its Final Report on Construction Industry Arbitrations to ensure that its arbitrators are fully aware of how best to use the powers conferred by the 1998 ICC Rules to secure cost-effective arbitrations. The Report contains the views of nearly forty arbitrators throughout the world with established experience in construction-related arbitrations. By conducting such an extensive study and widely publishing its findings, the ICC has placed itself in a position where it will be regarded as a leading body for resolving complicated international construction disputes. It is not surprising therefore that the construction industry was one of the three leading sectors that used ICC arbitration (along with energy and information) in 2001.¹³³

Range of Dispute Resolution Services

In addition to arbitration, the ICC offers international commerce a range of complementary dispute resolution services including Amicable Dispute Resolution ('ADR').¹³⁴ As the name suggests, ADR is designed to provide the parties with a framework for settling disputes on an amicable basis. On 1 July 2001, the new ADR Rules came into force replacing the 1988 Rules of Conciliation. The ADR Rules are designed to be in tune with the current trends and needs of international commerce and in particular the trend to embrace alternative dispute resolution. The distinctive feature of the ADR Rules is that parties are given the freedom to choose a technique which they consider most conducive to settlement. The techniques include mediation, neutral evaluation, mini-trial, any other settlement technique or a combination of settlement techniques. Each technique is facilitated by an ICC appointed Neutral. The ADR Rules have been designed to complement the ICC's arbitration service. If the parties do not succeed in resolving their dispute through ADR they can refer it

132. On 6-7 February 2003 such a co-hosted conference was held at the ICC in Paris where key members from both the ICC and FIDIC gave presentations.

133. ICC International Court of Arbitration Bulletin 2001 Statistical Report (2002) 13 no. 1 at p. 6.

134. Other dispute resolution services offered by the ICC include *Expertise and Docdex*. Expertise is a process whereby the ICC International Centre for Expertise can propose and appoint experts at the request of parties and arbitral tribunals to provide an expert opinion on specialised matters involving technical, financial or legal issues. Docdex is a process that utilises the ICC Rules for Documentary Credit Dispute Resolution Expertise to resolve disputes relating to documentary credits. For more information about these services including ADR see Gaillard E. 'The New ADR Rules of the International Chamber of Commerce' (2001) *New York Law Journal* 1; International Chamber of Commerce, *Guide to ICC ADR*; International Chamber of Commerce, *ADR Rules in force from 1 July 2001*; International Chamber of Commerce, *Expertise Dispute Resolution Services* <www.iccwbo.org/drs/english/expertise/>; and ICC *International Court of Arbitration Bulletin* 2001 Statistical Report (2002) 13 no 1.

to arbitration. Similarly, parties engaged in an arbitration may turn to ADR if their dispute seems to warrant a different, more consensual approach. However, it is noted that the two services remain distinct and are administered by two separate secretariats. Importantly, Article 7(3) of the ADR Rules allows a Neutral to act as a judge, arbitrator, expert or representative of a party in other proceedings provided that all parties to the ADR agree to that in writing. This provision effectively allows the parties to obtain the benefits that are associated with 'med-arb' or conciliation-arbitration, a process that CIETAC and JCAA have been using successfully for some time. In its marketing of ADR, the ICC has set out 4 suggested clauses, one of which expressly combines the ADR process with arbitration.¹³⁵

Weaknesses of the ICC's business – Real, potential and perceived

Successful businesses must not only maintain and improve upon their strengths but they must also address any weaknesses whether or not they are real, potential or perceived. The greatest criticism of international commercial arbitration, relating to what has been described as the 'crisis of arbitration' and the 'banalisation of arbitration',¹³⁶ is that it is too costly and cumbersome in nature. An impressive empirical study conducted by Christian Buhring-Uhle has demonstrated that the market does not consider that the arbitration process is less costly than litigation, and that it is believed to be only moderately faster.¹³⁷ He observes that:

*International arbitration has undergone a metamorphosis from a gentlemen's game, where commercial disputes were resolved informally among peers, to a highly sophisticated judicial procedure ... The resulting proceduralisation is manifested in protracted battles over procedural technicalities, both within the arbitral proceedings and in parallel, "collateral" court litigation.*¹³⁸

Lord Mustill has also criticised this hijacking of international arbitration by a new breed of technical lawyers who set out to make life as difficult as possible for their opponents. He has observed that '[e]very point, good, bad or indifferent is taken, every procedural device is employed.'¹³⁹ In a sharp attack on those who embrace such tactics Lord Mustill urged that

135. The ICC have suggested the following clause which combines ADR with arbitration: 'In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a request for ADR or such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.'

136. This is a phrase that has been used by Yves Derains and Lord Mustill. See Mustill MJ. 'Comments on fast-track arbitration' (1997) 10 *Journal of International Arbitration* 121.

137. Buhring-Uhle C. *Arbitration and mediation in international business: designing procedures for effective conflict management* (1996) Kluwer Law International.

138. *Ibid.* at p. 148.

139. Mustill MJ. 'Comments on fast-track arbitration' (1997) *Journal of International Arbitration* 10 no. 4, 121-125 at p.125.

'[a]ll we can do is to try and see that they do not cause arbitration to strangle itself.'¹⁴⁰ Such criticism can be unfair. As Buhning-Uhle notes, the amounts being resolved by international commercial arbitration are much larger than they used to be. In some cases, given the enormous amounts at stake, coupled with the inability of the losing party to appeal the merits of a decision, an arbitrator's award has the potential to severely affect the financial health of even large corporations and sovereign states. Therefore, in many cases, international commercial arbitration is in effect (and should continue to be) a specialised system for resolving international business disputes that entails a high quality procedure which requires that parties commit a substantial amount of their time and resources to it.¹⁴¹

Lord Mustill and others have suggested that the creation of special 'fast track' procedures may be a valuable initiative in addressing the crisis of delayed and costly arbitrations. While the ICC has held a conference to consider the merits of drafting rules for fast track arbitration it has not yet adopted and made available such rules.¹⁴² As other institutions, such as the AAA, use expedited procedures, at least for matters not involving significant amounts of money, the ICC may also want to seriously consider adopting supplementary accelerated arbitration rules. If it does so, special consideration will need to be given as to when those rules may be appropriate and also to the fundamental due process rights of the parties that may be affected. Any material risk that an award would not be enforced by national courts would negate the benefit that could be attained through fast-tracking. In practice it may be that allowing time for a thoughtful and well considered award may in fact save time and money.¹⁴³

In addition to the criticism about cost and delay that has been directed generally at international commercial arbitration, the prominence and predominance of the ICC has ensured that it has attracted its fair share of criticism. A sample of the complaints made against the ICC include:

- (a) the selection of arbitrators through national committees limits the pool of potential arbitrators;
- (b) party autonomy is unduly restricted by the Court's supervision;
- (c) the Court's supervision of the award is cumbersome and less effective than judicial correction of error; and
- (d) the terms of reference lead to delay and premature determination of the issues.¹⁴⁴

140. Ibid.

141. Buhning-Uhle C. *Arbitration and mediation in international business: designing procedures for effective conflict management*, (1996) Kluwer Law International at pp. 149-151.

142. Rau AS. and EF Sherman. 'Tradition and Innovation in International Arbitration Procedure' (1995) 30 *Tex. Int'l L.J.* 89 at p.104.

143. For a detailed analysis of the risks associated with fast-tracking see Davis B, Glain OL, Volkovitsch M. 'When doctrines meet: fast-track arbitration and the ICC experience' (1997) *Journal of International Arbitration* 10 no. 4, 69 - 112.

144. Graving RJ. 'The International Commercial Arbitration Institutions: How good a job are they doing?' (1989) 4 *AM. U.J. Int'l. L. & Pol'y* 319 at p.334.; Peck SC. 'Playing by a new set of rules: will China's new arbitration laws and recent membership in the ICC improve trade with China?' (1997) 12 *Journal of International Arbitration* 51 at p.54.

In determining whether this criticism is justified it is noted that one generally gets what one pays for and specifically:

- (a) the national committees help expand the ICC's reach and thus the pool of potential arbitrators;
- (b) the Court's supervision in such matters as resolving deadlocks as to the location of the arbitration, appointment of arbitrators, and hearing challenges against arbitrators, facilitates the process thus giving meaning and substance to the parties' decision to arbitrate their dispute;
- (c) the Court's scrutiny of the draft award is designed as a quality control mechanism whereby the accumulated experience of the ICC (and not just the particular arbitral tribunal) is applied to ensure that the award that is eventually rendered is enforceable;
- (d) the terms of reference direct everyone's attention at an early stage in the proceedings to what the real issues of dispute are, enabling minor controversies to be settled and thus assisting the efficiency of the entire process.

Conclusion

An analysis of the world of the ICC demonstrates a number of trends. Since its establishment in 1923, the ICC has, like others, embarked upon a process of professionalising itself and improving the services that it offers. It has established an elaborate structure consisting of a Court, a Secretariat, rules of procedure and an open list of arbitrators. It has continually revised its methods, embarked upon a vigorous marketing campaign and looked to other products such as 'med-arb' to ensure that it is at the cutting edge. However, these endeavours are not unique. The ICC has been joined by a number of other very successful institutions offering international arbitration services. A study of the growth of the ICC and its competitors is illuminating for those in Australia offering domestic arbitration services. Much has been written in recent times about the future of domestic arbitration to meet the expectations of business in resolving disputes in a fast and efficient way. As organisations such as the Institute of Arbitrators and Mediators strive to continually improve their dispute resolution services, it may be that much can be learned from successful international organisations such as the ICC.

Improving Arbitration in the New Millenium

Ian D Nosworthy¹

IAMA

The Silver Anniversary issue of *The Arbitrator* records a good deal of the fascinating history of arbitration in Australia, and the development of this Institute. It includes the minutes of the first meeting of directors of the Institute of Arbitrators Australia, which was held on 20 November 1975 at Redhill in the ACT. John Lewis Doust was elected Chairman of the Interim Council, and Peter Joseph Bryant was appointed first Public Officer. The genesis of the Institute arose from meetings of the Master Builders Federation of Australia, and the Royal Australian Institute of Architects.

Since that time, the Institute has steadily grown. In December 1997, having embraced mediation as part of its role, the name of the Institute was changed in December to the Institute of Arbitrators & Mediators Australia. We have continued to grow in size, so that IAMA now has more than 1400 members in all States and Territories, and overseas, covering most disciplines.

Most members will be aware of our establishment of guidelines relating to the conduct of ADR processes, including a variety of rules which are available at our website.

We are proud of the development of a series of programs to train both arbitrators and mediators, and to maintain a high standard of continuing professional development.

The purpose of this paper is to examine some changes in the approach of the Courts to arbitration, the continuing clamour for new forms of dispute resolution, and some suggestions aimed at achieving effective resolution of disputes economically.

A change in the curial approach to Arbitration

One of the major changes which has occurred in the last two decades has been the change in relation to applications for a stay of proceedings. This is the subject of section 53 of the uniform *Commercial Arbitration Acts*. Subsection (1) contemplates the commencement of Court proceedings and an application to stay those proceedings. Subsection (2) contemplates the commencement of arbitration and an application for removal of those proceedings into

1. Ian Nosworthy is a Barrister, Arbitrator, Mediator, the Immediate Past President of the Institute of Arbitrators & Mediators Australia (IAMA) and director of the Australian Centre for International Commercial Arbitration (ACICA). He is the Deputy Chairman of the Law Council of Australia's Business Law Section, and its Construction Law Committee. He is also an editor of *Building and Construction Law Journal* (Thomson Lawbook Co.).

the Court. The section attempts to specify in what circumstances either Court or arbitral proceedings will be stayed so that the dispute can be dealt with in the other forum.

In relation to staying Court proceedings, the requirement in section 53 (1)(b) is that the Court is satisfied:

That there is no sufficient reason why the matter should not be referred to arbitration.

Conversely when an application to stay arbitration in favour of court proceedings is made, the Court must be satisfied:

That there is a sufficient reason why the subject matter of the proceedings should be dealt with by the court rather than by arbitration.

The legislature's choice of a double negative in one subsection, and a positive onus in the other slants the section in favour of arbitration, and against litigation. However, for some time the courts appeared to struggle with this concept. There is a lengthy discussion of the competing considerations in Sharkey and Dorter's *Commercial Arbitration*.²

Further, at that time litigation involving claims or a stay from either side were relatively commonplace. See for example *Crusader Resources v Santos Ltd and Others*,³ *Brunswick NL v Sam Graham Nominees Pty Ltd*.⁴

In more recent times, however, the Courts have moved towards holding the parties to their bargain, so that if the contract provided for arbitration they were held to that process. Compare *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.⁵

More conclusively, however, this issue has been dealt with in two major Australian decision resolving that, in essence, where a party has agreed to arbitrate, it is bound to deal with the matter in that way.

In *PMT Partners Pty Ltd (in liquidation) v Australian National Parks and Wildlife Service*⁶ the majority of the High Court said at page 311:

It may be accepted that contracts will only be construed as limiting the rights of the parties to pursue their remedies in the courts if it clearly appears that that is what was agreed. However, when it is provided, as it is in cl 45 that "[a]ll disputes or differences ... shall be decided" in accordance with specified procedures, the starting point must be that the parties are to be taken to have provided exclusively and exhaustively as to the procedures to be followed, unless something makes it plain that that is not the case. That is not simply because, in a context dealing with rights and obligations, the word "shall" ordinarily involves a mandatory aspect. There is also the important consideration that cl 45 is concerned with dispute resolution. Disputes are not readily resolved if there are parallel proceedings permitting of different outcomes. Nor are they readily resolved by procedures which can be set at nought if one party elects to pursue

2. Sharkey and Dorter. *Commercial Arbitration* (1986).

3. (1990) 156 LSJS 420.

4. (Unreported, Supreme Court of Western Australia 19 January 1990).

5. [1993] 1 ALR 664 at 670.

6. [1995]184 CLR 301 at 311.

*some other course of action. As with statutes, there are difficulties in construing contracts by application of the principle expressed in the maxim *expressio unius est exclusio alterius*. However, the subject matter with which cl 45 is concerned compels an approach which treats that clause as requiring the parties to have their disputes decided in accordance with the procedures specified – and only in accordance with those procedures, unless there is something which clearly indicates to the contrary.*

The Court added at page 312:

The provision limiting access to the courts “[w]here a notice is given ... requiring that the matter at issue be referred to arbitration”, prevents the Contractor from proceeding in the courts to secure the benefit of so much of the Principal’s decision, if any, as is in its favour and, also, proceeding by way of arbitration to contest that part with which it is dissatisfied. It also prevents the Principal from pursuing any claim it might have in parallel court proceedings. The express limitation on access to the courts ensures that the dispute is dealt with in its entirety by arbitration, and also ensures that the final paragraph of cl 45 has full effect, with it being at the discretion of the Principal whether or not to “withhold payment of moneys in respect of any matter that is the subject of arbitration proceedings”.

The Court of Appeal erred in construing cl 45 as permitting the Contractor to elect between proceeding in the courts and by way of arbitration prior to the giving of notice requiring arbitration. Rather, it should have held that cl 45 provides exclusively as to the procedures to be followed in the event of a dispute to which it applies.

In *ABB Power Plants v Electricity Commission of NSW*,⁷ the NSW Court of Appeal said:

*It has long been established that contractual or statutory provisions prescribing in positive terms a procedure to be followed necessarily imply that the same matter will not be dealt with under a different procedure. In *King v Wallis* (1949) 78 CLR 529 at 550, Dixon J said:*

*“This accords with the general principles of interpretation embodied in the maxim *expressum facit cessare tacitum* and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.”*

Sheller JA said at 611:

In my opinion General Condition 46 establishes an agreed code for resolving disputes of the kind described between the contractor and the principal. The first step is the furnishing in writing to the superintendent of details of the party’s claim or the reasons for rejecting the other party’s claim and a request to the superintendent to make a decision and the second, in the three circumstances mentioned, the reference of the dispute to arbitration. The first step in this procedure is described in the language of obligation, “shall”.

7. (1995) 35 NSWLR 596 at 599.

He added at 612:

In this context the use of the word “may” is as appropriate as the use of the word “shall” in cl 46.1. I do not regard it as indicating that after the first step has been taken either party may abandon the stipulated procedure and take proceedings in court. Like Giles J I regard the first step as obligatory and cl 46.2 as providing that the second step may be taken if one or other of the parties wishes to do anything more in the circumstances described. His Honour spelled out the operation of the subclause in the following terms with which I agree:

“The dissatisfied party, if it wished to do something more, could refer the dispute to arbitration. Either party, if the Superintendent failed to make a decision within twenty-eight days, could let things rest until a decision was made, or could refer the dispute to arbitration. The claiming party, if the responding party did not furnish to the Superintendent its reasons for rejecting the claim, could again let the matter rest until those reasons had been provided and a decision was made or refer the dispute to arbitration. Reference to arbitration either takes the dispute to the next step if the Superintendent has given a decision, or provides a means of overcoming a failure of the first step in the process. I do not think that cl 46.2 so far as it says the dispute ‘may be referred to arbitration’ is intended to give a choice between curial litigation to resolve the dispute, on the one hand, or referring the dispute to arbitration, on the other hand. That, it seems to me would not be consistent with the scheme of cl 46, with the care with which the conduct of an arbitration has been spelt out, or with the agreement confining interest to be awarded by an arbitrator, all of which seemed to me to point to arbitration as the next step, if invoked, being the sole next step.”

Had the statements of principle not been made, I would have thought that the plain intent of section 53 of the *Commercial Arbitration Act* was to consider on a case-by-case basis whether arbitration or litigation was the better forum for determining the dispute, recognising nonetheless a slight preference for arbitration. However, these judicial pronouncements evince a clear intention to hold the parties to their bargain, so that if the parties have agreed to arbitrate, that agreement will be enforced by the Courts.

Such an approach is no doubt welcomed by this Institute and its arbitrators. However, we can only expect the Courts to continue to show confidence in the process of arbitration if we as an Institute ensure that our members provide a high quality professional service. There have, of course, been criticisms of arbitration as being long and costly, but most such criticisms are common to litigation also. Many of the criticisms relate to managing the pallet loads of paper generated by modern commercial dealing. Dispute resolvers need to devise solutions which are not only fair, but cheap and quick also.

The clamour for new forms of ADR

There is undoubtedly a level of cynicism about, or dissatisfaction with, both litigation and arbitration. The rise of mediation in commercial dispute resolution is one response to that dissatisfaction.

The perception is that most disputes may be capable of being resolved – when the dispute is ripe for resolution – in a relatively short time by an astute dispute resolver.

'Expert Appraisal' and 'Expert Determination' are processes which have been used in recent years in an effort to avoid the delays and costs involved in litigation or arbitration. Whether it is effective is the subject of a good deal of debate.

In NSW, there has been a thriving industry in recent years in adjudications under the *Building & Construction Industry Security of Payments Act 1999*. This legislation contemplates a fast track process aimed at effecting a quick recovery of progress payments by a person carrying out construction work, typically a builder or subcontractor.

As this process has developed, there has concurrently been a developing jurisprudence in judicial review of such decisions. The May 2004 *NSW Law Society Journal* contains a helpful article by Christopher Wong discussing the process of judicial review, and analysis four authorities of *Musico*, *Abacus*, *Brodyn* and *Luikens*. The article points out that claimants may face an application for judicial review of an adjudicator's decision, perhaps coupled with an injunction to prevent the obtaining and lodging of adjudication certificate, or an application for stay of execution of a judgment, followed by a further round of adjudication.

In essence, these problems tend to show that astute commercial parties will find a way to blunt the effectiveness of even the best, and most expeditious process.

Innovative approaches to arbitration

It is essential to consider how the arbitral process may be made more effective. This usually is intended to mean cheaper and quicker, but with just as effective an outcome.

At a conference of the Chartered Institute of Arbitrators in Leeds in June 2001, Professor John Uff QC said:

'... dispute resolution should not be compartmentalised. The user has no loyalty to one dispute resolution club against another. The key to appropriate dispute resolution must be in flexibility of approach.

I would like to address three propositions. First, despite appearances to the contrary, arbitration still adheres much too closely to court procedures. Secondly, "alternative" forms of dispute resolution are currently still seen as alternatives which, once chosen, will lock the parties into a particular procedure. Thirdly, the breaking down of such barriers provides a convenient platform from which to project arbitration as a truly distinctive means of resolving commercial disputes.'

Professor Uff identified wasteful formalism in formal arbitration procedures, 'clubs and dedicated adherents' to mediation, conciliation and adjudication, and suggested that what he called 'holistic dispute resolution' might be achieved using the following procedure:

THE ARBITRATOR & MEDIATOR AUGUST 2004

1. *Arbitrators will first inform themselves about the dispute that has arisen, in order to be in a position to decide how to proceed. They may need, at this stage, to take the initiative in ascertaining what the dispute is about, without waiting for a formal process of pleading to be conducted at the usual snail's pace.*
2. *Arbitrators will then discuss with the parties the appropriate procedure to be adopted, where necessary applying different procedures for different parts of the overall dispute. This may entail hiving off issues which are capable of a mediated settlement direct between the parties, with little further involvement of the arbitrator.*
3. *Arbitrators will also be seeking to establish which parts of the overall dispute are likely to require a binding decision, and therefore those which may need an exchange of written submissions/pleadings and a formal hearing with evidence.*
4. *Disputes or issues which do not justify a formal hearing, but which cannot be mediated might be more suitable for arbitrators (using their initiative) to give a provisional view, which may then form the basis of a settlement of those issues, leaving only the issues which do require a hearing.*
5. *Finally, arbitrators will conduct a short evidence hearing to give a binding decision on the issues incapable of being otherwise disposed of.*

While these principles are easy enough to state and less easy to put in practice, they remain relevant and fundamental to expeditious dispute resolution.

A large responsibility for such difficulties as are experienced nevertheless rests with the parties themselves. As you will be aware, there are many agreements which parties can reach which will determine the efficacy or otherwise of the arbitral process, but in my view the three key provisions in the *Commercial Arbitration Act* commencing with section 14 which provides a wide level of discretion as to the manner in which the arbitrator may conduct the proceedings. The second provision is the manner in which evidence may be given before an arbitrator. Section 19(3) of the Act permits an arbitrator to inform himself or herself in relation to any matter in such manner as the arbitrator thinks fit. There is a provision once more for the parties to agree how that part of the process may be managed. Precisely what agreement might be made will of course vary from case to case.

Third, section 27 permits mediation. It is a provision which is largely eschewed by arbitrators for fear of conflict.

Arbitrators need to be alert to which particular form of innovation may be appropriate, and what sort of agreements parties might be encouraged to make to save time and costs. It should go without saying that experienced lawyers for opposing parties should be thinking about these issues and possible agreements, but regrettably this occurs all too rarely.

A checklist of matters to be considered

(a) Confidentiality

Arbitration and mediation are generally intended to be private. Consider whether the process will be enhanced, and perhaps more effective, by expressly providing in the arbitration agreement that the proceedings and any documents produced are confidential. Consider whether any further agreement is required and, if so, deal with it in the preliminary meeting.

(b) Identify what is in dispute

The parties should be able to articulate what the dispute is about in a relatively few words. No pleadings are needed for this to occur. If the parties cannot do so at the first preliminary conference, it is a warning sign. Once the parties have done so, it may be that the arbitrator (or mediator) can make practical suggestions for appropriate processes.

(c) Consider a program to hearing and dividing the dispute into segments

In large disputes it is highly unlikely that every item in dispute will be best dealt with in the same way. Consider dividing the dispute into its different segments, and devising different strategies for different types of dispute. Some will require pleadings while others do not require any formal pleading. Perhaps different discovery is needed for different parts of the dispute. It is likely that most forms of dispute will accommodate the provision of evidence-in-chief in writing, with the respondent identifying areas where cross-examination is intended. Perhaps time limits may be placed on that cross-examination.

(d) Pleadings and discovery

Some care is needed. Pleadings can serve a useful purpose. They are supposed to narrow the issues between the parties. Frequently, however, they become an occasion for showcasing the forensic skills of the drafter in putting the case of their party with the highest level of hyperbole. In recent times, the temptation to drown one's opponent in discovery has been a common occurrence. The rise of mediation is probably much due to these two features, because position papers and selective presentation of key documents are features of many effective mediations.

That said, there is no reason why an arbitrator should not carefully manage both pleadings and discovery to ensure that what is on the table in terms of the dispute is germane, and that discovery is confined to an appropriate ambit.

(e) Managing the process by preliminary meetings

State courts have acknowledged the success of the Federal Court docket management system by mimicking it in most jurisdictions. However, mere frequency of court attendance is not a necessary guarantee of efficacy, economy, or expedition. Nevertheless, parties will generally work to deadlines. Self-imposed deadlines are often the most effective, and it is surprising how realistic parties may be in offering to agree to timetables for the next step in a proceeding.

In the past, at a Preliminary Conference an arbitrator would frequently seek to put in place a timetable with all steps leading to the hearing. The expectation was almost never achieved. Therefore, it is probably better to see the process managed from stage to stage, so that the arbitrator can ensure that the matter is in hand procedurally, and that the parties adhere to their agreements and predictions.

The arbitrator should at all times remain alert for a sign that the dispute is sufficiently 'mature' for the encouragement of discussions to resolve it overall, or that circumstances have arisen permitting some agreement, shortcut or compromise on less important issues, or on procedural matters. This can be done readily if procedural matters are monitored regularly. Importantly, arbitrators must guard against the two extremes:

1. Driving the dispute unnecessarily, where well-informed and well-represented parties suggest that a pause would help;
2. Allowing the matter to meander.

(f) Consider other ADR

In arbitration, for good reason, section 27 of *The Commercial Arbitration Act* has found little scope for use because of the likely denial of natural justice if a mediation process is undertaken. However, the prospect of using such a process and not selfishly hanging on to the dispute should be uppermost in the minds of all arbitrators. The prospect that another skilled dispute resolver might be brought in to bring the dispute to an end should be welcomed.

(g) Hot tubbing the experts

When there is a dispute with apparently conflicting positions taken by experts on each side, should the hot tub not be routine?

The relaxing qualities of the hot tub are well known, and assuming that the experts are competent, honest and genuine, an exercise in hot-tubbing will almost always achieve some narrowing of the differences between the parties. If it does not, it is in fact likely to expose the differences in the assumptions on which the various experts have worked, because differences in factual background provide the usual genesis for differences in expert opinions.

There is no reason why an expert conclave need necessarily involve the parties or their advisers or urgers or the arbitrator, though the arbitrator should always be ready to intervene, and to help manage the process. Often the arbitrator's presence will lead to compromises which have hitherto been rejected.

(h) Limit the evidence which may be called

Plainly the extent to which this expedient can be adopted will depend upon the nature of the dispute, but in most cases there is no justification for a string of witnesses reciting the same mantra on every issue. It may be that the parties can be called upon to elect which evidence or expert they will rely on in which particular circumstance. It is also frequently the case that the parties themselves will be willing to agree to realistic limits in this regard.

(i) The round table

In many disputes it is simply incongruous for each party to present its witnesses in the typical courtroom style, that is with witness A for the applicant giving evidence on 427 items one by one, followed by witnesses B and C to the same general effect; after which the respondent produces its witnesses according to the same scheme.

It may be far more effective for the parties to sit with their witnesses and advisers around a large conference table, and present their competing evidence and submissions on item one, and for the arbitrator to take a moment and make, but not disclose, their decision on that point before moving on to item two. The reason for this process is that the arbitrator will hear all the evidence in an efficient way, and after the process is established, it is likely that substantial similarities of evidence and argument will be repeated on later issues, leading to time saving.

The unpalatable alternative is for the arbitrator to be backing and filling between the evidence of the various witnesses as they attempt to recall whether the evidence on point 50 was the same by all witnesses as it is on point 227 and so forth.

Once more, this approach does not necessarily apply to all kinds of dispute and the arbitrator must consider when it can be used. Perhaps it may be used for some specific kinds of detail disputes. This may be coupled with, or separated from, an inquisitorial approach or more traditional process on different topics.

Some innovations

There are numerous other innovations which an arbitrator can use to deal with a dispute effectively, including:

1. Single-issue arbitration.
2. Last offer arbitration.
3. A settlement with no figure.
4. The use of a mediator for discrete aspects of the dispute.
5. The use of an expert to assess discrete aspects of the dispute.
6. Arbitrator assisted targeted discovery.

If all else fails

Plainly there are cases which proceed to a hearing despite the best efforts of a dispute resolver to have parties take a realistic approach to resolution. At the hearing, arbitrators should be ever conscious of time saving devices such as:

1. Written outline of openings and submissions.
2. Evidence-in-chief in writing.
3. Limiting the time for cross-examination or submissions.
4. Agreement of documents.
5. Stopwatch hearings in which the parties agree as to the amount of time allotted to the presentation of their respective cases.

IAMA's role

As an Institute we must ensure that our arbitrators and mediators are well trained and conduct themselves professionally and with a high level of personal probity.

The Institute has both appropriate Codes of Conduct and a Professional Affairs Committee which monitors complaints against arbitrators and mediators to provide parties in dispute reassurance that institutionally we take our responsibilities very seriously.

* This paper was delivered at the IAMA 2004 National Conference, *New Directions In ADR*, Sydney, 22 May 2004.

Adjudication at the Coal Face

Bill Taylor¹

Introduction

The original concept of the Building and Construction Industry Security of Payment Act ('the Act'), as it seems to me, was to give a Claimant a quick determination of a disputed progress claim while the works progressed. The reality of adjudication as we now know is somewhat different. The work is usually at an end, complete or otherwise, and the parties are typically in a protracted dispute over payments. Adjudication is an alternative to or the first step in litigation. Some Adjudication Applications are made while the dispute is in court.

Except for the prescriptive provisions of the Act, there are no hard and fast procedural rules for conducting an adjudication. We do not yet have practice and procedure guides/rules as we have in arbitration and mediation.

It would seem, however, that within the 'industry' two approaches are emerging. Firstly, borrowing from the arbitration model, the adjudicator manages the adjudication process with little input from the Authorised Nominating Authority ('ANA'). The alternative is that the ANA becomes more involved, acting as a conduit between the parties and the adjudicator, receiving correspondence and recovering the adjudicator's fees. There is talk that proposals for the foreshadowed amendment of the Act may result in the ANA receiving the Adjudication Application and the Adjudication Response before the adjudicator accepts the Adjudication Application. The adjudicator receives a complete 'package' of documents.

What I would like to focus on in this paper is the process that I have used as an adjudicator where the ANA has had little involvement in the process. At the end of the paper I touch upon some important issues which seem to surface in almost every adjudication.

My experience has been in claims that range in value from \$1,500 to \$500,000, many in the \$20,000 to \$80,000 range. Typical of these types of Adjudication Applications is a lack of understanding of the process by the parties and their advisors, together with poorly drafted submissions. The range of amounts involved highlights the 'one size fits all' limitations of the Act.

Several approaches to the adjudication process have developed amongst adjudicators. It would be an exaggeration to say that my approach receives universal support from the fraternity of adjudicators.

Prospective adjudicators should be warned, no adjudication ever resembles the last!

1. BE(Civil), MDR, Grade 2 Arbitrator, Adjudicator, Mediator, Civil Engineer, Licensed Builder and Construction Consultant, Fellow of the Institution of Engineers, Australia, Member of the Institute of Arbitrators and Mediators Australia.

My First Experiences

I received my first adjudication application (for \$60,000) in February 2001. I quickly bought Davenport's book, stayed up late and read it cover to cover. It had been nearly 12 months since the IAMA accreditation course.

The Adjudication Application involved a Claimant subcontractor and a Respondent head contractor in a protracted dispute on a major infrastructure project. A second (for \$400,000) and then a third (for \$30,000) adjudication application from the same subcontractor in respect of the same work arrived shortly after the first.

My first inclination was to put on my arbitrator's hat, call a conference, ask for further submissions and get an agreement from the parties to extend the time for my determination. It seemed like a good idea at the time.

A phone conference was initially held to get the parties together and the process moving. I found this quite unsatisfactory as I did not know the parties' representatives. Difficulties were compounded by the parties lack of knowledge of the adjudication process and an obvious power imbalance. It also became apparent that the parties had not been altogether truthful as to who 'attended' the phone conference.

A face to face conference was then held with the parties. It was attended by the subcontractor's wife and several representatives from the Respondent company including an in-house counsel, a senior construction manager and the national commercial manager. The parties were antagonistic and argumentative. It was agreed that further submissions with replies could be made over a three week period. At the end, I received little more than a second copy of the original documents, but wrapped in different coloured folders.

A view was held at which I was able to observe the defects alleged by the Respondent. I found the view helpful in understanding the defects and the nature of the work.

My experience was that little was gained from this 'arbitration' model. The adjudication process was delayed and costs were probably increased with little apparent benefit to the process or the parties.

Based on the above experience I do not call conferences, I avoid calling for further submissions and I rarely seek an extension of time. I have not since seen the need to hold a view.

The second and third adjudications were conducted to the timetable in the Act. The benefits of the guillotine approach of the Act became apparent.

My Current Adjudication Process

Step 1: The Nomination (1st Day)

When an ANA calls I identify the parties, the nature of the work and the size of the claim. My decision to consider a nomination is directly related to my existing workload.

Step 2: Preliminary Document Check (2nd Day)

On receipt of the adjudication application, I carefully check the documentation for compliance with the Act in terms of:

- The Payment Claim
- The Payment Schedule
- The Adjudication Application
- The Reference Date
- Timetable
- Any jurisdictional issues raised in the Payment Schedule or apparent on the face of the documents.

I set out a programme on a calendar to assist counting of days.

I also reconsider, in light of the documentation, any issue of potential conflict, my expertise and my timetable.

In my view, it is better that the adjudicator spends a few days ironing out the 'problems' rather than jumping in. I prefer to see that the parachute is at least attached before jumping.

If I have any serious doubt as to jurisdiction:

- Where the Adjudication Application is in my view fatally flawed (or for some other reason I cannot proceed), I decline to accept and return it to the ANA. This can usually be done within 24 hours of nomination. It is open to the ANA to appoint another adjudicator or for the Claimant to withdraw.
- Where there is significant doubt on issues such as timing of service, reference date or a statutory bar, I write to the parties inviting them to clarify. Often the Claimant withdraws at this point. The matter may be clarified such that the adjudication can proceed. I stress this is not an opportunity for the parties to prop up their cases. It is usually a matter of clarification of an issue of fact.

My approach is to resolve any substantive issue of jurisdiction prior to acceptance of the Adjudication Application. The time spent doing this is in my view a cost for the adjudicator of doing business.

In my view, if the Payment Claim, Adjudication Application and/or the Payment Schedule are invalid, then it may follow there can be no adjudication. I am not comfortable with the alternative view that the adjudicator should accept an Adjudication Application warts and all and determine the validity/jurisdiction as part of the determination.

It may be that significant issues will arise after acceptance. These have to be dealt with on the run.

Hopefully, the forthcoming amendments to the Act will give adjudicators better direction in this area.

Step 3: Notify Parties of Fees (2nd Day)

Having satisfied myself that the Adjudication Application appears to be valid, I write to the parties advising of my nomination and my fee structure. I identify and list (in summary form for larger matters) the documents in the Adjudication Application.

THE ARBITRATOR & MEDIATOR AUGUST 2004

I do not accept an Adjudication Application unless it is clear that the Respondent has 'received' the Adjudication Application and usually request in my letter that the Claimant confirm details of service of the Adjudication Application upon the Respondent. The Respondent has five days after receiving the Adjudication Application in which to serve its Adjudication Response. If at the time of acceptance the Adjudication Application has not been served, the adjudicator loses control of the process. The Adjudicator may be placed in a position where the 10 day period for the determination has run out before the Respondent is required to serve the Adjudication Response.

I send my correspondence by both facsimile and by 'express mail', usually within 24 hours of receipt of the Adjudication Application.

Step 3: Acceptance (3rd Day)

Having satisfied myself that the Adjudication Application has been received by the Respondent, and in the absence of any objection to my nomination and fee structure, I notify the parties of my acceptance of the Adjudication Application by facsimile. I also send confirmation of the facsimile by 'express mail'.

In my acceptance I request that the parties communicate by facsimile. I also provide an address for service of larger documents including the Adjudication Response.

The process up to acceptance usually takes three or four days. I am happy to take an extra day or so to ensure the determination is ready to 'begin'.

Step 4: The Determination (4th to 14th Day)

The structure I use for my determination is outlined below:

1. Cover Page
2. Determination: the amount, due date and interest
3. Attached Reasons:
 - a. Table of contents
 - b. Introduction
 - c. Itemised list of submissions and timetable
 - d. Preliminary issues on jurisdiction
 - e. Claimant's submissions in summary
 - f. Respondent's submissions in summary
 - g. Discussion of important issues
 - h. Calculation of amount due, usually in table format
 - i. Calculation of due date for payment
 - j. Rate of Interest
 - k. Apportionment of my fees
 - l. Apportionment of the ANA fees
 - m. Unsolicited submissions if any
 - n. Appendix schedule of documents/correspondence

Step 5: Notifying the Parties of the Determination (14th Day)

I notify the parties of my fees, who is to pay and where to pay. I always inform the parties that I will not release my determination before my fees are paid.

Step 6: Waiting to be Paid (15th to 365th Day)

In my experience the adjudicator usually gets paid.

Some Important Issues as Viewed from the Adjudicator's Office

Jurisdiction or Lack of It

Notwithstanding the approach apparently taken by others, I cannot see that lack of jurisdiction is something to be determined by the adjudicator in the determination.

The 'Flawed' Claim or Missed Defence

It is common to see 'flaws' in the Claimants' claims and/or an obvious defence that has been missed by the Respondent. Some claims may potentially be barred by statute or contract, but the parties have not recognised this. The dilemma for the adjudicator is whether to raise the issue or not.

Service of Documents

I do not know why it is, but most Claimants appear unable to provide a short chronology setting out the reference date and details of the service of the Payment Claim, the Payment Schedule, the S17(2) notice and the Adjudication Application. Such a chronology would make the life of the Adjudicator much easier.

Most submissions consist of a bundle of documents. The parties are generally unwilling to index and/or label the important elements of the submissions nor to provide details of service.

Calculation of Due Date/Interest Rate

Notwithstanding that determining the due date for payment and the rate of interest are two of the three things the Act requires the Adjudicator to determine, most submissions are void of any reference to these two issues.

Parties appear confused between interest due prior to adjudication and that accruing after the 'due date' determined by the Adjudicator.

The Reference Date

This is perhaps the most important date of the whole process. It is rare to see a Claimant make submissions as to the reference date to which the Payment Claim relates.

Service of Payment Claim before the Reference Date

Is the service of the Payment Claim a few days early fatal? If the parties do not mind does the Adjudicator step in?

Valuing the Work Done

The value of a progress claim is usually, 'the total value of work done to date less the total amount paid to date'. It is a simple proposition but rarely seen in a Payment Claim or Payment Schedule. A summary overview of the job 'financials' would be very helpful to the Adjudicator.

Progress Claims

Parties' submissions, particularly the responses, often miss the point that adjudication is about valuing a progress claim. More effort seems to go into (often) convoluted legal argument rather than the 'management process' of dealing with a progress claim.

Mediation option

Many parties could benefit from a mediation/conciliation option within the adjudication process.

The Contract

I cannot recall an adjudication where both parties have actually provided a complete copy of the contract on which they rely (as an identified/marked bundle within the submissions) or where there has been consistency between those parts of the documents provided purporting to be the contract. In some instances parties have provided two entirely different documents in respect of payment terms, neither party having made comment on the alternative offered by the other party.

John Holland v Cardno MBK

The ratio of the number of pages – Payment Claim to Adjudication Application is usually about 4/1000. Similar figures are often seen in respect of the Payment Schedule/Adjudication Response ratio.

In the light of the *John Holland v Cardno* decision in relation to documents and/or claims contained in the Adjudication Application but not in the Payment Claim, and also the comments in the decision regarding the purpose of submissions requested by the adjudicator under S21(4)(a), it would seem that Claimants and Respondent will need to improve their payment claims and schedules. If the Payment Claim and Payment Schedule are properly prepared they should say it all. There may not be a need for a voluminous Adjudication Application or Adjudication Response (or one at all).

It would seem that the decision also reinforces the notion that a Claimant must 'prove' its claim rather than just state it.

* This paper was delivered at the IAMA 2004 National Conference, *New Directions In ADR*, Sydney, 22 May 2004.

Final and Binding: It means what it says, *and* Stay of Proceedings and Expert Determination Agreements:

A review of issues raised by the recent decision in Ipoh v TPS Property No. 2²

Logan Campbell¹

This case concerned an application seeking to stay or strike out the statement of claim on the basis that the subject matter of the claims had been the subject of binding expert determination. It highlights the importance of understanding the method of dispute resolution employed in an agreement at the time the agreement was executed by the parties. It confirms that the usual phrase in an expert determination clause that the decision of the expert be 'final and binding' on the parties means exactly that.

The decision also examines the power of the Court to stay court proceedings to provide for *de facto* enforcement of an expert determination clause or a decision resulting from that process having been conducted. The judgment confirms that once an expert decision as been made, the only grounds on which Court proceedings may thereafter be commenced for judicial review of that decision on the limited grounds of error or mistake of law.

Facts in *Ipoh v TPS*

Ipoh and TPS entered into an initial development agreement which provided that:

A party may not begin legal proceedings in connection with a dispute under this Agreement (excluding urgent applications for interlocutory injunctions) unless that dispute has first been decided by a person appointed under this clause ...

...

(h) The determination of the expert:

(i) Must be in writing;

(ii) Will be final and binding.

A contractual claim for defective work had been submitted to the expert. The expert had delivered a decision rejecting that claim. Ipoh, the complainant, then commenced proceedings in the Supreme Court in respect of that same contractual claim in reliance on the same facts and, further, an action for negligence based on the same facts.

1. In house counsel, Choice Homes (Qld) Pty Ltd.

2. (Unreported, New South Wales Supreme Court, 16 April 2004, McDougall J.)

Final and Binding: It means what it says

The Court adopted the authority stated in *Legal & General Life of Australia Limited v A Hudson Pty Limited*,³ as confirmed in *Kanivah Holdings Pty Limited v Holsworth Properties*,⁴ that a determination must be made in accordance with the contract and may be set aside if it is not. The decision may also be set aside if it is vitiated by factors such as mistake, misrepresentation, incapacity, fraud or collusion.

The Court noted that the two significant aspects of the expert determination clause in the development agreement were:

- (a) a prohibition against the institution of legal proceedings in connection with the dispute; and
- (b) a provision that the outcome of the expert determination 'will be final and binding'.

Ipoh submitted that the expert determination clause contained an implied permission to commence proceedings once the process of the expert determination in accordance with the steps set out in that clause had been concluded. However, if the words 'final and binding' were read at face value, then no such implicit commission could be construed to be in that clause. The Court rejected this submission:⁵

There is a fundamental inconsistency between the proposition that an expert determination of a dispute between the parties is final and binding on those parties, and the proposition that such an expert determination is final and binding only if the parties accept it (or if neither of them wishes to challenge it). The submission for Ipoh not only requires that words be read into clause 21.2; it subverts, in a fundamental way, the clear meaning of the existing words.

The Court held that while there was an express prohibition on the institution of legal proceedings in connection with the dispute referred to expert determination, the silence in the clause as to whether proceedings could be commenced after that determination had concluded did not mean that the parties were thereby free to commence legal proceedings on the conclusion of the expert determination. In doing so, it held that the presence of the words 'final and binding' meant precisely the opposite. The Court further stated:⁶

It would be an extraordinary outcome if a party, having frustrated the operation of clause 21.1 (so that the "first stage" barred commencement of proceedings by that party), became thereafter able to commence proceedings, notwithstanding its default, because the other party, in order to obtain a resolution of the dispute, had taken the only course available to it, namely referring the dispute to expert determination. In most circumstances ... the party in breach would obtain a benefit from the breach - namely

3. (1985) 1 NSWLR 314.

4. [2001] NSWSC 405.

5. At paragraph 54.

6. Paragraph 61.

the right to commence litigation - that was otherwise denied to it. If, however, the words "final and binding" mean what they say then this could not arise.

The Court then concluded:⁷

Where there has been an expert determination under clause 2.1.2, and where that expert determination is not assailed on the ground that it does not accord with the contract, or on grounds of fraud, collusion, misrepresentation etc, then that expert determination is, as the clause says, final and binding. I conclude further that it is only proceedings to enforce that determination, or be set aside on grounds of the kind that I have mentioned, that may thereafter be commenced.

Ipoh does not appear to have argued that the phrase 'final and binding' ousted the jurisdiction of the court, no doubt in view of the clear observations in *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*⁸ that the effect of this wording is to make the decision of the expert final and binding provided the matters referred to the expert are ones which the agreement contemplates. The expert's decision is, however, susceptible of an attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.⁹

The decision has two consequences on this point. First, it confirms the court's intention to enforce expert determination clauses by preventing a disgruntled party from relitigating its case when an expert has made a valid determination. Second, it reminds those advising businesspeople of the limited scope for review of an expert's decision as opposed to an arbitrator's award. This is a double-edged sword and clients must be made aware of this when different dispute resolution clauses are being considered.

Stay of court proceedings commenced in breach of the expert clause

Basis of court's jurisdiction

The court's power to order a stay of proceedings is derived from its inherent jurisdiction to prevent abuse of its process.¹⁰ For a party to proceed with litigation in the face of an enforceable agreement to follow a dispute resolution procedure may be an instance of abuse of process in accordance with the principle stated in *Racecourse Betting Control Board v Secretary for Air*:¹¹

*... the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.*¹²

7. Paragraph 63.

8. (Unreported, New South Wales Supreme Court, 14 July 1997, Rolfe J.)

9. Cf. observations in *Baulderstone Hornibrook Engineering v Kayah Holdings* (1998) 14 BCL 277.

10. *State of NSW v Banabelle* [2002] NSWSC 178, paragraph 30 per Einstein J.

11. [1944] Ch 114 at 126 per MacKinnon LJ, with reference to an exclusive jurisdiction clause.

12. Cited with approval in *Hooper Bailie Associated v Natcom Group* (1992) 28 NSWLR 194 and *State of NSW v Banabelle*.

Conflicting authority as to jurisdiction of the courts

There is conflict between older and modern authority in Australia as to whether the court's inherent jurisdiction can be exercised to stay proceedings brought in breach of an arbitration agreement. Previously the courts considered that there was no jurisdiction to order a stay apart from the conference of such jurisdiction by statute. In *Anderson v G H Mitchell & Sons Ltd* a unanimous High Court held that, apart from statute, Australian courts can enforce an agreement to refer disputes to arbitration only by an action for damages against the party who refused to carry it out.¹³

The position today

The first step away from this line of authority was the rejection in *Racecourse Betting Control Board v Secretary of Air* of the notion that the power to stay proceedings brought in breach of an arbitration clause derived solely from the arbitration statutes.¹⁴ This issue is now resolved, following the Supreme Court decisions in *Badgin Nominees v Oneida*,¹⁵ *Hooper Bailie Assoc Limited v Natcon Group Pty Ltd*,¹⁶ *Heart Research Institute Limited v Psiron Limited*¹⁷ and *Savcor v State of New South Wales*.¹⁸ The Court has the inherent jurisdiction to stay proceedings brought before it in breach of an agreed contractual process that expert determination would be used to resolve disputes,¹⁹ provided the procedures are sufficiently detailed to be meaningfully enforced.²⁰

-
13. (1941) 65 CLR 543 at 548. See also Robert Angyal. 'Enforceability Of Alternative Dispute Resolution Clauses' (1991) ADRJ 32; *Murphy v Benson* (1943) 42 SR (NSW) 66; *Adelaide Steamship Industries Pty Ltd v The Commonwealth of Australia* (1974) 8 SASR 425 at 439. Angyal notes, it is submitted correctly, that no doubt that is the reason that statutes such as the *Commercial Arbitration Act 1984* (NSW) expressly empower the Court to grant a stay of proceedings where there is an agreement to arbitrate (ss53(1) and 55(1)) and expressly abrogated the right to sue for damages for breach of an arbitration clause (s 53(3)).
 14. [1944] Ch 114, referred to by Lord Mustill in *Channel Tunnel Group Pty Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.
 15. (Unreported, Supreme Court of Victoria, 18 December 1998, Gillard J.)
 16. (1992) 28 NSWLR 194.
 17. (Unreported, New South Wales Supreme Court, 25 July 2002, Einstein J) at paragraph 43 where the court stated that this position was clear after the judgment in *Badgin Nominees*.
 18. (2001) 52 NSWLR 587.
 19. *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 at [41]; *New South Wales v Banabelle Electrical Pty Limited* (2002) 54 NSWLR 503 at [29] to [31]; *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [36] to [44] per Gillard J, citing *Channel Tunnel Group Limited v Balfour Beatty Construction Limited* [1993] AC 334; *Strategic Publishing Group Pty Limited & Anor v John Fairfax Publications Pty Limited* [2003] NSWSC 1134 at [14].
 20. *Aiton v Transfield*, (unreported, Supreme Court of New South Wales, 1 October 1999, Einstein J) at paragraph 44; *Computershare Ltd v Perpetual Registrars* (unreported, Supreme Court of Victoria, 17 April 2000, Warren J).
-

Starting point: no ouster of jurisdiction

Pending or commenced proceedings do not oust the jurisdiction of an inferior tribunal²¹ including, it is submitted, an expert pursuant to a referral clause.

The expert determination clause and the court proceedings must generally concern the same issues and the same parties.²² It is axiomatic that the disputes which are the subject of the proceedings sought to be stayed must be within the scope of the contractual provision²³ and the process sufficiently certain.²⁴

Exercise of the court's discretion

A court order for stay of proceedings, having the effect of indirectly enforcing a dispute resolution clause, should not be made unless it can be done in accordance with fairness.²⁵ The party contesting the stay application bears the practical burden of persuading the court that it should not be held to an apparent agreement to settle its dispute with the other contracting party by the agreed dispute resolution process. The court will have regard to the terms of the agreement, both the expert determination clause and the agreement as a whole, the subject matter of the agreement, the nature of the dispute and issues relevant to the resolution of that dispute.²⁶

-
21. *Boyd v Halstead*; Ex parte Halstead [1985] 2 QdR 249 at 253; *Concrete Developments Pty Ltd v Queensland Housing Commission* [1961] QdR 356.
 22. See, for example, *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287.
 23. *Morrow v Chinadotcom* (Unreported, NS Supreme Court, Young J, 28 March 2001); *Fletcher Constructions Australia Ltd v MPN Group Pty Ltd* (unreported, NSW Supreme Court, 14 July 1997, Rolfe J). Where the does not, or, alternatively does not as to its entirety, fall within the scope of the expert determination clause, a stay has been refused on lack of jurisdiction on the part of the expert: *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [37].
 24. *Hooper Bailie Associated Limited v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.
 25. See *AWA Ltd v Daniels* (unreported, Supreme Court NSW, 24 February 1992) per Rogers CJ at 5; cited with approval by Einstein J in *Aiton v Transfield* at paragraph 166. The applicant must demonstrate that they are ready and willing to do everything necessary for the proper conduct of the expert determination: *Adelaide Steamship Industries Pty Ltd v The Commonwealth of Australia* (1974) 8 SASR 425. The applicant must satisfy the court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the expert determination. The applicant must file an affidavit to this effect in support of the application for a stay, and unless the court is satisfied on the point the application to stay must be dismissed: *West v Brucek Constructions Pty Ltd* (1969) 14 F.L.R. 337 at 342, cited with approval in *Adelaide Steamship Industries Pty Ltd v The Commonwealth of Australia* (1974) 8 SASR 425.
 26. *Bradken Resources Pty Ltd v ANI Corporation Pty Ltd*. (unreported, Supreme Court of Victoria, 4 June 2002, McLenan J).
-

Primary Principle

In *Huddart Parker Limited v The Ship Mill Hill*²⁷ the principles which should guide a court in an application to stay a court proceeding because of an arbitration agreement were explained:

But the courts begin with the fact that there is a special contract between the parties to refer, and therefore ... consider the circumstances of a case with a strong bias in favour of maintaining the special bargain

This principle, that parties who have made a contract should keep it, has been held to apply equally to an application for a stay where the parties have agreed to other dispute resolution procedures including expert determination.²⁸

There are conflicting decisions concerning the manner in which that discretion has been exercised, which appear to have resulted in two lines of authority. The first provides for greater weight to be given to the perceived inappropriateness of the expert determination process to properly resolving the dispute. The second affords greater weight to the parties' agreement in the exercise of the discretion. There is as yet no decision at Court of Appeal level in Australia concerning the approach by the court in respect of an application for a stay in such circumstances.

However, in *Ipoh v TPS Property & Anor*,²⁹ the court accepted as correct the submission that while the court starts with a presumption that the parties should be held to their contract (and without limiting the generality of the court's discretion), a stay of proceedings may be refused:

- (a) where the dispute involves the determination of complex legal issues; or
- (b) where the stay might result in multiplicity of proceedings.

It is respectfully submitted that the review of the following authorities shows that:

1. The first of these professed grounds for refusing a stay is not based on sound principle and is inconsistent with other Supreme Court decisions at the same level.
2. The second ground stated is correct and consistent with relevant authority at the same level.

Inappropriateness of expert determination to the dispute

In *Baulderstone Hornibrook Engineering v Kayah Holdings*,³⁰ a stay was sought of proceedings commenced in breach of a clause requiring all disputes arising out of the contract to be determined by an accounting expert. The disputes that arose were legally and factually complex. The quantum of the claims were also substantial. The Court refused to order the stay, stating:

27. (1950) 81 CLR 502 at 508-509.

28. *Badgin Nominees v Oneida* at paragraphs 33 to 44; *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 715; *Aiton v Transfield* at paragraph 167; *Savcor v State of New South Wales* at paragraph 42; *Morrow v Chinadotcom* (unreported NSW Supreme Court, Young J, 28 March 2001); *Karen Lee Nominees v Gollin & Co* (1983) 1 VR 657 at 669; *Strategic Publishing Group Pty Limited & Anor v John Fairfax Publications Pty Limited*. (Unreported Supreme Court of New South Wales, 4 December 2003, Einstein J).

29. (Unreported, New South Wales Supreme Court, 16 April 2004, McDougall J.)

30. (1998) 14 BCL 277 (Supreme Court Western Australia).

“Satisfactory determination of those matters by a referee who is required to act as an expert and not as an arbitrator is impossible; by its very nature the task is one for an arbitrator and not an expert.”

The Court held that the relevant clause was against public policy on two grounds:

- (a) that it purported to oust the jurisdiction of the courts;³¹
- (b) against public policy in that it *‘prescribed a procedure which is entirely unsuitable to the resolution of disputes which may arise out of the contract’* and was therefore void.

There appears to be some agreement by journal authors that the Court was correct in labeling the procedure unsuitable to the facts of the case.³² However, it is submitted that a clause which requires a dispute to be referred to what may be considered an unsuitable tribunal is not, of itself, sufficient to make the clause contrary to public policy.³³ It is, however, if clearly made out, a good ground for refusing to stay proceedings where the expert determination process or the person appointed as expert may clearly be unable to properly and finally determine the issues in dispute between the parties.

Whether the expert determination process would finally resolve the disputes between the parties was the primary consideration identified in *Bradken Resources Pty Ltd v ANI Corporation Pty Ltd*,³⁴ as a result of which the Court determined that the proceedings should not be stayed. The Court observed that its discretion should be exercised having regard to:

- (a) the agreement of the parties;
- (b) the nature of the dispute;
- (c) the issues relevant to the resolution of that dispute.

The nominated expert was an accountant. Allegations of fraud, thereby causing the credibility of witnesses to be a central issue, were made. In determining these allegations, the expert would have had to first construe the relevant parts of the contract and the effect of documents purportedly issued pursuant to the contract. The Court stated:

Although the parties contracted on the basis that disputes in relation to invoices would be adjudicated upon by an expert where, as in the present case, the transaction is challenged as a sham and questions may arise as to the integrity of the action of officers of one party and of officers of a third party, in my opinion, the difficulties should be resolved in the Court.

Although the parties agreed that the relevant differences could be settled by an expert referee, and may possibly have contemplated that the integrity of officers of ANI may be in issue, I doubt whether it was contemplated that the expert would be asked to examine the integrity of the acts of third parties. In determining that the court process is the appropriate mechanism for resolution of the dispute, I am conscious of the fact that it is most likely that the efforts of the expert would not lead to any final disposition of the matter. (emphasis added)

-
- 31. Which ground is in directly inconsistent with decisions of the Supreme Courts of Victoria and New South Wales in *Badgin Nominees v Oneida and Fletcher Constructions v MPN Group*, discussed further below.
 - 32. See Hunt ‘The Law Relating To Expert Determination’ (February 2002) 18 *BCL* 2.
 - 33. A view shared by other learned authors. See Bellemore. ‘Is expert determination always appropriate?’ (2003) 19 *BCL* 84; Master Tomas Kennedy-Grant, High Court of New Zealand. ‘Expert determination and the enforceability of ADR’ (June 2000) *NZLJ* 223.
 - 34. *Supra* fn 26.
-

Underlying this observation is the view that the issues for determination were beyond the expert's capabilities, notwithstanding the 'special contract' between the parties. This ground is prone to inconsistent application, being dependent on the court's perception of the process agreed to by the parties.³⁵ Further, in *Heart Research Institute v Psiron Ltd*,³⁶ the Court was prepared to extend the matters which may be considered by expert determination to issues of liability and quantum, while the argument that the role of an expert under such agreements should be limited to those usually dealt with by experts, for example, questions of value, questions of the work to be done prior to practical completion, quality of work and, presumably, extensions of time was also rejected. The courts should therefore be slow to rely on this ground as the principle reasons for refusing a stay.

Discretionary remedies

Whether the expert determination process is capable of producing a result which is both useful and meaningful in the circumstances of each case is an important factor in the exercise of the court's discretion whether to stay proceedings brought in breach of such a clause.³⁷ While the fact that a particular dispute is seen by the complaining party as warranting discretionary remedies may favour judicial determination rather than a stay, this is not conclusive.³⁸ The powers of an expert to grant such relief as is appropriate if the claim is made out are potentially broad. In this way an answer may be provided, depending on the proper construction of each expert referral clause, to the concern expressed in *Bradken Resources* that the expert determination process may not resolve all disputes between the parties.

In *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*,³⁹ and

-
35. The grounds relied on in this instance are similar to those on which a stay was refused in *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540, where the court refused to stay proceedings brought in breach of an agreement that all disputes arising out of an agreement were to be referred for determination to a senior executive in the soft drinks industry. The executive had no training or expertise in determining legal and factual disputes, nor did the relevant body have in place any structure (rules or procedures) to govern the process.
36. [2002] NSWSC 646 at [24] and [25].
37. *Savcor v State of New South Wales* (2001) 52 NSWLR 587. Where urgent interlocutory relief is sought by one party, it is unlikely that the court will allow another party to shelter behind a dispute resolution process so as to frustrate the party obtaining that urgent relief. Such considerations will inform the court's exercise of its discretion to grant a stay or adjournment as appropriate: *Aiton Australia Pty Ltd v Transfield Pty Ltd* (Unreported, NSW Supreme Court, 1 October 1999, Einstein J at paragraph 31), citing *Townsend v Coyne* (Unreported, NSW Supreme Court, 26 April 1995, Young J).
38. *Petersville Ltd v Peters (WA) Ltd* [1997] ATPR 41-566; *Savcor v State of New South Wales* at paragraph 44. The court in *Savcor v NSW* relied on the multiplicity of proceedings and the discretionary remedies sought in refusing the stay, concluding: 'This undesirable multiplicity of enquiries – even beyond the multiplicity already involved in the two-tiered dispute resolution process in the head contract – is enough, in my view to justify refusing the stay the first defendant seeks, particularly where, as here, the remedies sought by the plaintiff against the first defendant are in part discretionary. Although an expert or an arbitrator may make the necessary discretionary judgments, it is probably better that a court do so where the multiplicity considerations point clearly in that direction in any event' (para 49).
-

IBM Australia Ltd v National Distribution Services Ltd,⁴⁰ it was held that an arbitration clause may confer on an arbitrator the power to dispense remedies of a kind which a statute puts in the hands of the courts.⁴¹ Those decisions turned wholly on what Mason J described in the former as 'the real question', namely:

[w]hether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.

That is also 'the real question' in relation to expert determination. It is quite conceivable that parties will refer to an expert the question whether, for example, a court would make an order pursuant to the *Trade Practices Act* declaring their contract void, and that they will agree to abide by the expert's decision on that question as if it were an order made by a court under those sections. The power may be conferred to provide other statutory remedies also. If such an agreement may be made expressly, it may also arise by implication if the terms of the referral clause so warrant.⁴² While there do not yet appear to be any expert decisions that have come before the court where the expert has made such an order, the legal basis for such orders to be made by an expert is clear. The conferral of jurisdiction to grant such relief should be expressly made. In doing so, the parties must be mindful that the expert is not required to approach the determination of such issues in a judicial manner as the court is and the parties may well find that relief order by an expert without the application of the adversarial process. Complaints of justice not being done between the parties would be quick to arise.

Primacy of the parties' agreement

The second discernible line of authority provides for exercise of the court's discretion to grant a stay of court proceedings requiring participation in an expert determination process, consistent with the 'special bargain' between the parties as identified in *The Ship Mill Hill*. There are three main Supreme Court decisions:

- (a) *Badgin Nominees Pty Ltd v Onieda Limited*;⁴³
- (b) *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*;⁴⁴
- (c) *Savcor v State of New South Wales*.⁴⁵

39. (1981) 146 CLR 206.

40. (1991) 22 NSWLR 466.

41. The awarding of interest in accordance with the Supreme Court Act and remedies which the Trade Practices Act allows a court to give, respectively.

42. *Savcor v State of New South Wales* at paragraph 31 to 39.

43. (Unreported, Supreme Court of Victoria, 18 December 1998, Gillard J.)

44. (Unreported, New South Wales Supreme Court, 14 July 1997, Rolfe J.)

45. [2001] 52 NSWLR 587. The UK decision of *Cott v Barber*, where a stay was refused when the issues to be determined were more legally and factually complex than in *Badgin* (and in circumstances similar to those found in *Baulderstone v Kayah* and *Bradken Resources*), was concerned solely with a valuation (albeit which required the construction of provisions in the contract) and was distinguished on its facts by the court in *Badgin*.

In *Badgin Nominees* the plaintiff conducted the business of manufacturing cutlery, which business was sold to the defendant for a sale price subject to the valuation of the stock. The agreement expressly stated: '*in bald terms*' that the dispute in question (valuation of stock but which required questions of legal construction to be determined) was to be decided by an expert and his '*determination in writing ... will be conclusive and binding on the parties*', without providing any rules concerning procedure, evidence, obtaining legal advice by the expert or complying with the rules of natural justice.

The Court held that the applicable principles to guide the Court in an application to stay a court proceeding because of an arbitration agreement in *Huddart Parker Limited v The Ship Mill Hill* apply equally to an application for a stay where the parties have agreed to a dispute resolution procedure involving an expert. The guiding principle is '*that parties who have made a contract shall keep it*'. More recently it has been stated that 'the Court starts with the proposition that the parties should be held to their agreement'.⁴⁶

The Court in *Badgin Nominees* had regard to evidence that showed that the terms of the contract were negotiated over a period of two months, with solicitors assistance. On this evidence it was considered '*not difficult to infer that the parties appreciate the difference between arbitration and expert determination*.' The Court found that the parties put in place what they intended was to be an inexpensive and speedy dispute resolution procedure conducted by an expert valuer. This conclusion was supported by the requirement that each party was to pay the costs of the valuation in equal proportions. It was also pertinent to observe that the parties provided two different procedures to accommodate different types of disputes (as to price and as to any other dispute under the contract), in contrast to the one expert and procedure for all disputes found in *Baulderstone v Kayah* and *Bradken Resources*.

Complexity of the dispute

The complexity of the legal and factual disputes before the expert is not, of itself, a sufficient reason to refuse to grant a stay. In *Fletcher Construction v MPN Group* the Court, while agreeing that the issues raised were complex, observed that:

In any event the mere fact that there was a degree of complexity involved does not mean that the chosen procedure should be abandoned.

This observation that lesser weight be given to the complexity of the issues in dispute in exercising the discretion was approved in *Badgin Nominees v Oneida*. In *Badgin* the Court noted, consistent with the decision in *Baulderstone Hornibrook* and *Bradken Resources*, that:

Where there are a number of issues involving questions of law and fact it may be that the Court should not grant a stay especially if the issues are the type of issues which are not suitable for determination in an informal dispute resolution procedure.

The Court did not agree, however, that this was the primary factor, stating that in considering the question of discretion, the fact that the parties agreed that the procedure should not be overlooked.

46. *Strategic Publishing Group Pty Limited & Anor v John Fairfax Publications Pty Limited*, fn 28.

In *Savcor Pty Ltd v State of New South Wales* the Court observed:

Determination of the dispute between the plaintiff and the first defendant will therefore involve a decision as to the content and quality of the representations made by the first defendant and its representatives in the process of contract negotiation and formation and a decision on the legal questions whether the head contract is void for mistake and, in the alternative, whether an order should be made declaring it void. Are these decisions which it is appropriate to leave to the process of expert (sic) determination provided for in the head contract?

but did not refuse to refer the matter to an expert for these reasons.⁴⁷

The decisions in *Badgin Nominees, Fletcher Constructions v MPN* and *Savcor v State of New South Wales* confirm that apparent difficulties to be grappled with by the expert in the interpretation of the agreement and other complex issues will not, without more, provide a sufficient ground for refusing to stay an action. Simply because the task given to the expert is difficult does not mean that it is impossible. The governing consideration is that it is a task which the parties have expressly agreed is to be undertaken by the expert and not the court.⁴⁸

Other Factors affecting exercise of court's discretion

Where there are parties to the proceedings that are not party to the expert clause, the court will be less likely to stay the proceedings as to order otherwise would result in multiple proceedings.⁴⁹ Where found to exist, this has been a powerful factor in the exercise of the discretion not to compel adherence to the extrajudicial procedure.⁵⁰ The duplication of effort in relation to disputes between the parties will result if the stay is granted is not of itself sufficient to warrant a stay.⁵¹

Strict compliance (subject to where agreement of the other party is required) with a dispute resolution procedure by a party invoking the process is generally an essential precondition to being entitled to relief by way of enforcing the other party to comply with the procedure.⁵²

47. (2001) 52 NSWLR 587, Barrett J at paragraphs 31, 40 and 48.

48. *Badgin Nominees* at paragraphs 48 to 60, citing as authority *Karen Lee Nominees v. Gollin & Co* (1983) 1 VR 657 at 669 and *Email Limited v. Robert Bray (Langwarren) Pty Ltd* (1984) VR 16 at 23, both decisions of the Full Supreme Court of Victoria.

49. *Morrow v Chinadotcom*, fn 23.

50. *Savcor v State of New South Wales* at paragraph 47; *Thomas v Star Maid International Pty Ltd* [1999] FCA 911; *Moussa v Eski Export Pty Ltd* [2000] FCA 1670; *Tasmanian Pulp & Forest Holdings Ltd v Woodhall Ltd* [1971] Tas SR 330 (Full Court); *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* [1998] VSC 103, Gillard J.

51. *Savcor v State of New South Wales* at paragraph 45, citing *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.

52. *Aiton Australia Pty Ltd v Transfield Pty Ltd* at paragraph 172.

Exercise of the discretion in Ipoh v TPS

Ipoh had commenced a claim for negligence in the Supreme Court on the same facts as the contractual claim for defective work. The Court held that this was, in truth, the dispute which had already been referred to expert determination. The Court stated that the reality was that the substance of that defect claim, which was also the subject of the contractual claim, had been referred for expert determination and that a determination of that claim had been produced. It was not open to Ipoh to reserve an alternative claim in tort based upon the very same circumstances. This was the dispute that was referred to the expert and which was determined by the expert, no matter how it was formulated as a cause of action.

This finding was based on an express prohibition in the dispute resolution clause against commencing legal proceedings ‘in connection with a dispute’ that has been the subject of expert determination. In instances where the expert determination clause contains such an express prohibition (most are silent) then a party will be prevented from commencing proceedings, albeit on a difference legal basis, to that claimed in the expert determination. Whether the same would apply in expert determination which does not contain an express prohibition on the commencement of legal proceedings in connection with the dispute referred to the expert is questionable. Importantly, the Court held that the rights and obligations that were considered in the contractual context for the purpose of expert determination were now advanced, based on exactly the same facts as the claim in tort.⁵³ On that basis, the Court held that these claims should be struck out or permanently stayed.

The likely jurisdiction of an expert to grant relief similar to that available under the Trade Practices Act (as noted above) is relevant to the granting of a stay, particularly given it is now common for contractual claims to be accompanied by a claim for breach of the Trade Practices Act based on the same facts. Both ‘arise out of’ the contract and would therefore usually fall within the scope of the referral clause. There would be no potential ‘splitting’ of the action by enforcing the referral of that dispute to the expert.

Scope and extent of the stay

The Court also addressed the question of whether any stay granted should be temporary or permanent. The nature of the stay sought must be considered in each case by the applicant.⁵⁴ In this instance the court concluded that the result of a temporary stay would be effectively to permit these proceedings to continue as valid if the expert determination process didn't produce a resolution. This would give the Plaintiff a substantial tactical benefit through the premature commencement of those Court proceedings in breach of the expert determination clause. For this reason, the Court held that the stay should be permanent. Anything less than a permanent stay would fail to protect the contractual right if either party seeks to enforce by requiring the expert determination process to be complied with.⁵⁵

53. Paragraph 71.

54. For example, in *Computershare Ltd v Perpetual Registrars*, supra, the court considered it relevant that the disagreement before the court revolved around whether or not the procedures in the dispute resolution clause, including mediation and expert determination, had been exhausted. The terms of the stay, when granted, were therefore temporary and limited to requiring the parties to exhaust their contractual means before being permitted to resort to the court.

55. Paragraph 80.

Conclusion

The decision in *Ipoh v TPS Property* confirms the courts expressed intention of holding parties to their 'special bargain' in expert determination clauses which are sufficiently certain. A distinct line of authority is now emerging on this point both as to the applicable principles and the exercise of the court's discretion in applying those principles. A disgruntled party seeking to relitigate the issue determined by the expert will likely be met with a successful application for a stay of proceedings. Experts and parties have reasonable certainty that the process and decision cannot be subverted by one party. However, given the limited grounds on which an expert's decision can be attacked, solicitors must ensure the parties are fully appraised of the advantages and disadvantages of expert determination in selecting this process.

Auburn Council v Austin Australia Pty Ltd

(Administrators Appointed) [2004] NSWSC 141

Bill Morrissey / Sarah Connell^P

Justice Bergin of the Supreme Court of New South Wales considered the effect of administrators being appointed to a party to an arbitration during the course of arbitration proceedings.

Facts

Auburn Council ('the Plaintiff'), and Austin Australia Pty Ltd ('the Defendant'), entered into a Construction Management Contract ('the Contract') on 22 March 1999 by which the Defendant agreed to provide management services and to exercise certain functions on behalf of the Plaintiff in connection with particular works. The Contract contained an arbitration clause. Subsequently, a dispute arose between the parties and they agreed to proceed to an arbitration before the nominated arbitrator.

On 31 December 2003, Ernst & Young were appointed administrators of the Defendant. The Plaintiff's solicitor notified the arbitrator of the appointment of the administrators and requested advice as to whether he considered the proceedings to be stayed. The Defendant's solicitor notified the arbitrator that the administrators were of the view that the matter should proceed and without delay.

On 13 January 2004, the Plaintiff's solicitor requested the Defendant's solicitor to advise as to whether they had the written consent of the administrators to proceed with the action in accordance with section 440D of the *Corporations Act 2001*. On the same day the Plaintiff's solicitor wrote to the arbitrator requesting that no further work be undertaken until the stay of proceedings was appropriately lifted in accordance with section 440D of the Act. The Plaintiff's solicitor advised the Defendant's solicitor that their letter to the arbitrator informing him that the administrators were of the view that the matter should proceed and without delay did not constitute a valid written consent in accordance with the Act and invited the provision of an appropriate written consent.

On 22 January 2004, the Plaintiff's solicitor requested the Defendant's solicitor to advise as to whether they had instructions to provide security for costs. Although the Defendant's solicitor provided a cheque to the Institute of Arbitrators and Mediators in the amount of \$30,000, said to represent security for the arbitrators fees, no response was provided in respect of the request to provide security for the Plaintiff's costs.

On 6 February 2004, a preliminary conference was held before the arbitrator at which the Defendant informed the arbitrator that, in the administrators' view, their consent was

1. Bill Morrissey, Partner, Construction, Energy and Government Group. McCullough Robertson, Lawyers.

2. Sarah Connell, Graduate, Construction, Energy and Government Group. McCullough Robertson, Lawyers.

unnecessary for proceedings to continue. The arbitrator confirmed that proceedings would continue.

The Plaintiff commenced proceedings seeking leave to proceed with the summons and an order that 'to the extent necessary' it be granted leave to proceed with its cross claim in the arbitration. It also sought security for its costs in the arbitration from 1 December 2003 to the completion of proceedings.

Section 440D

Section 440D provides that during the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with except with the administrators written consent or with the leave of the court.

The question was whether the cross claim in the arbitration proceedings was, for the purposes of section 440D, 'a proceeding in a court against the company or in relation to any of its property'. Counsel for the Plaintiff submitted that 'arbitral proceedings may be seen to fall within the operation of section 440D of the Act' and relied upon Justice Austin's decision in *Brian Rochford (administrators appointed) Ltd v Textile Clothing and Footwear Union of New South Wales* (1998) 30 ACSR 38 in which his Honour concluded that the Industrial Relations Commission was a 'court' for the purposes of section 440D. His Honour stated that what was 'significant is that despite these procedures, the tribunal has the ultimate authority to determine the dispute by making binding orders'.

In *Auburn*, the parties privately agreed, by virtue of the arbitration clause contained in the contract, that disputes would be arbitrated before an arbitrator.

In *Rochford*, Justice Austin concluded that the words 'a proceeding in a court against the company' in section 440D have their 'general, undefined meaning'. His Honour reviewed the relevant case law in respect of the meaning of 'court' and concluded that:

- (a) there are no conclusive, generally applicable criteria for classifying a body as a court;
- (b) the answer in each case depends on the particular statutory question to be decided; and
- (c) the answer is to be supplied in light of a close consideration of the statutory constitution and functions of the body in question.

Justice Bergin agreed with this approach.

Justice Bergin found that the policy contained in section 440D could be frustrated if proceedings could be brought and/or continued against the company in administration in a place other than a court. However, her Honour found that it was not absurd or fantastic to exclude an arbitrator from the general definition of 'court'. While her Honour concluded that there are many hallmarks of what some arbitrators do that are similar to what occurs in courts created by statute, those similarities do not convert an arbitrator, appointed by reason of an arbitration agreement, into a 'court' for the purposes of section 440D.

Security for costs

The Defendant argued that leave should not be granted to the Plaintiff, or security should not be ordered, because the Plaintiff had delayed in bringing its application for security. The Plaintiff submitted that prior to the appointment of the administrators there was no proper basis upon which to bring such an application. The Plaintiff moved promptly after the appointment of the administrators and sought their agreement for security for the Plaintiff's costs in the arbitration. Justice Bergin did not regard the Defendant's submission on delay as having any force. Her Honour considered it appropriate that an order for security be made. Her Honour ordered that the Defendant give security for the Plaintiff's costs in the arbitration in the amount of \$325,000 by way of bank guarantee in a form approved by the Plaintiff.

Mond and Mond v Dayan Rabbi Isaac Dov Berger

[2004] VSC 45

Bill Morrissey¹ / Sarah Connell²

The case involved an appeal to the Supreme Court of Victoria against an award made under the *Commercial Arbitration Act 1984* (Vic) ('the Act') on grounds of misconduct including bias or apprehended bias on the part of the arbitrators, the failure of the award to determine issues referred for decision in the arbitration agreement and its determination of issues which were not referred.

Facts

The Plaintiffs and their family members worshiped at the CHC Synagogue. The Plaintiffs were members of a minority group of worshippers within the broader CHC community of worshippers. The relationship between this minority group, Or Chadash, and the main congregation of the CHC synagogue had been a source of tension for some years. There was conflict over the status of the Or Chadash group and the main congregation and the relative authority of the leaders of both groups.

David Mond believed that the Board of CHC had formed the view that Or Chadash should not exist and that its worshippers should pray in the main synagogue. Further, David Mond asserted that the spiritual leader of Or Chadash was ignored and slighted by the Board.

The annual general meeting of CHC for 2000 was scheduled for 20 September 2000. As it approached, David Mond and nine other persons affiliated with Or Chadash, who believed themselves to be members of CHC, planned to nominate for the board of management of CHC. Prior to the meeting, David Mond visited the CHC premises and requested the CHC staff to provide 200 proxy forms for the election. He was informed that pursuant to resolution of the board, only one proxy form would be provided to him. Later, David Mond received by post a single proxy form which incorrectly stated that the annual general meeting would be held on 19 September 2000.

When David Mond requested a copy of the CHC constitution he was informed that pursuant to a board directive he could inspect a copy, but that a copy would not be provided to him. After the President of CHC intervened, the requested copy was provided to David Mond.

On or about 11 September 2000, a worshipper, who was associated with Or Chadash and who intended to stand for election, was informed by CHC staff that he was ineligible to stand for election, as he was not a member of CHC. The worshipper regularly occupied a seat in CHC for his son paid rental on his behalf. He had assumed that all seat holders at CHC were members of CHC. On 13 September 2000, David Mond visited CHC offices. He asked to inspect the CHC register of members. He was not shown a register of members, and was told that there was no register of members 'as such'. There was no clear indication of whether

1. Bill Morrissey, Partner, Construction, Energy and Government Group. McCullough Robertson, Lawyers.

2. Sarah Connell, Graduate, Construction, Energy and Government Group. McCullough Robertson, Lawyers.

membership of CHC was based on the payment of rental for seats within the CHC synagogues or on occupation of a rented seat or on some other ground.

On 13 September 2000 David Mond issued an *ex parte* application pursuant to section 14A of the *Associations and Corporations Act 1991* (Vic) against CHC as Defendant in the Magistrates Court, seeking to prevent the holding of the forthcoming annual general meeting, and to cause the names of all seat holders to be entered on a register of members. On 18 September 2000, Magistrate O'Dwyer ordered that 'until the hearing and determination of this proceeding or further order of the court, the annual general meeting of the Defendant which had been convened to be held on 20 September 2000 is postponed until the question of eligibility for membership of the Defendant has been determined by Rabbinical arbitration or otherwise'.

As a result of David Mond's application to the secular court the board and executive of CHC sought to terminate certain of his prayer rights and religious honours. On 29 September 2002 David Mond obtained further interlocutory relief in the Melbourne Magistrates Court restraining CHC from terminating his membership and his prayer rights and honours. After 29 September 2000 and during 2001, negotiations to resolve the dispute between David Mond and CHC continued. David Mond's brother, Barry Mond, also became a party to the dispute in relation to a claim that CHC had wrongly issued invoices to him.

Throughout this time, CHC was unable to hold its annual general meeting due to the Magistrates Court injunction. The parties ultimately decided to proceed to refer their disputes to a Rabbinical arbitration conducted by three judges of Jewish law.

The arbitration

The First, Second and Third Defendants were 'Dayanim' (judges under Jewish law) who were appointed arbitrators by the parties under an arbitration agreement executed on 1 August 2001 by the Plaintiffs on the one part, and Caulfield Hebrew Congregation Incorporated ('CHC') and 20 named persons belonging to CHC's board and executive on the other part. The arbitrators were to decide 'all claims and counter claims existing between either of the Messrs Mond and the other named parties'.

The appointed arbitrators were to act according to Jewish law and the rules of procedure established for and customarily employed in references to arbitration before a Jewish court of law. Pursuant to the arbitration agreement the arbitrators decision would be final and binding on all the parties and enforceable under the Act. CHC was the Fourth Defendant, and the Fifth to twenty fourth Defendant's were members of CHC's board or executive.

The arbitration took place at the CHC synagogue in Caulfield between 24 October 2001 and 2 November 2001. The proceedings were held in public and were conducted in English. A considerable number of issues were identified by the parties for determination. On 30 October 2001, the Mond's made an open offer to settle the dispute, on the basis that CHC pay them the sum of \$85,000, in respect of costs and upon certain conditions. A meeting of the board of CHC was held on 31 October 2001 to consider the Plaintiffs' settlement offer. The board voted against acceptance of the Plaintiffs' offer and put a counter-offer.

Later that day, a meeting took place in an upstairs room of the synagogue between the

three judges, the Monds, their solicitor and their counsel. That meeting is the basis of several of the Plaintiffs' claims of misconduct. David Mond's evidence was that in the course of the hotel meeting he stated he would not proceed with the arbitration and dismissed his appointed arbitrator.

On 1 November 2001, the Monds and their legal representatives did not appear at the arbitration. The hearing proceeded in their absence on 1 November 2001 and 2 November 2001. The hearing concluded before midday on 2 November 2001, and the arbitrators completed and signed a Partial Award. David Mond did not pay Rabbi Ulman, his appointed arbitrator, his fee and he did not pay his share of the other arbitrators' fees. CHC ultimately paid those fees. The Plaintiffs commenced proceedings by originating motion dated 21 December 2001. By order of Justice Balmford made 27 August 2002, the arbitrators were restrained from conducting any further hearing.

Misconduct

The Plaintiff's sought to have the partial award set aside or remitted on the grounds of misconduct within the terms of section 42 of the Act. '*Misconduct*', in the context of arbitration legislation, includes a broad diversity of conduct both in relation to the arbitral hearing and the making of the award. Section 4(1) of the Act provides that '*misconduct includes corruption, fraud, partiality, bias and a breach of the rules of natural justice*'. In addition to conduct which involves moral turpitude, '*misconduct*' comprehends irregularities in the conduct of the proceeding and extends to breaches of duty associated with the making of the award. For example, if the arbitrator fails to decide the issues referred for decision, or decides issues not referred for decision, it will amount to misconduct.

The Act confers upon the court a discretion to set aside the award in whole or in part where misconduct is established. At the outset of the trial senior counsel for the Plaintiffs reduced the original ground for complaint to six principal matters including:

- (a) the comments made by an appointed arbitrator regarding 'hate mail' sent to David Mond, which was said to give rise to a reasonable apprehension of bias;
- (b) an alleged comment made by an appointed arbitrator at the meeting on 31 October 2001 that if David Mond did not accept the settlement proposal, he would be expelled from CHC. That alleged comment was submitted to give rise to a reasonable apprehension of bias or to constitute actual bias;
- (c) the alleged comment by another appointed arbitrator at the meeting on 31 October 2001 that 'you can't fight City Hall', which was also said to give rise to a reasonable apprehension of bias;
- (d) the failure of the Partial Award to determine the issue of eligibility for membership of CHC, referred to the arbitrators for determination; and
- (e) the inclusion in the Partial Award of the findings on Or Chadash, which the Plaintiffs contend was not a matter properly within the reference and hence, the arbitrators' jurisdiction.

Victorian law

The Court held that the terms of the arbitration agreement provided that the claims were determined in accordance with Jewish law. However, insofar as Jewish law itself requires conformity with, or the application of, local law, and in relation to claims arising pursuant to a Victorian statute, the Court may play a role. Further, 'misconduct' was determined in accordance with Victorian law, although the Court held that particular requirements of conformity with natural justice may be modified by reference to the procedure selected by the parties, provided that the fundamental requirements of natural justice are satisfied.

The Court held that the arbitration agreement, the requirements of an award and the enforcement of the award are governed by, and must conform to, the law of Victoria. If the arbitration or the making of the Partial Award involved conduct which amounted to misconduct within the terms of the Act, then although it was permitted under Jewish law or procedure, the Partial Award could not be enforced and was liable to be set aside by a Victorian court.

Jewish law and procedure

The Defendants contended that certain procedures and practices which could constitute bias or a breach of the rules of natural justice pursuant to common law or 'misconduct of the proceedings' in terms of the Act, were permissible pursuant to Jewish law and pursuant to the procedure customarily employed in reference to arbitration before a Jewish court, to which the parties agreed. The Defendants relied on expert evidence to establish the status and provisions of Jewish law.

Bias

The Court held that an arbitrator's statement that if David Mond did not agree to the proposed settlement, he would expel him or throw him out, would cause a fair minded person knowing the relevant circumstances of the case reasonably to apprehend that the arbitrator had pre-judged or might pre-judge the case, and that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. Further, another arbitrator's statement that 'you can't fight City Hall' would, in the circumstances, create a reasonable apprehension or suspicion in a fair minded person that that arbitrator was also unable to approach the resolution of the case even-handedly and had pre-judged it in favour of the 4th to 24th Defendants, as representing an established authority or institution challenged by an isolated dissident.

According to the expert evidence provided on behalf of the Defendants, a Jewish arbitrator may be partial during the hearing and in a mediation, although not an advocate. The evidence did not define what particular species of conduct are comprehended by 'partiality'. The evidence stated that although a judge may be 'partial' he must make an unbiased decision. Further, an arbitrator may legitimately, during the course of the hearing, threaten his appointer's opponent with a particular adverse outcome (even where the arbitral tribunal has no jurisdiction to order such an outcome) unless the party agrees to a proposed

settlement. As the Court saw it, it would have been a major divergence from concepts of fairness and natural justice as understood under common law, and hence the Act, to allow such an approach. Such conduct would violate the fundamental principles of natural justice. A Victorian court would not enforce, or would set aside, on grounds of public policy, an award produced in such circumstances. The court was not convinced that such conduct was allowable under Jewish law.

Plaintiff's right to object not waived

It was submitted on behalf of the 4th to 24th Defendants, that if a reasonable apprehension of bias were established, the Plaintiffs had waived their entitlement to rely upon it due to their failure to make an application to the arbitral tribunal that the makers of the comment be disqualified. The Plaintiffs made no objection or application after Rabbi Berger's hate mail comments, but continued with the hearing. David Mond then publicly indicated that he was not dissatisfied with the hearing he had received. Immediately following the comments which were made after the evening meeting held on 31 October 2001, the Plaintiffs abandoned the hearing. The court held that while it is desirable that objection and a formal application in relation to apprehended bias be made as soon as possible, the failure to take such steps does not necessarily result in a waiver of the right to object. The fact that the Plaintiffs abandoned their participation in the hearing without making a formal objection or an application before the arbitral tribunal was not a sufficient ground for depriving them of their right to rely upon an apprehension of bias, reasonably based, in order to satisfy the partial award for misconduct.

Partial Award

The court held that the Partial Award was a final, rather than a provisional award. Although it purported to reserve some matters for possible future determination or enforcement, the reservation was ineffective.

Although misconduct was not established in relation to a number of bases on which the Plaintiffs sought to rely, relevant terms of the Partial Award contributed to a reasonable suspicion of a lack of partiality and was indicative of a general trend or pattern. Certain matters determined by the Arbitrators were not matters within the arbitral reference and hence not within the jurisdiction of the arbitrators. Certain subject matter of the Partial Award, in the opinion of the court, constituted 'misconduct of the proceeding', within the terms of section 42 of the Act. The appointment of a nominated accountant to supervise the compilation of a register of members of CHC and supervise the preparation and conduct of the next Annual General Meeting pursuant to the Partial Award constituted a delegation of the arbitrators' power and amounted to misconduct within the terms of section 42. The associated failure of the arbitrators to determine the issue of eligibility for membership of the CHC, referred for decision, also constituted misconduct within the terms of section 42. It followed that misconduct within the terms of section 42 of the Act was established on a number of distinct bases. The Partial Award was set aside.

Wiki v Atlantis Relocations (NSW) Pty Ltd

[2004] NSWCA 174 (18 June 2004), New South Wales Court of Appeal

Dispute between expert evidence – expert evidence accepted on basis that expert was ‘impressive’ or ‘eminent’ – obligation to give reasons when deciding between expert evidence – duty to inform parties of matters within judge’s personal knowledge before taking those matters into account.

Robert Hunt¹

The New South Wales Court of Appeal had some strong words to say in this case about the reasons for accepting expert evidence, which are as important for arbitrators as they are for judges.

The issue concerned conflicting medical evidence given in an action for personal injuries. Relevantly, after recounting the evidence of the more important medical witnesses in summary form, the trial judge said:

I found Dr Dan’s evidence to be very persuasive. Not only was he the most eminent of the medical practitioners called (or whose reports were tendered) but he was in my view the most impressive witness whether lay or expert called in the case. Accepting as I do his evidence I find that the [appellant] has not established that she suffered the disc injuries at T11/12 and L5/S1 as claimed. Furthermore again based upon my acceptance of Dr Dan’s evidence, I do not find that the plaintiff has established that she has suffered the pain and disability of which she complains.

In the Court of Appeal, in allowing the appeal and setting aside the decision of the trial judge, Ipp JA, with whom Bryson JA and Stein AJA agreed, provided a useful analysis of the relevant principles and authorities, which are worth setting out in full. His Honour said:

52 *Newman AJ went on to assess the appellant’s damages in the sum of \$290,139.35. That sum was heavily influenced by the judge’s acceptance of the testimony of Dr Dan, in preference to that of the medical practitioners who testified on the appellant’s behalf.*

53 *In deciding to accept the testimony of Dr Dan, Newman AJ did not analyse or examine the merits of the opinions expressed by Dr Ellis and Dr Evans. He merely relied on:*

(a) *The “very persuasive” quality of Dr Dan’s evidence.*

1. Robert Hunt is a Barrister, Arbitrator, Mediator, Past President of the Institute of Arbitrators & Mediators Australia (IAMA), and is a director of the Australian Centre for International Commercial Arbitration (ACICA). He drafted the IAMA Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules) 1999, the IAMA Expert Determination Rules 2001, the IAMA Mediation and Conciliation Rules 2001, and the IAMA Industry and Consumer Scheme Rules 2001, in addition to writing various IAMA Practice Notes. He is the author of ‘Establishing the Basis for Arbitration and ADR’, and ‘The Trade Practices Act and Associated Legislation’ in *A Guide to Arbitration Practice in Australia* (University of Adelaide), and many published articles on arbitration and ADR in Australia and elsewhere.

- (b) *His view that Dr Dan was the "most eminent" of the medical practitioners called (or whose reports were tendered).*
- (c) *His view that Dr Dan was "the most impressive witness whether lay or expert called in the case".*

54 *These findings must be seen in the light of the fact that, as I have pointed out, his Honour made no credibility findings against any of the witnesses who testified relevantly on behalf of the appellant (save for the appellant herself).*

55 *Thus, apart from the question of the "eminence" of Dr Dan, the most important issue in the case was resolved solely by his Honour's subjective opinion as to which witness was regarded as the most "persuasive" and "impressive."*

The judicial obligation to give reasons

56 *A miscarriage of justice can arise where what is and is not disclosed in a judge's reasons is a breach of the principle that justice must not only be done but must be seen to be done: Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430 at 431 (per Mason P).*

57 *As McHugh JA explained in Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 (at 279), one of the purposes served by a judicial decision is that:
"[I]t enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision."*

Accordingly, as McHugh JA said (at 278-279):

"[A] judicial decision must be a reasoned decision arrived at by finding the relevant facts and then applying the relevant rules or principles. A decision which is made arbitrarily can not be a judicial decision; for the hallmark of a judicial decision is the quality of rationality".

58 *In Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 which was followed in Moylan v The Nutrasweet Company [2000] NSWCA 337, Henry LJ said (at 381-382) in regard to the general duty of a judge to give reasons for his or her decision (particularly in relation to expert evidence):*

"The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know ... whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is

that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not."

59 *It is, of course, well settled that a judge does not need to refer to all the evidence in the proceedings or to indicate which of the evidence is accepted or rejected. The extent of the duty to give reasons depends upon the circumstances of the individual case: Mifsud v Campbell (1991) 21 NSWLR 725 at 728 (per Samuels JA, with whom Clarke JA and Hope AJA agreed). But it is not for nothing that in some bilingual countries the judgment of the court is given in the language of the unsuccessful party. The proper administration of justice requires reasons to be given in a form, firstly, that will enable the losing party to understand properly the grounds upon which the case was lost, and, secondly, that will not, effectively, frustrate the losing party's right of appeal: Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 at 666-667.*

60 *In some disputes between experts, demeanour will be crucial. This may occur where a witness has given dishonest or misleading evidence, or has become an advocate for a party, or where the evidence given is inherently unreliable for other reasons. Demeanour may also be crucial in other cases where the evidence is not so tainted. Situations may arise where, after due consideration of the reasoning of the differing views of the expert witnesses, the judge is simply unable to decide the issue otherwise than by impression and demeanour. Demeanour may also be crucial in situations of the kind described by Mahoney JA in Public Trustee v The Commonwealth (unreported, NSWCA, 20 December 1995) when making the following remarks:*

"[N]ot infrequently, the court may not be in a position to decide whether the facts on which the witness relies are true and may not be able to judge the scientific or professional accuracy of the principles ... And where experts state different conclusions and rely for them upon facts which differ and principles which do not agree, it may not be able to form its conclusion by reference to those facts or those conclusions alone. When a judgment must be made between the facts and the principles advocated at the trial, the court may not be in a position to give objectively convincing reasons for its choice. It may, in the end, have to depend upon the impression which the witness has made."

Demeanour also often plays a partial role in a decision whether to prefer one expert over another. A judge may be persuaded by a combination of the material force of an expert's views together with the way in which the evidence was given.

61 *But, where the issue in dispute involves differences between expert witnesses that are capable of being resolved rationally by examination and analysis, and where the experts are properly qualified and none has been found to be dishonest, or misleading, or unduly partisan, or otherwise unreliable, a decision based solely on demeanour will not provide the losing party with a satisfactory explanation for his or her lack of success. A justifiable grievance as to the way in which justice was administered will then arise.*

62 In Moylan, Sheller JA (with whom Beazley JA and Giles JA agreed) referred to and adopted much of the reasoning of Henry LJ in Flannery. His Honour quoted the following remarks of Henry LJ (reported in Flannery at 381-382) with approval:

"It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye witness accounts is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible ... But with expert evidence, it should usually be possible to be more explicit in giving reasons: See Bingham LJ in Eckersley v Binnie (1988) 18 Con LR 1, 77-78:

"In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons ... "

And:

"[w]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other."

63 Sheller JA (at [64]) criticised the trial judge in Moylan for deciding the case virtually solely on the strength of the following remarks:

"I have had the advantage not only of hearing the various witnesses give evidence but also of seeing the way in which they

have reacted to the questions that they were asked. Having done so, I prefer the expert evidence that was given for the defendants to that which was given for the plaintiffs."

- 64 In Mistral International Pty Ltd v Polstead Pty Ltd [2002] NSWCA 321, in a judgment with which both Meagher and Beazley JJA agreed, Sheller JA again referred to Flannery and Eckersley v Binnie with approval and applied what had been said in those cases. In Archibald v Byron Shire Council (2003) 129 LGERA 311 Sheller JA (with whom Beazley JA agreed) adopted the same approach. His Honour said (at 323, [54]):

"Where a dispute, such as this one, involves something in the nature of an intellectual exchange with reasons and analysis advanced on either side, the parties are entitled to have the judge enter into the issues canvassed before the court and to an explanation by the judge as to why the judge prefers one case over the other. This is particularly so where there is disputed expert evidence. In the present case, the parties were entitled to be told if Dr Button's estimates were to be accepted, on what basis they were to be accepted, in preference to those of Mr Loomes and Mr Thompson. This had to be done if the court was properly to perform the duty of stating with certainty the extent to which the respondent was entitled to rely upon continued use."

See also Papadopoulos v New South Wales Insurance Ministerial Corporation [1999] NSWCA 116 at [17] .

- 65 I would add that the approach in Flannery was followed in McDonald v Moore [2003] WASCA 21 (per Murray, Anderson and Templeman JJ) and by Wheeler J in the Executive Director of Public Health v Lily Creek International Pty Ltd [2001] WASCA 410.
- 66 In Ahmedi v Ahmedi (1991) 23 NSWLR 288, Clarke JA (with whom Handley JA agreed) said (at 299):

"It has been contended that the principle which requires the Court to accord appropriate weight to the trial judge's assessment of the witnesses he has seen and heard does not apply in the case of expert witnesses. I do not think that the cases support the submission.

In Chambers v Jobling (1986) 7 NSWLR 1, Mahoney JA concluded that the principle applied with appropriate limitations to the evidence of experts (at 25) ... Although his Honour's judgment was a dissenting one, and to that extent his remarks must be regarded as obiter dicta, I find them persuasive particularly as they have been supported by later authority. In Abalos v Australian Postal Commission (1990) 171 CLR 167, for instance, the evidence of at least one of the witnesses was that of an expert. Again in Wilsher v Essex Area Health Authority [1988] AC 1074, Lord Bridge, clearly indicated that the general principles relating to the power of an appellate court to interfere with a trial

judge's findings as to which witnesses should be accepted applied equally in the area of expert evidence. His Lordship said (at 1091):

'... Where expert witnesses are radically at issue about complex technical questions within their own field and are examined and cross-examined at length about their conflicting theories, I believe that the judge's advantage in seeing them and hearing them is scarcely less important than when he has to resolve some conflict of primary fact between lay witnesses in purely mundane matters.'

(See, also X and Y (by her tutor X) v Pal (1991) 23 NSWLR 26).

Accepting as I do the principles laid down in those cases I do not think that it is open to this Court to decide that Phelan DCJ's conclusion on this aspect, which was clearly based upon his evaluation of the evidence of the expert witnesses and the facts which have already been mentioned, should be set aside and that the evidence of Dr Haik should have been preferred."

- 67 In Forbes v Selleys Pty Ltd [2004] NSWCA 149, Mason P (with whom Giles JA and McColl JA agreed) accepted, generally, that the principles governing appellate review of technical disputes do not differ from those governing "ordinary" factual disputes (and followed the majority in Ahmedi).
- 68 As I have explained, it may be entirely appropriate for trial judges to rely on matters of credibility in determining disputes between experts. Almost invariably the trial judge will have an advantage from having heard the totality of the evidence and the individual witnesses who testified at the trial. These are matters that are crucial to the Court's decision on appeal: Fox v Percy (2003) 197 ALR 201; Pledge v Roads and Traffic Authority (2004) 205 ALR 56. Nevertheless, where it is apparent from the judge's reasons that there has been a failure to follow the precepts to be adopted when resolving expert disputes as laid down in Soulemezis, Moylan and Flannery, there is nothing in Ahmedi that requires an appellate court to refrain from intervening.

Did the trial judge's reasons comply with the approach in Soulemezis, Flannery and Moylan?

- 69 The present is not a case such as that described by Mahoney JA in the Public Trustee v The Commonwealth. Here, there were several bases upon which it was open to the trial judge to determine, on a rational basis, which body of expert evidence should be preferred.
- 70 One possible basis was that the physical signs apparent from the MRI scan, coupled with the evidence of wasting of the muscles in the appellant's leg, justified a finding in the appellant's favour.
- 71 On the other hand, the effect of the myelogram and the concessions made by Dr Evans in cross-examination were capable of leading the judge to the opposite conclusion.

- 72 *The leg wasting was plainly regarded by some of the expert witnesses as a significant matter. Dr Dan made no reference to this matter in his evidence in chief. He was asked no questions about it in cross-examination. It might have been open to his Honour to apply the principle expressed by Handley JA in Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389 at 418, namely, that inferences should not be drawn in favour of a party that called a witness who could have given direct evidence when that party refrained from asking the crucial questions.*
- 73 *I mention these matters merely as examples of the kinds of reasoning that were open to the judge. There was nothing in the nature of the dispute that precluded a decision being made substantially through examination of the material, and rational analysis. Indeed, the absence of any adverse credibility finding concerning the appellant's experts and lay witnesses who testified as to her condition called for such an examination and analysis. But, the judge did not undertake such an exercise. Instead, his Honour merely relied on the "eminence" of Dr Dan, his view that Dr Dan was "the most impressive witness whether lay or expert called in the case" and the "persuasive" quality of Dr Dan's evidence. In my view, his Honour erred in this respect.*
- 74 *In addition, there is a serious question as to how his Honour determined that Dr Dan was "the most eminent of the medical practitioners called (or whose reports were tendered)". In particular, it is not clear whether his Honour was relying on his personal knowledge of the practitioners who testified (that is, outside the evidence that was led at the trial) or whether he was relying solely on the testimony before him.*
- 75 *It was pointed out on behalf of the appellant that the question of whether Dr Dan was more "eminent" than any of the other doctors was not a matter that was in issue at the trial. There appears to have been no investigation as to the respective degrees of "eminence" of the doctors in question. On that ground alone, it seems to me, it was inappropriate for any finding as to which of the witnesses was the "most eminent" to be made.*
- 76 *According to the written submissions filed on behalf of the respondent:
"Knowledge of a medical practitioner's reputation so far as lawyers are concerned is a matter of experience or at least involves a degree of experience. Anybody practising regularly in personal injury work is well aware of the eminence of Dr Dan as a neurosurgeon and of the fact that spinal disorders are within the province of neurosurgery as well as orthopaedics. Dr Dan is widely known to be still in busy practice treating patients as well as doing medico-legal work and his evidence in this case established that he remained in active practice and was a clinical*

Associate Professor at the University of Sydney and had a continuing association with Concord Hospital ... The trial judge was vastly experienced and could bring to account his knowledge as well as that specific evidence as to Dr Dan's eminence. In relation to a comparison of Dr Dan's standing with the standing of the other doctors involved in this case, again his Honour could bring to account his experience".

- 77 *These submissions indicate an acceptance that the judge was relying on his personal knowledge of the witness, rather than on evidence led at the trial. **If his Honour relied on facts known to him outside the evidence led at the trial, it was incumbent on him to inform the parties of the material to which he intended to have regard and to give them an opportunity to deal with it. This he did not do. In my view, this was a further error.** (emphasis added)*

Jones v Bradley (No 2)

[2004] NSWCA 258 (16 September 2003), New South Wales Court of Appeal

'Calderbank' offers of settlement – principles on which discretion to make special costs orders should be exercised – no presumption where offer bettered

Robert Hunt¹

An issue of increasing importance in arbitrations and litigation is the use of 'Calderbank' offers or Offers of Compromise under Rules of Court. There have been effectively two lines of authority on whether, if such an offer is bettered, there is a '*prima facie presumption*' that, where an offer is made and not accepted followed by a result which is more favourable, the Court or tribunal should order costs on an indemnity or solicitor and client basis instead of on a party and party basis.

The conflict between those two lines of authority has been resolved by this decision of the New South Wales Court of Appeal, and that Court's earlier decision in *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323m, which establish that there is no such '*prima facie presumption*', and which I expect will be followed by appellate courts in other Australian jurisdictions.

In their joint judgment in *Jones v Bradley (No 2)*, the Court (Meagher, Beazley & Santow JJA) summarised the position in the following terms:

- 5 *"Calderbank offers" are well recognised means of making offers of settlement in circumstances where the party making the offer ultimately seeks a costs advantage if the offer is not accepted: see Calderbank v Calderbank (1975) 3 WLR 586. Such offers do not comply with the Rules of Court for making offers of compromise. Accordingly the Rules which govern costs in those circumstances do not apply and the matter remains one for the exercise of the Court's discretion.*
- 6 *There are two lines of authority on the question of what effect a Calderbank offer has on the Court's discretion in awarding costs. The first is reflected in Rolfe J's judgment in Multicon Engineering Pty Ltd v Federal Airports Corporation (1996) 138 ALR 425 where his Honour stated at 451:*

1. Robert Hunt is a Barrister, Arbitrator, Mediator, Past President of the Institute of Arbitrators & Mediators Australia (IAMA), and is a director of the Australian Centre for International Commercial Arbitration (ACICA). He drafted the IAMA *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)* 1999, the IAMA *Expert Determination Rules* 2001, the IAMA *Mediation and Conciliation Rules* 2001, and the IAMA *Industry and Consumer Scheme Rules* 2001, in addition to writing various IAMA Practice Notes. He is the author of 'Establishing the Basis for Arbitration and ADR', and 'The Trade Practices Act and Associated Legislation' in *A Guide to Arbitration Practice in Australia* (University of Adelaide), and many published articles on arbitration and ADR in Australia and elsewhere.

"... the proper approach to take to an offer of compromise ... or pursuant to a Calderbank letter, is that there should be a prima facie presumption in the event of the offer not being accepted and in the event of a recipient of the offer not receiving a result more favourable than the offer, that the party rejecting the offer should pay the costs of the other party on an indemnity basis from the date of the making of the offer."

This line of authority has been followed in: Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2) [1999] 1 Qd R 518, and Brittain v Commonwealth of Australia [2003] NSWSC 270.

- 7 The other line of authority rejects the "prima facie presumption" approach. In MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd (1996) 70 FCR 236 Lindgren J said at page 239:

"It is important, however, to appreciate that the mere making of an offer by a Calderbank letter and its non-acceptance followed by a result more favourable will not automatically lead to the making of an order for payment of costs on an indemnity basis."

His Honour said the manner of exercise of the discretion "depends on all relevant circumstances of that case". His Honour's view reflected the jurisprudence in the Federal Court at the time: see WCW Pty Ltd v Charthill Ltd (unreported, Federal Court, Olney J, 7 July 1992); John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd (1994) 52 FCR 201; and has continued to be applied in that Court: see The Sanko Steamship Co Ltd v Sumitomo Australia Ltd (unreported, Federal Court, Sheppard J, 7 February 1996) and NMFM Property v Citibank (2001) 109 FCR 77.

- 8 This principle has also been enunciated in this Court. In SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323 Giles JA stated at para 37:

"The making of an offer of compromise in the form of a Calderbank Letter ... where the offeree does not accept the offer but ends up worse off than if the offer had been accepted, is a matter to which the court may have regard when deciding whether to otherwise order, but it does not automatically bring a different order as to costs. All the circumstances must be considered, and while the policy informing the regard had to a Calderbank letter is promotion of settlement of disputes an offeree can reasonably fail to accept an offer without suffering in costs. In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure."

It appears that Priestley JA, by his Orders in this case, would endorse this approval. But in any event, the principle has been applied in the Supreme Court both at first instance and on appeal: see Enron Australia Finance Pty Limited (in liquidation) v Integral Energy Australia [2002] NSWSC 819; Nobrega v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 2) [1999] NSWCA 133; LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd [2003] NSWCA 74; and Cummings v Sands [2001] NSWSC 706.

- 9 *It is worth pausing to note that the difference between the two lines of authority may be "more apparent than real" as **in either approach the Court must consider all the circumstances of the case**: see CBA Investments Limited v Northern Star Limited (No 2) [2002] NSWCA 164. Be that as it may, **we consider that the approach taken by the Court in SMEC Testing Services is correct and is the approach which should be consistently applied when dealing with Calderbank offers.** (emphasis added)*

John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors

[2004] NSWSC 258 (20 April 2004- Einstein J) Supreme Court of New South Wales

Adjudication- Payment Claims – submissions in Adjudication Application not duly made in support of the Payment Claim – Adjudication Application tied to Payment Claim – jurisdictional error – denial of natural justice.

David Campbell-Williams and Graeme Robinson²

This judgment concerns a challenge to an Adjudicator's determination under the *NSW Building and Construction Industry Security of Payment Act 1999* (the Act). The key issues in the case concern the construction of the payment claim, the ambit of submissions and documentation permitted in the consequent adjudication application, and the consequences for a determination.

Background to the NSW Act

Justice Einstein outlined the background to the Act and his assessment of the status of the numerous recent decisions in proceedings to quash determinations under the Act.

The Act requires that an adjudication response is relevantly tied to the payment schedule. A respondent is expressly prevented from including in the adjudication response any reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant - section 20(2B).

It follows that the Adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application, which fall outside the scope of the claim and materials comprising the payment claim.

An applicant cannot raise for the first time in its adjudication application, heads or grounds of claim which had not been included in the payment claim, as a respondent could not have been expected to deal with those heads or grounds in its payment schedule. A respondent would thus be unable to respond to such additional heads or grounds in its adjudication response, by reason of the prohibition in section 20(2B) of the Act.

There is no express provision to be found in section 17 (dealing with adjudication applications), equivalent to section 20(2B).

Justice Einstein considered that the adjudication application should be relevantly tied to the payment claim such that the adjudication application cannot include reasons supporting the payment claim unless those reasons had been included in the payment claim. However, the Act does not expressly require any form of reasons for the making of a payment claim, to be included in the payment claim.

1. Solicitor, Arbitrator and Adjudicator.
2. Engineer, Arbitrator and Adjudicator.

The issues

The broad issues addressed in this case are whether

- the adjudication application made to the adjudicator contained submissions which were not duly made in support of the payment claim for the purposes of 17(3)(h) and 22(2)(c) of the Act;
- the adjudicator relied on submissions in the adjudication application which were not duly made in support of the payment claim contrary to section 22(2)(c) of the Act;
- the adjudicator committed a jurisdictional error or otherwise committed an error justifying an order in the nature of *certiorari* quashing the determination; and
- the plaintiff was denied natural justice in the adjudication.

The only issues which the respondent is entitled to agitate in the adjudication response are those issues dealing with reasons for withholding payment which have been indicated in the payment schedule in accordance with s.14 (3);³

The purpose of s 13(1) and (2), s 14(1), (2) and (3), and s 20(2B) is to require the parties to define clearly, expressly and as early as possible, the issues in dispute between them;⁴

These are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s 22.⁵

The content of payment claims was addressed in *Multiplex*:

*A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute.*⁶

Section 13 of the Act does not expressly require the payment claim to include reasons for the claimed entitlement to a particular progress payment. The sole requirements found in subsection 13(2), are that a payment claim:

- (a) must identify the construction work (or related goods and services) to which the progress payment relates;

3. Einstein J in *John Holland v Cardno MBK* at paragraph 12 citing *Multiplex Constructions Pty Limited v Luikens & Ors* [2003] NSWSC 1140 (Palmer J) at paragraph 67.

4. *Ibid.*

5. *Ibid.*

6. Einstein J in *John Holland v Cardno MBK* at paragraph 14 citing Palmer J in *Multiplex* at paragraph 76.

- (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
- (c) must state that it is made under the Act.

Justice Einstein held the view that a payment claim clearly is a claim to an entitlement to be paid a progress payment. It required as an *essential condition* that the document by which the payment claim was put forward, *include*, sufficient information to identify *what the claim is*. For a claim to be *valid*, the statutory regime requires the claim to be comprehensible by the respondent; that the claim is supported by the relevant documentation.

This argument was based on the requirement in Section 14(3), that the respondent indicate *why* the scheduled amount is less than the claimed amount and to give the respondent's reasons for withholding payment. This requirement can only be justified by the proposition that the payment claim will identify in a fashion comprehensible to a respondent, just what the claim is. Section 22(2)(c) requires that the application must '*relate*' to the payment claim.

Justice Einstein noted that there are no words within Section 13(2) which required the claimant to do otherwise than:

- to identify the subject construction work to which the progress payment relates [subsection (2)(a)];
- to indicate the amount of the progress payment that the claimant claims to be due [subsection (2)(b)]; and
- to state that the claim is made under the Act. [subsection (2)(c)].

Approaching the question in terms of Section 20(2B)

Justice Einstein addressed several issues arising from the terms of Section 20(2B) and considered that:

Whilst a claimant which provides the most minimal amount of information in its payment claim may even so, be seen to technically comply with section 13, such a claimant will expose itself to an abortive adjudication determination if it be that:

- *the respondent is simply unable to discern from the content of the payment claim, sufficient detail of that claim to be in a position to meaningfully verify or reject the claim: hence not then being in a position to do otherwise than to reject the whole of the claim on the basis of its inability to verify any part of the claim;*
- *the claimant then elects to include the missing detail in the adjudication application with the inexorable consequence that the respondent is barred by section 20 (2B) from dealing with that detail/matter in its adjudication response;*
- *the adjudicator relies in determining the adjudication application upon the detail supportive of the payment claim which first emerged as part of the adjudication application (emphasis added).⁷*

7. *John Holland v Cardno MBK* at paragraph 22

Justice Einstein went on to observe:

For those reasons whilst it is not permissible to construe section 13 as providing that in order to be a valid payment claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2 (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.⁸

Justice Einstein addresses the question in terms of the adjudicator's power:

*An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside **the ambit or scope of] the materials which were provided in the payment claim, for the reason that the adjudicator only has power to make a determination based upon:***

- *The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "duly made by the claimant in support of the (payment) claim": see section 22 (2) (c)] (emphasis added).⁹*

It is suggested that his Honour's use of the word 'materials' here is significant and indicates the importance of ensuring the documentation supporting the payment claim goes beyond merely identifying the 'issues' of 'claims' raised.

This also suggests that at a practical level at any rate, the observations in paragraph 76 of Justice Palmer's judgment in *Multiplex* quoted above, must be read closely. There is, on Justice Einstein's analysis, real risk in relying upon a cryptic payment claim, if one is to be confident that, in Justice Palmer's words, there is 'precision and particularity ... reasonably sufficient to apprise the parties of the real issues in dispute'.

It is crucial that all possible grounds for the claim or head of claim, are identified in the payment claim.

The same applies to the payment schedule. Any submissions (and relevant documentation) furnished in the adjudication response, have to have been 'duly made by the respondent in support of the (payment) schedule'.

Both sub paragraphs (c) and (d) of sub section 22(2) refer to submissions 'duly made'.

Justice Einstein explains:

The emphasis upon submissions "duly made" makes clear that the scheme really addresses the issues which have been thrown up once the payment claim has been served and the responsive payment schedule then served ... The adjudication application will relate to a particular payment claim and payment schedule [section 17 (3) (f)]. The central significance of the entitlement of the applicant to include submissions as part of its adjudication application is because those submissions have to be supportive of the payment claim. Those submissions cannot constitute a payment

8. *John Holland v Cardno MBK* at paragraph 23.

9. *John Holland v Cardno MBK* at paragraph 24.

*claim or part of it. The central significance of the entitlement of the respondent to include submissions as part of its adjudication response is because those submissions have to be supportive of the payment schedule. Those submissions cannot constitute a payment schedule or part of it.*¹⁰

The limitation upon additional submissions

Justice Einstein considered whether shortcomings in documentation may be addressed by the adjudicator requesting further written submissions from either party. His Honour observed (as obiter) that:

*... it would seem unlikely that the legislature would have intended the provisions of section 21 (4) (a) and (b) to permit a radical departure from the statutory scheme described above. Rather it seems likely that these sub-sections are to be read as permitting no more than additional submissions which clarify earlier submissions: those earlier submissions being constrained in the manner above described (emphasis added).*¹¹

Where the adjudication application contains parameters not telegraphed in the payment claim

His Honour drew a distinction between circumstances:

- *where the claimant for the first time advances a new contractual basis for a payment claim in the adjudication application; and*
- *where the claimant for the first time seeks to deploy in the adjudication application, supporting documentation of one type or another (emphasis added).*

New contractual basis

His Honour considered that an '*... abortive adjudication determination likely to result from the advancing [within the adjudication application] of a new contractual basis for a payment claim.*'

Supporting documentation

The position in respect of new documentation is far less clear. His Honour observed that:

The deploying for the first time in the adjudication application, of supporting documentation will require careful attention and becomes a matter of degree and detail. However in the main I do not see that a respondent which, by reason of insufficient information supplied with the payment claim, is unable to verify that claim, and says

10. *John Holland v Cardno MBK* at paragraph 25.

11. *John Holland v Cardno MBK* at paragraph 26.

as much in the payment schedule [only later to receive as part of the adjudication application, the supporting documentation which should have been earlier supplied in order to permit a meaningful payment schedule response], will be otherwise than barred by section 20 (2B) from including in its adjudication response reasons for withholding payment arising by reference to the later supporting documentation. It could not be said that those reasons were already included in the payment schedule provided to the claimant. A complaint about inability to verify a claim because of insufficient information is not synonymous with reasons for dealing with a properly supported claim (emphasis added).

Challenges based on jurisdictional error and denial of natural justice

John Holland challenged the determination on the basis that it was a jurisdictional error for the adjudicator to rely on matters which were the subject of the adjudication application, which had not previously been raised in Cardno MBK's payment claim.

John Holland also asserted that it was denied natural justice by the adjudicator not providing it with an opportunity to adequately respond to the claim in its Payment Schedule and accordingly it was not able to present an adequate defence to this claim in its adjudication response (by reason of section 20(2B)).

Dealing with the challenges

John Holland challenged the determination in respect of four heads of Cardno MBK's claim. Only three of the four challenges were pressed at the hearing, each based on both jurisdictional error and denial of natural justice.

Variation claim 6

In what his Honour regarded as the clearest of the three cases, Cardno MBK had in its adjudication application changed its ground, by putting an alternative contractual basis, to that put in the payment claim in respect of this particular head of claim.

It followed that John Holland's payment schedule did not address the alternative contractual basis, and on his Honour's analysis, section 20(2B) operated to preclude John Holland from dealing with the alternative contractual basis in its adjudication response.

Critically, the adjudicator accepted Cardno MBK's alternative contractual basis for that head of the payment claim as determinative of Cardno MBK's entitlement. In doing so, his Honour held that the adjudicator not only fell into jurisdictional error, there was a denial of natural justice.

Had the adjudicator invited John Holland to make further submissions in respect the alternative contractual basis, his Honour observed that this could have cured the denial of natural justice.

Progress claim 39 – construction stage services timesheets

Cardno MBK's payment claim had included a claim for consulting engineering services in a period before the payment claim had been made. The claim was based on professional time spent during the construction phase of the project. The payment claim had neither attached nor specifically referred to timesheets, although Cardno MBK's invoices, which were attached to the payment claim did particularise the time spent and identify the personnel involved.

The payment claim had not outlined the contractual basis for this head of claim.

John Holland's payment schedule rejected the head of claim on the basis that it was not supported by approved timesheets, in accordance with the agreement between the parties.

The adjudicator determined Cardno MBK was entitled to some \$29,767.13 in respect of this work, which was supported in the adjudication application, by unapproved timesheets and contentions as to the contractual basis of the head of claim. The adjudicator undertook an inspection of the site and concluded that the time sheets generally supported the labour hours claimed. The issue was thus determined on timesheets which had not formed part of the payment claim.

His Honour held:

Whilst the matter is certainly not clear beyond doubt my own view is that in this particular state of affairs it was impermissible for the claimant to raise these matters for the first time in the adjudication application. Had the respondent sought to treat with these issues in its adjudication response, it would have been in breach of section 20 (2B).¹²

In result the adjudication miscarried – for the same reasons as have been given in relation to challenge 4. It was also a denial of natural justice ...

Progress claim No 8 – construction stage services timesheets

The payment claim did not expressly refer to, identify or particularise a head of its claim as derived from Progress Claim 8. The amount of \$59,370 claimed *in the adjudication application* under this head was (by deduction), a component of an amount described in a reconciliation attached to the payment claim as 'Total invoiced (up to 5/9/03)'. The contractual basis of the head of claim and particulars of the calculation of the time expended were however only given in the adjudication application.

John Holland had nevertheless responded to this head of claim in its payment schedule, rejecting the claim by reason of the lack of timesheets.

12. *John Holland v Cardno MBK* at paragraphs 47 and 48.

In addition to the additional (and fatal) issue of lack of identification in the payment claim, this head of Cardno MBK's claim was also confronted by the same obstacles as raised in the other two challenges.

Justice Einstein observed:

In those circumstances I do not see that the relevant provisions of the Act were enlivened at all in relation to this item ...

The adjudicator determined the whole of the item the subject of [the] challenge ... upon the mistaken assumption that the Act had been enlivened. The determination clearly miscarried in relation to the item ...

The payment claim was defective. The determination was misconceived. The claim was invalid and effectively "writ in water".¹³

13. *John Holland v Cardno MBK* at paragraphs 56 to 58.

Notes for Contributors

Contributions to the Journal are welcome, and should be sent in hard and soft copy to:

Russell Thirgood
Editor
The Arbitrator & Mediator
National Office, Level 1, 190 Queen Street, Melbourne, 3000
national@iama.org.au

Material should be submitted in the form of articles, case notes, practice notes or the like. Letters to the editor will not normally be published in this journal, and then publication will be at the discretion of the Editor.

Contributors should note the following:

1. The manuscript, including footnotes, should be double-spaced typescript on one side only of A4 paper. The Contributor(s) name(s) and position(s) (for publication), forwarding address (not a PO Box) and contact numbers should be attached to the manuscript.
2. Two copies of the submission should be provided; one in hard copy, another in soft copy. The maximum length of each submission is 5,000 words.
3. The manuscript should be in its final form, as corrections on proofs will generally be limited. Manuscripts may on occasion be edited to correct errors, clarify meaning or enhance expression. Minor amendments may occur without the Editor seeking the Contributor's approval.
4. In the preparation of manuscripts the Journal Committee recommends the use of the Commonwealth Government's *Style Manual for Authors, Editors and Printers* (6th Edition) and the handbook derived from it, the *Little Book of Style*, both available from Government Information Shops in capital cities.
5. Contributors are totally responsible for the accuracy of case names, citations and other references, spelling judges' names, accuracy of quotations, etc.

THE ARBITRATOR & MEDIATOR AUGUST 2004

6. It is assumed that a submission to *The Arbitrator & Mediator* has not been submitted to another publisher or journal. Accordingly, it is the Contributor's responsibility to inform the Journal Committee of any previous publication of the submission. It is also the Contributor's responsibility to obtain, from the previous publisher or journal, express written consent that the submission may be published in *The Arbitrator & Mediator*.
7. On publication, unless otherwise expressly agreed in writing, copyright is vested in the Institute of Arbitrators and Mediators Australia.
8. Articles published in *The Arbitrator & Mediator* are critically appraised or reviewed by academic or professional peers of the Contributor.

Style Points

- (a) In an article all case, journal and book references should appear not in the text but as footnotes, numbered consecutively throughout.
- (b) Levels of headings should be clearly indicated.
- (c) Authorised reports should be used in citations.
- (d) Gender-neutral language should be used.
- (e) A colon should be used to introduce block quotations, lists set off from the text, and run-in lists except those that begin with for example, that is, including, such as and so on, which do not require punctuation.
- (f) Hyphens and dashes should be differentiated.
- (g) The Contributor is to set out below the title of the submission his or her name and in the first footnote brief details of his or her appropriate qualifications.

Deadline for Submissions

All submissions for the December 2004 edition must be with the Editor by 1 October 2004.

Advertising

The Arbitrator & Mediator is available for the placement of advertisements. A list of advertising rates appears below. Our readers include leading professionals from a wide range of professions including law, architecture, engineering, psychology, building and construction, valuers and academics. If you want to reach Australia's leaders, advertise in this journal.

Note that advertisements must be approved for publication by the Editor. Advertisements should be submitted to the Editorial Office or via e-mail at national@iama.org.au.

Rates for Display Advertising

	<i>Casual</i>	<i>2 issues</i>	<i>3 issues</i>
FULL PAGE is 190 x 130 mm	\$500	2 x \$400	3 x \$300
HALF 130 x 95 mm	\$300	2 x \$220	3 x \$180
QUARTER 65 x 95 mm	\$150	2 x \$125	3 x \$100

Preparing Your File For Output

To try to eliminate any problems that may occur during production we established this page to help answer any questions developers may have about file preparation.

If you require any further assistance please e-mail us at national@iama.org.au.

Digital files should be composed preferably on a Mac platform and e-mailed.

When Preparing Your Files

1. Always include all screen and printer fonts used in any document or imported graphic, even if they are standard fonts.
2. When sending a job, include only the files that are going to be imaged. Additional files can create confusion and delay the processing of that order. Be sure to label all the files appropriately so they are easily identifiable.
3. All colors should be specified as Spot colours.
4. Include all linked graphic files and please provide only those files necessary for each particular project and always include a PDF proof.

When sending a Quark file (preferred option)

1. Use "collect for output" when submitting files.
2. All graphics should be in the same folder as the Quark document.
3. Do not save the pages as an .eps.
4. Do not insert an exported "Quark EPS" file back into your Quark document.
5. Include any special extensions required to open and output the document.

When sending Illustrator images (preferred option)

1. Save all files as .eps.
2. Do not parse files.
3. Convert fonts to outlines.
4. Include all placed or linked components.
5. Specify Pantone colours correctly.

The Institute provides:

Dispute Resolution Services:

- Access to a wide range of highly qualified and experienced dispute resolvers, who have been graded as Arbitrators, or accredited as Mediators, Adjudicators or other ADR practitioners
- Nomination of Arbitrators, Mediators, Adjudicators and other ADR neutrals from lists of practitioners accredited by the Institute on the basis of their training and experience and compliance with the Institute's CPD requirements
- Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)
- Mediation & Conciliation Rules
- Expert Determination Rules
- Administered Industry-based Consumer Dispute Resolution Schemes
- Practice Notes for Practitioners
- Assistance in dispute resolution process selection or design, and available practitioners

Education and Training:

- The Professional Certificate in Arbitration (in conjunction with the University of Adelaide and provider universities across Australia)
- The Practitioner's Certificate in Mediation & Conciliation
- Training programs in other forms of ADR, such as expert determination (or appraisal) and adjudication
- A high quality Continuing Professional Development Program delivered across Australia, covering arbitration, mediation, conciliation, expert determination (and appraisal), adjudication and other forms of ADR
- Pupilage training and experience for newly-qualified practitioners

Other Services:

- A high quality refereed Journal, published regularly
- A National Newsletter
- A Website
- A National Office (located in Melbourne)
- Chapter offices in States and Territories, which provide administrative services, as well as regular educational and networking activities, Chapter newsletters etc
- Annual National Conference, featuring an interesting and varied program dealing with topics of interest in arbitration and ADR

**High Quality Professional Dispute Resolution Services,
Education and Training**

**THE
INSTITUTE of
ARBITRATORS & MEDIATORS**
—  —
AUSTRALIA

