Improving Arbitration in the New Millenium

Ian D Nosworthy[1]

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 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:*
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> > *"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:

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.

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