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President's Message

Tim Sullivan, President

There have been, and always will be, disputes in commercial endeavours. Most, if not all, commercial disputes are resolved at some time or another. It is not necessary to enumerate the various mechanisms presently available for resolving disputes but it is worth noting that the Institute of Arbitrators and Mediators Australia's is the only national body of professionals that engages in facilitating the resolution of disputes, and the training and accrediting of professionals for the independent neutral roles in dispute resolution.

The Institute is a professional organisation that draws its strength from having within its national and international membership, people of the highest calibre from many cultures and professional disciplines such as academics, social workers, archaeologists, lawyers, scientists, engineers, architects, economists, loss assessors, public servants, medical practitioners, telecommunications experts, builders, government policy advisors, administrators, insurance specialists, management consultants and so on.

There is great strength in having the range of perspectives, which this diversity brings to bear, and great strength in having the finite specialists from many of the professions.

It is with this sound foundation that the Institute has positioned itself as the organisation of choice for alternative dispute resolution in Australia. That, however, is not where we rest and it is rewarding to see that the efforts of many of our members over our first 30 years of existence is now providing the platform from which we have been able to play our part in the development and refinement of alternative means of dispute resolution.

A good example of the confidence placed in the Institute is that it is the only organisation to have been appointed by the governments in all operative jurisdictions throughout Australia as both an Authorised Appointor or an Authorised Nominating Authority and an Authorised Trainer for adjudicators under the state based legislation covering payment disputes in construction contracts.

The Institute is also working with governments around Australia to develop and refine legislation for arbitration and adjudication of disputes. We are also refining our working models, rules and procedures for efficient, economical and reliable dispute resolution. The Institute's *Rules for the Conduct of Arbitration*, *Rules for Conduct of Mediation* and *Rules for Conduct of Conciliation* and model dispute resolution clauses for inclusion in contracts are being used extensively throughout Australia.

Recently, there has been a high take-up rate of statute-based adjudication as a means to address progress payment disputes in the construction industry. Although there may be various ways to interpret the messages, which this may send, it must be recognised that change creates opportunities. As the statute based adjudications only provide interim relief, that is, they do not finally determine the claimant's or the respondent's rights in respect of the monies claimed or paid, the Institute has recognised the need to provide efficient dispute resolution mechanisms for the final resolution of the parties rights by mediation, expert determination or arbitration. New models for arbitration presently being developed by the Institute will be available in 2005.

In response to those organisations that have expressed a desire to be a part of and to support the Institute in its work, the Institute is moving toward making corporate membership available in 2005. The mutual short term benefits of such membership is easily recognised but the long term benefits to corporate members are almost inestimable in such areas as providing corporate members with a vehicle to promote alternative dispute resolution and a forum for their input during the development and changes to legislation, rules, training, practice and procedure.

Next year, like the Family Law Court of Australia, the Institute will celebrate its 30th Anniversary. Founded in 1975, as the Institute of Arbitrators Australia it subsequently changed its name to the Institute of Arbitrators and Mediators Australia. The 2005 Annual Conference, which will be celebrated in Canberra from 27 – 29 May, will not only showcase our achievements over the first 30 years but will, as our previous conferences have done, provide the best presenters and presentations on alternative dispute resolution in Australia. The three streams at the 30th Anniversary Conference will cover mediation, arbitration and adjudication. The Institute is pleased to see the early level of interest from those wishing to attend.

Finally, I would like to recognise the formation of the Asia Pacific Regional Arbitration Group (APRAG) and the role of the Australian Centre for International Commercial Arbitration (ACICA) in bringing together over 200 participants from 21 countries for the Asian Arbitration Conference held in Sydney recently. APRAG was formed to provide a forum for arbitral bodies of various countries in the Asia Pacific engaged in international commercial arbitration. APRAG will stimulate both bilateral and multilateral cooperation in commercial dispute resolution in the region and we wish the new organisation success.

Editor's Commentary

Russell Thirgood, Editor

Welcome to this final issue of *The Arbitrator & Mediator* for 2004 – a year that has passed by at seemingly incredible speed!

Throughout the year a common theme has emerged. Most submissions to the journal have explored ways in which alternative dispute resolution (ADR) can be improved to ensure that those who use ADR services (and indeed the community at large) can have a product which is cost effective, quick, fair, reliable and user-friendly. It is within this context that the Institute held its 2004 conference, 'New Directions in ADR' – which I might add has produced a number of high quality papers, some of which we have been able to publish in the journal.

At times, it seems as though this quest to refine ADR to produce the 'perfect product' is as elusive as finding the Holy Grail. Like those who have sought to uncover the Grail, our search has taken us through various countries and cultures. In Craig Pudig's paper, 'Domestic Lessons from International Arbitration', we learn, in part, of the Asian influence in modern ADR. This influence has led many ADR practitioners to introduce a level of 'flexibility' into the process to ensure that disputes are settled and not adjudicated. Those of us who have spent time searching for the Grail in 'western' countries, and who are well-versed in the adversarial system, immediately see the pitfalls of breaching that sacred and revered concept of natural justice – something which, throughout the Ages, has been held up as if it contained all of the secrets of the Universe. At times, it seems as though ADR is at the epicentre of the clash of competing civilisations and philosophies. How then, against that backdrop, can we possibly find 'the solution' that we have all been looking for?!

But the search goes on and in this edition of the journal we start by receiving an update from the United Nation's Commission on International Trade Law (UNCITRAL), as it gets ready to celebrate the 20th anniversary of the adoption of the Model Law. Corrine Montineri and Franca Musolino analyse ways in which the Model Law can be strengthened with respect to interim measures of protection. Scott Ellis then explores ways in which arbitrators can deal with the curse of the self represented party – something that surely is an obstacle (or maybe a blessing in disguise) for finding the answers that we are looking for. While these two papers deal with discrete and specific issues, and it certainly is a truism that 'the devil is in the detail', the submissions from Craig Pudig and Robert Hunt (both papers that were originally presented at this year's national conference) go to the heart of the quest before us by examining what's wrong, what's right and what can be done about arbitration and ADR.

Well, if all of that is not enough to ensure that your journey is very interesting, but perhaps rather confusing, finally some clarity. Enter Max Tonkin and Mal Ferrier. For Tonkin and the Department of Commerce, the Grail is staring us all in the face and has been for the last ten years – quite simply it is expert determination, of course! But, if we are to believe Ferrier, then all that is needed is an interpretive engineer to unlock the codes and riddles that are before us.

I hear the sighs from my Queensland colleagues in the far north of this great continent! During intensive training over the last year the Queensland chapter has discovered that, at least in respect of the construction industry which has been such a wonderfully fertile land, all will be revealed and the meaning of life itself discovered provided that claims are made pursuant to the B*uilding and Construction Industry Payment Act 2004* and the adjudication process is followed. To satisfy the Queenslanders (and I am a proud member of that Chapter) we have included a number of case notes from our southern colleagues who have known such truths for a number of years now.

I hope you enjoy this final edition of the journal for 2004 as I have. Many thanks are extended on behalf of the journal committee to all those who have contributed papers over the year and have made the journey so fascinating. As to whether or not there is a Holy Grail, I suspect that is a question that perhaps can never be answered. On a practical level, each case is different and the more journeys that each of us undertakes, and the more we learn from the experience of others, the more likely we are to at least survive to join the next quest. We may never find the Grail, but at least we can enjoy looking for it, share the stories along the way, point out to our colleagues some of the dry gullies and perhaps resolve a few skirmishes along the way. That, ultimately, is the aim of the Institute and this journal.

On behalf of the Journal Committee I wish you a happy and peaceful festive season.

UNCITRAL's Current Work on Interim Measures of Protection Granted by Arbitral Tribunals and their Enforcement

Corinne Montineri and Franca Musolino [1]

Introduction

The year 2005 marks the 20th anniversary of the *UNCITRAL Model Law on International Commercial Arbitration* ('the UNCITRAL Model Law'). The anniversary will provide an opportunity to assess its impact on the harmonisation of the law of international commercial arbitration and consider possible areas for its further refinement or modernisation. The UNCITRAL Model Law has had a significant impact. Since its adoption by the Commission in June of 1985, legislation based on its articles has been enacted in over 48 jurisdictions,[2] including Australia.[3] The UNCITRAL Model Law is credited with having provided a solid starting point for those countries that did not have arbitration legislation and providing template provisions to better harmonise existing national arbitration laws.[4]

Whilst the UNCITRAL Model Law has been very successful, there have been calls to revise or further refine some aspects of its provisions. The UNCITRAL Working Group on

1. Corinne Montineri and Franca Musolino are Legal Officers in the UNCITRAL Secretariat whose principal areas of responsibility include dispute settlement. UNCITRAL is the core legal body of the United Nations system in the field of international trade law. The views expressed in the article are the personal views of the authors and not necessarily those of the United Nations.
2. Legislation based on the *UNCITRAL Model Law on International Commercial Arbitration* has been enacted in Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda, Bulgaria, Canada, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda: overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe. Source <www.uncitral.org.>.
3. The *International Arbitration Act 1974* ('the International Arbitration Act'), as amended, provides that the UNCITRAL Model Law will have the force of law in Australia in relation to international arbitrations, except to the extent that parties opt-out by agreeing that the Model Law will not apply (see section 21).
4. 'UNCITRAL's Model Law in International Commercial Arbitration of 1985 was a success. Presently almost 40 States, modernizing their arbitration law, have adopted the Model Law. Several States adopted the Model Law also for domestic arbitration. Germany did so in 1988. The Model Law also has had a harmonizing effect on new arbitration legislation in countries which did not adopt the Model Law as such, e.g., the English Arbitration Act 1996 [....]'; Peter Sanders, 'UNCITRAL's Model Law on Conciliation', (2000) 12 *International Journal of Dispute Settlement*, p. 1.

Arbitration, one of six Working Groups of the UNCITRAL,[5] has for a number of years been considering several issues relating to the UNCITRAL Model Law. One issue on the Working Group's agenda is whether the requirement set out in article 7(2) (and a similar requirement in article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)) ('the New York Convention') that the arbitration agreement 'shall be in writing' imposes an overly strict form requirement.[6] The Working Group is currently examining a text to revise article 7 of the Model Law as well as how best to revise article II(2) of the New York Convention.

The topic of interim measures has been on the Working Group's agenda since the Commission agreed, at its 33rd session in 1999, that one of the priority items for the Working Group should be the 'enforceability of interim measures of protection'.[7] At that session, the Commission noted that the 'question of enforceability of interim measures of protection issued by an arbitral tribunal was of utmost practical importance and in many legal systems was not dealt with in a satisfactory way.'[8] The Commission also heard a suggestion that, in addition to enforcement of an interim measure in the state in which the arbitration took place, work should also be undertaken on enforcement outside of that state.[9] Also, there were some suggestions that it would be useful to further study whether provisions dealing with assistance by courts (in the form of interim measures ordered before an arbitral tribunal was formed or during arbitral proceedings) was needed and a further suggestion was made that consideration be given as to whether the power to order interim measures should be allowed, in certain circumstances, to be ordered on an *ex parte* basis.[10]

Deliberations on the topic of interim measures began at the 32nd session of the Working Group in the year 2000, during which general support was expressed for a legal regime governing the enforcement of interim measures of protection by an arbitral tribunal.[11] At that session, there was also a preliminary analysis as to whether or not uniform rules on court-ordered interim measures of protection were needed.[12] Discussions continued at the 33rd session of the Working Group with an agreement that the proposed new article (tentatively titled article 17bis of the UNCITRAL Model Law on International Commercial Arbitration) should include an obligation on courts to enforce interim measures of protection if certain conditions were met.[13] At its 34th session, held in 2001, whilst discussions continued on

5. Further information about the other working groups of UNCITRAL may be found at <www.uncitral.org>. Working Group papers and Commission documents referred to below may all be found at <www.uncitral.org>.
6. For background information on this matter, see the document prepared for the 32nd session of the Working Group on Arbitration (March 2000), referenced A/CN.9/WG.II/WP. 108/Add.1, in particular, paras. 5-10.
7. *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 371-373.
8. Ibid., para. 371. The document on which the Commission based its conclusion was A/CN.9/560, paras. 115-127.
9. Ibid.
10. Ibid.
11. See the report of the Working Group on Arbitration on the work of its 32nd session (March 2000), document referenced A/CN.9/468, paras. 60-70.
12. Ibid., paras. 85-87.
13. Ibid., paras. 78-106.

defining the recognition and enforcement of arbitral-ordered interim measures as contained in draft article 17bis, the Working Group also considered proposals to more comprehensively define the scope of the power of an arbitral tribunal to order interim measures by revising article 17 of the Model Law.

At its most recent session, held in September 2004, the Working Group had before it a text (tentatively numbered draft article 17 of the UNCITRAL Model Law) regarding the power of an arbitral tribunal to order interim measures, which included a power to order interim measures on an *ex parte* basis. That text is set out in the Annex (see below). The Working Group had at its earlier 40th session, held in February 2004, considered a provision on recognition and enforcement of arbitral ordered interim measures (tentatively numbered draft article 17bis of the UNCITRAL Model Law) also set out in the Annex (see below). A further article setting out the power of courts to order interim measures in support of arbitration (for insertion in the UNCITRAL Model Law, tentatively numbered 17ter) is also still a matter being considered by the Working Group.[14]

This article will set out briefly the current issues under consideration by the Working Group in respect of both the power of an arbitral tribunal to order interim measures of protection and in respect of the recognition and enforcement of such measures by courts.

The arbitral tribunal's power to order interim measures of protection

Article 17 of the Model Law expressly provides that an arbitral tribunal may take such interim measures as the tribunal may consider necessary in respect of the subject matter of the dispute. That power is subject to a contrary agreement by the parties (an opt out clause in the opening words of article 17 which reads 'unless otherwise agreed by the parties') and the power may only be exercised 'at the request of a party'.[15]

As noted earlier, whilst work initially commenced from the perspective of preparing an enforcement regime for arbitral-ordered interim measures, it soon became clear that a more comprehensive statement of the arbitral tribunal's power to order interim measures should be considered, including: a definition of interim measures; a list of the conditions required to be met before such a measure was granted; a provision setting out when security should be provided by the party requesting the measure;[16] a liability regime setting out liability for any damage caused to the responding party by an unjustified measure;[17] and a provision imposing a continuing obligation of disclosure on the party requesting the interim measure.[18]

Interim measures of protection, often not defined in arbitration rules providing for their issuance,[19] can encompass a wide variety of measures including: orders for not removing

14. The proposed text and alternative variants are set out and discussed in document A/CN.9/WG.II/WP. 125, paras. 40-43.
15. See draft article 17(1) set out in Annex below.
16. For discussion on this aspect see A/CN.9/523, para. 46.
17. For a discussion of a possible liability regime see A/CN.9/WG.II/WP.127, which sets out the reasons for inclusion of such a regime and also include national legislative responses to that question.
18. A/CN.9/545, paras. 91-92, A/CN.9/569, paras. 66-68.
19. For example, article 26 of the UNCITRAL *Arbitration Rules* allows an arbitral tribunal to take any interim measures it deems necessary and merely provides that such measures 'include measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.'

goods or assets from a place or jurisdiction; preserving evidence; selling goods; and, posting a monetary guarantee. An interim measure may be imposed for the duration of the arbitration proceedings or it may be of a more temporary nature and expected to be modified as matters evolve. The measure may be in the form of an order by the arbitral tribunal or in the form of an interim 'award'.[20]

In drafting a revision of article 17 of the UNCITRAL Model Law, the Working Group decided that a definition of interim measures would be neither possible nor practical. Instead, after a general description of an interim measure, referring to its temporary nature and its issuance before the dispute is finally decided, paragraph (2) of draft article 17 sets out a list of types of interim measures. That list is not intended to be exhaustive. The current draft provides generic broadly cast categories describing the functions or purposes of various interim measures rather than seeking to provide strict definitions describing an interim measure. By focusing on a purpose or function-based definition, the current draft provides a flexible approach covering the possible circumstances in which an interim measure might be sought. A non-exhaustive generic list balances the need to provide some guidance in respect of the powers of the arbitral tribunal with the need to allow flexibility to enable the development of arbitral practice without overly formalistic rules. As well, it is hoped that the definition will also provide some reassurance to courts at the point of recognition or enforcement of an interim measure.

In respect of *inter partes* measures, the possibility of requiring security is left to the discretion of the arbitral tribunal. The Working Group has also agreed to include a liability provision for interim measures of protection that is subsequently shown to have been unjustified (see paragraph 6bis of the proposed revised draft of article 17).

The position under Australian Law

Section 23 of the *International Arbitration Act* provides that Chapter VIII of the Model Law 'applies to orders by an arbitral tribunal under Article 17 of the Model Law requiring a party:

(a) to take an interim measure of protection; or

(b) to provide security in connection with such a measure;

as if any reference in that chapter to an arbitral award or an award were a reference to such an order'.

Section 23 implements article 17 of the UNCITRAL Model Law without change and thus confers power on the arbitral tribunal to order interim measures, and security in respect thereof. The proposed revised draft article 17 does provide further information that could clarify the power and the circumstances in which it should be exercised.

20. Interim measures are referred to by a variety of expressions including: 'interim measures of protection', 'provisional orders', 'interim awards', 'conservatory measures' or 'preliminary injunctive measures'. For a discussion of the various purposes of interim measures see A/CN.9/WG.II/WP.108, paras. 63-66.

Recognition and enforcement of interim measures of protection

Article 17 of the UNCITRAL Model Law expressly sets out the power of an arbitral tribunal to order interim measures of protection. The Model Law, however, is silent on the matter of recognition and enforcement of such measures. A number of states have adopted legislative provisions dealing with the court enforcement of interim measures, and it was considered desirable that a harmonised and widely acceptable regime be prepared by UNCITRAL. In respect of recognition and enforceability of interim measures issued by an arbitral tribunal, a variety of approaches have been taken by legislatures. In many states, the legislation is silent on this point. In others, including some of those that have incorporated article 17 of the Model Law empowering the arbitral tribunal to order interim measures of protection, there are express provisions for recognition and enforcement of those interim measures.

The practical question often discussed by practitioners is the enforceability of interim measures of protection, both in the state where the arbitration is taking place and in other states. The need for enforceability is usually supported by the argument that a final award may be of little value to the successful party if, in the meantime, action or omission to act on the part of a party has rendered the outcome of the proceedings largely useless (e.g. by dissipating assets or removing them from the jurisdiction). If a party refuses to comply with an interim measure, then in many cases such refusal may be done without fear of potential adverse consequences, such as responsibility for costs. Furthermore, the provisions on court enforcement of interim measures, including the discretionary powers of the court in respect of that enforcement process, may reflect the interim nature of the measures and do not necessarily have to be the same as the rules governing the enforceability of final awards.

At various stages of the discussion in the Working Group, on the issue of enforceability of interim measures of protection, reference was made to the power of the arbitral tribunal to issue such measures, the scope of that power and the procedures to be followed in issuing interim measures. However, it was recognised that the issues of recognition and enforceability of interim measures of protection should be considered separately from the issue of the arbitral tribunal's power to order interim measures of protection and related procedural questions.

During the discussion on that matter, the Working Group considered possible approaches to the drafting of the uniform provision on recognition and enforcement. One approach identified was to base the uniform provision on articles 35 and 36 of the UNCITRAL Model Law, which sets out the regime for recognition and enforcement of arbitral award. The advantage of that approach is that the regime is known and tested in practice. However, some took the view that the regime should reflect the unique features of the interim measures and reflect the differences of such measures from final awards.

There is a broad agreement in the Working Group that the uniform regime should be based on the assumption that the court should not repeat the decision-making process in the arbitral tribunal that led to the issuance of the measure and that the enforcement process should not be delayed; in particular, the court should not review the factual conclusions of

the arbitral tribunal or the substance of the measure. The Working Group has taken the view that the court's discretion should be limited to procedural aspects of the enforcement of the measure. As it is often not clear whether an issue is to be considered procedural or substantive, the Working Group's approach to date has been to avoid making a distinction between interim measures and final awards and instead ensure that the enforcement regime for interim measures parallels as closely as possible the regime governing the enforcement of awards. Nonetheless, this matter is yet to be comprehensively discussed and determined by the Working Group.

In discussing how the enforcement regime of interim measures of protection could reflect the fact that such measures are temporary (in that the circumstances on the basis of which a particular measure is ordered by the arbitral tribunal may change by the time the court considers the request for enforcement or even thereafter), it is to be noted that the UNCITRAL Model Law on Cross-Border Insolvency[21] deals with the recognition of a foreign insolvency proceeding whose status may also change over time. Some of the solutions in that Model Law may serve as an inspiration in devising the enforcement regime of interim measures of protection. The relevant provisions in that Model Law are contained in articles 17(4), 18 and possibly 22(2). The development of the regime for recognition and enforcement of interim measures is still ongoing in the Working Group.

The position under Australian Law

Whilst section 20 of the International Arbitration Act provides that Chapter VIII of the UNCITRAL Model Law (which deals with recognition and enforcement of awards) will not apply where 'both Chapter VIII and Part II of this Act [which implements the New York Convention provisions on recognition and enforcement of awards] would apply in relation to an award', Chapter VIII of the UNCITRAL Model Law is applied to provide for recognition and enforcement of arbitral-ordered interim measures.

Effectively, this means that if an order for an interim measure is made or an order to provide security is made in connection with that interim measure, then the same regime that applies to arbitral awards in connection with their recognition and enforcement and the grounds for refusing such recognition and enforcement apply to the interim measure or security awarded in relation thereto.

Ex parte interim measures of protection

One aspect of the work on interim measures is whether or not to allow the possibility for an arbitral tribunal to order an interim measure of protection on an *ex parte* basis (i.e. without notice to the party against whom the measure is directed) and, if so, whether or not such orders should also be enforceable. The current text before the Working Group set out in draft paragraph (7) of the revised article 17 sets out the conditions required to order an interim measure on an *ex parte* basis and also provides some important safeguards to protect the party against whom such an order is made.

21. This Model Law was adopted in 1997. Its text may be found at <www.uncitral.org>.

The Working Group has yet to decide the general policy question as to whether or not to retain this paragraph 7 in the final text. To date, it has been considered the most contentious aspect of the work on interim measures.

There are strong views both for and against the inclusion of an *ex parte* measure. Proponents of such a regime emphasise that, in some circumstances, the element of surprise is crucial to prevent the other party to the arbitration from taking action that would either make the interim measure sought moot or unenforceable. As noted earlier, the proponents point to urgent situations such as the need to preserve crucial evidence.

There are, however, strong opponents to the inclusion of paragraph 7.[22] Such opponents argue that, given the absence of worldwide consensus on the question of *ex parte* interim measures, its introduction as part of a review of the Model Law could undermine the Model Law as well as undermine the principle that parties to an arbitration should be given equal treatment by the arbitral tribunal as contained in article 18 of the Model Law. These opponents argue that, given the potentially damaging consequences of an *ex parte* interim measure, the power to make such orders should be the sole reserve of courts. In addition, opponents argue that *ex parte* interim measures are rarely, if ever, sought or ordered in arbitrations and to that end question the need for inclusion of such a power.

Nonetheless, those in favor of a power to order interim measures on an *ex parte* basis argue that it is more important to develop a regime in which such measures can be monitored than to allow these measures to develop without such a regime.

To date, the Working Group has left the ultimate question of inclusion of draft paragraph 7 to be decided after the main features of the paragraph are determined. One unsettled aspect of the *ex parte* regime is whether or not the regime should be based on an 'opt out' basis, such that the regime will apply unless the parties agree otherwise or should be based on an 'opt in' approach such that it will only apply when the parties so agree. The 'opt out' approach is currently used both in the existing article 17 and in other provisions of the Model Law and is more typically used in legislative instruments than is opt in. Nonetheless, the Working Group has yet to decide on this issue and has further suggested other options including making the provision an optional provision for states to include when adopting the Model Law.[23]

Another feature included in draft paragraph 7 is when notice of the *ex parte* measure should be given to the other party. There are several options, namely as soon as the measure is taken, at some period thereafter or after enforcement of the measure. At present, the draft text requires the arbitral tribunal after it has made a determination in respect of the interim measure requested on an *ex parte* basis to 'give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application'

22. See for example, Professor Hans Van Houtte 'Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration' 2004 20 (1) *Arbitration International*, pp. 85-95.

23. For the most recent discussion on the opt out versus opt in approach see the report of the 41st session of Working Group held in September 2004 and contained in document A/CN.9/569 at paras. 18-21.

(paragraph 7(d) of the draft text). Whilst the Working Group has considered text that would allow deferral of notification in certain circumstances until after the enforcement of the measure, it failed to reach consensus as to whether the issue of court enforcement of preliminary orders should be dealt with in the revised draft of article 17.[24] A related feature is when the other party should be given an opportunity to be heard. At present, draft paragraph 7(e) requires that this be at the earliest possible time but not later than 48 hours after notice has been given to the other party.[25] An overarching safeguard included in the *ex parte* power is that orders made hereunder will expire after twenty days (paragraph 7(f)) and any extension can only take place once the other party has been given notice and an opportunity to be heard.

A further feature of draft paragraph 7 is whether or not security should be provided by the requesting party on a mandatory basis. Whilst security was initially seen as a crucial safeguard for the party against whom the measure was taken, the Working Group more recently expressed some preference for leaving that matter more expressly within the discretion of the tribunal.[26]

Conclusion

It is important to note that the power of an arbitral tribunal to order interim measures in an international arbitration is not dealt with in Australia beyond the present article 17 of the UNCITRAL Model Law. The current work of UNCITRAL will undoubtedly have an impact on the practice of arbitral tribunals to grant interim measures of protection. The practice with respect to interim measures – particularly with regard to the way those applications are handled by arbitral tribunals – is still evolving and there is hope that the current work of UNCITRAL will help build a worldwide consensus with respect to the standards and practices concerning the granting of interim measures by arbitral tribunals. Certain of the proposed modifications to article 17 may as well help parties and arbitrators in their practice with respect to interim measures. Similarly, providing a regime governing the enforceability of interim measures will help state courts in dealing with such applications and evaluating the effect of such measures. The question whether arbitral tribunals should be expressly empowered to grant *ex parte* interim measures remains a serious point of contention. This and other aspects of the work on interim measures will be further discussed at the next session of the Working Group on Arbitration to be held in New York in January 2005.

24. A/CN.9/569, paras. 46-51.
25. Ibid., paras. 52-61.
26. Ibid., paras. 35-38.

Annex

Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection*

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

"(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

"(a) Maintain or restore the status quo pending determination of the dispute;

"(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];

"(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

"(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

"(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

"(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

"(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

"(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

"(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

"(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the arbitral tribunal's own initiative, upon prior notice to the parties.

"(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that,

in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

"(7) (a) [Unless otherwise agreed by the parties,] where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure, the requesting party may file its application without notice to that party and request a preliminary order [directing that party to preserve the status quo until the arbitral tribunal has heard from that party and ruled on the application].

"(b) The provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

"(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

"(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application [, unless the arbitral tribunal determines [pursuant to paragraph 7 (i)[27]] that such notification should be deferred until court enforcement or expiry of the preliminary order].

"(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.

"(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the

27. Proposed subparagraph relating to deferral of notification for the purpose of allowing court enforcement:
"[(i) If notification by the arbitral tribunal risks prejudicing court enforcement of the preliminary order, the arbitral tribunal may defer notification to the party against whom the preliminary order is directed of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The duration of such deferral shall be indicated in the order and shall not exceed the maximum duration of the preliminary order. At the expiration of the period fixed for the deferral of notification, the arbitral tribunal shall give immediate notice to the party concerned of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.]"

form of an interim measure of protection [or in any other form]. Such confirmation, extension or modification shall take place only after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

"(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order.

"(h) Until the party against whom the preliminary order is directed has presented its case under subparagraph (7) (e), the requesting party shall have a continuing obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c)."

* As contained in A/CN.9/569.

Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)**

"(1) An interim measure of protection issued by an arbitral tribunal, that satisfies the requirements of article 17, shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application [in writing] to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.*

"(2) The court may only refuse to recognize [and] [or] enforce an interim measure of protection:

"(a) If, at the request of the party against whom it is invoked, the court is satisfied that:

"(i) *Variant 1*: There is a substantial issue as to the jurisdiction of the tribunal [[of such a nature as to make recognition or enforcement inappropriate] [of such a nature as to make the interim measure unenforceable]] [and no appropriate security was ordered by the arbitral tribunal in respect of that interim measure];

Variant 2: There is a substantial question relating to any grounds for such refusal set forth in article 36, paragraphs (1) (a) (i), (iii) or (iv); or

"(ii) Variant 1: That party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [, in which case the court may suspend the enforcement proceedings [until the parties have been heard by the arbitral tribunal] [until the parties have had an opportunity to be heard by the arbitral tribunal] [until the parties have been properly notified]];

Variant 2: Such refusal is warranted on the grounds set forth in article 36, paragraph (1) (a) (ii); or

"(iii) *Variant 1*: That party was unable to present its case with respect to the interim measure [in which case the court [may] [shall] suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

Variant 2: Such refusal is warranted on the grounds set forth in article 36, paragraph (1) (a) (ii); or

"(iv) The interim measure has been terminated or suspended by the arbitral tribunal or by order of a competent court; or

"(b) If the court finds that:

"(i) The interim measure requested is incompatible with the powers conferred upon the court by its laws, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

"(ii) *Variant 1*: The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.

Variant 2: Any of the grounds set forth in article 36, paragraphs (1) (b) (i) or (ii) apply to the recognition and enforcement of the interim measure.

"(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure of protection.

"(4) The party who is seeking or has obtained enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or amendment of that interim measure.

"(5) *Variant A*: The court where recognition or enforcement is sought may, if it considers it proper, order the other party to provide appropriate security for costs [unless the tribunal has already made an order with respect to security for costs] [unless the tribunal has already made an order with respect to security for costs, except when the court finds that the order is inappropriate or insufficient in the circumstances].

Variant B: The court where recognition or enforcement is sought may, if it considers it proper, order security for costs.

Variant C: The court where recognition or enforcement is sought shall not, in exercising that power, undertake a review of the substance of the interim measure of protection.

Variant D: The court where recognition or enforcement is sought may only order security for costs where such an order is necessary to protect the rights of third parties.

"(6) Paragraph (2) (a) (ii) does not apply.

Variant X: To an interim measure of protection that was ordered without notice to the party against whom the interim measure is invoked provided that the interim measure was ordered to be effective for a period not exceeding [thirty]

days and the enforcement of the interim measure is requested before the expiry of that period.

Variant Y: To an interim measure of protection that was ordered without notice to the party against whom the interim measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.

Variant Z: If the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17 (2), the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the interim measure is invoked."

* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure of protection. It would not be contrary to the level of harmonisation sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

** As contained in A/CN.9/547.

Arbitrators and Self Represented Parties

Scott Ellis [1]

Introduction

While there have been litigants in person or self represented parties (SRPs) for as long as there has been litigation, it appears that the increasing number of litigants is placing ever more pressure on the judicial system.[2] This is due to a variety of factors, although undoubtedly increased legal costs and the decline in availability of legal aid are major causes. It may, to some extent, be a result of the extent to which the judicial process has been demystified and information relating to it has become more generally available. Persons who represent themselves are also likely to have an increasingly significant impact on arbitration processes, particularly if arbitral procedures form part of industry based consumer dispute resolution schemes.[3]

The purpose of this article is to examine:

- some of the issues which litigants in person create for the courts;
- the responses of the court system to these issues; and
- whether the same or similar steps should be adopted by arbitrators dealing with unrepresented parties.

It is suggested that, where an arbitral procedure involves a 'traditional' hearing, the approach taken by courts in civil proceedings to assisting litigants in person should be adopted by arbitrators. However, arbitrators have a greater opportunity than courts to adapt procedures to the exigencies of the particular dispute before them and should be proactive to adopt or encourage the parties to adopt procedures that will minimise the disadvantages experienced by some SRPs, while remaining fair and efficient.

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2. See generally, Hon Justice RD Nicholson, 'Australian Experience with Self Represented Litigants' (2003) *ALR* p. 820; Hon Justice RD Nicholson, 'Litigants in Person' (2001) 5 *TJR* p. 181; Hon Justice Dean Mildren, 'Don't Give Me Any LIP – The Problem of the Unrepresented Litigant in Criminal Trials' (1999) 19 *Australian Bar Review* p. 30; *Federal Court Civil Justice System Strategy Paper*, Department of Attorney General, Dec 2003, viewed 10 May 2004, <www.ag.gov.au>; 'Erosion of Legal Representation in the Australian Justice System' February 2004, <www.lawcouncil.asn.au/> ; Western Australian Law Reform Commission, Review of the Criminal and Civil Justice System in Western Australia, Consultation Drafts Volume 1, *Litigants in Person Management Plans Issues for Courts and Tribunals*, Australian Institute of Judicial Administration Issues Paper, viewed 25 May 2004, <www.aija.org.au/onlinepub.htm>; 'The Unrepresented Party', Adversarial Background Paper No. 4, Dec 1996, <www.austlii.edu.au/au/other/alrc/publications>.
3. Such as the dispute resolution schemes required by sections 912A(1) and 1017G of the *Corporations Law* of financial services licensees who provide financial services to retail clients.

Issues for the court system

The paradigm of dispute resolution within which the court system operates is that the judge is impartial and does not participate in the investigation of the circumstances of the dispute. It is for the disputants themselves to investigate the factual and legal circumstances of the dispute and then present material to the court in a partisan fashion using established procedures.[4] It is said in support of this system that 'truth is best discovered by powerful statements on both sides of the question'.[5] Within this context, the ability of the parties, or their representatives, to marshal and present material to the court so as to make a 'powerful statement' is important to their prospects of success in the proceedings.

In general, parties involved in litigation in courts may appear in person or be represented by a legal practitioner.[6] Persons involved in litigation without legal representation are seen as being at a disadvantage compared to persons who are represented by competent legal practitioners.[7] In *Deitrich v R*,[8] Mason CJ and McHugh J said:

> *An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable to dispassionately assess and present his or her case in the same manner as counsel for the Crown.*

Real concerns can arise about the fairness of the court system towards the unrepresented. These concerns were expressed forcefully by Kirby J in *Re Refugee Review Tribunal; ex parte HB*:[9]

> *The applicant does not have counsel or a solicitor or any other advocate or representative. He has for a long time been detained in immigration detention. He is unable to earn funds to pay for a lawyer of his choice. He does not speak the English language. He claims to be a refugee. In such circumstances it would be an affront to justice for me to sit silent and allow him, unaided, to flounder in the mysteries of our court procedures and substantive law until he had adequately demonstrated an incapacity to present relevant evidence and argument. The judicial power of the Commonwealth does not oblige those who exercise it to engage in a charade of justice.*

There is material that suggests that self-represented litigants are less likely to be

4. The classic statement of this paradigm is found in *Jones v National Coal Board* [1957] 2 QB 55 at pp. 63-54.
5. Per Ld Eldon in Ex parte Lloyd (1822) Mont. 70, 72n, cited in *Jones v National Coal Board* [1957] 2 QB 55 at p. 63.
6. See for example, Order 4 Rule 3(1) of the *Rules of the Supreme Court* (WA), and Order 4 Rule 14(1) of the *Federal Court Rules*. Corporations which are parties to litigation are required to be represented by legal practitioners, subject to express permission of the courts: see for example, Order 4 Rule 3(2) of the *Rules of the Supreme Court* (WA), Order 4 Rule 14(2) of the *Federal Court Rules*. The requirement of exclusively legal representation is frequently modified in inferior courts and statutory tribunals. Such bodies may permit non-legal representation and exclude legal representation (or both).
7. This article is primarily concerned with the situation where there is one unrepresented party to proceedings and the other party or parties are represented. This article should not be taken as suggesting that lawyers have a monopoly on competent representation, or that all lawyers are equally competent.
8. (1992) 177 CLR 292 at 302.

successful than litigants who are represented.[9] It is not clear whether this is due to the fact that the party is self-represented, or perhaps a tendency of SRPs to pursue weak cases.

SRPs are generally seen as placing a greater burden on the legal system than parties who are represented by legal practitioners. There is a common assumption that trials which involve SRPs take longer to complete than trials in which all parties are represented, because SRPs are unable to adequately identify the issues and are reluctant to abandon arguments which are weak and likely to lose. The cost of providing court facilities is substantial. The South Australian Courts Administration Authority estimated the daily cost to the public of providing a magistrate's court in a civil matter at $4485 per day[11] Unnecessarily lengthy trials divert judicial resources away from other litigants.

If an SRP does not put adequately researched legal arguments before the court, this will mean that either additional judicial time is devoted to doing this work or the research is not done. The High Court observed, in *Neil v Nott*,[12] that a 'frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of the parties which are obfuscated by their own advocacy'.

Some studies suggest that SRPs are less likely to settle proceedings prior to trial than represented parties, and are less effective negotiators.[13] Naturally, proceedings which go to a full hearing require more time and resources than matters which settle before trail.

Lack of legal training may impact on compliance by SRPs with procedural requirements. An SRP may, for example, make a number of efforts at adequately formulating his or her pleadings before compliance with formal or substantive requirements is achieved. In general, this process will involve repeated application to the court by the other party to the proceedings, at significant expense. Discovery of documents, in particular, is a technical area which requires significant experience and, when carried out by legal practitioners, imposes substantial ethical obligations on them. Mustill and Boyd, in *Commercial Arbitration*,[14] comment that 'an order for discovery will often be useless unless the parties are represented by English solicitors.'

Where parties before a court are not represented, the court is not able to rely on the professional obligations imposed on legal practitioners. These obligations are said to be owed to the court but are in fact owed to the public at large and operate whether the practitioner is appearing in court or before some other tribunal. Duties owed by legal practitioners to the courts include obligations to not 'mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case'.[15] In conducting a case, a legal practitioner must have regard to the 'speedy and efficient

9. (2001) 179 ALR 513 at 516.
10. Australian Law Reform Commission Discussion Paper 62 paras 9.49–9.53, 11.39–11.42, 11.165–11.173, 12.9–12.23, 12.212–12.23, viewed 27 May 2004, <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/>.
11. Referred to in 'Erosion of Legal Representation in the Australian Justice System' [57] February 2004, <www.lawcouncil.asn.au/>.
12. (1994) 121 ALR 148 at 150.
13. Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system* (ALRC 89), [5.119] viewed 25 May 2004, <www.austlii.edu.au/au/other/alrc/publications/reports/89/ALRC89.rtf>.
14. MJ Mustill and SC Boyd, *Commercial Arbitration* (2nd edn, London: Butterworths, 1989) p. 325.

administration of justice'.[16] These duties override the duty of the legal practitioner to his or her client. It has been suggested that these duties are fundamental to the proper functioning of the litigation process.[17]

More specifically, legal practitioners are obliged to advise parties if it is considered that a case is hopeless. In *Kumar v MIMIA*,[18] Mansfield J was considering an application for an order for payment of legal costs personally against an applicant's lawyer. Mansfield J said at [14] to [16]:

> *Of course that does not excuse the solicitor from the obligation to conduct such investigations, and to give such advice, as is appropriate in the circumstances before the institution of the proceedings. It is for the client whether to take that advice. If the client does not do so, it may well be in the public interest for the client to be represented, as the solicitor then has the duty to the Court not to incur costs improperly or without reasonable cause. … The advocate also of course has duties of independence and frankness to the Court … Proceedings, even hopeless proceedings, are likely to be conducted more efficiently by a solicitor for a party than by a litigant in person.*

Some court rules require that a pleading prepared by a legal practitioner contain a certificate that there is a proper basis for each allegation and denial in the pleading.[19] An SRP is not subject to many of the obligations or constraints imposed on legal practitioners either at common law, or under the court rules.

Responses of the court system

The 'hallowed' approach to the 'problem' of the SRP is for the judge to become counsel for the unrepresented litigant, 'extending a "helping hand" to guide the accused throughout the trial so as to ensure that any defence is effectively presented'.[20] However, this approach presents the risk that the court will be too helpful to the represented litigant. The court must not only be fair to the litigant in person, in must be fair to the represented litigant. The dilemma was identified in *Raybos Australia Pty Ltd v Scitec Corporation Pty Ltd*:[21]

> *In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer,*

15. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, per Mason CJ.
16. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, per Mason CJ.
17. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, per Mason CJ.
18. [2004] FCA 18.
19. For example, Order 11 Rule 1B and Form 15B of the *Federal Court Rules*. The certificate is given on the basis of the legal and factual material available to the practitioner.
20. Referred to with disapproval in *Dietrich v R* (1992) 177 CLR 292 at 302. There are, of course, occasions in which self-representation is regarded as appropriate, for example, uncontested divorce application.
21. Unreported NSW CA, 16 June 1986 (BC8601339) per Samuels JA, cited with approval in *Re Morton; ex parte Mitchell Products Pty Ltd* (1996) 21 ACSR 497 at 514, and *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 at 446.

and to prevent destruction from the traps which our adversary system offers to the unwary and untutored.

The courts have adopted the general principle that the nature and extent of any assistance offered by the court to an unrepresented party depends on all the circumstances of the case including the nature of the litigant, and the extent to which the litigant can understand the case.[22]

More specific guidance has been provided in the context of family court proceedings. In *Re F: Litigants in Person Guidelines*,[23] the Full Court of the Family Court said:

1. *A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;*
2. *A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;*
3. *A judge should explain to the litigant in person any procedures relevant to the litigation;*
4. *A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;*
5. *If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;*
6. *A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;*
7. *If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;*
8. *A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (*Neil v Nott *(1994) 121 ALR 148 at 150);*

22. *Minogue v HREOC* (1999) 84 FCR 438; *Abram v Bank of NZ* (1996) ATPR 41 – 507. While the question of judicial intervention arises most acutely where an SRP fails to adequately conduct his or her own case, the issue is an aspect of the larger issue of the extent to which decision makers should intervene in the trial process. See The Hon Mr Justice DA Ipp, 'Judicial Intervention in the Trail Process' (1995) 69 *ALJR* p. 366, where his Honour asserts that the Court may intervene where a party's legal representative is incompetent.

23. (2001) 161 FLR 189 at 226-227; [2001] FamCA 348 at [253]. See also the guidelines formulated by T Smith J in his 'Judges' Dos and Don't in a Civil Trial' (reproduced in Western Australian Law Reform Commission, above note 2, p. 582).

9. *Where the interests of justice and the circumstances of the case require it, a judge may:*
   - *draw attention to the law applied by the Court in determining issues before it;*
   - *question witnesses;*
   - *identify applications or submissions which ought to be put to the Court;*
   - *suggest procedural steps that may be taken by a party;*
   - *clarify the particulars of the orders sought by a litigant in person or the bases for such orders.*

   The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

The courts appear more likely to sanction intervention, and criticise a failure to assist an unrepresented litigant where technical issues, particularly evidentiary issues, are involved which might trap the untutored. For example, Bryson J, in the Supreme Court of New South Wales, intervened to prevent a document being tendered as a business record when he considered it was not.[24] In a claim for underpayment of salaries,[25] it was held that the claimant ought to have been given a warning by the presiding magistrate that conducting his case on a limited basis would prevent him subsequently pursuing a related argument.[26] It has been suggested that a court should be particularly reluctant to strike out the pleading of an unrepresented party, but should assist in teasing out properly triable issues.[27] Section 132 of the *Evidence Act 1995* of New South Wales and the Commonwealth requires the Court to ensure a witness or a party is aware of any grounds it may have for objecting to the admission of evidence on the grounds of privilege.

The nature of the proceedings is also relevant: a heavier duty is imposed on the court in a criminal trial, particularly one involving the individual's liberty, or the welfare of a child in family court proceedings. In such circumstances, there is a public interest in the outcome of the proceedings that extends beyond the interests of the parties themselves and that requires the court itself to take proactive steps to ensure that all issues have been dealt with adequately. In criminal proceedings, for example, a judge is obliged to ensure that evidence put to the jury is properly admissible and is obliged to hold a *voir dire* as to the admissibility of evidence, whether the issue of admissibility is raised by the unrepresented party or not.[28] Section 132 of the *Evidence Act 1995* of New South Wales and the Commonwealth requires the Court to ensure a witness or a party is aware of any grounds it may have for objecting to the admission of evidence on the grounds of privilege.

The courts have also formulated some limits on the nature and extent of assistance which ought to be provided by a judge to a litigant in person:

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24. *NAB v Rusu* (1999) 47 NSWLR 309.
25. *La Ferla v Bindon Sands* (Supreme Court of the Northern Territory, unreported 21 August 1998, BC9804305).
26. Because of the principle in *Port of Melbourne Authority v Anshun Proprietary Ltd* (1980-1981) 147 CLR 589.
27. *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 at 536 to 537, *Morton v Vouris* (1996) 21 ACSR 497 at 513 to 514.
28. (1981) 147 CLR 512. The advice to be given in a criminal matter can be quite extensive: see *Foster v R* (1982) 38 ALR 599 at 606-607.

(a) The courts should not provide 'advice'. In *In the marriage of Johnson*, the Full Court of the Family Court said:

> *It is undesirable for legal advice to be given to the litigant in person, essentially for the following reasons:*
> *(a) it may be unfair or have an appearance of unfairness to the other parties; and*
> *(b) the advice given may not be with full knowledge of the facts.*[29]

A distinction is drawn between providing information about the litigation process and the options which are available to a party (e.g. possibly seeking an adjournment) and advising a party what to do.

(b) The judge must not take over the conduct of the case. Extensive participation by a judge in the examination or cross-examination of a witness is likely to prove problematic, particularly where the judicial interventions take place at an early stage of the proceedings or the evidence of the witness.[30]

(c) There is no requirement that a court assist a litigant in person to formulate a question in admissible form.[31]

(d) In general, there is no obligation on the court to take steps to remedy any inadequacies in the material presented by the unrepresented party.[32] The court is entitled to proceed on the basis of the materials presented.

The extent of intervention by a judge will depend on all the circumstances of the case. It may be difficult to distinguish between an intervention that assists an unrepresented party and an intervention that simply involves a judge getting to grips with the proceedings. An intervention may have both consequences. *Municipality of Burwood v Harvey*,[33] for example, was a dispute about valuation of land. It was conceded by counsel for the respondent that some assistance would need to be provided by the judge to the unrepresented parties and that 'such assistance would properly involve, in the rather technical area of the law involved in this case, a certain amount of technical advice and guidance to ensure that attention was addressed by the respondent not simply to a vague feeling of the inadequacy of the compensation offered but to the proper application of the relevant statute and of the principles of valuation law, which have accumulated around its sparse words'.[34] One envisages that the judge might list the factors to be taken into account in making his or her decision and direct the unrepresented party's attention to each of them. A similar result might have been obtained by reciting the various arguments put by counsel for the other side and inviting specific responses. Both these course of action would assist a judge in identifying the case of the unrepresented party.

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29. (1997) 139 FLR 384 at 407, see also *Deitrich v R* (1992) 177 CLR 292 at 302, 334-5.
30. *Yuill v Yuill* [1945] P15; *Galea v Galea* (1990) 19 NSWLR 263' *Abram v Bank of New Zealand* (1996) ATPR 41-507; *Municipality of Burwood v Harvey* (1995) 85 LGERA 186.
31. *R v Zorad* (1990) 19 NSWLR 89 at 101. This is not to say that it is improper for a decision-maker to formulate questions for an unrepresented party: *Nagy v Ryan* [2003] SASR 37.
32. *Reisner v Bratt* [2004] NSWCA 22.
33. (1995) 85 LGERA 186.
34. (1995) 86 LGERA 389 at p. 399.

Other steps have been taken to assist self represented litigants:

(a) Many courts have simplified the litigation procedure and have adopted printed forms as the means by which proceedings are initiated.[35]

(b) Many courts have significant programs for the provision of information to SRPs by way of pamphlets or publications, or through court websites. For example, the South Australian Magistrates Court makes available the *Magistrates' Bench Book* through its web site.[36] The information available may include instructions about aspects of the conduct of litigation, such as appearing in court. The Commonwealth Administrative Appeals Tribunal operates an outreach program specifically for unrepresented applicants.

(c) The courts have also responded to the issue of unrepresented parties by ameliorating the limitations on representation in legal proceedings to lawyers. In exceptional cases, a court may permit a litigant in person to be assisted by a 'friend', although the friend is not generally permitted to address the court.[37] The court may also allow the appearance of *amicus curiae* to assist the court in relation to matters of public interest.[38] The Federal Court and the Federal Magistrates Court are empowered to refer unrepresented litigants to *pro-bono* schemes. The legislature has also sought, in certain circumstances, to redress the imbalance arising from differential legal representation by limiting or excluding legal representation or expanding the scope of non-legal representation.

Arbitration

There is little systematic information about the number of arbitrations conducted in Australia. There is even less information about the percentage of those arbitrations which involve unrepresented participants. Given the private nature of arbitrations, it is unlikely that this information will become available. It is clear, however, that arbitrations occur in which one party self-represents. What then, should be done in such circumstances?

The nature and extent of the duties of an arbitrator to unrepresented parties do not appear to have been considered at length. There do not appear to have been any decisions where an SRP has complained about a lack of assistance from an arbitrator.[39] Comments dealing with the duty of a judicial officer towards an unrepresented party were made by Donaldson MR in *Chiltern v Saga Holdings plc*.[40] He said, at p. 844:

35. See for example, the forms for commencement of proceedings for contravention of the *Human Rights and Equal Opportunity Act 1986* in the Federal Court (Form 167 of the *Federal Court Rules*).
36. Viewed 13 May 2004, <www.courts.sa.gov.au/lawyers>.
37. *McKenzie v McKenzie* [1971] P 33; *Schagen v R* (1993) 8 WAR 410; *Galladin Pty Ltd v Ainworth Pty Ltd* (1990) 60 SASR 145.
38. See for example, *Minogue v HREOC* (1999) 84 FCR 438.
39. In *Fox v Wellfair* [1981] 2 Lloyd's Rep 514 at 522, the arbitrator had assisted a party, who was not only unrepresented but failed to attend the hearing, by making findings based on the arbitrator's private knowledge without putting those assertions to the represented party. The arbitrator's conduct was a breach of natural justice towards the represented party.
40. [1986] 1 All ER 841.

> *The problem which arises where you have one represented party and one unrepresented party is very well known to all judges and in particular to judges who deal with small claims in the county court. It becomes the duty of the judge so far as he can, without entering the arena to a point where he is no longer able to act judicially, to make good any deficiencies in the advantages available to the unrepresented party. We have all done it; we know that it can be done and that it can be done effectively. That is the proper course to be adopted. The informality which is stressed by the rule and the requirement that the arbitrator may adopt any method of procedure which he considers to be convenient (it would have been better perhaps if it had said "just and convenient") covers the situation where, as so often happens, a litigant in person is quite incapable in the time available for cross-examination of putting his own case. The judge or the registrar then picks up the unrepresented party's complaints and puts them to the other side.*[41]

However, this case concerned the failure of the registrar to allow a represented party to cross-examine on evidence given by an unrepresented party. The court held that the conduct of the registrar was a denial of natural justice to the represented party.

Mustill and Boyd[42] deal with the topic as follows:

> *Where only one party is legally represented, it is the professional duty of the advocate for the other party to ensure that he does not take an unfair advantage of his greater skill and knowledge, and it is the function of the arbitrator to ensure that this duty is observed. Most litigants in person are able to explain their case, but many find it more difficult to expose the weaknesses of their opponents case. Cross-examination in particular, does not come easily to the unpractised. This does not mean, however, that the arbitrator should try to redress the balance by disallowing cross-examination by the professional advocate. Instead he should pick up the unrepresented parties' points and put them to the witness himself.*[43]

The question is also adverted to in *Russell on Arbitration*,[44] where the authors suggest that 'there is no positive obligation for a tribunal to make a party's case for him, even where that party is not legally represented.' While this statement is in accordance with the Australian authorities, as far as it goes, it does not deal with the arbitrator's obligations short of taking over the conduct of the hearing for the unrepresented party. Sutton and Gill further state that 'there was some authority under the old law that if a tribunal has in mind certain findings of

41. Slade and Lloyd LJJ agreed with Donaldson MR.

42. MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration*, (2nd edn, London: Butterworths,1989) p. 349.

43. While it is accepted that the passages from *Chiltern v Saga Holdings* and Mustill and Boyd are not intended to be comprehensive statements of the approach to assisting the unrepresented, the passages suggest a greater involvement by judges in cross-examination than is favoured by the Australian authorities cited at paragraph 19(b) above. T Smith J, in his Judges' Dos and Don't in a Civil Trial', above note 23, p. 582, suggests that a judge participating in proceedings involving an unrepresented party should 'engage in genuine questioning to elucidate the facts', rather than 'cross-examination' and, where there are disputes as to facts, both parties' version of the facts should be put to the witness. As to the duties of legal practitioners towards SRPs in Australia see 'Litigants in Person – Procedural and Ethical Issues for Barristers' (2000) 19 *Aust Bar Rev* p. 41.

44. D St J Sutton and J Gill, *Russell on Arbitration* (22nd edn, London: Sweet and Maxwell, 2003) at paras 5-058.

fact arising out of the evidence given which would establish a defence to a claim, and it requires that defence to be formulated in the pleadings, it should spell this out to the party concerned and failure to do so could render the award susceptible for "procedural mishap".' The case of *Indian Oil Corporation v Coastal (Bermuda) Ltd*[45] is cited in this context. It concerned an arbitration conducted before a panel of three Queen's Counsel in which pleadings were exchanged. Both parties were legally represented. The claimant alleged an express oral abandonment of past claims for demurrage. The arbitrators formed the view that there might have been an implied abandonment, but that it was not open to the arbitrators to make this finding on the pleadings. The arbitrators invited counsel for the claimant to amend the claimant's pleading, but no amendment was forthcoming. The claim was dismissed. The court held that the arbitrators did not need to go further in helping the claimant. There was, however, no suggestion that the level of assistance the arbitrators had provided to the claimant was inappropriate.

It is useful recall that an arbitrator is under an obligation to provide a level of explanation or assistance even to represented parties:

(a) An arbitrator must ensure that the parties understand the nature of the proceedings that are to take place, particularly if there is to be any variation from the 'ordinary' course of events.[46]

(b) An arbitrator may not decide a case on the basis of a point that was not raised by the parties, and must raise the issue with the parties so they might comment on it.[47]

It appears, therefore, that there will be occasions on which an arbitrator may provide assistance to an unrepresented party. The principles in relation to intervention by an arbitrator will most closely resemble the principles applied by courts where the procedure adopted for the arbitration substantially mirrors that of the judicial system ie where there are pleadings and an oral hearing with examination and cross-examination.

There are, however, a number of significant differences between arbitrations and proceedings in court, which may impact on the nature and extent of intervention by arbitrators:

(a) Arbitration proceedings are private disputes between parties.

While there is a public interest that a fair process be followed by arbitrators, there is not, in relation to arbitration proceedings, a general public interest in the outcome of an arbitration, in the way that there is a public interest in, say, the outcome of family law disputes involving children. The fundamental obligation of the arbitrator is to give the parties the opportunity to present their cases, not to ensure that they take best advantage of that opportunity.[48] Given that the cases involving SRPs in

45. [1990] 2 Lloyds Rep 407. An appeal from this decision was settled before judgment, see *King v Thomas McKenna Ltd* [1991] 1 All ER 653 at 655.

46. *Bunge and Co v Ross T Smith and Co Ltd* (1926) 24 Lloyd's Rep 30.

47. *Interbulk Ltd v Aiden Shipping Co Ltd* (1984) 2 Lloyds Rep 66 at per Goff LJ at p. 75 and Ackner LJ at p. 76.

48, *Sullivan v Dept of Transport* (1978) 20 ALR 323 at 343.

arbitrations involve excessive assistance by the arbitrator, it is worth repeating the warning sounded by Deane J in *Sullivan v Department of Transport*:[49]

Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to a failure to extend to him an adequate opportunity of presenting his case.

(b) The rules in relation to representation in arbitrations are significantly different from the rules in relation to representation in court proceedings.

An arbitrator has a discretion to allow representation in an arbitration by a person who is not a legal practitioner, where this is likely to shorten the proceedings or reduce costs, or where the party would be unfairly disadvantaged if leave were not granted.[50] The choice for a party to arbitration is not simply between representation by a lawyer and self-representation. Further, corporations which are parties to litigation are required to be represented by legal practitioners, subject to express permission of the courts.[51] A corporation is entitled to be represented in an arbitration by a person who is not a legal practitioner. These rules and the prior practices in relation to representation in arbitration have lead to the development of 'non-lawyer' advocates. Corporations which have substantial involvement in arbitration may employ 'in-house' advocates to conduct or assist in the conduct or arbitrations. The differing rules relating to representation in arbitrations do not require a fundamental shift in the approach to the SRP. An arbitrator should not intervene to assist an SRP unless it is apparent that the party is disadvantaged or unable to adequately deal with the arbitration. Particularly, where the SRP is a corporation utilising in house representation, it is not appropriate to assume that an SRP is at any particular disadvantages. It may, however, be appropriate for an arbitrator to take steps to impose on the parties obligations equivalent to those imposed on legally qualified representatives. This might be done by specific directions requiring parties to provide a certificate as to the factual and legal basis for the claims.

(c) A further difference between arbitrations and court proceedings is that an arbitrator is not obliged to apply the rules of evidence, unless the parties agree to the contrary in writing.[52]

It seems unlikely that an SRP would agree that the rules of evidence apply. Not applying the technical rules of evidence would eliminate some of the more esoteric issues about which an SRP lacks knowledge. There remain some evidentiary issues

49. (1978) 20 ALR 323 at 343.

50. S 20 of the *Commercial Arbitration* legislation.

51. See for example, Order 4 Rule 3(2) of the *Rules of the Supreme Court* (WA), Order 4 Rule 14(2) of the *Federal Court Rules*.

52. See for example, s 19(3) of the *Commercial Arbitration Act 1985* (WA).

upon which the legally untutored might need assistance, such as the lower weight which might be given to hearsay evidence, and the rules in *Browne v Dunn*,[53] and *Jones v Dunkel*.[54]

(d) More fundamentally, arbitrations often do not operate within the adversarial paradigm mentioned at paragraph 4 above.
Quality arbitrations in the commodity trades involve an 'inquisitorial' procedure in which the arbitrator may not have a 'hearing' or accept any submissions from the parties. In such circumstances, the role of and need for legal representation is more limited than otherwise.[55] Although the arbitrator is expected to be neutral and unbiased, the arbitrator takes on responsibility for investigating factual matters, frequently without substantive input from the parties. While it may be necessary, or course, for the arbitrator to give the parties the opportunity to comment on or controvert material resulting from those investigations, an inquisitorial procedure in which an arbitrator makes his or her own inquiries may be fair without requiring either party to possess particular forensic skills.

(e) Arbitrators have a greater role in procedural matters than many judges.[56]
This provides an opportunity for arbitrators to mould the procedure of the arbitration so that the disadvantages of the SRP are minimised, while remaining fair to the represented parties. It is suggested that the following procedural approaches may be suitable in cases where one party represents itself:

(1) Active participation in the identification of the real issues of the case may be appropriate. This might occur through discussion in conference rather than through formal 'pleadings', which are often confusing to non-lawyers. (The issues so identified should, of course, be reduced to writing and clearly agreed by the parties.)

(2) The discovery process may be modified. In particular, the scope of discovery may be defined by reference to particular categories of documents, rather than by reference to 'relevance' to the issues, as is usual in many courts.

(3) It may also be productive for an arbitrator to be more actively involved in obtaining expert reports where an SRP is involved, than in cases where both parties are legally represented.

(4) The principal disadvantage under which the legally untutored are seen as labouring relates to the conduct of oral hearings. The Court of Appeal, in

53. (1894) 6 R 67.

54. (1959) 101 CLR 298.

55. In *FE Hookway & Co v Alfred Isaacs & Sons* [1954] 1 Lloyds Rep 491, Devlin J described a longstanding policy of a trade association to exclude lawyers from quality arbitrations as 'sensible' (at 507).

56. There are a number of courts where procedural matters are generally dealt with by specialised court officers, for example, the Supreme Court of Western Australia.

Chiltern v Saga Holdings plc,[57] identified cross-examination as an area of particular difficulty for persons who are not professionally trained. Where issues in an arbitration do not involve disputes of oral evidence, an oral hearing may not be necessary. Written witness statements ought to reduce the disadvantage suffered by an SRP since written witness statements provide a greater opportunity for persons who are not skilled in cross-examination to prepare for the task and reduce the prospect of surprises. Against the advantages of written witness statements must be weighed the possibility that the SRP will produce prolix and confusing documents.

(5) Procedural directions may need to be more fulsome than would ordinarily be the case with legally represented parties. For example, the rules of court generally require that affidavits deal with different matters in each paragraph and that the paragraphs be numbered. It may be appropriate for these requirements to be set out in directions where an unrepresented party has shown a tendency towards prolixity. The consequences of failure to comply with procedural directions should be spelled out.

(6) It may be appropriate for the arbitrator to be more explicit in relation to the mechanics associated with the hearing, such as securing witnesses, than would ordinarily be the case, to reduce the risk of an application for an adjournment based on a lack of preparation for hearing.[58]

(7) An arbitrator should actively encourage compromise between the parties and may suggest conciliation or mediation to them.

These are steps that ought to operate to overcome some of the barriers which might impede effective participation by an SRP. It may well be that some of these steps could be taken to more effectively conduct arbitrations involving represented parties as well.[59] The promise of arbitration, in general terms, is a less legalistic approach that the courts and a more active involvement by the arbitrator in the process. This promise, if fulfilled, should make arbitration a procedure in which persons can adequately represent themselves.

57. [1986] 1 All ER 842.

58. Cf *Titan v Babic* (1994) 126 ALR 455 at 464.

59. See for example Ian D Nosworthy, 'Incorporating ADR into Contracts' (2004) 23 (2) *The Arbitrator & Mediator*, p. 13 at 21.

Domestic Lessons from International Arbitration

Craig Pudig [1]

Introduction

Domestic arbitration is criticised for becoming too much like litigation. Lord Woolf suggested that 'a case can be made for a full red-blooded adversarial approach if questions of cost and time are put aside.'[2] Arbitration developed as a response to the inefficiencies of litigation. It was designed to promote party autonomy, and help parties to save time and money. Additionally, it served to provide a confidential private forum for the resolution of commercial disputes. The theory, and original practice, was that, in choosing arbitration, the parties would accept that the process may not be as thorough as that undertaken by the courts, but consider that to be outweighed by the procedural advantages offered by arbitration. In recent times, the distinction between domestic arbitration and litigation has been blurred. We are now in a position where domestic arbitration has all the undesirable attributes of 'old' style litigation and few of the characteristics of modern commercial 'Woolf' type commercial court procedures. The parties can choose their own judge and agree to appropriate degrees of confidentiality but are unlikely to be delivered cost effective procedure.

The contention of this paper is that it is possible for domestic arbitration to provide parties with a true alternative to litigation. This will, however, involve a change in the way in which parties approach domestic arbitration. This paper looks at international arbitration and considers whether some of the aspects of international arbitration can be applied to domestic arbitration in Australia.

This is not to say that international arbitrations do not sometimes suffer similar procedural difficulties. The point is that participants in domestic arbitration in Australia tend to come from a background of adversarial justice conducted through the courts. In contrast, international arbitration has to accommodate many different legal cultures. As a result, different methods of conducting arbitrations have developed, some of which offer significant procedural advantages.

Some Background

Arbitration has had a surprisingly long history. References to arbitration appear in ancient Greek civilisation.[3] In Australia, arbitration has been used to resolve disputes since the second

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1. Craig Pudig is a Partner at Clayton Utz, Sydney. The assistance of Simon Chapple, paralegal from Clayton Utz, in the preparation of this paper is acknowledged.
2. Lord Woolf quoted in Dr Robert Briner, 'Domestic Arbitration: Practice in Continental Europe and its Lessons for Arbitration in England' (1997) 13 (2) *Arbitration International*, pp. 155-166.
3. David St John Sutton and Judith Gill, *Russell on Arbitration* (22nd edn, London: Sweet & Maxwell, 2003) p. 3.

half of the 19th century.[4] Since that time, arbitration steadily increased in popularity, particularly in the building and construction industry. A prominent commentator has argued that:

> *Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction.*[5]

As formal courts were established, the practice of arbitration continued 'because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to the courts.'[6] Thus, arbitration emerged as the private enterprise counterpart of the court system.[7] It derives its existence and force from the agreement between two or more parties to submit their dispute to the final and binding determination of a third party.

In times that are still not too far past, arbitration was regarded as a rudimentary and primitive form of justice. Justice French summarised this picture of arbitration:

> *The arbitrator was seen in some circles as a dubious, below stairs figure, requiring close curial supervision ... He operated what was regarded by legal elites as a second-rate system of backyard justice. In England before 1979 and Australia before 1984, he was subject to frequent judicial lashings and only had to stumble, however innocently, to be branded with the stigma of a very broadly defined concept of "misconduct".*[8]

The turning point for domestic arbitration in Australia was in 1984. The *Uniform Commercial Arbitration Acts*, introduced in the States during 1984 and 1985, gave to the arbitrator increased autonomy and judicial recognition. Referring to the 1979 *English Act* (on which the Australian Acts were based), Mustill and Boyd argue:

> *It is now possible to say that the 1979 legislation marked the occasion of a profound psychological change in the relationship between the courts and the arbitral process.*[9]

Similarly, referring to the 1984 New South Wales Act, Rogers J argued:

> *It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created.*[10]

With increased recognition of arbitration in Australia, arbitration became an important part of the dispute resolution system. In the second-reading speech for the Commercial Arbitration Bill 1985, the Attorney-General for Western Australia commented that:

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4. Robert Hunt, 'The Institute in the 21st Century – The way ahead' (2000) 19 (2) *The Arbitrator*, November.
5. Lord Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration*, p. 43.
6. Holdsworth Mr, *History of English Law* (1964), Vol XIV, p. 187.
7. *Northern Regional Health Authority v Derek Crouch Construction Co Ltd & Anor* [1984] 2 All ER 175 at 189.
8. Justice R S French, 'Arbitration – The Court's Perspective' (1993) *Australian Dispute Resolution Journal*, November.
9. MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration* (2nd edn, London: Butterworths, 1989) p. 28.
10. *Qantas Airways Ltd v Dillingham Corp* (1985) 4 NSWLR 113 at 118.

> *The major advantages to the parties over a court hearing are, generally, savings in time and cost, flexibility, privacy and the availability of expertise. It is an important advantage to the parties that hearings are conducted in private so that the risk of release of confidential information in open court is removed.*[11]

It is for these reasons that arbitration has an important role to play in dispute resolution in this country. It is suggested, however, that domestic arbitration has ultimately become like the system is was originally designed to extend. Today, domestic arbitration has a reputation for being unable to deliver speedy and cheap dispute resolution. One of the reasons for this is that because arbitration is a private form of binding dispute resolution, there is a rarely resisted temptation in arbitration to imitate traditional court procedure. In many instances, the lawyers natural conservatism and the arbitrator's fear of criticism by a Court has resulted in arbitration procedure being more cumbersome than the foreshortened features available in the commercial courts. A respected commentator writes:

> *Too many arbitrators conduct their arbitrations as if the courts were still breathing down their necks. They constantly worry about whether someone somehow might say that they misconducted themselves ... So they walk slowly with circumspection.*[12]

And so, we come to the present day. At the beginning of the 1990s, arbitration was seen as the only serious alternative to litigation.[13] The development of alternative methods of resolving disputes such as statutory adjudication, mediation/conciliation, DRBs/DABs, expert determination and other hybrid processes means that there are now many legitimate alternatives to arbitration or litigation. Compounding this is the fact that recent reforms to court procedure and case management means that the commercial courts are now dealing with cases more efficiently than ever before. The end result is that domestic arbitration is losing 'market share'.[14] The problem facing us today is how to solve some of the problems in domestic arbitration, and once again differentiate it from litigation. It is suggested in this paper that the experience of international arbitration can offer valuable lessons as to the way domestic arbitrations can be conducted.

It is at this point that it is necessary to distinguish between domestic arbitration and international arbitration. International arbitration is now the generally accepted method of resolving international business disputes.[15] These disputes tend to be between parties from different legal and cultural backgrounds, with different understandings of the way in which the proceedings should be structured. The process has grown out of a need to be eminently flexible.

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11. Western Australian Legislative Council, *Hansard*, 21 February 1985, p. 172.
12. Pierre A Karrer, 'Don't be Afraid: A pep talk' The Chartered Institute of Arbitrators, Diploma in International Commercial Arbitration, 5-13 January 2004.
13. Ronald Bernstein QC, 'Arbitration as the Crossroads: The Arbitrator as Leader? Or Just Listener?' (1996) *The Arbitrator*, February, p. 209.
14. Ibid.
15. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn) p.1.

International arbitrations in Australia are governed by the *International Arbitration Act 1974* (Cth) which gives the *UNCITRAL Model Law* ('the Model Law') the force of law. Domestic arbitrations are not governed by the Model Law, but rather by the Commercial Arbitration Act that applies in each State and Territory. These Acts (presently under review) are largely uniform but are significantly different from the Model Law. Importantly for us, the *Uniform Commercial Arbitration Acts* impose a greater degree of judicial supervision and allow limited appeal from awards.

What is wrong with domestic arbitration?

Put simply, the crux of the problem is that domestic arbitrations have a tendency to mimic traditional court procedure. Mr Justice Lander suggests:

> *The arbitration process has been perceived, I think, as having similar shortcomings to the litigation process. Insofar as lawyers participate in it, they are held in the same regard as those who participate in the litigation process. Insofar as the procedures are concerned, the perception is that the procedures in arbitration are not much less cumbersome than the procedures in the litigation process.*[16]

As an example of the way in which a domestic arbitration may be similar to court proceedings, it is not uncommon to see detailed pleadings submitted to the arbitral tribunal, together with lengthy requests for particulars. This can cause lengthy delay and increase costs. Full-scale discovery is also common and ensures that there are thousands of irrelevant documents clogging the process. Unlimited oral hearings also add to the time and cost of a hearing and are traditionally seen as necessary in a domestic arbitration.

This is not to say that these processes are inherently bad, indeed, they ensure that no stone is left unturned (however uneconomic it may be), and the lessons of history have shown them to be most useful in a judicial context. However, arbitration is not litigation. Barwick CJ, in *Tuta Products Pty Ltd v Hutcheson Bros Pty Ltd*,[17] argued the advantages of arbitration are 'economy, celerity and finality'.[18] The above discussion shows that arbitration is finding it difficult to meet these first two objectives. With regard to the issue of finality, Mr Justice Lander suggests:

> *The commercial world, I think, considers that the arbitration procedure has a further shortcoming in as much as not only does it have the same cumbersome qualities that perhaps the litigation procedure has, but as well, it is subject to the review by the litigation process itself.*[19]

16. Justice Lander, 'The Perception of the Courts to the Role of Arbitration in the Dispute Resolution Process' (1995) *The Arbitrator*, November, p. 169-170.
17. (1972) 126 CLR 253.
18. Ibid. at 257.
19. Justice Lander, above note 16, p. 170.

Thus, another problem with domestic arbitration is the level to which the courts can review the decision of the arbitral tribunal, effectively making the arbitral tribunal just another tier in the appeal process.

Pleadings and Discovery

Pleadings have a long history in litigation. Lawyers are familiar with using them to identify the issues in dispute. The question for those involved with arbitration is whether or not pleadings in arbitration should mirror those used in court proceedings.

Under section 14 of the *Uniform Commercial Arbitration Acts*, the arbitrator may conduct proceedings in such a manner as the arbitrator thinks fit. This is of course subject to the arbitration agreement in which the parties are free to agree on all matters of procedure. The arbitrator must also conduct proceedings in accordance with principles of procedural fairness.

One school of thought is that, particularly where the issues to be determined are complex, pleadings should be as similar as possible to court pleadings.[20] This was the controversial view accepted in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd & Ors*.[21] The Court was of the view that 'procedural justice requires arbitrators should, in long complex arbitrations, follow as nearly as reasonably practical the pre-trial pleading, discovery and other procedures of court'.

The alternative (and it is strongly suggested better) view was put forward by Rogers J in *Imperial Leatherware Co Pty Ltd v Macri & Anor ('Imperial Leatherware')*.[22] His Honour affirmed the basic proposition that, subject to the requirements of natural justice, the arbitrator has a free hand. That is, the arbitral process should be allowed to continue without being weighed down by interlocutory processes.[23] This approach was recently affirmed in *John Holland Pty Ltd v Federal Building Industries Pty Ltd (in liq) ('John Holland')*.[24] The position ultimately seems to be:

> *[S]o far as the letter of the Act is concerned, it gives the parties the greatest possible freedom in the conduct of the arbitration … laws of evidence need not be followed. The sole requirement in the "letter and spirit" of the Act is the call of natural justice, which, whilst requiring that each party may have a proper opportunity of putting its own case, and meeting the case for the other party, does not require adherence to court procedures as necessary.*[25]

Having said that, there will be cases where court-style pleadings will be the best way of ensuring the requirements of natural justice are met. The problem is that there is a temptation for lawyers in domestic arbitration to use pleadings in all cases, causing unnecessary delay.

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20. Denise M Kelly, 'Pleadings in Arbitration' (2002) *The Arbitrator*, May, p. 40.
21. (1990) 55 SASR 327.
22. (1991) 2 NSWLR 653.
23. Kelly, above note 20, p. 42.
24. [2001] QSC 326 (7 September 2001).
25. *Imperial Leatherwear Co Pty Ltd v Macri & Anor* (1991) 2 NSWLR 653 at 666.

Discovery is a process that is central to the common law tradition. As a result, there is a tendency for domestic arbitration to also incorporate aspects of the discovery process. Full-scale discovery of documents ensures that every document, including thousands of irrelevant documents, will need to be discovered. This inevitably, and sometimes unnecessarily, clogs the process. In cases involving a multitude of documents, it is not uncommon for the issue in dispute to hinge on only a few of them.

One of the criticisms of litigation is that these pre-trial interlocutory processes, in particular discovery of documents, unnecessarily add to the cost and time of litigation. Justice de Jersey suggests:

> *The litigator has ordinarily adopted the so-called Rolls-Royce approach, involving minute pre-trial examination of every conceivably relevant avenue for inquiry, lest something emerge which might aid, or indeed hinder, the client's case.*[26]

The traditional benefit of arbitration is that parties can tailor the process to suit their requirements. That is, in choosing arbitration, the parties have made the decision that the cost and time advantages of going without full-scale discovery outweighs the benefit of the thoroughness of the courts. The problem is similar to that concerning pleadings. Lawyers are used to the discovery process, and as a result some expect it to be mirrored in arbitration. As Justice de Jersey suggests:

> *I am sure it has frequently, in the past anyway, been the lawyers who have channelled their arbitrating clients towards an arbitration very like litigation. This has been understandable, if not acceptable: lawyers have always done their best work in the courtroom; their talents have been developed with relation to litigation.*[27]

The importance of adequately defining the issues at the pre-hearing stage in arbitration cannot be understated. If the issues are not adequately defined, the hearing will be prolonged as the parties attempt to work out precisely what issues are in dispute. Furthermore, the tribunal runs the risk of coming to an incorrect decision which ultimately may be appealed. The problem for those involved with domestic arbitration, then, is to find a process that allows the parties to quickly and adequately define the issues in dispute, and produce the necessary evidence.

This problem is faced by parties from common law jurisdictions throughout the world.[28] International arbitration can offer guidance to those using arbitration in the domestic Australian context, not because it is necessarily immune to these problems, but because international arbitration as a process has to transcend national and cultural boundaries. It is thus informed by a wide range of perspectives. Not only may these different perspectives be helpful to those using domestic arbitration, but international institutions such as the IBA have attempted to synthesise the different legal cultures, and this too can be a useful perspective which can inform the way in which domestic arbitrations are conducted in Australia.

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26. Justice de Jersey, 'Reform of the Arbitration Process: Interlocutory and Hearing Steps: Problems and Solutions' (1996) *The Arbitrator*, November, p. 182.
27. Ibid.
28. See for example, the English experience of arbitration prior to the enactment of the 1996 Act.

As a starting point, it is useful to look at the way in which parties from civil law jurisdictions have dealt with the problems of defining the issues in dispute, and the problem of gathering evidence in international arbitration. Of course, it is to simplify the idiosyncrasies of each jurisdiction to generalise as to 'civil law' procedure. Just as there are significant differences between Australian and United States legal culture, there are the same between the different civil law jurisdictions. However, for the purposes of this paper, the generalisation is useful.

Civil law practitioners do not welcome the prospect of discovery. One commentator observes that 'the idea of producing all documents, both those which are helpful and unhelpful to one's case, is something most unpalatable to civil law practitioners.'[29] In fact, the concept of separate pleadings and discovery is foreign to civil law practitioners, but it is misleading to say that discovery, in the sense that it is used to ascertain the relevant facts, is not used in civil law jurisdictions. Rather, lawyers establish the facts, and narrow them by producing their own supporting documents to the courts and the other parties, and their submissions.[30] Further, judges in civil law jurisdictions can call for witnesses to be heard at any time during the proceedings and can put questions to them directly.

This tradition tends to be incorporated into international arbitrations where the tribunal consists of lawyers from a civil law background. Of course, ultimately the nature of the proceedings depends on the agreement of the parties. A typical arbitration begins with the written submission of a brief introductory statement from both sides; however, it should be noted that often these initial statements will develop the position of each party in some detail and have appended all of the documents upon which that party initially intends to rely. If the position of each party is unclear, the arbitrator will order a second round of submissions that will need to set out the factual and legal arguments. All documents on which the parties intend to rely are usually attached to these submissions. Unlike the common law tradition, it is rare for one party to request further and better particulars. The mentality is that each party bears the burden of making their argument and submitting the necessary evidence to prove its case. If one party considers the other party's evidence to be insufficient, it will draw the tribunal's attention to that fact and ask that the case be dismissed.[31]

Similarly, an international arbitral tribunal will approach the production of documents by the other party with caution. One of the reasons for this is that, by definition in the international context, the parties will be from different jurisdictions. There will usually exist no local court that can compel a party to produce the necessary documents. If one party requests the other for the production of certain documents, the tribunal will usually warn the non complying party that an adverse inference may be drawn by the failure to produce the requested documents.[32]

29. Paolo Michele Patocchi and Ian L Meakin, 'Procedure and the Taking of Evidence in International Commercial Arbitration: The Interaction of Civil Law and Common Law Procedures' [1996] *IBLJ* p. 884 at 891.
30. Dr Brian King and Lise Bosman, 'Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide' (2001) 12 (1) *ICC International Court of Arbitration Bulletin*, Spring, p. 27.
31. See generally, Dr Robert Briner, 'Domestic Arbitration: Practice in Continental Europe and its Lessons for Arbitration in England' (1997) 13 (2) *Arbitration International*, pp. 155-166.
32. Redfern and Hunter, above note 15, p. 318.

In recent years, one of the challenges in international arbitration has been to accommodate the different legal backgrounds of the parties to an arbitration. The *IBA Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules of Evidence')* were prepared by a group of international arbitration experts and incorporate the features of civil and common law traditions that are most suitable for international arbitration.

These rules provide that, within a time ordered by the tribunal, each party is to submit to the tribunal and the other parties all available documents on which it relies. A party may also submit to the tribunal a request to produce. The party on whom the request is served must produce the documents within the time specified. Alternatively, it may object in writing to the tribunal, which is to make a timely determination. The tribunal may also, at any time before the conclusion of proceedings, request a party to produce any documents that it believes to be relevant to the outcome of the case.[33]

With regard to witnesses, each party is to identify the witnesses on whose testimony it relies and the subject of that testimony. It is not improper to interview these witnesses, and the tribunal may order each party to submit to the other parties a written statement by each witness on whose testimony it relies.[34]

The key features of these rules are that they incorporate time limits, are flexible, simple and combine the strong aspects of both the common and civil law traditions. One of the problems with domestic arbitration is that the parties know of no other system for conducting the proceedings, so they resort to traditional court procedures. The *IBA Rules of Evidence* provide an easy to use model on which the parties can base the conduct of proceedings.

Evidence

When adducing evidence in a domestic arbitration, the temptation again is to mirror the procedure followed in the courts. However, there are real time and cost advantages to be had from streamlining the hearing procedure.

Section 19 of the *Uniform Commercial Arbitration Acts* sets out that unless a contrary intention is expressed in the arbitration agreement, evidence before the arbitrator may be given orally or in writing.[35] It is suggested that parties involved in domestic arbitrations do not take full advantage of this section. Throughout the common law world, there is, however, a temptation to rely overly on oral argument. For example, Mr Justice Kaplan of the Hong Kong Supreme Court (as he then was), now a respected international arbitrator, writes:

> *I am strongly of the view that far too much oral argument is allowed in arbitrations and in litigations.*[36]

33. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Article 3.
34. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Article 4.
35. *Commercial Arbitration Act* section 19(1)(a).
36. Justice Kaplan quoted in G R Masel, 'Conduct and Misconduct of Arbitration Proceedings' (1994) *The Arbitrator*, November, p. 179.

There is much to commend oral argument, but too often it is used when not necessary. Again, in Australian domestic arbitration parties are reluctant to agree on an alternative procedure, because they have never experienced anything else. In international arbitration, the most common type of evidence is documentary evidence.[37] This probably stems from the civil law influence that sees documentary evidence as being more reliable. The parties will usually submit written statements of witnesses on whose testimony they intend to rely. The parties will then indicate which witnesses will need to attend the hearing.[38]

On one hand, increased use of documentary evidence avoids the delay that can be caused by oral argument. At the same time, documentary evidence, produced prior to the commencement of proceedings, gives the inquisitorial arbitrator the chance to familiarise themselves with the case. In an inquisitorial arbitration, the arbitrator cannot be content that the parties will draw his or her attention to the main issues in dispute. Dr Briner describes the huge gains in efficiency when an experienced arbitrator is familiar with the file in front of them:

> *If one wants to be an inquisitorial arbitrator, one has to know the file. Only then and possibly with great experience can one achieve the mastery which the former President of the French Cour de Cassation, M. Bellet, the first Chairman of Chamber 2 of the Iran-United States Claims Tribunal demonstrated, when he told me once: "Ah, you know after judging an innumerable number of cases one gets, by looking at the file rather quickly, the feel for the decisive issues and what the respective merits are". Using this expertise, he created shock and consternation with the American lawyers at the Claims Tribunal when he used quickly to interrupt them and say: "Save all your explanations, the only issues which I am interested in are the following ones".*[39]

With the increasing number of small-scale, cross-border transactions, it has become common for arbitrations to be conducted without a hearing, and the decision made on the basis of documentary evidence. It is possible in such a case to obtain a determination on the issue within days of the dispute arising. Some of the major international arbitration institutions make allowances for the conduct of this type of arbitration. The *LCIA* and *SIAC Rules* allow the parties to agree to a documents-only arbitration.[49] The *ICSID Arbitration Rules* specify that the proceeding will comprise two stages: a written procedure to be followed by an oral one.[41]

As was the case when dealing with pleadings and discovery, The *IBA Rules of Evidence* provide a model that parties using domestic arbitration may wish to follow. The rules prescribe that the tribunal may order each party to submit, within a time specified, a written statement by each witness on whose testimony it relies. Once these statements are submitted, any party may submit revised or additional statements from persons not previously named as witnesses, so long as these revisions or additions respond only to matters raised in other

37. Redfern and Hunter, above note 15, p. 316.
38. Ibid., p. 321.
39. Briner, above note 31, pp. 155-166.
40. *LCIA Rules*, Article 19; *SIAC Rules*, Rule 22.1.
41. *ICSID Arbitration Rules*, Rule 29.

statements. Each witness is to appear for testimony, unless agreed otherwise. Importantly, if the parties agree that there is no need for a witness to attend the hearing, this does not mean that the parties have agreed as to the truth of the statement.[42]

Experts

The appointment of experts in domestic arbitration is a cause of much inefficiency. Experts frequently adopt the position that their role is to act as a 'hired gun' and provide a favourable opinion for their 'client.'[43] The proliferation of experts and their associated differences of opinion is a major stumbling block in achieving effective and efficient resolution of the dispute. Often a number of experts will provide competing but equally persuasive expert opinions. The problem is that often an expert opinion will be a product of the facts on which it was based and thus may not actually resolve any of the essential facts in dispute.[44] Dr Briner eloquently illustrates the problem:

> *The main object of the cross-examination of the expert seemed to consist of many attempts to try to trap him and point out possible contradictions. Sometimes this gave rise to the somewhat comical situation that the examining barrister was at his wits' end when he was given an answer that he did not expect or did not fully understand ... He then had to go into a desperate huddle with his own expert witness.*[45]

It has been a longstanding practice in Continental arbitrations for the tribunal to appoint their own expert. This is akin, in a sense, to the referencing out procedure in the Supreme Court. The expert does not become a decision-maker, but a finder of facts under the supervision of the parties and the arbitrator. It is submitted that in appropriate situations, this can be an efficient method of conducting proceedings.

The *IBA Rules on the Taking of Evidence in International Commercial Arbitration* offer another solution to the problem of experts. The rules deal with both party-appointed experts, and tribunal-appointed experts. In the case of party-appointed experts, the tribunal may order that the experts meet and confer on the issues raised in their expert statements. They are to record in writing any issues on which they reach agreement. The experts are then to appear for testimony at the hearing.[46] Where the expert is appointed by the tribunal, the expert is to be independent and may request the parties to submit any information deemed relevant. The expert is to report to the tribunal and send a copy of the report to all parties. The expert shall be present at the hearing and the report shall be assessed by the tribunal with due regard to all circumstances of the case.[47]

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42. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Article 4.
43. George Golvan QC, 'Alternative Dispute Resolution Mechanisms' (Paper presented at the Building Dispute Practitioners' Society Inc. Seminar,16 and 17 September 1997).
44. Ibid.
45. Briner, above note 31, pp. 155-166.
46. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Article 5.
47. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Article 6.

Tools to make the proceedings more efficient

(a) *Stopwatch hearings*

It is common in international arbitration for strict time limits to be imposed on the proceedings. The increasing use of stopwatch (sometimes called 'chess clock') arbitrations is an example of a process that is more frequently being used to provide a speedier resolution of the issues.

The process is used when the parties have agreed, or where the tribunal orders them, to conduct the hearing within a certain amount of time, and each party is given an equal portion of the time in which to present their case. The amount of time each party has to present their case is dependent upon the complexity of the issues in the dispute, and the timeframe that the parties have imposed.

In these hearings, parties have to utilise all the tools of efficiency that have previously been mentioned, such as limiting oral argument, limited cross-examination, increased use of documentary evidence, and increased involvement of the arbitrator as an active participant in proceedings.

Of course, while there are many time and cost advantages to be had by limiting the time of an arbitration in this way, the parties and arbitrators need to be astute to ensure the preservation of a requisite degree of procedural fairness.

(b) *Use of technology*

While technology is being used in domestic arbitrations and even by the Australian courts, it is in international arbitration that the true limits of technology are being pushed. The ICC, for example, have developed technology for the online transmission of documents. Similarly, domain name dispute resolution, conducted under WIPO, can now take place almost entirely online. By embracing this technology, parties can get real savings in the conduct of their arbitrations.

A number of web-based software packages have been developed to facilitate efficient document management. Generally, these packages have two features:

- They allow parties to upload documents (such as submissions and evidence) on a secure website which can then be accessed by others, subject to any restrictions that may have been set up for certain users or documents. All relevant participants are then notified as soon as new information is available.
- They allow procedural and contextual information to be attached to the document. This includes information such as when the document was disclosed, what statements refer to the document and if any submissions relate to the document

Used in this way, technology can eliminate the cost of storage and filing, courier costs and photocopying costs. A virtual document room may also be established that provides secure access to documents at anytime and anywhere. One distinct feature is 'access tracking' which shows when a person had access to a specific document. Providing parties and arbitrators with access to a 'virtual document room' significantly reduces the time and cost of reviewing evidence and other documents.

Document Analysis

When technology is used to control the submission of documents, the documents will necessarily be in electronic form. Electronic documents can be organised into easily searchable categories, much like an electronic version of a filing cabinet. If a party needs to find a particular document or a particular clause in a document, where previously they would have to physically search through hundreds of documents, it is possible to quickly run a keyword search and quickly find the relevant information. These processes can also be used to track references to specific documents in submissions and during hearings.

Electronic Hearings

Video conferencing technology allows parties from different ends of the world to virtually meet' and discuss issues 'face to face' in real time. Of course, present technology is no substitute for a 'face to face' hearing, but it has tremendous value in bringing participants together to discuss procedural issues (for example, at a pre-hearing conference) without the cost of the two parties having to meet physically, thereby reducing unnecessary travelling time and associated costs.

Similarly, text-based interactive software which allows parties to communicate in real-time chat rooms, is perfectly suited to a 'documents only' arbitration when the arbitrator seeks clarification of an issue.

Technology may even facilitate some disputes being resolved by arbitrations conducted entirely 'online'. As technology brings people across the world closer, there will be a greater number of smaller scale, cross-border business transactions. For these transactions, particularly those relating to intellectual property and electronic commerce, cost-effectiveness may dictate greater use of online arbitration such as already exists for domain name dispute resolution. Under these arbitrations (often under WIPO rules), all matters are dealt with electronically and 'virtually'.

The immediate future of technology in domestic arbitration depends upon its acceptance by those involved in disputes. The technology is available, and is being used in a number of international arbitrations. All that needs to be done is for the parties to agree to use it.

Conflicts of Interest

We have so far discussed procedural aspects of domestic and international arbitration. Another area in which the lessons from international arbitration can be applied to domestic arbitration in Australia is that of the independence and impartiality of arbitrators.

Parties to a litigation and an arbitration have the right to expect that the judge or arbitrator is impartial and does not unfairly favour one side or the other. The challenge for the arbitrator is to avoid doing anything that will render his or her award subject to effective challenge. As a consequence, the arbitrator needs to know what to disclose to avoid the appearance of bias. The complication is that arbitrators are often drawn from the commercial realm and many are heavily involved with a particular industry.

Section 44 of the *Uniform Commercial Arbitration Acts* provides:

> *44. Removal of arbitrator or umpire*
> *Where the Court is satisfied that:*
> *(a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted proceedings,*
> *(b) undue influence has been exercised in relation to an arbitrator or umpire, or*
> *(c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute, the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.*

Actual bias displayed by an arbitrator will constitute misconduct. Actual bias tends to be made out when 'the complaining party satisfies the Court that the arbitrator is predisposed to favour one party, or conversely, to act unfavourably towards him, for reasons peculiar to that party, or to a group of which he is a member.'[48] However, Mustill and Boyd point out the problems with actually establishing actual bias. It will be difficult to establish unless the arbitrator made 'some incautious remark'.[49]

Accordingly, imputed bias is more likely to be relevant for parties seeking to challenge an arbitrator. It is based on the notion that justice not only needs to be done, but needs to be seen to be done. For domestic arbitration in Australia, discerning the actual test for imputed bias is made more difficult by the fact that the English and Australian tests for imputed bias are somewhat different. In Australia, the test is that there must be reasonable apprehension of bias.

Arguably, the problem is more acute in international arbitration. The problem is that the courts of each jurisdiction have a tendency to interpret the requirements of independence and impartiality slightly differently. One commentator suggests:

> *As a result of increased globalization and the sheer expansion in international trade, the elements leading to conflicts of interests for arbitrators are becoming more numerous and more complex ... the detailed implementation and criteria still depend greatly on the specific circumstances of each case. They will also vary considerably between the different systems, cultures and individual arbitrators.*[50]

However, as a result of this international confusion as to conflict of interest, the International Bar Association formed a working group to review the issues relating to conflict of interest. A final draft of the *IBA Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration ('IBA Guidelines')* is now available.

The *IBA Guidelines* outline some general standards that are based on statutes and case law from a number of jurisdictions. According to these standards, a conflict of interest exists if facts or circumstances exist that, from a reasonable third person's view, having knowledge of

48. *Bremer Handelsgesellschaft mbH v Ets Soules et Cie and Anthony G Scott* [1985] 1 Lloyd's Rep 160 at 164, per Lord Mustill.
49. Mustill and Boyd, above note 9, p. 250.
50. Axel H Baum, 'Conflicts of Interests in International Commercial Arbitrations: Some Aspects of United States Practice' The Chartered Institute of Arbitrators, Diploma in International Commercial Arbitration 5-13 January 2004.

all relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality and independence. Doubts are considered justifiable if the arbitrator may be influenced by factors other than the merits of the case. This definition seeks to encompass the various international standards for impartiality and independence. The usefulness of the *IBA Guidelines* for domestic arbitrations in Australia, arises from the inclusion of a practical application list that helps arbitrators to determine potential conflicts of interest.

Briefly, the *IBA Guidelines* include three lists. Each list describes practical situations, and the action that should be taken by the arbitrator. The green list encompasses situations where no appearance of a conflict of interest exists. The orange list covers situations which may give rise to justifiable doubts as to independence and impartiality. In these cases, the arbitrator is to disclose the circumstances to the parties. The red list is split into two lists: non-waivable and waivable. The non-waivable red list covers situations where the arbitrator must not accept the appointment, or resign. The waivable red list covers situations that can be waived by the parties, notwithstanding the significant doubts about the arbitrator's impartiality or independence.

The practical application of these guidelines in the domestic context is that they make the general standards easier to understand and to apply. Given that it has no force of law, it is really a code of conduct for arbitrators, but by following this general standard, it is hoped that challenges to arbitrators will be reduced, and arbitrators will not accept positions in domestic arbitrations from which they will later have to withdraw.

The Asian influence

Arbitration was traditionally regarded in Asia as being an invention of the West, inconsistent with a history of non-confrontational dispute resolution. Rapid economic development in the second half of the 20th century precipitated the development of arbitration laws throughout Asia. However, arbitration in Asia still retains a distinct conciliatory flavour.[51]

Conciliation has had an exceptionally long history in Asia. Indeed, in some senses it is the cornerstone of the Asian legal tradition. By way of background, Confucian ethics and cosmology inform the traditional Chinese view of dispute resolution. Confucius held a low view of law and this is reflected in the Chinese approach to the resolution of disputes. Traditionally, litigation is seen as a last resort and signifies a breakdown of harmony. Thus, the goal in Chinese dispute resolution is to settle the dispute, not to have it adjudicated. As a result, non-binding methods of dispute resolution are not seen as an alternative to pursuing the dispute through the legal system, but in fact, a fundamental part of arbitration.[52]

Historically, conciliation was used at the local village, neighbourhood and work unit level. In Thailand, as long as 700 years ago, the king acted as a mediator, settling disputes

51. David J Howell, 'An overview of Arbitration Practice in Asia' [2001] *International Arbitration Law Review* p. 143.

52. Christopher H Lake, 'ADR Techniques and International Arbitration: Can we learn from Europe, the Far East and America?' (Paper presented at The Commercial Way to Justice an International Arbitration Conference, Boston 1996).

between subjects. Thus, mediation in the Asian context operated within a structure where conciliation was a primary method of resolving disputes.[53]

This culture has infused the Asian arbitration experience in two ways. The first is that, traditionally, the arbitrator's role, in addition to deciding the dispute, is to 'educate' the parties so they cease disputing.[54] The second feature of Asian arbitration is that conciliation and arbitration are often combined, such that if both parties have a desire for conciliation, the arbitral tribunal may choose to conciliate the case.[55]

Interestingly, the *Uniform Commercial Arbitration Acts* make provision for this type of settlement in domestic arbitrations in Australia.

Section 27(1)(b) of the Act provides that parties to an arbitration agreement:

> *[M]ay authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire), whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.*

In its original form it authorised the arbitrator to convene a section 27 conference without the parties prior agreement and many will recall the very effective use which some arbitrators made of this power, John Morrissey included. Sadly, the act was amended to require the parties prior consent and the section ceased immediately to have any real value.

Inevitably, an issue of impartiality arises when the parties have refused to accept a compromise suggested by the arbitrator in the previous mediation process. Furthermore, the arbitration may be influenced by what has been conveyed confidentially and informally during the mediation process.

Section 27 must be skilfully used, and the arbitrator must be careful not to appear biased. In reality, a mediator assumes a role where they are party to confidential information, the goals of the various parties and what they may be happy to settle for. The mediator will then have great difficulty in assuming the role of impartial arbitrator after experiencing mediation.

Parties involved in a domestic arbitration should think carefully before adopting this Asian fusion of arbitration and conciliation. However, much can be gained by adopting the Asian mindset that arbitration should only be used as a last resort, after attempts to resolve the dispute amicably have been exhausted.

Putting it all together

Ultimately, the procedure adopted in an arbitration, whether domestic or international, is decided by the parties. There are no fixed rules of procedure. The only requirement is that the rules chosen by the parties comply with the relevant law of the place of the arbitration. In the case of domestic arbitration, the rules chosen by the parties must comply with the relevant

53. Suchint Chaimungkalanont, 'Resolving Disputes by Mediation: Policy, Law and Practice in Thailand' (2004) *Asian Dispute Review*, March, p. 19.

54. Yasuhei Taniguchi, 'Is there a growing international arbitration culture?' (1996) *ICCA Seoul*.

55. *CIETAC Rules*, Article 45.

Commercial Arbitration Act. The *Uniform Commercial Arbitration Acts* do not impose the kind of burdensome procedure that is currently being adopted in many domestic arbitrations. The recent decisions of *Imperial Leatherware and John Holland* demonstrate that the courts will not unduly intrude on the process adopted by the parties.

It is a case of changing the way in which the parties approach an arbitration. This same observation has been made in relation to the UK experience of arbitration:

> *[W]e are aware that Continental arbitration procedure is more flexible than what we are accustomed to and also perhaps less formalistic, but we do not have the courage to use this flexibility.*[56]

There is no reason that parties cannot adopt any of the innovative procedures that have been discussed. It is suggested that these procedures are either included in the arbitration agreement, or discussed at a preliminary conference.

Justice Howard Holtzman suggests that:

> *[I]n most cases it is wise for an arbitral tribunal to take an active role in augmenting the parties' presentation of the facts. This can be done by conducting pre-hearing conferences with the parties and, in appropriate cases, by issuing orders requiring parties to submit specifically described evidence. Arbitration is more effective and efficient when the arbitrators actively seek to elucidate the facts, rather than merely evaluating what the parties choose to present.*[57]

For arbitrators, when conducting the arbitration, it is useful to ask the parties at the end of each day whether they are happy with the way in which the arbitration is progressing.

An experienced arbitrator suggests:

> *The beauty about procedure is that no harm is done until an award is rendered that is affected by procedural mistake. If you make a mistake, that is not the end. You are not on a tightrope. If a party thinks that you went wrong, it will often tell you spontaneously. You should even encourage the parties to tell you if they believe you committed a procedural mistake, say, at the end of each hearing day. Procedural mistakes can almost always be rectified on the spot.*[58]

Finally, when choosing the arbitral tribunal, not only should arbitrators be chosen on the basis of who can best deal with the issues arising out of the dispute, but it is also suggested that if, for example, the parties wish to use inquisitorial techniques, then it is wise to choose an arbitrator who is familiar with such techniques, and will conduct the arbitration appropriately.

56. Briner, above note 31, pp. 155-166.
57. Justice Howard Holtzman quoted in Redfern and Hunter, above note 16, p. 334.
58. Karrer, above note 12.

Conclusion

International Arbitration is by no means a 'perfect' form of dispute resolution, and does not offer all the answers for those involved in domestic arbitration in Australia.

It is necessary for parties to consider what they want to get out of the arbitration, and communicate that to their representatives and the arbitrators. Furthermore, preferably with the agreement of the parties, arbitrators need to take into their own hands the conduct of the arbitration to ensure a speedy resolution of disputes. Finally, education is necessary to ensure that all those involved in arbitration are aware that there are other methods that can be employed in arbitration than those used by the Australian courts. This is not to say that common law procedure is not valuable, because there will be times when it is most appropriate. Rather, the challenge for all concerned is to tailor the processes used in an arbitration to ensure the dispute is resolved in the best possible manner.

Ultimately, the objective of arbitration should be 'not to give a party his "day in Court"'; it should be to resolve the dispute justly, economically and speedily.[59]

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

59. Bernstein, above note 13, p. 209.

Re-inventing the Wheel: Cost Effective Dispute Management in Arbitration and ADR

Robert Hunt [1]

1. Introduction

> *It is trite to observe that we live in an age of consumerism. If the arbitration industry is unable to satisfy the demands of consumers of its services for an efficient, economical and expeditious dispute resolution service, then it will continue to wither. I say "continue" because the process is already under way. (Justice Drummond, of the Federal Court of Australia, 1996)* [2]

> *[I]n Australia, until lately, we did not always embrace wholeheartedly the different techniques needed for mediation and arbitration. Those techniques do not always come easily to people trained in the combative atmosphere of adversary trials before Australian courts. That is why the educative work of the Institute and of the centre are so important. Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology. (Justice Michael Kirby AC CMG, of the High Court of Australia, 1999)* [3]

In 2004, it is timely to consider whether, in the practice of arbitration, we are living up to what Justice Kirby says that mediation and arbitration are (or should be).

I propose to do that by identifying the problem, and then looking at ways and means of saving time and costs in arbitration by:

- considering some techniques and approaches which are effective in other dispute resolution processes to see what we can learn from them;
- dealing with an 'old chestnut', namely how much the requirements of natural justice are (or should be) a constraint on saving time and costs in the conduct of arbitrations;

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2. Justice Drummond, '1996 John Keays Lecture', cited in *The Arbitrator* 15 (2), August, p. 76.
3. Justice Michael Kirby (1999) cited in *The Arbitrator* 18 (2), September, p. 107.

- offering some observations about the various phases of the arbitral process, namely the preparatory (or interlocutory) stage, the hearing, and preparing the arbitral award, including methods I have found to be effective in minimising time and cost.

In relation to the last aspect, I should say at the outset that by and large my experience as an arbitrator (and as counsel) has been in larger and more complex disputes. The matters to which I specifically refer obviously may need to be 'scaled down' according to the size and complexity of the arbitration. For example, proactive case management during the interlocutory stages may prove to be an effective tool in minimising the overall time and cost of a complex arbitration, but may well be inappropriate for a short simple arbitration involving a small amount of money or a limited number of issues.

As many of you undoubtedly know, this is not a new theme for me. In 1997, I delivered a paper entitled 'A Pro-active Role in the Arbitral Process', which was published in *The Arbitrator & Mediator* in November 1997, outlining many of the things I then did (and still do) in seeking to conduct arbitrations efficiently and cost-effectively.[4] In section 5 in this paper, I will not waste time repeating the detail of what I then said about various matters including particulars, discovery and inspection, and expert evidence. I will simply note that you should refer to the earlier paper for that detail.

2. Identifying the problem

In his introduction to a paper delivered to the 2004 IAMA Conference, 'New Directions in ADR', Peter Wood refers to what were traditionally regarded as the principal attractions of arbitration, including resolving disputes more expeditiously, flexibility and cost effectiveness. He then says:

> *It is clear that litigants in Australia no longer perceive arbitration to have these advantages because domestic arbitration generally mimics and adopts exactly the same procedures as litigation. Domestic arbitration utilises many of the expensive and time consuming interlocutory steps provided for by the rules of Court, involves a delay to commencement of the hearing which is not considerably shorter than the delay in the listing of a trial before a Court, involves a hearing itself which is not necessarily shorter than a trial before a Court, but involves the additional cost to the litigants of the arbitrator and venue. Indeed, with the advent of managed court lists, and early judicial intervention in the interlocutory litigation process in some courts, arbitration is now generally seen as a less efficient process than litigation.*[5]

4. That issue of *The Arbitrator & Mediator* is, unfortunately, not on the IAMA website. However, a copy of 'A Pro-active Role in the Arbitral Process' is located in 'Recent Papers' at <www.roberthuntbarrister.com>.

5. Peter Wood 'Domestic Lessons from International Arbitration – *Anaconda v Fluor*: a case study' (Paper presented at New Directions in ADR, 2004).

I anticipate that not everyone will agree that this is a justifiable criticism, given the manner in which many large, complex commercial arbitrations have been conducted in recent years (at least in New South Wales). It is important to note, however, that this may be the perception of litigants and their lawyers.

Many people may see this as a classic 'chicken and egg' situation, largely brought about by lawyers pressing for (or insisting on) arbitral processes which enable them to operate within their comfort zone. In opening the IAMA Dispute Resolution Centre in Sydney in May 2000, the then Governor of New South Wales (and former Judge of the Court of Appeal), the Honourable Gordon Samuels AC expressed the view that the real reason why some lawyers press for arbitrations to be conducted in the manner of traditional litigation is because that is what they are familiar with. His Excellency then said:

> ***The fact that the standard adversarial procedures are generally rational and fair is insufficient to commend them for adoption in an arbitration. …***
> ***I am reasonably sure that it is the facile adoption of the standard and familiar adversarial procedure which adds time and cost to arbitrations.*** *If such procedure is unnecessary to the solution of a dispute, as in many cases at least I believe it is, it is therefore inefficient.*
> *Well then, what is the remedy? It is, of course, to modify in the conduct of arbitrations the rigours of the adversarial system. In particular, it is not sensible, in my view, to run an arbitration on the footing that the parties alone decide what evidence they will produce (thus denying the arbitrator any right to call a witness) and determine the pace at which the caravan moves forward.* ***The parties must, of course, establish the basic issues which they desire to contest: but after that any decisions about evidence or procedure must be made by the arbitrator in consultation with the parties.*** (emphasis added)

3. What can we learn from techniques and approaches which are effective in other dispute resolution processes

(1) The various forms of ADR (i.e. mediation, conciliation, expert determination)

Mediation and Conciliation

There is a lot that we can learn from tools which are effective in the practice of mediation and conciliation.

One is the importance of gaining the trust and the respect of the parties. Once an arbitrator has that trust and respect, parties will be more receptive to views that the arbitrator expresses about possible means of saving time and cost in the arbitration. Without that trust and respect, the prospects of persuading parties to adopt suggestions of the arbitrator which differ from the 'traditional' adversarial approach to court litigation will be very remote indeed.[6]

6. See Part 3 below, particularly what was said by the Honourable Gordon Samuels AC.

Another important lesson from mediation and conciliation is the technique of 'active listening'. I have found this to be particularly important in the interlocutory stage, when exploring ways and means of minimising the time and cost of the process. A related tool which is very useful is 're-statement', by which the arbitrator re-phrases what is put to him by the parties, as a means of guiding the dialogue with the parties in a direction which the arbitrator considers will be beneficial to minimising time and cost.

A further important lesson from mediation and conciliation is the benefit of developing options, particularly during the preparatory or interlocutory stage of the arbitration. Decisions made at that stage in respect of the arbitral process can have far-reaching effects on the ultimate time and cost of the arbitration.

Yet another thing we can learn from mediation and conciliation is the benefit of narrowing issues as a means of minimising the time and cost of the arbitral process. I have found, in my own practice, that because it seems I am regarded as a fairly proactive arbitrator, the work which I put into the narrowing of issues during the preparatory or interlocutory stages often results in the arbitration never in fact reaching a hearing. Those cases which do proceed to hearing usually take considerably less time than that originally estimated by the parties.

Expert Determination

There are various lessons that we can learn from expert determination as well.

Perhaps the most important is the increased popularity of expert determination, which indicates that the market is anxious to avoid processes that involve parties committing themselves to lengthy oral hearings. Instead, the proponents of expert determination (of which there are many) prefer a process where the person who is to determine the dispute makes that determination based on documents only, after a process where information can be supplied and exchanged and submissions made, in writing.

The downside, of course, is that the expert determination process is completely unsuitable for some disputes.

For example, where there are factual issues to be determined which are entirely dependent on questions of credit (i.e. choosing between two competing versions based entirely on whether the Expert believes the version of A or, conversely the version of B), the documentary material or inferences which may properly be drawn do not assist in determining which particular version should be accepted. In such cases, the only satisfactory method of determining those issues is for oral evidence to be given, and for the witnesses to be made available for cross-examination. That would tend to indicate that the process actually employed was in substance an arbitration, opening the door to a possible application for leave to appeal by the unsuccessful party under the *Uniform Commercial Arbitration Acts*.[7]

7. Arbitration under the IAMA *Expedited Commercial Arbitration Rules* provides a better solution, as it offers a relatively quick process, which basically proceeds on documents, but leaves an option for an oral hearing to the extent considered appropriate by the arbitrator. See paragraph 9 of Schedule 2 to the Rules.

(2) Adjudication

The use of adjudication has increased exponentially over the past few years, following the introduction in NSW of the *Building and Construction Industry (Security of Payment) Act 1999*, ('the Act') as amended in 2002.

Statistics kept in NSW indicate that, in the 13-month period to 31 March 2004, 658 applications for adjudication were made, for claims between $389 and $33,511,962, in an aggregate amount of $205,380,593. Of those claims, 444 were determined, for amounts between $842 and $25,943,413, in an aggregate amount of $122,647,389.[8]

Similar legislation has been enacted more recently in other states and is foreshadowed elsewhere.

The adjudication process has been in use in the UK for some time longer, emanating from legislation in 1996. The process was also used as part of the dispute resolution regime in the construction of the Hong Kong Airport in the early 1990s.

The adjudication process is directed to the determining of the amount of progress payment to which a builder is entitled, while not affecting the rights of the parties for later determination of substantive disputes in relation to such matters as variations, defects, liquidated damages for late completion.[9]

Anecdotal evidence from Great Britain suggests that as many as 90% of matters which formerly would be referred to arbitration are now being determined finally by the adjudication process. If this is correct, it would seem to support a common contention by builders, subcontractors and the like, that clients and developers were taking inappropriate advantage of alleged contractual disputes to deny builders and subcontractors the cash flow they need to stay in business.

There are some things that we can learn from how the adjudication process is conducted, under the present legislation in NSW, which may be beneficial in the conduct of arbitrations. The detail of the adjudication process is not properly the subject of this paper.

For the purposes of this paper, however, it is worthy of note that the process is conducted basically on the papers, sometimes with the benefit of a view/inspection,[10] and that there are fixed times within which the adjudicator is required to deliver his or her adjudication. The Act provides that an adjudicator is to determine the adjudication as expeditiously as possible and, in any case, within 10 business days after the date on which the adjudicator notified the parties as to his or her acceptance of the application or within such further time as the claimant and respondent may agree.[11]

As can be seen from the statistics quoted above, some of the adjudications which have been the subject of applications to the Supreme Court of NSW have involved adjudication determinations as high as $25 million. In those circumstances, an adjudicator needs to be focused and particularly well organised to be able to deliver an adjudication determination

8. The remainder were completed but not determined for various reasons.
9. See s. 32 of the Act.
10. See s. 32 of the Act.
11. See s. 21 of the Act.

within a relatively short period of time. These are lessons that we can learn for the conduct of arbitrations as well.

(3) Court References

The court reference system is well established in NSW, pursuant to the provisions of Part 72 of the *Supreme Court Rules* and Part 28B of the *District Court Rules*. One particularly useful provision in the Rules is expressed in Part 72 Rule 8(5) of the *Supreme Court Rules* in the following terms:[12]

> *Each party shall, within a time fixed by the referee but in any event before the conclusion of evidence on the inquiry, give to the referee and each other party a brief statement of the findings of fact and law for which the party contends.*

Cole J (as he then was), said of this provision, in *Xuereb v Viola*:[13]

> *The recent amendment to Part 72 rule 8, by the insertion of a new subrule (5) providing "Each party shall, within the time fixed by the referee but in any event before the conclusion of evidence on the inquiry, give to the referee and each other party a brief statement of the findings of fact and law for which the party contends", ensures that each party is given the opportunity to place before the referee its submissions on fact and law. Of course, if parties breach their obligation under rule 8(5) by failing to comply with it, they cannot complain of a failure of natural justice.*

I have found that to be a useful direction to make in arbitrations as well, because it provides a ready checklist of the matters that need to be dealt with in the arbitral award.

Another issue in relation to court references that can be usefully considered is the practice which the Courts usually adopt of not referring a matter for a report pursuant to the Rules until the pleadings are closed and the various interlocutory steps have been completed (e.g. service of witness statements and experts' reports).

That should mean that the Referee should then be able to fix a hearing date for the Reference within the relatively near future on the basis that all of the interlocutory steps have been attended to. Unfortunately, that seems to rarely be the case for a number of reasons, including the fact that many parties seem to put off considering the detail of how the hearing will be conducted until the Referee is appointed, and then realise that pleadings, statements and reports may need to be amended.

One undesirable consequence of this sort of procedure by the Court is that it means that the parties have expended considerable sums of money in the preparation of experts' reports. Experience shows that, when a Referee conducts a conclave of experts, or directs that there be a meeting between the experts with a view to narrowing issues and producing a joint report identifying matters on which they agree and matters on which they disagree, much of the time and effort which has gone into producing the experts reports in the first place may well have been avoided.

12. A similar provision is contained in rule 7(5) of the *District Court Rules*.
13. [1989] 18 NSWLR 453, at pp. 466-467.

I was very pleased to hear from Janet Grey[14] of a case when she was appointed early in the process, with a much better outcome. In her words:

> *I was appointed as referee in a Supreme Court case recently between a Plaintiff/Lessee and Defendant/Lessor.*
>
> *Water penetration was occurring in the premises. The Lessee said it was coming from faults in the original building fabric and the Lessor said it was coming from faults caused by the Lessee's fit-out. The parties were unable to agree on what rectification work was required.*
>
> *I was appointed as referee early on in the proceedings with the parties saying to me go out to the site with the experts and try and sort the mess out (although not in those words). Prominent in the Lessee's mind was the need to have a waterproof place in which to run its business.*
>
> *I met with the experts on site about five times. We crawled and climbed over the building and then debated the cause of each leak. First substantial agreement was reached between the experts on what the causes of the leaks were and whether or not they were building or fit-out related (there were about twenty in all). Then agreement was reached on what was needed to be done to rectify the leaks, and the parties agreed on who would organise the rectification work.*
>
> *We then met during and after rectification work and tested it (flood and pressure) and the experts decided what further work needed to be done and further clarified some of the causes of the leaking. Finally, when the work was completed, there was a half day conclave regarding the additional cost of fixing up the fit-out mess (drooping plasterboard ceilings etc. followed by outline submissions. That concluded the hearing (apart from receiving final submissions). Prior to hearing final submissions the parties asked for an adjournment to discuss settlement options, which I have been informed are close to a successful conclusion.*
>
> *Ninety percent of the time in the reference was either on site with the experts or drafting up summaries of the experts' agreements and advising the parties lawyers of progress etc.*
>
> *Had the Court waited until all witness statements had been concluded and exchanged the horse would have bolted, and the Court would not have had the benefit of the referee's expertise through the process of the identification of the problems and their rectification.*
>
> *In these kinds of situations the very early appointment of the referee can be very useful.*

14. NSW Grade 1 Arbitrator.

(4) Procedures in the courts

There are three particular aspects of procedures adopted by the Courts (at least in NSW) which are worthy of consideration.

Case Management

There is a practice in NSW commercial and construction lists of relatively detailed case management. This is a technique that I find is useful in arbitrations for two principal reasons. The first is that the setting of a long interlocutory timetable with a hearing date inevitably means that the matter is not ready to proceed on the appointed hearing date. In my opinion, it is better to have a number of preliminary conferences to better manage the flow of the interlocutory processes, and only fix a hearing date when it is clear that that hearing date can be realistically achieved. The second reason is that case management in this way is a particularly effective technique for developing options and narrowing issues, to which reference was made in subsection 2(1) above.

The Expert Witness Code of Conduct

The Federal Court of Australia and the Supreme and District Courts of New South Wales have all introduced an *Expert Witness Code of Conduct*. Expert reports are not admissible unless experts acknowledge that they have read the *Expert Witness Code of Conduct* and agree to be bound by it.

The *Expert Witness Code of Conduct* in Schedule K of the NSW *Supreme Court Rules* provides as follows:

General Duty to the Court

2. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
3. An expert witness' paramount duty is to the Court and not to the person retaining the expert.
4. An expert witness is not an advocate for a party.

The Form of Expert Reports

5. A report by an expert witness must (in the body of their report or in an annexure) specify:
   (a) the person's qualifications as an expert;
   (b) the facts, matters and assumptions on which the opinions in their report are based (a letter of instructions may be annexed);
   (c) reasons for each opinion expressed;
   (d) if applicable – that a particular question or issue falls outside his or her field of expertise;
   (e) any literature or other materials utilised in support of the opinions; and
   (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.
6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in their report.

7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate.

Compulsory Mediation

The third aspect to which I would refer in the court procedures is that, under amendments to the *Supreme Court Act* in NSW, judges now have the power to refer matters to mediation without the consent of the parties.

That is not a power that an arbitrator presently has. The best that an arbitrator can do is to seek to persuade parties that it would be beneficial to at least attempt mediation for some (or all) remaining issues in the case.[15]

4. Natural Justice: How much of a constraint is it (or should it be) on saving time and cost in the conduct o arbitrations

There are two aspects to natural justice, namely procedural fairness and bias or, perhaps more correctly, the appearance of bias.

The requirements of natural justice are not fixed and immutable, but are dependent on and will vary with the circumstances and nature of the case. In *Kioa v West*,[16] Mason J (as he then was) said:

> ***What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting. ... The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case?*** (emphasis added)

(1) Procedural Fairness

There is a perception, amongst some lawyers and arbitrators, that affording procedural fairness requires that a contested arbitration be conducted in much the same manner as a traditional contested trial. That perception is not correct.

The requirements of natural justice were the subject of detailed consideration by Cole J (as he then was) in *Xuereb v Viola*,[17] a case concerned with a Reference under Part 72 of the *New South Wales Supreme Court Rules*.[18] In relation to procedural fairness, his Honour said:

15. See paragraph 8 under 'Becoming Pro-active' in Hunt, above note 4.
16. [1985] 159 CLR 550, at pages 584-585.
17. [1989] 18 NSWLR 453.
18. At p. 468-469.

> ***[I]n my judgment, it can be said that non-compliance with procedures normally applied in Court proceedings does not, of necessity, result in a denial of natural justice.*** *Were an inquiry to be directed by a court as to what monetary indebtedness of a party was shown by a set of books of account (as distinct from determining the indebtedness generally), there may be no denial of natural justice to either party by a judge directing a competent accountant, as referee, to report on that matter without reference to the parties. In contrast, if a referee were asked to the indebtedness of A to B having regard to the set of books of account and any other circumstances, it may well constitute a denial of natural justice not to permit each party to advance to the referee such factual circumstances relating to indebtedness, or falsity of such books, as may be relevant. Equally, it may constitute a denial of natural justice not to permit a party to respond to an allegation of indebtedness made against him.*
>
> ***The example I have given is an endeavour to demonstrate that what is required by natural justice will vary with particular circumstance.***
>
> *...*
>
> ***Referees, no doubt, look to the Courts for elucidation upon what is meant by "natural justice". Its absence is readily recognised but its constituents are difficult to define. In essence it means fairness between the parties. If an allegation is put by one party against the other, the other should have the chance to respond. Yet the process of responding is not indeterminable.*** *For once a party is aware of the case or argument or fact asserted against him, natural justice is usually satisfied by giving to his opponent the opportunity to respond. The response may, of course, throw up material not adverted to by the first party.* ***It is usual, in the Courts, for the first party to be given a limited right of reply to deal with any such new material, whether factual, argumentative or a matter of legal concept. But it is not always essential that such a right be given. If issues are clearly defined, particularly if they be of a technical nature, and if each party is given a full opportunity to place before the Referee that which it wishes in relation to those issues, it does not necessarily follow that there is a denial of natural justice by not permitting each then to respond to any new material advanced by the other. Particularly is that so where the Referee is a person of technical competence able to understand the material placed before him by each party.*** (emphasis added)

(2) Bias (or the apprehension of Bias)

A succinct summary of the relevant principles was given by Cole J (as he then was) in *Xuereb v Viola*, where he said:[19]

19. At p. 469.

> *Another aspect of natural justice is that the Referee must be actually impartial, and must be perceived by a disinterested bystander to be so. Accordingly, he must not hear evidence or receive representations from one side behind the back or in the absence of the other. (emphasis added)*

The application of these principles means that it is inappropriate for an arbitrator to privately 'caucus' with parties and their professional advisers, notwithstanding that it is a perfectly proper practice for a mediator or conciliator. The difference is that a mediator or conciliator is not called upon to decide the substantive issue.

5. Minimising time and cost in the arbitral process

It is probably stating the obvious to say that not all arbitrations are the same, and not all arbitrators are the same. Nevertheless, I think it needs to be acknowledged in considering how best to minimise time and cost in the arbitral process.

Various techniques I use seem to be more effective in some arbitrations than others, as the mix of issues and personalities changes. I find that, as a general rule, inexperienced parties and their professional advisors take more persuasion to try something new. As indicated in section 2 above, one tends to find that lawyers like to operate within their comfort zone, that is, on their territory rather than yours. A similar comment could probably be made about experts.

There is a wide range in personalities and styles among successful arbitrators. Some arbitrators find an assertive proactive approach suits their style, while others are less comfortable with it. It is probably fair to say that I am in the former category.

With that disclaimer, I can describe what I think is important at the various phases of the arbitral process, and the techniques I find are effective.

(1) General

(a) The powers of the arbitrator

Section 14 of the *Uniform Commercial Arbitration Acts* ('the Acts') provides an arbitrator with very wide powers in determining the arbitral procedure, namely:

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

The only express constraints on the exercise of those powers are the Acts and the arbitration agreement. However, it would be unwise for an arbitrator to exercise those powers in a manner which was opposed by both parties.[20]

Other relevant provisions of the Acts that are worthy of note are:

- section 18(3): the arbitrator has the same powers as the Supreme Court to continue with arbitration proceedings in default of appearance or failure to comply with a subpoena or with a requirement of the arbitrator etc;

20. See paragraph 2 under 'Becoming Pro-active' in Hunt, above note 4.

- section 19(3): unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator is not bound by the rules of evidence but may inform himself or herself in relation to any matter in such manner as arbitrator thinks fit;
- section 37: the parties have a duty to, at all times, do all things which the arbitrator requires to enable a just award to be made, and not to do or cause to be done any act to delay or prevent an award being made;
- section 46(1): unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the arbitration agreement that it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in the arbitration proceedings;

(b) The style of the arbitrator

While acknowledging the differences in personality and style among arbitrators, I believe there are some important things we all should do if we are serious about trying to conduct arbitrations efficiently.

The first is to focus on what you are trying to achieve, and not lose sight of 'the wood for the trees'. There is no point in adopting innovative techniques if they involve more time and cost than what you are trying to save. Related to the first point is that you need to be flexible in your approach to achieving your aim. If you try something and it does not work, then try something else rather than giving it away as too hard.

You need to be enthusiastic in 'selling' the benefits of something a party is not familiar with. Related to that point is the need to be committed to what you are seeking to persuade the parties about. Sometimes, it may be better to come back to a suggestion at a later time, rather than pressing it to the point of rejection. If you do not appear committed and enthusiastic, you can hardly expect the parties to be.

Finally, the 'firm but friendly' arbitral style invariably yields the best results.

(c) The importance of preparation

In my opinion, preparation is one of the most important ingredients for an arbitrator in the efficient conduct of the arbitral process.

While it requires more time and more effort on the part of the arbitrator, it pays dividends throughout the process. During the preparatory stage of the arbitration, it enables the arbitrator to appreciate the relative importance of issues, which is a prerequisite to devising an efficient process for dealing with those issues. During the hearing, it places the arbitrator in a better position to deal with matters which arise, including such things as objections to oral evidence, minimising cross-examination as far as possible, and questions from the arbitrator after re-examination.

While it takes time, it ultimately saves time that is expensive when solicitors, barristers and others are present. This can lead to a significant saving in time and cost of preliminary conferences and hearings.

(d) The importance of being seen to be in control of the process, and having the respect of the parties

Good preparation is an important ingredient here as well. Most experienced arbitrators would probably admit that, on occasions, they may have slipped a little in this regard. Experience shows us that having the respect of the parties, and being seen to be in control of the process, are interdependent. While it is not something which one achieves by 'bullying' the parties, it is important that the parties perceive the arbitrator to be in control. How an individual achieves that is very much a question of personal style. While some arbitrators are assertive, others achieve much the same result by engendering a spirit of cooperation. I find that, in most arbitrations, at least one of the parties (or their representatives) will test the envelope, or test the limits which an arbitrator will accept in pursuit of their own client's interests. I find it is useful to establish, relatively early in the process, that it is the arbitrator who controls the process, rather than either party. At the risk of repeating myself, this is only possible with proper preparation. This is encompassed in the phrase 'firm but friendly'.

(e) Electronic copies of documents

Used appropriately, electronic documents can lead to a significant saving in time and cost in the arbitral process.

The April issue of *Insights – International Arbitration* contains a very useful article by Andrew Stephenson and Simon Chapple entitled 'Using Technology in International Arbitration'.[21]

My current practice is to direct that the parties provide me and the other party with copies of documents in both hard copy and electronic form. If the arbitrator is provided with electronic copies of documents such as witness statements, experts reports and written submissions, those documents need to be provided to the arbitrator in a form which the arbitrator can use to cut and paste sections as required into the arbitral award.

I have found there are two problems which arise. Firstly, some solicitors jealously guard their intellectual property rights in those documents, and prefer to provide them in 'pdf' form to the opposing lawyers. The second problem I have experienced is that, if you are using a program such as 'Outlook Express', those programs find it difficult to cope with very large attachments. Some documents transmitted to me electronically have been as big as five megabytes, and have caused quite a problem in my electronic mail system.

I have found that a convenient solution to both problems is that the electronic copy of such documents served by email is in pdf form, and I later receive CD ROMs containing a version of those documents, in 'word' format, which I can then cut and paste.

(2) The preparatory (or interlocutory) stage

(a) Before the first Preliminary Conference

The initial notice to the parties convening the preliminary conference provides an important opportunity to define the parameters within which you intend to conduct the

21. See paragraph 3 under 'Becoming Pro-active' in Hunt, above note 4.

arbitration. I use a form of letter which is somewhat different to Annexure 'A' to the IAMA Practice Note 3C 'The Preliminary Conference', along the lines described in the 1997 paper.[22]

I do this for two main reasons. Firstly, to gain some initial appreciation of the sorts of issues involved in the dispute. It is important to know, at the outset, whether there are legal, technical and/or *quantum* issues involved in the dispute, as well as gaining some appreciation of whether there is a cross claim, and the *quantum* of what is in dispute. As indicated in section 1 above, the type of procedure one might suggest for a complex multi-million dollar dispute will be significantly different to the sort of procedure which is appropriate for a simpler dispute where the amount in issue is much less.

The other principal reason for this form of letter is that, by being proactive from the outset, an arbitrator should be perceived by the parties as being in control of the process, and thereby gain the respect of the parties at a very important stage. Another benefit I have found is that the initial statement of issues is often the first occasion on which the parties address the types of issues involved in other than very general terms. An illustration of this was in an arbitration I conducted in late 2003, where the provision of that sort of document in a multi-million dollar commercial case led to settlement of the matter within two weeks of the first Preliminary Conference.

(b) The first Preliminary Conference

The first Preliminary Conference is also an important opportunity to set the parameters for the arbitration.

It provides the first opportunity for face to face contact between the arbitrator, the parties and their lawyers.

In the sorts of matters in which I have been involved, I have found that almost invariably I do not have enough information by the first Preliminary Conference to make procedural directions for the matter up to and including the hearing. Accordingly, my practice at the first Preliminary Conference is to set a timetable for properly particularised pleadings and a preliminary bundle of documents. Provision of this material, added to the initial statements of issues by the parties, means that I am in a better position at the next Preliminary Conference to assess what procedure should be adopted in that particular arbitration in preparing the matter for hearing.

(c) 'Pleadings' and particulars

The adequacy of particulars in pleadings, and requests for further and better particulars, are often an occasion when lawyers for a party may try some 'muscle flexing'. I am a strong proponent of procedural directions by which objections to the adequacy of particulars are notified to the arbitrator and the arbitrator directs what (if any) further particulars are to be provided.[23]

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23. See Annexure 2 to IAMA Practice Note 3C and paragraph 6 under 'Becoming Pro-active' in Hunt, above note 4.

While it may sometimes be inconvenient to have to deal with arguments concerning the adequacy of particulars within a very short time frame, I consider it is well worth the effort involved for various reasons, namely:

- it creates a favourable impression, of the arbitrator being across the issues in the arbitration;
- it establishes that you, as arbitrator, are firmly in control of the process (rather than a solicitor for one party, who may have a multi page request for particulars in its precedent file); and
- it does (or should) earn you the respect of the parties.

All of those things are important matters for the efficient conduct of the remainder of the arbitration.

(d) 'Case management' in further Preliminary Conferences and otherwise

In most cases with which I am involved, I use a 'case management' type of approach which is not dissimilar to case management processes in some courts. Basically, the approach involves an initial stage of information gathering and exchange (i.e. properly particularised pleadings, joint bundles of documents etc.), and then developing options, narrowing issues.

I sometimes find that a suggestion which does not find favour at an early Preliminary Conference is then adopted by the parties at a later Preliminary Conference. This is particularly so in relation to joint reports of experts and a 'chess clock' approach to fixing the hearing.

I have found that there is no single case management approach that works in all arbitrations. Sometimes I find that as few as three Preliminary Conferences are required before the hearing. On other occasions, at various stages through the process, considerably more attention is required. For example, in a substantial construction arbitration recently, we found that a stage was reached in the preparatory stage where considerably more was required than a one to two hour Preliminary Conference. With the consent of the parties, I scheduled a Preliminary Conference for an entire day, during which we made substantial progress in formulating an appropriate process. That Preliminary Conference involved the parties, their solicitors and barristers and, perhaps most importantly, their respective experts in two areas. At one stage during the Preliminary Conference, I conferred separately with the barristers and the experts together, to generate some options for how the expert evidence could be dealt with. When a process was agreed, the Preliminary Conference was reconvened, and the minutes of the Preliminary Conference recorded what was agreed with the barristers and the experts.

I have also found that, on some occasions, something emerges from documents served that requires attention before the next Preliminary Conference. If that happens, my practice is to formulate appropriate draft directions for dealing with the problem, and inviting submissions from the parties if there is any disagreement with the directions proposed.

It is important to remain flexible. In an arbitration recently, an issue was raised concerning determination of a matter as a preliminary question, by way of interim award.

Courts are extremely cautious about embarking on determination of matters as preliminary questions. They will usually only do so on the basis that facts are agreed and the determination of the preliminary question appears likely to lead to an early determination of the proceedings. One particular problem which judges and arbitrators face in determining matters as a preliminary question, is the prospect that the unsuccessful party will then seek that the judge or arbitrator disqualify himself or herself from the further conduct of the proceedings. This has more serious consequences in arbitration than in a trial before a judge, because a good deal of costs may already have been expended in the arbitration and, unless the parties expressly agree, any replacement arbitrator would need to begin afresh.

On that basis, my initial view was against determining the issue as a preliminary question. However, it was then explained to me that one party was seeking the determination of a question of law as a preliminary question, because the time experts for the parties were unable to agree on the proper construction of the contract in relation to the matters to be taken into account in assessing extensions of time.

If this issue was not determined as a preliminary question, it would mean that the joint deliberations of the experts would need to proceed on the basis of two competing assumptions as to the proper construction of the contract. This would obviously be less efficient and more costly than if the experts had the benefit of a determination on the proper construction of the contract beforehand. For that reason, I indicated to the parties that I would be prepared to determine the question of construction of the contract as a preliminary question, provided that the parties agreed that neither would take the point that I should disqualify myself from the further conduct of the arbitration by reason of determining such a preliminary question of law.

In the end, that agreement was not forthcoming.

(e) Documents: discovery & inspection, and preparation of joint bundle of documents

I usually find that informal discovery and inspection is accepted by the parties and their lawyers as the appropriate manner in which discovery and inspection should proceed. I cannot now recall the last occasion when a party sought to argue that discovery should comprise a detailed list of all documents in the traditional manner. It seems to be generally accepted that discovery be by identified folders of documents, in which the documents in the folder are individually numbered (but not described in an index). In relation to joint bundles of documents, my practice is to direct preparation of a joint bundle at two different stages of the interlocutory process. Initially, I find it useful to have a joint bundle of documents by the time of the second Preliminary Conference, to assist me to appreciate the issues (particularly in relation to the contents of contracts and other documents), rather than simply having the documents summarised in a pleading (regardless of how well particularised the pleading is). With that joint bundle of documents, I direct that it is to be prepared on the basis that it comprises only documents which are agreed by both parties. If one party objects to the inclusion of a document in the joint bundle, then it is excluded. I use that bundle of documents solely to gain a better appreciation of the issues, and not for any evidentiary purposes.

At a later stage, I seek to persuade the parties to prepare a joint bundle of documents for use as evidence in the proceedings. This saves a considerable number of trees in eliminating multiple copies of documents all attached (or exhibited) to various witness statements. It simplifies matters considerably if all witnesses refer to a single bundle of documents, rather than the arbitrator being faced with the prospect of cross referencing between the versions respectively attached or exhibited to particular witness statements.

This sort of process usually involves the addition of further documents to the initial joint bundle of documents. Those documents are included in the evidentiary joint bundle on the basis that I will rule on objections to the documents in due course (before the hearing). Objections are dealt with further in subsection (2)(k) below.

(f) The factual evidence: do witness statements save time and cost or not?

There are a number of competing arguments in relation to this particular issue. As a case increases in complexity, it obviously becomes less efficient to have the evidence in chief given *viva voce*. Oral evidence in chief usually turns out to be a stop start sort of process, and cross-examination can tend to be prolix until counsel has seen the transcript of the oral evidence. On the other hand, the wording used in witness statements often tends to more closely reflect the language of the lawyer involved in preparing the statement rather than that of the witness. This may be particularly significant where there is disputed evidence about a conversation which took place many years earlier. It is undoubtedly correct that the preparation of written witness statements involves significant time and expense. However, the time involved will usually be that of a witness and a solicitor. If the evidence is given orally at the hearing, the time taken involves the arbitrator, counsel for the parties, the solicitors, and the ancillary costs of transcript, hearing room and so on.

There are two other aspects which probably tip the balance in favour of written witness statements in most matters. The first is that service of written witness statements certainly encourages settlement at an earlier stage than if the evidence in chief is given *viva voce* at the hearing. The second aspect is that it shortens the time required at the hearing for dealing with objections to evidence and also the time taken in cross-examination. My practice in dealing with objections is set out in subsection (2)(k) below.

(g) The expert evidence: reports before (or after) meetings or conclaves of experts?

This is an issue that I dealt with in my 1997 paper.[24] I have found that, almost invariably, initially the parties prefer to serve their respective experts reports before meetings or conclaves of experts. I am strongly of the view that this is extremely inefficient. In most cases, I find that a joint report prepared after experts meet involves a very substantial degree of agreement between the experts. Often one finds that opinions between experts differ simply because of the different factual instructions which they receive.

As indicated above, I find that I am often successful in persuading parties to move from

24. See paragraphs 12 and 13 under 'Becoming Pro-active' in Hunt, above note 4.

that position. Sometimes it is simply a matter of chipping away patiently, until the parties accept what you regard as commonsense.

A copy of my standard directions for experts meetings is Annexure 'A' to this paper. In most cases, some amendment is required to those directions before they are accepted by the parties. However, I consider that this sort of procedure is worth persevering with because of the significant saving in time and cost which may result. That saving is not limited to the time costs of the experts themselves. If this sort of process can be put in place before factual witness statements, it can also lead to a substantial saving in time and costs in the preparation of witness statements, as there is no need to deal at length with matters which are not controversial to provide the factual foundation for expert evidence. If a procedure is adopted whereby the factual witness statements are prepared first, and expert reports follow, parties may not be prepared to take the risk in not dealing with particular factual matters, until they know that those facts are not controversial or are not germane to the respective opinions of the experts.

(h) Conducting meetings or conclaves of experts

There are differing views on the extent to which the arbitrators should be involved in meetings or conclaves of experts. In my 1997 paper, I expressed a note of caution in relation to the conduct of expert conclaves.[25] A further concern which I have is the prospect that something may be said in a conclave at which the arbitrator is present, which is not part of the evidence in the case, but which has some perceptible influence on the decision of the arbitrator. One way of dealing with this is for a transcript to be kept of the conclave, and to require that the transcript be tendered as evidence in the arbitration. However, transcripts are expensive and it may not always be cost effective to proceed in this manner.

Another practical reason for the arbitrator not to take part in the deliberations of the experts is that one sometimes finds that, in the absence of the parties, the lawyers and the arbitrator, it is a much shorter and more efficient process. In some matters where I have proceeded in this manner, the amount of face to face meetings between the experts has been minimal, and much has been done by telephone or email. That may not be practical if the arbitrator is to be involved in the actual deliberations.

The technique I use is to convene the meeting between the experts, prepare a list of issues that I ask the experts to consider, invite the experts to amend or supplement that list of issues as they see fit (on the basis that they have a better understanding of the technical issues than I do, at least at that stage), invite the lawyers and representatives of the parties to be present when I am giving the experts their 'riding instructions', and then receive joint reports from the experts on the progress of their deliberations in a form which can be circulated to the parties. Sometimes that is by email, if the meetings are being conducted before the hearing. On other occasions it has involved a joint report by the experts during the hearing, which is recorded on the transcript. I find that this sort of process works efficiently.

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25. See paragraph 14 under 'Becoming Pro-active' in Hunt, above note 4.

However, I respect the views of others (obviously better technically qualified than I am) who adopt a more proactive role in the deliberations of the experts during the conclaving process. For example, the sort of procedure described by Janet Grey which is referred to in section 3(3) above was obviously heavily dependent on her active involvement in the deliberation process.

(i) The significance of the Code of Conduct for Expert Witnesses

A longstanding problem in litigation and arbitration has been that many experts have not recognised the obligations that flow from a privileged position of being able to give opinion evidence, and tended to tailor their evidence according to the interests of the party on whose behalf they are engaged.

As noted in section 2 above, the Federal Court of Australia and the Supreme Court and District Court of New South Wales have included in recent years requirements for experts to abide by an Expert Witness Code of Conduct. This requires an express statement from experts that they agreed to be bound by the Code of Conduct as a precondition to admission of an expert's report.

This is something which can, and should, in my view, be adopted in arbitral proceedings. I tend to find that, these days, most expert's reports in arbitrations contain the necessary statement. If such a statement is not contained in expert reports, I usually make a direction that it be provided.

I then find it useful to remind the experts of the obligations under the Code of Conduct before their joint deliberations. Some may consider this is overkill, but I find it useful to remind experts that their paramount obligation is not to the parties who retained them. I find it is better to do that at the commencement of the joint meeting, rather than telegraph it beforehand, as clients do not always understand that the expert they have paid is required to proceed in a manner which does not put their interests first.

(j) Fixing the hearing (the 'chess clock' approach)

Before the arbitration proceeds to a stage when hearing dates can be fixed, I circulate proforma 'Further Procedural Directions', a copy of which is Annexure 'B' to this Paper.

Paragraph 15 of Annexure 'B' sets out my standard direction for a 'chess clock' type hearing. I find it is useful to circulate that document before the time of actually fixing the hearing date, as often there is initial reluctance to the concept of a fixed hearing time.

One of the difficulties with large complex arbitrations is that, if such an approach is not adopted, one may find that when the end of the hearing time fixed has expired, the evidence is only partly complete and, due to prior commitments of barristers, expert witnesses and arbitrators, a resumption of the hearing is not possible for many months. When a hearing is interrupted in this manner, further time and cost is involved on everyone's part in getting back up to speed for the resumption of the hearing.

I usually find that, at a subsequent Preliminary Conference, the parties agree to a 'chess clock' type approach to the hearing provided that sufficient time is fixed for the hearing. The practice I adopt is that, if one party says that X weeks should be set aside for the hearing, and

the other party says that X plus two weeks should be set aside for the hearing, then unless there is agreement to the contrary, I fix the hearing for X plus two weeks. By doing so, neither party can later say that further time should have been fixed for the hearing in the first place.

It is interesting to note that, even if there is initial resistance to a 'chess clock' approach, I can recall only one occasion since 1995 when the hearing has taken the full time allocated for the evidence. On one other occasion, the evidence was not completed within the allocated time and required further hearing dates to be set. That was due to something which could not reasonably be anticipated at the time of fixing the hearing, being the consequence of something which arose from joint meetings of experts which were being conducted while the hearing proceeded.

It is important to remain flexible and reasonable in the face of such changed circumstances.

(k) Other matters (statements of issues, statements of findings contended for, dealing with objections, directing security and service of offers of compromise etc)

The proforma 'Further Procedural Directions' in Annexure 'B' deal with various other matters that I find useful in the arbitral process.

I have included in Annexure 'C' to this paper the proforma schedule that I use for objections. Objections and preliminary rulings on objections are dealt with in paragraph 14 of Annexure 'B'. My practice is then to finalise my rulings on objections as each witness is called. This saves considerable time at the hearing in dealing with these sorts of matters, particularly as I find that, in most cases, there is no serious challenge to my preliminary rulings.

I have dealt with statements of findings of fact and law contended in section 3(3) above, and do not need to repeat that here.

I have found that directing security, and directing service of offers of compromise, are both useful tools in facilitating early settlement. On one (perhaps notable) occasion, when I made a direction for the service of offers of compromise, the claimant's offer of compromise was that it would accept a lesser amount than the amount offered by the respondent in its offer of compromise. As was to be expected, the matter immediately settled.

Unfortunately, that experience has not been repeated, although I live in hope. However, the process is useful because it encourages parties to consider, at an early stage, the cost consequences of the amount of the Offer of Compromise. Instead of the usual situation of a claimant starting high and a respondent starting low, the Offer of Compromise (or Calderbank letter) encourages lower offers by claimants and higher offers by respondents.

Directions for the provisions of security for the arbitrator's costs can also assist in encouraging parties to focus on the potential costs involved if they are not successful in the arbitration. In NSW, legal practitioners are required under the *Legal Profession Act 1987* to provide costs estimates to their clients. This, coupled with providing security for the arbitrator's costs beforehand, can provide a reasonably powerful incentive to early settlement.

Another matter that I should deal with at this stage is the direction in paragraph 18 of Annexure 'B'. This is an important tool in the arbitrator retaining control of the process, as it

enables prompt attention to minimising delays to the timetable which has been set. As a matter of prudence, I periodically check on progress rather than simply relying on the parties to notify me of any noncompliance. This is facilitated by checking compliance with directions made where material is to be served on the arbitrator as well as being served on the other party.

(3) The Hearing

(a) Maintaining control of the process

Maintaining control of the process remains important during the hearing. It is not unusual for counsel's tempers to become frayed, out of a sense of frustration when the hearing does not proceed in the manner which they anticipated. The best approach, yet again, is 'firm but friendly'.

(b) Expressing a 'preliminary view'

There is a lot to be said for expressing an informed preliminary view, during the course of the hearing. Particular care needs to be exercised in expressing a preliminary view before a hearing and, perhaps, even before witnesses are cross-examined on contentious factual issues.

Any such view needs to be carefully expressed as a preliminary view, so as not to appear to be a prejudgment of the issue.[26] An appropriately worded expression of a preliminary view by the arbitrator can often lead to a narrowing of the issues or settlement of the matter.

A good example was provided by an arbitration in which I was counsel many years ago, which involved deemed practical completion of a domestic building contract. The owner in that case sought liquidated damages for completion of the works. In cross-examination, it emerged that the owner in fact commenced occupation of the premises some considerable time before the date of practical completion certified by the architect. The particular contract provided for deemed practical completion on occupation. After that evidence in cross-examination, at the next convenient time during the hearing, the arbitrator asked to speak to both counsel, and pointed out the deemed practical completion clause in the contract. The arbitrator requested that counsel for the owner indicate what (if any) other evidence was intended to be led on this issue, given the admission by the owner in cross-examination. The owner's counsel requested a short adjournment to obtain instructions, and the matter settled shortly thereafter. If the arbitrator had not expressed that sort of preliminary view at the time, the hearing would have lasted for a number of further days, and then involved written submissions by both parties.

(c) Further meetings or conclaves of experts while the hearing proceeds

Not infrequently, the factual evidence on which expert opinions have been expressed may 'shift' during the course of the oral hearing, more particularly during cross-examination.

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26. See paragraph 10 under 'Becoming Pro-active' in Hunt, above note 4.

It is, therefore, useful to retain the facility for further meetings or conclaves of the experts.

For this reason, I tend to require that all of the factual evidence be given at the hearing before any expert evidence is given, unless persuaded that there is some difficulty in adopting this course.

(d) Other matters (including encouraging the narrowing of issues)

It often emerges, during the course of the hearing, that issues perceived at the outset are not necessarily contentious, or germane, by the time the hearing concludes. If this can be identified during the hearing, it saves time and costs in closing submissions and the preparation of the award.

Care needs to be taken in this process, however, so that what is said by the arbitrator does not appear to be a prejudgment of issues, contrary to the requirements of natural justice.

(4) Preparing the Arbitral Award

(a) Written submissions and oral addresses

The procedure I find works best is for written submissions in chief to be exchanged, followed by written submissions in reply, and then oral addresses on a day or days some two weeks or so after written submissions in reply. In my opinion, this is a process which is fair and also minimises the time taken in the written submission process. For that reason, it is preferable to the alternative of submissions in chief by the claimant, then submissions in response from the respondent, followed by submissions in reply by the claimant. The latter process usually involves at least another two to four weeks.

As indicated in subsection 5(1)(d) above the written submissions should be provided in electronic form, as well as a hard copy, so that the arbitrator can reduce the time and costs involved in the preparation of the award.

(b) What issues need to be addressed in the award

Where cases are put in the alternative, this can often mean that there is no need for the arbitrator to provide reasoned findings on all issues which have been raised. A recent arbitration that illustrates this point involved a claimant's case which was put on various alternative bases, some in contract and some on various extra contractual bases. It became evident that if a finding was made on one or more of the contractual bases, there was no need to determine the various extra contractual bases. In those circumstances, I thought it was prudent to raise that matter with the parties. Initially, I raised it during the course of the hearing, in the hope of encouraging consideration of that issue in the written submissions. When that consideration was not forthcoming, I raised it again with the parties following oral addresses. It was then agreed by the parties that my reasoned findings did not necessarily need to deal with all of the alternative bases on which the claim was put, but need only deal with those matters to the extent I considered appropriate in determining the matter overall. This led to a significant saving in the time and cost of preparing the award.

(c) Tips on award preparation

I find it useful to prepare a skeleton outline of the reasons for the award, in which I set out headings for the various matters with which I will deal in my reasons.

Where issues of credit are involved, I will usually make notes of my impressions of the witness within a relatively short time after the witness has given oral evidence. If one does not use this sort of approach, sometimes a lengthy period of time elapses and one's memory becomes hazy about aspects that may ultimately affect the acceptance of one witness's version in preference to another. I find that one cannot always rely on the written submissions of the parties to necessarily provide references to all of the evidence which favours the acceptance (or otherwise) of the version of a particular witness.

Before commencing drafting the award, it is then my practice to consider the written submissions and oral addresses in detail, as well as the findings of fact and law contended for respectively by the parties, to ensure that I deal with all issues and consider all of the appropriate evidence.

As indicated in subsection 3(3) above the requirement for the parties to provide a statement of findings contended for provides a useful checklist to ensure that nothing is omitted in the award and reasons.

This does not mean that all arguments put by the parties must be dealt with expressly in the reasons. As Mahoney JA said of the duty to give reasons, in *Housing Commission of NSW v Tatmar Pastoral Company Pty Limited and Anor*:[27]

> ***However, such a duty does not exist in respect of every matter, of fact or of law, which was or might have been raised in the proceeding. It is not the duty of the Judge to decide every matter which was raised in argument. He may decide a case in a way which does not require the determination of a particular submission: in such a case he may put it aside or, as Lord Scarman said, merely salute it in passing:*** **R v Barnett London Borough Council;** *ex parte Nilish Shah [1983] 2 AC 309, at 350.* (emphasis added)

6. Conclusions

In closing, at the risk of becoming repetitive, there is much which arbitrators can do to ensure that arbitrations are conducted efficiently and cost-effectively, subject of course to the 'you can lead a horse to water, but cannot make it drink' principle. However, it is probably worthwhile quoting, yet again, the views expressed by Justice Drummond in the John Keays Lecture in 1996:

> ***Informed parties can be expected to contribute to structuring an arbitration so as to deliver, quickly and economically, a measure of final justice that is acceptable to them. But arbitrators have a special responsibility to educate and encourage the parties who have appointed them to pursue those***

27. [1983] 3 NSWLR 378, at p. 385.
28. Drummond J, above note 2.

objectives. *The arbitrator who adopts that approach, in an attempt to give the parties the best service, will take up a heavier burden than is borne by the arbitrator conducting an old-style arbitration, i.e., one that mirrors equally old-style court processes. But it is that pathway which I believe is most likely to lead to the arbitration system achieving a high degree of acceptability, across the whole community, as a valuable means of resolving disputes that is truly alternative to litigation and ADR.* (emphasis added)

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

ANNEXURE A
"RE-INVENTING THE WHEEL"

ARBITRATION BETWEEN X PTY LTD AND Y PTY LTD

PROCEDURAL DIRECTIONS – EXPERTS' CONCLAVE(S)

1. Separate Experts' Conclaves are to be held between Experts respectively nominated by the parties in relation to each of the following:
   COMPLETE
2. The solicitor for each party is to nominate, in writing, to the Arbitrator and the other party, the identity of each Expert who will be participating in each Conclave at the request of their client, by 4.00 pm on COMPLETE.
3. The nominated Experts for each of the Conclaves referred to in Direction 1 above are to meet at a time and place agreed between them, being not later than the week commencing COMPLETE, and prepare a joint report on liability and quantum in respect of the issues therein referred.
4. The parties shall provide any factual information reasonably required by the Experts for preparation of the joint report as soon as reasonably practicable and within 48 hours of a written request by the Experts or either of them. The Experts may jointly approach the Arbitrator, by telephone or facsimile, if there is default by a party in this regard.
5. A representative of each party, with factual knowledge of the project, should attend the Conclave to provide to the Experts such factual assistance as they are able.
6. Subject to paragraphs 7 & 8 below, the Experts are to identify in their joint report what has been agreed in respect of liability and quantum in respect of the issues referred to them, the ambit of any disagreement, and their competing contentions in respect of any areas of disagreement (together with their reasons for same).
7. Each joint report is to identify precisely all of the factual material, or any factual assumptions, on which it is based. Where the source of any such factual material is contained in a document, a copy of that document is to be annexed to the joint report. Where the source of any such factual material is oral, the source of the information is to be identified, together with the substance of the information and the date on which it was obtained.
8. If there is a conflict in factual information provided, and that conflict cannot be resolved by agreement between the Experts, the Experts are to endeavour to reach agreement on the consequences of each competing set of facts, for inclusion in the joint report as alternative factual assumptions.
9. Each joint report is to be prepared and circulated to the parties in draft form by COMPLETE . The parties shall then provide such further factual material as may be required by the Experts (or either of them) or as the parties may otherwise consider appropriate to resolve any conflict in the factual information identified in the draft report, in sufficient time to enable the Experts to finalise the joint report for service on the Arbitrator and the parties by COMPLETE .
   Other Directions
10. COMPLETE

ROBERT HUNT Date:
Arbitrator

ANNEXURE B
"RE-INVENTING THE WHEEL"

ARBITRATION BETWEEN X PTY LTD AND Y PTY LTD

FURTHER PROCEDURAL DIRECTIONS

1. All evidence in chief shall be in the form of a written witness statement or expert report.
2. Claimant to serve, on the Arbitrator and Respondent, all evidence in chief in respect of the issues for hearing in the Points of Claim by 4.00 pm on COMPLETE
3. (If applicable) Respondent to serve, on the Arbitrator and Claimant, all evidence in chief in respect of the issues for hearing on the Cross Claim by 4.00 pm on COMPLETE
4. Respondent to serve, on the Arbitrator and Claimant, all evidence in reply in respect of the issues for hearing on the Points of Claim by 4.00 pm on COMPLETE
5. (If applicable) Claimant to serve, on the Arbitrator and Respondent, all evidence in reply in respect of the issues for hearing on the Cross Claim by 4.00 pm on COMPLETE
6. If any party fails to comply with the directions for service of evidence set out above, then that party may not lead evidence to which those paragraphs relate without leave of the Arbitrator, which leave will only be given in exceptional circumstances and may be subject to terms.
7. The Hearing is to be held on COMPLETE. Sitting hours will be from 10 am to 4 pm on those days. Claimant's solicitor is to book a venue for the Hearing at the COMPLETE. Claimant's solicitor is to arrange for provision of a transcript (indexed Minuscript or equivalent, disk and hard copy for Arbitrator). The costs of the hearing room and transcript are to be shared equally between the parties pending the Arbitrator's Award.
8. Each party is to serve on the other party an Offer of Compromise pursuant to Part 72A Division 2 and Part 22 of the Supreme Court Rules, each such Offer to be served by 4.00 pm on
9. The parties are to provide to the Arbitrator a Joint Bundle of all documents to be relied on by either party in the Arbitration (indexed and paginated), by COMPLETE
10. In the absence of agreement on a Joint Bundle, each party is to provide to the Arbitrator, by that date and time, a Bundle of all documents on which it relies in the Arbitration (indexed and paginated), with a copy to be provided to the other party.
11. The parties are to provide to the Arbitrator a Joint Statement of Issues, by COMPLETE
12. In the absence of agreement on a Joint Statement of Issues, each party is to provide to the Arbitrator, by that date and time, its Statement of Issues, with a copy to be provided to the other party.
13. Each party is to provide to the Arbitrator and the other party a written Statement of Findings of Fact and Law contended for by that party, which is to be served by COMPLETE
14. If objection is taken by either party to any part or parts of any witness statement or report or to any document, written notice of such objection is to be given to the other party and the Arbitrator by 4.00 pm on COMPLETE, nominating precisely what is objected to and the grounds of objection in each case. The Arbitrator will fax preliminary rulings on objections to the solicitors for the parties by 4 pm on COMPLETE.

15. The time fixed for the Hearing, after allowing time for administrative and procedural matters, will be apportioned between the parties as follows:
    - Cross-examination of Respondent witnesses and re-examination of Claimant witnesses: 50%
    - Cross-examination of Claimant witnesses and re-examination of Respondent witnesses: 50%
16. Any opening addresses are to be in writing, and served on the Arbitrator and the other party, by 4.00 pm on COMPLETE
17. Closing adresses are to be in the form of Written Submissions, to be served by the times further directed by the Arbitrator.
18. The parties are to notify the Arbitrator of non-compliance with any direction made by the Arbitrator not later than 48 hours after the time fixed by the Arbitrator for compliance with that direction. Any such notification is to be provided by facsimile. The party which has failed to comply with the direction shall provide, with its notification, an explanation for its non-compliance and a proposed amended timetable which shall as far as possible minimise delay to the overall timetable directed by the Arbitrator.

19. COMPLETE

ROBERT HUNT Date:
Arbitrator

ANNEXURE C
"RE-INVENTING THE WHEEL"

X PTY LTD V Y PTY LTD

Y's OBJECTIONS TO X's EVIDENCE

Key

Objections:

A Argumentative
C Conclusion from unstated facts
F Form
H Hearsay
O Unqualified opinion
R Relevance
X Other (specify grounds)

Arbitrator's Preliminary Rulings

U Uphold objection
D Allow evidence in present form
L Leave to lead supplementary evidence in proper form

Statement / report	paragraph section or page	portion objected to	grounds of objection	Arbitrator's preliminary ruling	Comments
Joseph Smith 11 July 1998	para 3	3rd sentence to end of para	A F	U L D	3rd sentence remainder

Notes

(1) The above grounds of objections are merely examples
(2) Columns 1 to 4 to be completed by party notifying objection
(3) Columns 5 & 6 to be completed by Arbitrator in preliminary rulings

Expert Determination – Ten Years On

Max Tonkin [1]

Introduction

This paper outlines the view of a consumer of expert determination services. My employer, the Department of Commerce[2] ('the Department') has been involved as a respondent in many expert determinations in which disputes for many millions of dollars have been decided.

This paper deals essentially with two issues: legal challenges to expert determinations and practical lessons that the Department has learned.

Before dealing with these issues a definition of expert determination will be helpful, as will some background to the Department's involvement in the process.

Expert determination

In *The Heart Research Institute Limited and Anor v Psiron Limited*,[3] Einstein J provided a very good summary of expert determination.

> *[16] As the plaintiffs point out, in practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.*
>
> *[17] Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the Institute of Arbitrators and Mediators of Australia, the Institute of Engineers Australia or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted.*

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1. Max Tonkin (BE MPM MDR CPEng) is General Manager, Procurement Systems, at the Department of Commerce, NSW.
2. The Department of Commerce was created in 2004 by combining the Department of Public Works and Services, the Department of Fair Trading and the Office of Industrial Realations. The Department of Public Works and Services was created in 1995 by amalgamating the Department of Public Works, NSW Supply and elements of State Properties.
3. [2002] NSWSC 646.

Background

The Department has been involved in construction projects for many decades and, as an organisation, has had a great deal of experience in the resolution of contractual disputes.

There is little doubt that the introduction of expert determination has had a significant effect on the Department's approach to dispute resolution. Prior to the introduction of expert determination, the Department's construction contracts provided for disputes that were not resolved by the administrative procedures set out in the contract to be referred to arbitration. This approach had the effect of placing dispute resolution in the hands of arbitrators and lawyers with the result that, in many cases, costs were extremely high and disputes took a long time to resolve.

The introduction of expert determination in about 1994 created the opportunity for speedy and relatively low cost dispute resolution.

Speed and low cost, flowing from the expedited procedure and the limited right of appeal in expert determination, were advantageous but there were also perceived disadvantages.

Firstly, there was the perceived risk that, because expert determination avoided the rigors of the rules of evidence and was based on a simple defined process, it ran the risk of resulting in perverse findings by experts who would not have the benefit of examining witnesses and a formal hearing procedure. Secondly, there was the perceived risk that the expert's findings could be challenged legally and, as a result, finality would not be achieved.

The Department's approach in dealing with the risk of perverse outcomes has been to place a financial limit on determinations that are binding.[4] Findings above the financial limit are of no effect if either party exercises a right to reject the result. The claimant then has the right to proceed to litigation.

The risk of challenges to the process is essentially a legal issue that, whilst possibly a problem in 1994, seems to be now essentially resolved.

Legal issues

In his excellent article,[5] Robert Hunt dealt with a number of legal issues going to the question of whether an expert determination can be challenged.

Mr Hunt examined three challenges that might void an agreement to refer matters to expert determination:

- one based on the proposition that the process ousts the jurisdiction of the courts;
- one based on the argument that some issues are not susceptible to expert determination; and
- one based on the argument that the process is uncertain.

4. The Department's construction contracts provide for the expert determination to be final and binding if the expert finds less than $0.5 million is owed by one party to the other. In consultancies the limit is $100,000.
5. Robert Hunt, 'The Law Relating to Expert Determination' (2001) *The Arbitrator & Mediator*, December, pp. 39-60.

Ouster of the jurisdiction of the courts

Mr Hunt noted that, although contrary to the indications of other authorities, Heenan J, in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*,[6] found an agreement to refer disputes to an expert was void to the extent that it operated to oust the jurisdiction of the court. Mr Hunt said he did not believe the decision of his Honour will be followed in other states and it may even be distinguished by other judges at first instance in Western Australia.

The issue of ouster of the jurisdiction of the courts was considered by Einstein J in *The Heart Research Institute*.[7] Einstein J seems to have reached the same conclusion as Mr Hunt. He did not follow *Baulderstone Hornibrook*.[8] He reviewed a number of authorities and found that the agreement to refer disputes to expert determination was not an ouster of the courts.

Matters not susceptible to expert determination

In respect of this proposition, Mr Hunt cited Barret J's decision in *Savcor Pty Ltd v State of New South Wales (Savcor)*,[9] and concluded that the courts will allow an expert to determine matters that legislation has expressly empowered a court to decide, provided the parties have either expressly or by implication, agreed that that is what the expert is to decide.

Einstein J, in *The Heart Research Institute*,[10] came to a similar view. He said:

> *In the recent NSW Supreme Court decision* Savcor Pty Limited v New South Wales *(2001) 52 NSWLR 587, Barrett J summarised the present state of the law as follows:*
> *"In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert." (para 35)*
> *It is quite conceivable that parties may refer issues such as in IBM*[11] *for determination by an Expert and "agree to abide by the expert's decision on that question as if it were an order made by a court." (para 37)*
> *"where parties have by contract agreed to follow a particular dispute resolution procedure, they should be required to adhere to that procedure unless the party wishing to abandon it in favour of resort to the courts can show good reason for that course." (para 42)*

Lack of certainty in the procedure

With regard to the issue of lack of certainty in the procedure to be followed by the expert being sufficient ground for the process to be challenged, Mr Hunt's view, based on *Triarno Pty*

6. [1998] 14 BCL 277.
7. [2002] NSWSC 646.
8. [1998] 14 BCL 277.
9. [2001] NSWSC 596.
10. [2002] NSWSC 646.
11. [1991] 22 NSWLR 466.

Ltd v Triden Contractors Ltd,[12] and *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*,[13] was that this is a matter for the expert not the courts to resolve. However, it seems that Einstein J in *The Heart Research Institute*[14] came to a different view. He said:

> *36 The central issue raised by the defendant concerns the well-established proposition that agreements to participate in alternative dispute resolution procedures are enforceable in principle provided the conduct required of the parties for participation in the process is sufficiently certain. See* Hooper Bailie Associated Ltd. v Natcon Group Pty. Ltd. *(1992) 28 NSWLR 194;* Elizabeth Bay Developments Pty. Limited v Boral Building Services Pty. Limited *(1995) 35 NSWLR 709;* Aiton Australia Pty. Limited v Transfield Pty. Limited *(1999) 153 FLR 236;* Morrow v Chinadotcom *[2001] NSWSC 209;* Banabelle Electrical Pty. Limited *[2002] NSWSC 178.*

Mr Hunt also discussed enforcement of an expert determination as a possible avenue for a challenge to the process. He indicated that, in defending proceedings to enforce an expert determination, a party may seek to challenge the result of the expert determination. However, it seems his view is that expert determinations are not subject to appeal other than on the very narrow ground that the expert has acted beyond the terms of his or her appointment. He indicated a party will not be able to challenge an expert determination on the ground that the expert made a mistake, referring to *Fletcher Constructions*,[15] *Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd*,[16] and *Legal and General Life of Australia Ltd v A Hudson Pty Ltd*,[17] as authority.

Mr Hunt's view is entirely consistent with Einstein J's in *The Heart Research Institute*,[18] where he said:

> *32 The result of this line of authority is, I accept that a decision will be overturned if, as in* Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd *NSWSC, Rolfe J, 12 February 1998 (unreported), it is outside the terms of the agreement. The authorities are usefully gathered by Palmer J in* Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd *[2001] NSWSC 405, 21 May (unreported), where Palmer J states, with reference to Legal and General that "these principles are now well settled." (para 48) Where parties to an agreement have determined:*
>
> *"that a rent review dispute is to be resolved by the determination of a valuer, acting as an expert, and not as an arbitrator and that the determination is to be final and binding, then the determination may be successfully impeached as invalid only if it is shown to be tainted by fraud or collusion, or if it is shown not to have been made in*

12. [1992] 8 BCL 305.
13. Unreported, NSW Supreme Court, 14 July 1997.
14. [2002] NSWSC 646.
15. Unreported, NSW Supreme Court, 14 July 1997.
16. Unreported NSW Supreme Court , 12 February 1998.
17. [1985] 1 NSWLR 314.
18. [2002] NSWSC 646.

> *accordance with the determination process, if any, specified in the lease. In either case, this is so because the determination is not one for which the parties have contractually stipulated." (para 47)*
> *33 These principles are entirely consistent with, and were recently applied in* Aiton Australia Pty Ltd v Transfield Pty Ltd *(1999) 153 FLR 236 and* State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited*, [2002] NSWSC 178.*

Finally, Mr Hunt dealt with the issue of the differences between expert determination and arbitration. An example of how this may be the basis of a challenge to an expert determination is that a party may seek to appeal an expert determination on the ground that the expert has made a manifest error of law. Manifest error of law on the face of an award is a valid ground for appeal in an arbitration but not in an expert determination. It could also be important in situations where, for tactical reasons, a party contends that an expert determination is an arbitration so as to be able to obtain discovery or try to obtain a hearing or simply to attract a larger offer of compromise.

The question was addressed and decided on appeal in *Age Old Builders Pty Ltd v Swinton's Pty Ltd*.[19] Two worthy journal articles by David Levin QC[20] and Robert Hunt[21] outline the background to this case and the initial findings of the Victorian Civil and Administrative Tribunal (VCAT).

The Tribunal was asked whether 'the expert determination agreement alleged to exist between the parties and made in or about September 2000 is or is not void in law having regard to the provisions of the *Domestic Building Contracts Act 1995* and in particular to ss 14 and 132 thereof'. The sections of the Act referred to by the VCAT prohibit the reference of disputes to arbitration and prohibit the contracting out of the Act respectively. The Tribunal found that the expert determination agreement, which was based on the expert determination procedures of the Institute of Arbitrators and Mediators, Australia, was an agreement to refer disputes to arbitration and, accordingly, found in the affirmative to the above question.

The Tribunal's decision was overturned on appeal[22] in a very well reasoned decision by Osborne J handed down on 21 August 2003.

His Honour discussed in detail the point that was illlustrated in the Canadian case *Sports Maska Inc v Zitter*,[23] in which Canadian, United States and French law was argued, that the more a process is like a court process the more likely it will be determined to be arbitration as opposed to expert determination.

Osborne J found the process he examined did not have sufficient of the characteristics of a judicial inquiry for it to be an arbitration. He said:

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19. [2002] VCAT 1489.
20. David Levin QC 'The End of Expert Determination?'(2003) *The Arbitrator & Mediator*, August,p. 67.
21. Robert Hunt 'Age Old Builders Pty Ltd v Swintons Limited' (2003) *The Arbitrator & Mediator*, August, p. 81.
22. [2003] VSC 307 (21 August 2003).
23. [1998] 1 SCR 564.

> *[70(c)] ... Once again none of these matters in my view govern the fundamental character of the expert's role which was not that of an arbitrator simply because it did not have at its heart an inquiry in the nature of a judicial inquiry.*

Finally, Mr Hunt dealt with the liability of an expert saying that, as there is no statutory protection for the expert, as there is for an arbitrator, it is important for an expert to obtain a suitable release and indemnity from the parties so as to avoid any claims. It is also important for the release and indemnity for the expert to be included in the agreement between the parties to refer disputes to expert determination, so that one of the parties cannot later refuse to provide the release and indemnity, as happened in *Triarno*,[24] leading to a breakdown in the process.

Experience of the Department of Commerce

The Department introduced expert determination into construction contracts about 10 years ago. The process has been successful overall.

The Department has been respondent in some 50 expert determinations involving claims totaling $35 million. The total amount determined has been less than 19% of the amount claimed.

Initially, there were challenges to the process. These essentially concerned the issue to be determined by the expert. The early drafts of the expert determination clause in the Department's contracts provided for the parties to each sign an agreement to be forwarded to and signed by the agreed, or nominated expert. A summary of the dispute was to be appended to the agreement. On a number of occasions the Department disagreed with contractors as to the drafting of the summary. The Department was concerned that claimants were drafting the summary narrowly and, because expert determination does not give rise to *res judicata* or issue *estoppel*, claimants were positioning themselves so they could make another claim based on the same events if they were not successful in the first expert determination.

To reduce the risk of claims being re-run, in other words, to improve the chance of finality, the Department now includes broadly framed questions for the expert to answer in respect of each issue.

The questions are:

1 The *Expert* must determine for each *Issue* the following questions (to the extent that they are applicable to the *Issue*):

  .1 Is there an event, act or omission which gives the claimant a right to compensation, or otherwise assists in resolving the Issue if no compensation is claimed:

    (1) under the Contract

    (2) for damages for breach of the Contract, or

    (3) otherwise in law?

24. [1992] 8 BCL 305.

.2 If so:
(1) what is the event, act or omission?
(2) on what date did the event, act or omission occur?
(3) what is the legal right which gives rise to the liability to compensation or resolution otherwise of the *Issue*?
(4) is that right extinguished, barred or reduced by any provision of the Contract, *estoppel*, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?

.3 In the light of the answers to clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:
(1) what compensation, if any, is payable from one party to the other and when did it become payable?
(2) applying the rate of interest specified in the Contract, what interest, if any, is payable when the *Expert* determines that compensation?
(3) if compensation is not claimed, what otherwise is the resolution of the Issue?

2 The *Expert* must determine for each *Issue* any other questions identified or required by the parties, having regard to the nature of the *Issue*.

Not only are these questions framed broadly to cover every possible angle, they clearly require the expert to make decisions according to the law.

As indicated above the primary reasons for moving away from arbitration to expert determination were to reduce costs and improve the speed of dispute resolution.

Timely dispute resolution is important in managing government capital works programs. Unresolved disputes mean agencies cannot confidently forecast the end costs of projects. Unresolved disputes create uncertainties in allocating scarce resources. In extreme cases, unresolved disputes can delay other projects within a portfolio.

The situation is no different in the private sector. Developers and owners do not want costly disputes dragging on. They want to know the final cost of their projects as soon as they can. I suspect the private sector is as naturally drawn to low cost dispute resolution as is the public sector and that this is the primary reason for the increase in the use of expert determination over the past decade.

The cost of a dispute resolution process is important on its own and it is important also from the point of view of negotiation of disputes. Before the introduction of expert determination, a claimant could make a claim and threaten to commence arbitration, if this was an option in the contract,[25] or litigation if arbitration was not an option. Respondents had to assess, in addition to the risk of an adverse award and its *quantum*, the potential cost of arbitration or litigation, and the risks of unfavourable costs orders.

A claimant with a weak but seemingly complex case, was able to entice a large offer of compromise from a respondent simply because the respondent did not want to incur the

25. Department of Commerce current contracts based on GC 21 and Minor Works general conditions and consultancy agreements do not have provisions for disputes to be referred to arbitration.

costs and delays of arbitration or litigation. The high cost and delays in arbitration created an environment in which claims could be made simply to entice large offers of compromise.

The negotiation climate has changed markedly with the advent of expert determination. Adverse costs orders are not now an issue as each party meets its own costs and the costs of the process are significantly less than in arbitration. Respondents can be more rational in their negotiation strategies and can formulate their offers of compromise having made genuine assessments of the merit and *quantum* of claims. Where a claim appears to lack merit, it might be that no offer of compromise is made at all, leaving a claimant with the decision to either run the expert determination or abandon the claim.

The lower costs, improved timeliness and the improved negotiation climate of expert determination have been positive outcomes for the Department. However, the road has not always been smooth. Specific issues that the Department has dealt with are set out below.

1. Parties have avoided the contractual obligation to refer disputes to expert determination and have commenced litigation.

Over the past ten years, the Department has been involved in four cases in which plaintiffs commenced litigation proceedings rather than follow the expert determination provisions of their contracts. Three of the cases were closely related. The Department unsuccessfully sought orders to stay the litigation proceedings. Details of these cases are on the public record and I will give an outline of each case.

The Department applied for a stay of litigation proceedings commenced by Savcor Pty Limited in relation to a construction contract. The proceedings[26] commenced by Savcor named the State of New South Wales as the first defendant and one of Savcor's subcontractors as second defendant. The Department, for the State, was unsuccessful in the stay application because the Court found that it would not be in the parties' interests to have claims based on common material decided in more than one forum. Barret J said:

> *50 In my judgment, the proceedings against the first and second defendants should be heard and determined together. Because no basis has been shown on which the claims the plaintiff has against the second defendant can effectively be brought within the contractual dispute resolution process applicable as between the plaintiff and the first defendant, the way of ensuring that the proceedings are heard and determined together in an appropriate forum best able to deal with all matters in issue is for the action in this Court to proceed as presently constituted.*

The State of New South Wales was the first defendant in proceedings[27] brought by three

26. *Savcor v State of NSW* [2001] NSWSC 596.

27. *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited, Banabelle Electrical Pty Limited v State of New South Wales & 3 Ors, State of New South Wales & 2 Ors v Fugen Holdings Pty Limited, Fugen Holdings Pty Limited v State of New South Wales & 2 Ors, State of New South Wales & Ors v Automatic Fire Protection Design Pty Limited, Automatic Fire Protection Design Pty Limited v State of New South Wales & Ors* [2002] NSWSC 178.

trade contractors involved in the construction of the Conservatorium of Music redevelopment project. The contractors were Banabelle Electrical Pty Limited, Fugen Pty Limited and Automatic Fire Protection Design Pty Limited. The defendants, including the State, brought separate proceedings seeking declarations and orders restraining the contractors from continuing their proceedings and compelling them to pursue any of their claims by way expert determination in accordance with clause 1.46 of the contract.

Clause 1.46.5 of the contract stated (*inter alia*):

The Expert shall be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in the Annexure.

However, the relevant part of the Annexure that identified the person to nominate the expert was missing from each contract.

In rejecting the defendants' application Einstein J said (paragraph 70):

In my view clause 46.5 is uncertain and the uncertainty infects the entire clause.

Banabelle, Fugen and *Autofire* [see footnote 27] reflects a document control problem in those contracts and, it is to be hoped, will not be repeated. *Savcor*, on the other hand, indicates that it is open to claimants to seek to avoid expert determination by the simple expedient of joining another party.

2. Arbitral limit is exceeded

The Department has been involved in many expert determinations in which the amount claimed exceeded the limit of $500,000. Two examples of where the determination exceeded the limit serve to illustrate how this works.

Details of these cases are not on the public record and must be kept confidential in accordance with the expert determination provisions of the relevant contracts. Nevertheless, without revealing the claimants' identities, the general situations were as follows:

Case 1.

The claimant made claims for extras for a little over $800,000. The claims were rejected and the dispute was referred to expert determination. The expert found almost entirely in favour of the claimant finding that the Principal owed a little under $800,000.

The Department formed the view that the expert had not properly considered some aspects of the matter and, as the limit of $500,000 had been exceeded and the determination was not, as a consequence, binding, the Department refused to pay the amount determined. The claimant immediately referred the dispute to arbitration.

Fortunately, the dispute was settled shortly thereafter for a sum considerably less than that determined by the expert and a little less than the arbitral limit. Had the contractor

28. The standard expert determination provision in our construction contracts is for each party to make two submissions (claimant first, then respondent, then claimant and then respondent). In our consultancy agreements, the provision is for one submission by each party (similar to the single submission by each party prescribed in the NSW *Building and Construction Industry Security of Payment Act 1999*).

refused to settle for an amount that the Department was prepared to pay, and had the matter proceeded to arbitration, the costs of the arbitration could easily have exceeded the final value of an award. In this case, the expert determination, although not final and binding, provided a valuable insight for the parties and assisted them to settle the dispute.

Case 2.

The claimant made claims for extra for more than $11 million excluding GST. The claims were rejected. The matter was referred to expert determination and the expert, in a very well reasoned determination, found the contractor to be entitled to a little under $3.0 million plus GST.

Clearly the expert determination was of no effect and not binding on the parties, however, having considered the risks and costs of litigation, the Department formed the view that it would not get a better outcome if the matter were not resolved. The Department offered to pay the amount determined by the expert subject to the contractor releasing the Principal from further claims. The matter settled on that basis. It seems that the contractor was similarly impressed by the expert's reasoning and, although possibly not entirely happy with the outcome, decided that the risks and costs of litigation did not justify proceeding down that path.

3. Preliminary conferences

Expert determinations have become routine. The procedure is fully prescribed in the Department's contracts and the parties usually obtain professional assistance to prepare their cases. The submissions are always supported by necessary documentary evidence and the process usually progresses without fuss. However, some experts and some claimants request preliminary conferences. The Department, in most cases, resists. The Department believes that there is little to be gained from a preliminary conference.

Matters such as security for the expert's fees and modifications, or mechanisms to modify the prescribed timetable, can be conveniently resolved by corresepondance

I can recall only three preliminary conferences in the 50 expert determinations over the past decade and the outcome from these could have been achieved by the exchange of a few emails.

4. Conferences during the process

The prescribed process for a conference is as follows:

1. The expert may request a conference with both parties to the Contract. The request must be in writing, setting out the matters to be discussed.
2. The parties agree that such a conference is not to be a hearing which would give anything under this Expert Determination Procedure the character of an arbitration.

Conferences during the process have occurred on fewer than about six occasions and did not seem to be necessary. Experience indicates that experts can and do arrive at decisions based on written submissions and their own expertise without the need for conferences.

When an expert does call a conference it is usually about procedural matters or because the expert wishes to discuss a point raised in the submissions. To avoid the process becoming a hearing the Department finds it convenient to send its legal representative with instructions rather than a staff member or anyone who was involved with the project. Any questions that the representative cannot answer can be taken on notice and a written submission made to ensure there is no misunderstanding about something that is said.

On one occasion an expert wanted to discuss some issues with the parties respective programming experts. In this case, the Department proposed that the discussions be held with each of the parties' experts separately and this was done.

5. More than two submissions

In a number of cases claimants have requested permission to make a third[28] submission based often on a contention that the Department introduced new material in its second response. This is usually agreed to by the expert subject to agreement between the parties. The Department normally does not refuse although the Department would refuse if the Department thought the request was an abuse of process. When additional submissions are agreed it is inevitably necessary to agree to an amended timetable to accommodate the further submissions and for the expert to make his or her decision.

6. Costs

Costs of the process can be divided into five parts: salary costs of internal personnel to manage the process and prepare submissions; costs of external legal advisers to assist in preparation of submissions or to prepare submissions with internal personnel assisting; costs of technical experts such as quantity surveyors and programmers to prepare expert reports to support submissions; costs of project personnel who may have to prepare witness statements or assist in preparing submissions; and costs of the expert.

The costs of the process have generally been found to be satisfactory although there are some rules the Department applies to keep costs to reasonable levels.

Costs will rise markedly if external legal advisers take control of preparation of submissions. The Department has found that, although lawyers have, by their training, the skills for preparing submissions, there is a tendency to want to deal with every issue, even unimportant ones. Lawyers seem to also want to undertake significant legal research and attach to submissions copies of past cases, whilst experts, bound as they are to make decisions according to the law, seem to focus on common sense, logic and facts. They seem not to require voluminous legal submissions.

The best solution the Department has found to this problem is to have a lawyer prepare drafts of the submissions setting out logical arguments with the inclusion of facts based on research and analysis by in house architects and engineers. The Department finds it a challenge to develop teamwork between lawyers and internal technical staff because of their different training and in some cases different personalities, but when the teamwork is achieved, it is very powerful.

The Department has found less chance of teamwork occurring if the legal team takes control of the submissions compared with when the Department's officers are fully involved.

7. Rigor of the process

Whilst in theory expert determination is less rigorous than arbitration, there being no discovery and no opportunity for examination and cross-examination of witnesses, the Department's experience indicates that issues are thoroughly argued in expert determination and experts deal with the submissions fairly and competently.

The Department has rarely been disappointed with the process. Even when an adverse outcome (from the Department's perspective) has occurred in expert determination, the Department has never been of the view that arbitration or litigation, with its expense and delay and risks, would have resulted in a better outcome.

8. Separating liability and quantum

On two occasions the Department adopted a strategy of separating liability and *quantum*, asking an expert to determine liability without, at the same time, determining *quantum*. This was done with the intention of saving time and cost as on both occasions the Department considered it had a good position on liability. However, on each occasion, the expert found against the Department on liability and the parties had to instigate a new process to determine *quantum*. With the experience of these two examples, it is most unlikely that the Department will agree to an expert deciding liability without deciding *quantum* at the same time.

Conclusion

Whilst it would be preferable to avoid disputes altogether, the Department's experience of expert determination has been positive. Expert determination has proven to be a cost effective and speedy dispute resolution process. Because of its low cost and effectiveness, it helps create a rational environment for negotiation, the process by which most disputes are resolved.

The legal position is also positive. The courts accept that parties to a contract can agree to refer disputes to a third party expert and can agree to be bound by the expert's opinion.

Even though the process does not provide for issues to be ventilated as rigorously as arbitration or litigation because it does not provide for discovery and oral evidence, the Department's experience is that the parties are given a fair opportunity to put their cases and are not disadvantaged by any lack of rigor.

Whilst it remains to be seen whether the commencement of the *Building and Construction Industry Security of Payment Act 1999* will reduce the occurrence of disputes, I believe it can be safely predicted that expert determination will remain a fundamental feature of the Department's contracts for the foreseeable future.

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

Bridging the Gap – The Role of the Interpretive Engineer

Mal Ferrier [1]

In technical disputes lawyers will invariably seek expert opinion from engineers. Expert engineers are engaged to act independently in forming an opinion on particular issues involved. The expert is meant to assist lawyers 'at arms length' in preparing its case. The extent of understanding of the technical issues between lawyers and engineers can leave a gap in the middle. Too often lawyers do not understand the strength of their expert evidence until too late – in court when tested under cross-examination.

One way of bridging the gap is to involve an Interpretive Engineer (IE). The IE acts as an interpreter between the lawyers and experts or technical witnesses, providing a coordination and advisory function. That is, as distinct from the expert, the IE operates 'inside arms length'. The IE's role is not to be a witness for the parties.

Traditionally, the IE's role may be fulfilled through the involvement of the parties' own engineers. That will generally bring on board the necessary technical knowledge, but can carry excess baggage, particularly in defence mode. On the one hand this may involve emotional tie-ups, axes to grind, tunnel vision, biased discovery of documents, or 'no way it was our fault'. On the other hand, not wanting to know about it, too busy with forward work, has handballed the matter to its insurer and taken a back step, 'I did nothing wrong', or failure to appreciate the legal steps involved. This can hamper preparation of a defence and the identification of weaknesses.

The IE can also be a useful resource in both organising the document discovery process and day-to-day technical management of the case.

Ideally, the qualities of the IE will comprise not only an appropriate level of relevant technical knowledge, but also some experience of how the legal system works. In that way the IE will instinctively know where to head.

How an alliance between lawyer and engineer can work

Lawyers and engineers generally behave differently. At the risk of over generalising or appearing to indulge in some lawyer and engineer bashing, consider the following ideas:

1. A lawyers' grammar will tend to always reign over an engineers' grammar. You may have heard about the graduate engineer who remarked:

   *'Six months ago I couldn't even spell engineer, now I **are** one.'*

1. Mal Ferrier, B Eng (Mechanical), is a Mediator and Claims Engineer, Engineers at Law Pty Ltd, Melbourne.

2. Think of a lawyer and engineer each asked to describe something. The lawyer responds with a lengthy essay, beautifully worded but no illustrations. The engineer immediately constructs a diagram, accompanied by a few words. In the case of the lawyer you try to picture what the lawyer is saying. In the case of the engineer you try to work out what the engineer is trying to say. The engineer is usually proficient at formulating an answer, but poor at expressing it. Combining the two talents will produce a much clearer description suited to a wider audience.

3. Having presented the above two examples in descriptive form, it is now time for a diagram. Consider the share of knowledge between two individuals. Figure 1 represents individuals having a common background, for example a builder and architect. Figure 2 represents individuals from different backgrounds, for the purposes of this article, a lawyer and engineer.

Figure 1. Builder and Architect

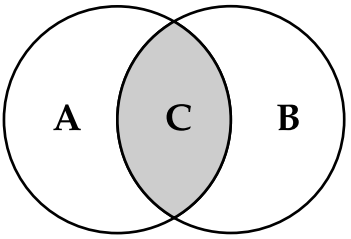
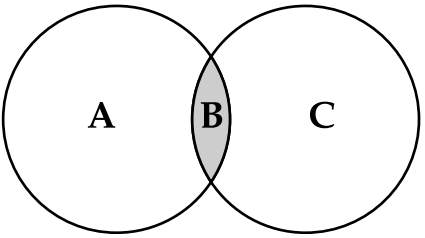


Figure 2. Lawyer and Engineer



Although in the Figure 1 partnership there is considerable reinforcement of core knowledge, or common ground (C), the breadth of overall knowledge (A+B-C) is not as great as in the case of the Figure 2 partnership. The broadened knowledge approach of involving an IE in the form of Figure 2 can significantly improve the effectiveness of running a technical dispute.

An army of lawyers and experts is not necessarily the most effective approach to running litigation. This discussion attempts to highlight the value in building up a litigation team with balanced resources, both technically and legally.

Benefits

In the case of a large technical dispute there are significant benefits from adding an IE to the legal team, including:

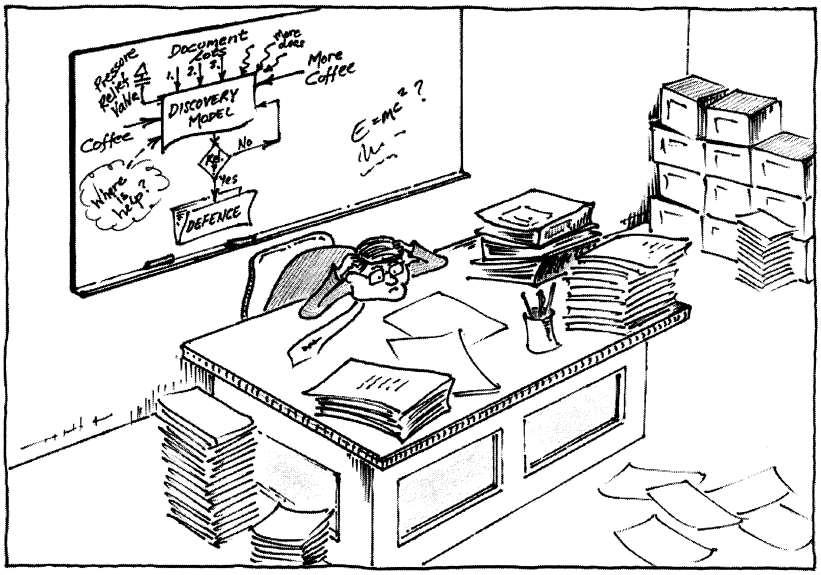
- A degree of independent technical advice.
- Obtaining an early understanding of the issues involved and likely exposures, even before experts are brought on board.
- Structuring the points and particulars of claims and ensuring that the numbers are properly presented. Why is it that the numbers never seem to add up in a claim document?
- Achieving an effective discovery of documents and control of documents.
- Drafting of briefs for expert assessments and counsel advice.
- Assisting in the sourcing of the right experts.
- Critiquing, comparing and stress testing expert opinions, sometimes to the extent of having to untangle differences in opinion between opposing experts.
- Preparing illustrations where appropriate including charts, spreadsheets, schedules, photograph and video galleries, models, drawings and diagrams.
- Ensuring that the lawyer's client is given accurate advice in relation to technical content and risk allocation.
- Day-to-day tasks which assist and maximise the output from solicitors and counsel.

Organisation

The IE can add considerably to the organisation of a technical matter. Of particular importance is document management or 'I know I've seen it, but where?' In the case of a very large volume of documents, it is crucial that the document discovery process is masterfully performed. Efficient discovery is being able to quickly differentiate between material that is key, relevant, and not relevant. Success at trial may boil down to the uncovering of a handful of key documents.

Documentation can come in the form of all sorts of files containing numerous duplicate copies and filed under different methods; in date order, in subject order, and others all over the place. For very large discoveries the sensible approach is for the parties to agree on relevant discovery only. The alternative in discovering the lot might be considered to be the safest approach, but apart from being cumbersome it will be extremely time consuming and

expensive. The burden of unnecessary discovery or messy discovery will continue to be felt throughout the litigation.



Where the discovery process has not been logically ordered, such as filed in chronological order and into particular claims categories, the IE can be also useful in sorting scattered documents into useable 'claim folders'. Once documents achieve this level of organisation the history and truth about claims issues will start to clearly unfold.

Concentrated discovery will also enable the preparation of effective briefs to experts, incorporating only relevant documents.

A lawyer's comment

> *'When the lawyer is thinking in English, and the expert engineer is speaking in tongue, you need someone bilingual.'*[2]

2. An anonymous lawyer.

The test

Some questions for the legal practitioners, with due respect:

- Do your claims always add up?
- How many times has your client caught you out on unclear or inaccurate technical advice?
- Is your discovery always efficient and well organised?
- How quickly have you been able to place your finger on the right documents when you need them or source answers to day-to-day technical issues?
- Have your presentations and documentation lacked illustration?
- How well do you understand your expert evidence and has it covered all the angles?
- How accurate and complete are your briefing documents to experts?
- Has your client been critical of lawyer and para-legal team numbers?

If your answers to these questions trigger some doubts, the use of an IE may be appropriate for some of your cases.

Conclusion

The cost of litigation can be immense. Parties to litigation are always on the look out for ways to reduce costs. Alternative dispute resolution processes have answered the call in some respects. Lawyers and their clients who are regularly involved in litigation of substantial technical matters should review what management strategies have been employed, and whether those strategies could have been improved through a better balance of resources.

The role of an IE is not to take the place of the independent expert. However, the inclusion of an IE in the legal team can provide meaningful inside help in steering through the technicalities of complex litigation. Obviously, this approach tends to suit larger and more complicated claims. The IE may also play a useful but more limited role in smaller technical disputes.

The IE concept is not limited to engineers in a technical environment. An interpretive assistant in any number of disciplines could be matched with other forms of dispute; for example, a commercial manager engaged to assist in the interpretation of a commercial dispute. The concept is not novel, but is possibly not considered as often as it should in order to maximise a party's strengths and understand its weaknesses in technical disputes.

Minister for Commerce v Contrax Plumbing & Ors

[2004] NSWSC 823
Supreme Court of New South Wales
(McDougall J 13 September 2004)

Consideration of the prohibition on exclusion, modification or restriction of the operation of the New South Wales Building and Construction Industry Security of Payment Act, found in section 34 of that Act.

David Campbell-Williams [1]

While perhaps overshadowed by the judgments in the New South Wales Court of Appeal six weeks later,[2] and itself subject to Appeal,[3] the judgment of Justice McDougall in *Minister for Commerce v Contrax Plumbing & Ors* is a salutary warning that the *New South Wales Building and Construction Industry Security of Payment Act* ('the Act') may override the contract notwithstanding the best intentions of contract drafters and principals to provide their own payment regime.

The judgment illustrates vividly the potential width of section 34, which prohibits contracting out of the Act, and highlights the inherent tension between freedom of contract and the constraints on that right imposed by the operation of the Act.

Background

Section 34 of the Act is in the following terms:

34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void.

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1. David Campbell-Williams is a Lawyer, Arbitrator and Adjudicator, Sydney.
2. *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (Brodyn) and *Transgrid v Siemens Ltd* [2004] NSWCA 395 Hodgson JA, (Mason P and Giles JA concurring) (3 November 2004).
3. *Minister for Commerce v Contrax Plumbing & Ors* NSWCA Proceedings 40874 of 2004 Notice of Appeal filed 12 October 2004.

Section 8(1) is in the following terms:

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

(2) In this section, reference date, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter – the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

Section 9 of the Act sets out how a progress payment is to be quantified. It is either the amount calculated in accordance with the terms of the contract (s 9(a)) or, if the contract makes no express provision, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out (s 9(b)).

Section 10(1) specifies how construction work is to be valued. That is either in accordance with the terms of the contract (s 10(1)(a)) or, if the contract makes no express provision, having regard to certain other matters that are then specified (s 10(1)(b)).

The contract

The contract between Contrax and the Minister had been drafted in terms that quite deliberately and carefully reflected the language and terminology employed by the Act.

The concept of the 'Contract Price' lay at the heart of the measurement of the value of any work under the contract. Clause 46 of the contract permitted variations, ('Ex-Contractual Claims'). Absent agreement, only after a cascading regime of submissions to the superintendent's representative, the superintendent, to expert determination and (if the claim was in excess of $500,000), to arbitration, was there any entitlement to a contract price adjustment. The adjustment process could thus take 200 days or more.

Without an adjustment of the Contract Price, Contrax (so the contract provided), had no entitlement to payment beyond the Contract Price. The Payment Claim in issue, sought payment for work that was not the subject of such an adjustment.

Not surprisingly, the Payment Claim had not raised section 34, and neither did the Payment Schedule, although the Adjudication Application did raise section 34 in answer to the Minister's assertion in the Payment Schedule that the contract prevailed.

The Judgment

Can an Adjudicator determine whether any part of a contract offends Section 34?

The Minister had submitted that there having been no Contract Price adjustment, the contract must prevail, and in any event, the Adjudicator had no power to determine that any part of the contract was void by reference to section 34.

Justice McDougall rejected the Minister's jurisdictional argument, following Justice Palmer's reasoning in *Multiplex Constructions Pty Ltd v Luikens and Anor*:[4]

> *If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.*

Justice McDougall went on to observe:

> *34. I interrupt to note that I respectfully agree with, and accept, his Honour's analysis. Applied to the present case, it means (contrary to the submission for the Minister) that the adjudicator had power to determine whether the contractual provisions relied upon by the Minister to defeat Contrax' claim were rendered void by the operation of s 34 of the Act. That is no more than determining that (by reference to Palmer J's examples) that a term had been waived or could not be relied upon because of some estoppel.*

Did the Contract prevail over the Act?

Justice McDougall held that the contract did not prevail, because it offended section 34.

In reaching this conclusion, his Honour observed that while it may be correct to say:

> *that the Act operates to supplement rather than to displace contractual entitlements. … However, as s 34 makes clear, the contractual regime cannot diminish rights given by the Act*.[5]

The statutory right to a progress payment is a right to a payment for construction work done or undertaken to be done. Justice McDougall considered:

> *That must be a reference to construction work done (or undertaken to be done) under, or by reference to, the contract*.[6]

The nub of his Honour's reasoning is found at paragraph 42 of the judgment:

> *42. The effect of the contractual regime in the present case is that Contrax has no entitlement to be paid, on a progress payment basis or otherwise, for certain kinds of construction work done under or by reference to the contract until a particular contractual regime is worked through.* ***It is apparent that the working through of that contractual regime may mean that any progress payment in respect of that work is payable not from the reference date occurring next after the work***

4. [2003] NSWSC 1140 at para 58.
5. At para 39.
6. At para 41.

> ***is done, but from the reference date occurring next after the contractual process is worked through.*** *If Contrax' submission is correct (see para [10] above), the latter reference date may be 200 days, or in excess of 6 months, after the former.*
> *43. In my judgment, it is plain that* ***the relevant contractual provisions exclude, modify or restrict the operation of the Act. They do so because, if relied upon, they defer the entitlement given by s 8(1) of the Act to be paid from a reference date for construction work carried out prior to that reference date.*** (emphasis added)

The John Holland issues and Section 20(2B) issues

Neither the Contrax Payment Claim nor the Minister's Payment Schedule had raised section 34. The Minister asserted that as a consequence, Contrax could not raise in its Adjudication Application, the contravention of section 34, by reason of the principles expounded by Justice Einstein in *John Holland Pty Limited v Cardno MBK (NSW) Pty Ltd*.[7]

Justice McDougall disagreed strongly, observing (on the John Holland issues, although noting the similarity of the section 20(2B) issues), in terms that speak for themselves:

> *60. It would be quite extraordinary if the statutory regime, on its proper construction, prevented an applicant for adjudication from dealing with issues raised by the respondent to adjudication in its payment schedule. Such a construction would mean, in effect, that the applicant would be required to anticipate in its payment claim, and deal with at length, every possible argument that the respondent might rely upon. That would have the effect of increasing enormously the complexity and expense of the statutory procedure: something quite at odds with the statutory objects set out in s 3 and reinforced in the Second Reading Speech. It would also mean that, notwithstanding the best attempts of the applicant to foresee and answer all possible arguments, it might be defeated if the ingenuity of the respondent or its lawyers turned up yet further arguments.*
> *61. I do not believe that the legislature intended such consequences to flow from the scheme that it enacted. Nor do I think that there is anything in what Einstein J said in* John Holland *that requires me to conclude, notwithstanding the views that I have expressed, that the legislature did intend such bizarre consequences to follow.*[8]

7. [2004] NSWSC 258. See also case note *John Holland Pty Ltd v Cardno MBK* (NSW) Pty Ltd (2004) 23 (2) *The Arbitrator & Mediator*, August, p. 145.
8. At paras 60, 61.

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor

[2004] NSWCA 394

Transgrid v Siemens Ltd

[2004] NSWCA 395
New South Wales Court of Appeal
Hodgson JA, (Mason P and Giles JA concurring)
(3 November 2004)

Setting aside Determinations of Adjudicators under the New South Wales Building and Construction Industry Security of Payment Act, and judgments based on such Determinations; Injunctions and Declarations, rather than relief in the nature of Certiorari available; a three element test necessary.

Estate Property Holdings Pty Limited v Barclay Mowlem Construction Limited

[2004] NSWCA 393
New South Wales Court of Appeal
Hodgson JA, (Mason P and Giles JA concurring) (3 November 2004)

Proper construction of the s 13(4)(b) limitation period applicable to a Payment Claim under the New South Wales Building and Construction Industry Security of Payment Act; Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited [2003] NSWSC 1103 wrongly decided; s 13(4)(b) requires that some work for which payment is claimed in the payment claim has been performed in the twelve month period.

[2004] NSWSC 823
Supreme Court of New South Wales
(McDougall J 13 September 2004)

Consideration of the prohibition on exclusion, modification or restriction of the operation of the New South Wales Building and Construction Industry Security of Payment Act, found in section 34 of that Act.

David Campbell-Williams [1]

1. David Campbell-Williams is a Lawyer, Arbitrator and Adjudicator, Sydney.

On 3 November 2004, the New South Wales Court of Appeal delivered its first three substantive judgments in respect of the *New South Wales Building and Construction Industry Security of Payment Act (*'SoPAct')*.*[2]

Essentially, *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (Brodyn)* and *Transgrid v Siemens Ltd (Transgrid)* deal with the fundamental issue of how a Determination under the SoPAct might be set aside.

The judgment in *Estate Property Holdings Pty Limited v Barclay Mowlem Construction Limited* deals with the discrete issue of the limitation period in section13(4)(b) of the SoPAct.

The Judgments

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor

Brodyn deals quite succinctly with five issues, namely:

- whether a judgment based on an Adjudication Certificate, itself based on a purported Determination, can be set aside;
- whether *certiorari* is available (and thus whether *Musico v Davenport*[3] *(Musico)* was correctly decided);
- whether the payment Claim was valid (and thus whether *Holdmark Developers Pty Limited v GJ Formwork Pty Limited*[4] is incorrect, to the extent that it decides that only one payment claim can be made after termination of a contract and/or cessation of work;
- whether the adjudicator's failure to refer to the respondent's submission that money should be deducted for incomplete work and for rectifying defects, and that the claimant had breached cl 43 of the subcontract by not furnishing a statutory declaration, amounted to a denial of natural justice or rendered the determination void; and
- whether the claimant's failure to hold a necessary licence under the *Home Building Act* was a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination.

The *certiorari* issue lies at the heart of this judgment, although the other four issues are also of significance to practitioners.

Since the seminal judgment of McDougall J in *Musico* 12 months earlier, there had been little if any doubt expressed judicially at first instance, as to whether a Determination could be set aside if vitiated by jurisdictional error or want of natural justice, but not for non jurisdictional error. Generally, following the analysis and reasoning of McDougall J, there have been many decisions which have considered whether the Determination should be quashed by way of an order in the nature of *certiorari*.[5]

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2. While *Brewarrina Shire Council v Beckhaus* [2003] NSWCA4 (17 February 2003) had involved a consideration of the Act, ([2002] NSWSC 960 (18 October 2002)), consideration of the Act (unlike the judgment of Macready AJ in the Court below) was only incidental to the consideration of cl. 42.1 AS2124-1992.
3. [2003] NSWSC 977 (31 October 2003).
4. 2004] NSWSC 905.
5. See for example, the analysis in *Transgrid v Siemens & Anor* [2004] NSWSC 87 Master Macready (25 February 2004) in turn adopted by Barrett J in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 at para 4.

Although the focus clearly remains on jurisdiction, the Court of Appeal decision in *Brodyn* represents a shift in the approach to be taken in considering whether a Determination might be set aside. Justice Hodgson delivered the substantive judgments in all three Appeals. His Honour considered that rather than simply distinguish between jurisdictional and non-jurisdictional error, that 'it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination',[6] and that relief in the nature of *certiorari* is not available to quash a purported Determination, but rather, declaratory and injunctive relief should be used.

It is submitted that the focus on compliance with the basic requirements of the SoPAct and the need for natural justice (within the confines of the SoPAct) remain as critical as they were under the *Musico* line of authority. The distinction is to be found in the Court's elucidation of a three point test of any challenged Determination, as to:

- whether the basic requirements of the SoPAct were complied with;
- whether the purported determination was a *bona fide* attempt to exercise the power granted under the SoPAct; and
- whether there was a substantial denial of the measure of natural justice required under the SoPAct.

The novelty in the approach of the Court of Appeal lies in the second requirement of the test.

It is submitted that *Brodyn* will make it more difficult to overturn Determinations, provided the three point test is met. Justice Hodgson observes as follows:

> *58 The question then is whether there is available a remedy in the nature of certiorari, in circumstances where the determination is not void by reason of defects of the kind I have been discussing. In my opinion it is not,* ***because the availability of certiorari in such circumstances would not accord with the legislative intention disclosed in the Act that these provisional determinations be made and given effect to with minimum delay and minimum court involvement; and because it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of certiorari lies***
>
> *59* ***For these reasons, I disagree with the view expressed in Musico and the cases which followed it, to the extent that they hold that relief in the nature of certiorari is available to quash a determination which is not void.***[7] (emphasis added)

It must inevitably follow from his Honour's judgment that unless the Determination is flawed to the extent that it is void, the Determination must stand, pending the ultimate resolution of the contractual issues between the parties, which are expressly preserved by section 32 of the SoPAct.

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6. *Brodyn* [2004] NSWCA 394 at para 54.
7. *Brodyn* [2004] NSWCA 394 at paras 58, 59.

The heart of Justice Hodgson's judgment is found at paragraphs 52 and following and bears repetition here:

> *52* ***…it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable.*** *A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction,* ***without the need to quash the determination by means of an order the nature of certiorari.***
>
> *53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:*
>
> 1. *The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).*
> 2. *The service by the claimant on the respondent of a payment claim (s 13).*
> 3. *The making of an adjudication application by the claimant to an authorised nominating authority (s 17).*
> 4. *The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19).*
> 5. *The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss 22(1)) and the issue of a determination in writing (ss 22(3)(a)).*
>
> *54 …A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance* ***decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error.*** *I think that approach has tended to cast the net too widely; and* ***I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.*** (emphasis added)

Entirely consistent with the *Musico* line of authority, the measure of natural justice afforded by the SoPAct is an integral requirement for a valid determination. Justice Hodgson observes, with some force:

> *55 …What was intended to be essential was* ***compliance with the basic requirements*** *(and those set out above may not be exhaustive),* ***a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power … and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported***

> ***determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination.*** *If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.*
>
> *57 The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion,* ***such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity****… [In] my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void.*[8] (emphasis added)

Can a judgment based on a void determination be set aside?

In the circumstances of this case, there was significant irregularity with the issue of the Adjudication Certificate, which instead of being issued five days (or later) after the service of the Determination upon the respondent,[9] was issued only one day after service. Nevertheless, the Adjudication Certificate was used to ground a judgment in the District Court of New South Wales. In the Court below,[10] Justice Gzell had declined to exercise his discretion, to dissolve the District Court judgment.

Justice Hodgson took an entirely different view:

> *42 Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set aside on the ground that there never was a determination.*[11]

8. *Brodyn* [2004] NSWCA 394 at paras 55, 57.
9. Act Section 23(1).
10. *Brodyn* [2004] NSWSC 254 Gzell J (2 April 2004).
11. *Brodyn* [2004] NSWCA 394 at para 42.

The Court provides clear guidance on the procedure to be followed. Relief in the nature of *certiorari* should no longer be sought, but rather, declarations and injunctions. His Honour has also held that s 25(4)(a)(iii) of the SoPAct does not prevent an application to set aside the judgment:

> *61 Where the adjudicator's determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and… it is not contrary to s 25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator's determination.*[12]

Was the Payment Claim invalid?

Brodyn had in the Appeal, relied on the very recent authority *Holdmark Developers Pty Limited v GJ Formwork Pty Limited*,[13] in which it was held that upon termination of a contract and the cessation of work, there was thereafter only one reference date, in respect of which only one final payment claim could be made.

Justice Hodgson took a different view to that expressed by Justice McDougall in *Holdmark*:

> *63 However, s 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s 13(4): reference dates cannot support the serving of any payment claims outside these limits…*
>
> *65 There is a possible point of distinction between the present case and* Holdmark*, in that in* Holdmark *it was common ground that the contract was at an end, whereas in the present case [the claimant] did not concede this. However, in circumstances where the document provided by [the claimant] on 27 June 2003 referred to its "final claim", it seems strongly arguable that, if Brodyn was not entitled to terminate, [the claimant] did by this document accept the repudiation that the purported termination would in these circumstances constitute. In any event, in my opinion* Holdmark *was wrongly decided, and it is not necessary to distinguish it.*

12. *Brodyn* [2004] NSWCA 394 at para 61.
13. [2004] NSWSC 905 McDougall J (24 September 2004).

Was there a denial of Natural Justice?

It is submitted that the Court's consideration of whether there had been a denial of natural justice vividly illustrates the extent to which difficulties are likely to be experienced in future, in attempting to obtain injunctions and declarations where the 'basic and essential requirements' of the SoPAct have been met.

The Adjudicator had not apparently taken into account Brodyn's offsetting claim in respect of deficiencies and defects. His Honour observed:

> *74 In my opinion… in so far as a cross-claim for damages may rely on defective or incomplete work, plainly this is to be taken into account under s 10(1)(b). Only the work completed is to be valued, and regard is to be had to the estimated cost of rectifying defects. It appears that the adjudicator did not have any regard to Brodyn's claim that there were deficiencies and defects requiring something in the order of about $90,000.00 in all to rectify.*
>
> *75* ***However, this omission in the adjudicator's reasons appears to flow, not from his not having regard to Brodyn's submissions, but from either misinterpreting them or misapplying the law. I do not think this amounts to a denial of natural justice; and certainly not to one which would render the determination void.***[14] (emphasis added)

Was the Claimant's Lack of Home Building Act Licence fatal to its Payment Claim under the SoPAct?

Brodyn argued that because the claimant did not have a licence under the *New South Wales Home Building Act* (HBA), the subcontract was illegal (s 4 HBA) and unenforceable (s 10 HBA). Accordingly, so Brodyn argued, the claimant was not entitled to any progress payment. The Court was not persuaded by this submission and construed the sanctions in the HBA against unlicensed contractors as being limited to those in s 10 of the HBA. The Court held:

> *82 … In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s 10 of the HBA.*
>
> *83 Accordingly, in my opinion [the claimant]'s failure to have a licence could not be a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination.*[15]

Clearly, on this reasoning, there is no interrelationship between the SoPAct and the HBA.

14. *Brodyn* [2004] NSWCA 394 at paras 74, 75.
15. *Brodyn* [2004] NSWCA 394 at paras 82, 83.

Transgrid v Siemens Ltd

It had been thought that *Transgrid* might have produced the more substantive decision in the Court of Appeal, having regard to the magnitude of the amount in issue in that determination.

The Appeal was also expected to deal decisively with the inherent tension between the SoPAct and the terms of the contract, particularly where the contract provides, as is often the case, that absent certification of a progress claim (or Payment Claim) by the Superintendent, there is no entitlement to payment.

Indeed, while in the Court below,[16] Master Macready had allowed the Determination to stand on discretionary grounds, he nevertheless found on careful analysis, that the adjudicator had made a jurisdictional error, because he did not determine the amount calculated in accordance with the terms of the contract, as required by s 9(a) of the SoPAct. As will be seen, the Court of Appeal dealt with this issue in short measure.

The judgment in *Brodyn* is the more substantive; however, *Transgrid* is nevertheless worthy of comment, in that Justice Hodgson restates in a succinct form, the position expounded at length in *Brodyn*:

> *29 However, for reasons I have given in* Brodyn *...* ***in my opinion this review is available only where the determination is not a determination within the meaning of the Act, because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination. If an adjudicator has erroneously decided that such an essential pre-condition has been satisfied when in truth it has not, then that can be considered a jurisdictional error making the determination "reviewable".*** *However, for reasons given in* Brodyn, *such an error would in fact make the determination void; and in my opinion, relief in the nature of certiorari is not available to quash a determination under the Act that is not void. Where a determination is void, relief is available by way of declaration and injunction; so in my opinion there is no occasion where relief in the nature of certiorari would be available and required.*[17] (emphasis added)

The Court held that there had not been any jurisdictional error. Indeed, there would not have been jurisdictional error, even if it were the case that the 'amount calculated in accordance with the terms of the contract' was, on the true construction of s 9(a) of the SoPAct and of the contract, the amount certified by the Superintendent.

In those circumstances:

> *a decision to the contrary by the adjudicator would be a mere error of law, and not such as to render the determination invalid. To that extent, I disagree with the views expressed by McDougall J in* Musico v Davenport *[2003] NSWSC 977. Similarly, if it be the case that, on the true construction of the contract, there could be no*

16. *Transgrid v Siemens & Anor* [2004] NSWSC 87 Master Macready (25 February 2004).
17. *Transgrid* [2004] NSWCA 395 at para 29.

> *entitlement to a progress payment in respect of a variation not approved in writing by the Superintendent, the inclusion of such a progress payment would likewise be an error of law, and not a matter which would render the determination invalid.*[18] (emphasis added)

The Court found it unnecessary to decide whether on the true construction of s 9(a) of the SoPAct, and the contract, the amount 'calculated in accordance with the terms of the contract' is:

- the amount certified (cl 42.2 of the contract) or
- the value of the work less deductions (cl 42.3 of the contract).

The Court did, however, indicate a preference for the interpretation of s 9(a) of the SoPAct and the contract, consistent with the use of the word 'calculation' and consistent with the provisions against contracting out found in s 34. That is, the Court preferred the view of Justice McDougall in *Abacus v Davenport*[19] over that tentatively expressed by the Master in the Court below.

In short, the SoPAct is to be construed as overriding the certification (or lack thereof), of the Superintendent under the Contract.

Estate Property Holdings Pty Limited v Barclay Mowlem Construction Limited

This Appeal arose out of a decision of Justice Einstein in the Court below. His Honour had also decided *Leighton Contractors Pty Limited v Campbelltown Catholic Club*, with which the decision under appeal was entirely consistent.

> Section 13(4) is in the following terms:
> *A payment claim may be served only within:*
> *(a) the period determined by or in accordance with the terms of the construction contract, or*
> *(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),*
> *whichever is the later.*

Justice Einstein had noted three possible interpretations of section 13(4)(b):

- first, as requiring only that some work under the construction contract had been performed in the twelve month period;
- second, as requiring that some work for which payment was claimed in the payment claim had been performed in the twelve month period; and
- third, as requiring, in respect of each item for which payment was claimed, that some work had been performed in the twelve month period.

18. *Transgrid* [2004] NSWCA 395 at para 34.
19. [2003] NSWSC 1027.

His Honour had accepted the first of the three interpretations, consistent with his previous decision in *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited (Leighton)*.

Justice Hodgson, however, concluded that *Leighton* was incorrect, in that the second interpretation, not the first, was the proper interpretation, reasoning as follows:

> *17 In my opinion, s 13(2)(a) of the Act requires that a payment claim identify the construction work for which payment is claimed in the claim, not merely the construction work as a whole that is being carried out under the relevant construction contract.* ***I think this is indicated by the words "construction work … to which the progress payment relates"; and strongly confirmed by the consideration that, unless a progress claim identified the particular work for which payment was claimed, it would be impossible for a respondent to provide a meaningful payment schedule supported by reasons. This in turn would make wholly unreasonable s 20(2B) of the Act, which prevents a respondent relying, in an adjudication of a payment claim, on reasons not included in the payment schedule.***
>
> *18 Consistently with this, in my opinion "construction work … to which the claim relates" in s 13(4)(b) is also the construction work for which payment is claimed in the claim; and accordingly, the requirement of s 13(4)(b) is that some of that construction work be carried out in the relevant twelve month period.* ***Accordingly, in my opinion, the primary judge's acceptance of the first of the three interpretations of s 13(4)(b) which he identified, both in this case and in*** Leighton***, was incorrect.***[20]

The Court went on to consider whether the third interpretation was valid, and concluded as Justice Einstein had, that it was not. This approach was in the view of Justice Hodgson, (with whom Mason P and Giles JA concurred):

> *confirmed by s 13(6), which suggests that items more than twelve months old may be included in a payment claim, when they have been included in previous claims, so long as the payment claim does relate to some work carried out within the twelve month period.*[21]

20. *Estate Property Holdings* at paras 17, 18.
21. *Estate Property Holdings* at para 21.

Energy-Brix Australia Corporation Pty Ltd v National Logistics Coordinators (Morwell) Pty Ltd

[2002] VSCA 113

Seal Rocks Victoria (Australia) Pty Ltd v State of Victoria & Anor

[2003] VSC 85

State of Victoria & Anor v Seal Rocks Victoria (Australia) Pty Ltd

[2003] VSC 84

Anaconda Operations Pty Ltd & Anor v Fluor Australia Pty Ltd

[2003] VSC 275

Andrew Kincaid[1]

Before it exercises its discretion to grant leave to appeal pursuant to section 38(4) of the *Commercial Arbitration Act* 1984 ('the Act') the Court is required to find, among other things, a manifest error of law on the face of the award, or strong evidence that the arbitrator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law. Whether the arbitrator has applied the correct legal principle of law to the facts as found amounts to a question of law.[2] The application of an incorrect legal principle will therefore amount to an error of law. Parties to recent arbitration awards in Victoria have had mixed success in relying upon an error of law as vitiating an award.

In *Energy-Brix Australia Corporation Pty Ltd v National Logistics Coordinators (Morwell) Pty Ltd*,[3] an arbitrator who, in a case of inconsistency between contract documents, gave precedence to a contract under seal over a subsequent contractual document described as a signed 'informal agreement', was found to have made a manifest error of law on the face of the Award.

In *Seal Rocks Victoria (Australia) Pty Ltd v State of Victoria & Anor*,[4] leave to appeal under the Act was refused. An arbitrator was found not to have made an error of law in awarding reliance damages only, as opposed to expectation damages, where he found that it was impossible to assess future loss of profits had the contract been performed. That is to say, it was correct in law for the arbitrator in such circumstances to shift to the defendant the ultimate onus of proving that, had the contract been performed, the net value of the plaintiff's benefit would not have covered the expenditure the plaintiff had incurred before rescission.

In *State of Victoria & Anor v Seal Rocks Victoria (Australia) Pty Ltd*,[5] leave to appeal under the Act was also refused. The court found that it was not an error of law for the arbitrator to have

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2. As to what constitutes an error of law generally, see P Vickery, 'When the Question Is-Is It a Question of Law' (1994) *The Arbitrator*, November, p.171. See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Roads Corporation v Dacakis* [1995] 2 VR 508.
3. [2002] VSCA 113, 8 August 2002. See also J D Wilson, 'Is the Arbitrator's Award Ever Truly Final and Binding?' *The Arbitrator & Mediator* (2002) 21 (3), December, p. 59. where other aspects of the decision are discussed.
4. [2003] VSC 85, 24 April 2003.
5. [2003] VSC 84, 24 April 2003.

had regard to the relevant matrix of fact when construing the contract where it was probably not open to him under the *Codelfa* principle to do so, but where the parties to the arbitration had nevertheless urged him to do so. Further, the arbitrator's finding in regard to the existence of an implied term was also found to have been reasonably open to him, and as such it could not be said that his error was so evident or obvious or that there were powerful reasons for considering that he was in error.

In *Anaconda Operations Pty Ltd & Anor v Fluor Australia Pty Ltd*,[6] an appeal was brought by the plaintiff from an 'Interim Award' dated 7 September 2002. Part of its claim in a lengthy arbitration before three international arbitrators was for the cost of a fifth manufacturing unit (or 'autoclave') beyond the four that the design and build contractor was required to build, in order to achieve the extraction rate of nickel from ore which was allegedly warranted by the defendant. Surprisingly, given the experience and standing of the arbitrators, the Court found that it was necessary to construe the interim award in order to determine whether the finding of the arbitrators was:

(a) that the defendant warranted a facility capable of achieving an extraction rate of nickel from ore of 95% from the acid leach autoclaves (viz. the warranty was that 45,000 tonnes of saleable nickel per annum would be extracted from 3.75 million tones of 'design' ore per annum) (as asserted by Anaconda); or

(b) simply that the facility would be capable of achieving a throughput of at least 3.75 million tonnes of ore per annum and that it would be capable of producing 45,000 tonnes of nickel per annum (viz. there was no warranty that 45,000 tonnes of nickel could be produced from 45,000 tonnes of ore and therefore no ceiling on the quantity of ore from which the 45,000 tonnes of nickel per annum must be produced) (as asserted by Fluor).

After some necessary analysis, her Honour found that the Interim Award accepted the proposition in (a) above. Having done so, it was necessary for her Honour to determine whether the arbitrators' treatment of Anaconda's remedy constituted an error of law on the face of the award.

The Interim Award apparently concluded that 'Anaconda had not discharged the heavy burden of establishing that the claimed remedy was the only means to achieve [the warranted] capacity'. This proposition was naturally immediately fastened on by Anaconda as being completely at odds with well-established principles governing the assessment of damages where a builder has erected a defective building or other structure viz. that *prima facie* the measure of damages is the cost of completing the building in accordance with the requirements of the contract. Her Honour had little difficulty in finding that it was not for Anaconda to demonstrate that the rectification method chosen was the only one practicable; but that the onus of establishing that a less expensive remedy than Anaconda's claimed remedy would lie on Fluor. Her Honour was, therefore, satisfied that the rejection of Anaconda's claim for the cost of the fifth autoclave properly considered and costed (in the absence of Fluor proving that the need for a fifth autoclave was unreasonable and in the absence of an alternative remedy) constituted an error of law. Other grounds of appeal were rejected. Her Honour remitted the questions back to the arbitrators. The arbitration was subsequently settled.

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6. [2003] VSC 275, 28 July 2003.

Arbitration and Preliminary Discovery: Alstom Power v Eraring Energy

[2004] FCA 706

Scott Ellis[1]

The recent decision of Selway J, in *Alstom Power v Eraring Energy*,[2] deals with the interaction between the power of the Federal Court to order preliminary discovery under the Federal Court Rules and arbitration proceedings.

The case concerned an application for preliminary discovery under O15A Rule 6 of the *Federal Court Rules*, which enables an applicant to seek discovery of documents before proceedings have been commenced.[3] The discovery must be sought for the purpose of deciding whether or not to commence proceedings, rather than just building a case, and may only be made after all other reasonable inquiries have been made. There must also be reasonable cause to believe that the applicant for discovery has or may have a right to obtain relief from an identified person.

In this case, Alstom sought preliminary discovery relating to a possible claim for misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* ('TPA'), arising out of the work of refurbishing and upgrading the Burrinjuck Power Station. At the time, arbitration proceedings arising out of that work had already commenced. Although the arbitration was not nearing completion, discovery had been given.

The respondent argued that preliminary discovery should not be ordered because the trade practices claim could and should be pursued in the arbitration proceedings. The Court rejected this approach. The judge pointed out, first, the limited effect which provisions of state legislation may have on the operation of the Federal Court at paras [6] to [8]:

> *In my view it is clear that this Court's jurisdiction to hear a claim pursuant to s 86(1) of the TPA cannot be excluded by an arbitration agreement or by a State statute such as the* Commercial Arbitration Act 1984 *(NSW): see* Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) & Anor *(1998) 90 FCR 1 at 23–24 , 29. The parties have not identified any law of the Commonwealth which purports to limit the jurisdiction of this Court in these circumstances. The result is that the applicant has a statutory entitlement to pursue its claim in this Court if it chooses to do so. The first respondent cannot require the applicant to pursue its claim in the arbitration. Nor is*

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2. [2004] FCA 706.
3. As to preliminary discovery generally see B Kremer and R Davies, 'Preliminary Discovery in the Federal Court: Order 15A of the Federal Court Rules'

there any reason of principle why an arbitration should be given an invariable priority over the pursuit of proceedings in this Court.

This is not meant to suggest that the parties to a contract cannot agree that an arbitrator can determine a dispute between them which includes rights or obligations conferred or imposed by the TPA, providing, of course, that the arbitrator is not exercising the "judicial power of the Commonwealth": see IBM Australia Ltd v National Distribution Services Ltd *(1991) 22 NSWLR 466 at 480–481. However, that agreement cannot have the effect that the parties can agree to waive the jurisdiction of this Court under the TPA.*

Of course, in an appropriate case this Court can stay proceedings in this Court pending the finalisation of arbitration proceedings involving the same subject matter: see Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd *(1987) 14 FCR 193;* Recyclers of Australia Pty Ltd & Anor v Hettinga Equipment Inc & Anor *(2000) 100 FCR 420;* Timic v Hammock *[2001] FCA 74. That power arises from the inherent jurisdiction of the Court in the management of the business of the Court so as best to achieve a sensible resolution of the dispute between the parties. It does not involve any denial of the Court's jurisdiction.*

The judge also said, at paragraph [14]:

The only remaining question is whether it is appropriate in the exercise of the Court's discretion to make the orders sought by the applicant for pre-action discovery. The first respondent has argued that such orders should not be made where there is an arbitration in relation to the same issues. This puts the matter too highly. At this stage the question in issue is whether the first respondent should be ordered to make discovery for the purpose of enabling the applicant to decide whether to institute proceedings in this Court. The effect of such an order on an existing arbitration may be relevant in some circumstances. If, for example, the arbitration were nearly completed and involved the TPA issues then it might well be seen as convenient not to make any order for pre-action discovery until the arbitration proceedings were complete. However, in this case the arbitration has not yet proceeded to hearing. The TPA issues are not raised. There is no obvious reason why the applicant should not consider whether to issue proceedings in this Court.

The judge expressly left open the question whether any proceedings actually commenced would be stayed in the inherent jurisdiction of the Court.

The respondent had indicated that the discovery which had been provided in the arbitration could be utilised for the purpose of deciding whether to commence proceedings and argued that further discovery was necessary. The Court held, however, that the documents relevant to deciding whether to commence trade practices proceedings were different to those already discovered in the arbitration. The misleading and deceptive conduct claims would involve issues as to the knowledge of senior management, rather than the operational aspects of the project.

The issue also arises in a broader context. Preliminary discovery may be sought in the Supreme Courts of most Australian Jurisdictions.[4] The relationship between the right to preliminary discovery and arbitration proceedings does not appear to have been considered in a state context. Section 53 of the *Commercial Arbitration* legislation is directly applicable to courts exercising state jurisdiction. While the impact of s 53 on preliminary discovery applications must await judicial determination, it may be observed that s 53 does not prevent an applicant *commencing* proceedings. Section 53 confers a discretion to stay proceedings once they have been commenced, and if an application for a stay has been made by the defendant.

4. NSW *Supreme Court Rules*, 1970 Part 3 r 2(2), ACT *Supreme Court Rules* 1933 O34A, Northern Territory *Supreme Court Rules* 1987 r 32.03, *Victorian Rules of the Supreme Court* 1996 R 32.03, Western Australia *Supreme Court Rules* 1971 O26A.

Gunns Forest Products Ltd v North Insurances Pty Ltd and Others

[2004] VSC 155

Bill Morrissey[1] / *Sarah Connell*[2]

The Plaintiff applied for leave to appeal pursuant to section 38 of the *Commercial Arbitration Act 1984* against an award of an arbitrator. By the award, which was handed down on 19 December 2003, the arbitrator determined that the loss of a large quantity of wood chips was not one which was covered by an 'Industrial Special Risks' policy of insurance.

Section 38

His Honour emphasised that those who choose to resolve disputes by arbitration must 'take the good with the bad'. They choose the advantages of speed and cost that come with alternative dispute resolution, but also more limited rights of recourse to the courts thereafter. Section 38 limits those rights of appeal. Section 38(1) states that without prejudice to the right of appeal set out elsewhere in the section, the court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award. By virtue of section 38(2), an appeal lies to the court on any question of law arising out of an award brought with the leave of the court. That leave shall not be granted unless, but shall be granted if, the court considers that each of two conditions precedent exist:

1. Having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and
2. There is either:
   (a) a manifest error of law on the face of the award; or
   (b) strong evidence that the arbitrator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

The Plaintiff submitted that the award contained a manifest error on its face. His Honour referred to the judgement of Sheller JA in *Promenade Investments Pty Ltd v State of New South Wales*,[3] where Sheller JA states that before leave is granted there should be 'powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law'. It was not sufficient for the Plaintiff to demonstrate that the correctness of the award is open to some doubt, or that the arbitrators favoured construction of an insurance policy is only one of several, each of which is fairly arguable.

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1. Bill Morrissey, Partner, McCullough Robertson, Lawyers, Brisbane.
2. Sarah Connell, Graduate, McCullough Robertson, Lawyers, Brisbane.
3. [2003] VSC 275.

The policy

The Plaintiff was the insured and the first Defendant the insurer, under an 'industrial special risks' policy of insurance. Industrial special risks insurance is designed to cover the insured against loss of gross profit and increased costs of working or production flowing from physical damage to the insured property. In this case, that property included the Plaintiff's wood chips. A quantity of wood chips was found to contain flakes and scallops of rubber and the underwriters accordingly accepted liability, but with a qualification which brought the parties to the arbitrator. The underwriters contended that there was a relevant exclusion clause. The arbitrator found that the exclusion clause applied to exclude the insured's claim.

The relevant clause was included in the part of the policy which was headed 'Perils Exclusions'. It provided that, in circumstances such as those which apply in this case, the insurer shall not be liable 'in respect of … physical loss, destruction or damage occasioned by … contamination … unless such … results from a cause not specifically excluded which originates beyond the premises … of the insured'. Physical loss, destruction or damage occasioned by a number of things including wear and tear and faulty materials or faulty workmanship were likewise excluded. The exclusion clause was limited to the extent that it did not apply to 'subsequent loss, destruction of or damage to the property insured occasioned by a peril'.

The arbitrator's findings

The arbitrator found that the damage constituted contamination within the terms of the exclusion clause. The introduction of pieces of rubber into the woodchips resulted in the mixture of the two, so that they could not conveniently be separated. The woodchips were therefore unmerchantable.

Plaintiff's submissions

The Plaintiff submitted that there was a manifest error of law on the face of the award in that the damage did not fall within the scope of the perils exclusion. The plaintiff made the following submissions:

(a) The reference to 'physical loss, destruction or damage' in the policy refers to the physical harm to the property, not the financial consequences of that harm;

(b) The policy did not exclude physical damage where the damage itself was contamination, it excluded damage 'occasioned by or happening through contamination'; and

(c) The arbitrator made a manifest error in that he did not examine, as he was bound to do, the cause of the damage.

Manifest error of law

Justice Harper considered the submissions made by the Plaintiff in light of the relevant authority and concluded that while the phrase 'occasioned by or happening through' requires consideration of causal concepts, it does not follow that the reasoning adopted by the Plaintiff was correct. It was held that the distinction drawn between damage constituting contamination and damage occasioned thereby was not the proper reasoning to adopt. While it was agreed that the award was not particularly clear in stating that the arbitrator examined the cause of the damage, it was held that a fair reading of the award as a whole and in context left no doubt that that issue was taken squarely into account.

Justice Harper held that it was clear from the award that the arbitrator concluded that the damage to the woodchips was occasioned by their contamination and that the damage was not the contamination itself. On that basis, there was no need for the arbitrator to further consider issues of causation. It was held that the arbitrator was not manifestly wrong in adopting that approach. Further, where the arbitrator's award is not on its face affected by a manifest error of law, and where there is no strong evidence that the arbitrator made such an error, leave cannot be granted under the Act. Accordingly, the appeal was refused with costs.

Letterbox Holdings Pty Ltd v Stephen John Kirkham & Anor

[2003] NSWSC 177

Bill Morrissey[1] / *Sarah Connell*[2]

The case involved an appeal against an Arbitrator's decision to award costs on a solicitor and client basis.

Facts

Letterbox Holdings Pty Ltd (the Plaintiffs) purchased a freight express business from the Defendants in 1998. The Plaintiffs contended that the Defendants had engaged in misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974* in that they misrepresented the character of the business, and hence its likely profitability, and also misrepresented the July-November accounts in that expenses were not accrued so as to appropriately match income and expenditure. In the Defendant's' cross-claim, the Defendant's sought the payment of extra consideration under an escalator clause in the contract of sale.

In his Interim Award published on 23 July 2002, the Arbitrator held that both the claim and the cross-claim should be dismissed. The Arbitrator went on to order that the Plaintiff's pay the Defendant's' costs on a solicitor and client basis.

Requirements of section 38

Section 38 of the *Commercial Arbitration Act 1984* (NSW) makes provision for an appeal from an Arbitrator's award. Certain conditions must be fulfilled before leave to appeal a decision may be granted. Such circumstances involve:

1. The determination of a question of law that could substantially affect the rights of one or more parties to the arbitration agreement.
2. Either:
   (a) there is a manifest error of law on the face of the award; or
   (b) strong evidence that the Arbitrator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

Justice Nicholas highlighted an object of the Act: to promote the private, prompt and speedy hearing of contractual disputes which the parties to the contract have agreed should

1. Bill Morrissey, Partner, McCullough Robertson, Lawyers, Brisbane.
2. Sarah Connell, Graduate, McCullough Robertson, Lawyers, Brisbane.

be decided by arbitration. It follows that an appeal should be allowed only in very restricted circumstances.

The Plaintiffs claimed that there were manifest errors of law on the face of the award resulting in the award of costs on a solicitor and client basis and the award of costs to the Defendant's in respect of their unsuccessful cross-claim. Further, the Plaintiff's claimed that the determination of such issues was likely to add to the certainty of commercial law by clarifying the basis and type of costs award permitted to be made by arbitrators.

Solicitor and client costs

The Arbitrator awarded costs on the basis that his jurisdiction to make the award on a solicitor and client basis was to be found in section 34 (1). The Plaintiffs submitted that by reason of the effect of certain provisions of the *Legal Profession Reform Act 1993* (NSW), namely the addition of a new Division 6 of Part 11, the Arbitrator had no jurisdiction to award costs on a solicitor and client basis. According to the Plaintiffs, the enactment of certain provisions of the *Legal Profession Reform Act* brought about the implied repeal of section 34 (1)(c) of the *Commercial Arbitration Act*, which allowed costs 'to be taxed or settled as between party and party or as between solicitor and client'.

Justice Nicholas disagreed. His Honour went on to consider the issue of implied repeal, concluding that there must exist very strong grounds to support an implication that a later provision was intended to repeal an earlier one. In this case, the later legislation dealt with substantially different subject matter and the Plaintiff's submission was rejected.

His Honour found that the amendments to the *Legal Profession Reform Act* do not limit any powers held by a court or tribunal to determine in any particular case the amount of costs payable, and the basis on which costs are to be calculated.

Consideration of offer

The Plaintiffs alleged that the Arbitrator erroneously took into account offers made by the Defendant and rejected by the Plaintiff's in his determination of the issue of costs. The Plaintiff's contended that the Arbitrator was precluded by section 34 (6) from taking into account the offers made because the offers were not offers of compromise made in accordance with rules of the court. His Honour considered the judgment in *Mideco Manufacturing Pty Ltd v Tait*,[3] and concluded that while section 34 (6) requires an arbitrator to have regard to an offer of compromise made under the rules of court, the section does not preclude the arbitrator, in exercising his or her discretion in relation to costs, having regard to other circumstances. Practically, a different finding would be inconsistent with the objects of the Act: to promote the speedy resolution of commercial disputes.

The failure of the Plaintiffs to consider the two offers made by the Defendant showed a failure to make some decision as to the likelihood of success. It was found to be unreasonable of the Plaintiffs to pursue the litigation when it had failed to responsibly evaluate its prospects of success.

3. (1989) VR 50.

Justice Nicholas found that there was no error of law on the face of the award; the requirements for leave were not met.

A single piece of litigation

The Plaintiffs argued that the Defendant should be ordered to pay the Plaintiff's costs of the cross-claim on a solicitor and client basis. The Arbitrator considered that the cross-claim would not have been pursued, but for the claim. His Honour went on to state that although unsuccessful, the cross-claim was in no way futile. Moreover, the Arbitrator considered the litigation as a single piece of litigation. Such litigation would not have been commenced had the Plaintiffs acted reasonably in regard to the offers made. The Arbitrator inferred that the Plaintiffs knowingly took a commercial risk in rejecting the offers and pursuing the litigation, the cross-claim being an incident of that litigation.

Justice Nicholas found that the Arbitrator's award was based on the finding as to the Plaintiff's unreasonable conduct, which led to an overall obligation to the Defendants for their costs in respect of each component of the litigation. His Honour held that the facts found by the Arbitrator justified the award.

Tridon Australia Pty Ltd v Tridon ADC Inc

[2004] NSWCA 146 (4 May 2004)
New South Wales Court of Appeal

Enforcement of arbitral award – power to make declarations – Section 33 Uniform Commercial Arbitration Acts

Robert Hunt[1]

The first interesting aspect of this decision of the New South Wales Court of Appeal is that it sheds some light on the operation of section 33 of the *Uniform Commercial Arbitration Acts*, which has received little judicial consideration. The section provides as follows:

> *33* ***Enforcement of award***
> *An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.*

The second interesting aspect of the decision is that, notwithstanding that there is no express power in the *Uniform Commercial Arbitration Acts* for an arbitrator to make an award in the form of declarations (in contrast to a power under section 24 to order specific performance), the trial judge (Smart AJ) and the Court of Appeal appear to have accepted that an arbitrator has such a power.

The arbitrator was appointed to determine a complex series of disputes, in which five issues were isolated for separate decision. The arbitrator made an award in relation to those issues (described as a partial award) in the form of declarations which were, in broad terms, declarations as to whether certain conduct was in breach of an agreement between the parties to the arbitration and whether a purported termination of the agreement was effective. Smart AJ refused to make an order under section 33 giving leave to enforce that award, saying:

> *22. I would not hold that declarations made by Arbitrators would never be enforced by an order of the Court. Section 75 of the* Supreme Court Act *1970 provides:* ***"No proceedings will be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether any consequential relief is or could***

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be claimed or not." *Ritchie at 75.2 and 75.3 (pp. 1142-1143) gives many examples of when declarations should be made and when they should be refused. Section 75, is read in conjunction with section 63 of the Supreme Court Act which provides:*

"63. ***The Court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."***

23. ***It is possible to envisage cases where one or more declarations may finally resolve the disputes between the parties and their rights, for example, that an agreement between the parties has been lawfully rescinded and that neither party is entitled to claim damages or seek any remedy against the other.***
24. *The Declarations made by the Arbitrator resolve important intermediate issues between the parties and set the course for the remainder of the Arbitration. There is some distance to travel and probably a considerable volume of evidence to be taken. Damages have yet to be considered and, possibly, assessed. This will involve reflecting upon a significant number of contingencies. The term of the Distribution Agreement was 99 years from 1988.*
25. *Declarations 2 and 3 relate to the issues of whether there had been a reach of the Agreement because of the trademark applications of TAPL and TNZL and whether ACDT was entitled to terminate the Distribution Agreement on that account. Those issues having been resolved they are unlikely to arise again or have any ongoing effect.*
26. *As to Declaration 4 the requisite period of notice had not been given. There was the further issue whether ACDT was entitled to withdraw all products from the Second Schedule of the Distribution Agreement. The Arbitrator's decision does not preclude a further notice being given but it would have to be in somewhat different terms from the one previously given. That is an issue for another day. While Declaration 4 resolves a present issue it does no more.*
27. *Declaration 5 depends upon the term implied into the Distribution Agreement and to which the covenant in clause 7(b) is subject. While Declaration 5 is adequate for the purpose of the Arbitration and when read in the light of the award, the Court would not make a declaration in that bald form.*
28. *At the present time there does not seem to be sufficient utility in the Court making Declarations in terms of paragraphs 2 to 5 at the end of the Partial Award. However, depending on the terms of a later award or the final award, that position could change.*

An application was then made to the Court of Appeal for leave to appeal, which was heard on full submissions so that, if leave to appeal was granted, the matter could be determined without further hearing. In refusing leave to appeal, Giles JA (with whom Handley and Santow JJA agreed) said:

5 *Smart AJ declined to make the order essentially because there was no utility in making it. His Honour contemplated the possibility that declarations made by arbitrators could be enforced in the same manner as a judgment or order of the Court, was of the view that there was no utility in this case in granting leave to enforce the declarations.*

6 *It is important to note that s 33 begins by referring to enforcement by leave, the entry of judgment in terms of the award being consequential upon the grant of leave.* ***The first question, then, must be what is desired by way of enforcement, and it is only when that question is asked and satisfactorily answered that there can be sensible attention to whether leave should be granted.***

7 *When the question was asked in the present application two answers were given.*

8 *The first answer was that there is no discretion under s 33, and that the applicant for an order pursuant to that provision is entitled as of right to the entry of judgment in terms of the award. Exceptions to this were recognised, but it was submitted that the exceptions went to jurisdictional facts enlivening the entry of judgment in terms of the award. Reference was made to* Russell on Arbitration, *21st ed, para 8-003.*

9 ***I do not agree that there is no discretion. It is connoted by the words "by leave of the Court" in s 33, and the paragraph in* Russell on Arbitration *clearly shows that there is a discretion. But in any event the purported answer is not an answer to the question. It is still necessary to know what is meant by enforcement and what is intended by way of enforcement in order to determine whether leave should be given.***

10 *That takes one to the second answer, which was that there was an entitlement to have not just the declarations in the interim award, but declarations which would "speak to the world" through being translated into a judgment entered in terms of the award. It was submitted that that translation was itself enforcement.*

11 *I do not think that it is.* ***Enforcement is a plain word, and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s 33 of the Act is a procedure with a purpose, the purpose of enabling the victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are binding on the parties, and bind them for the balance of the arbitration and beyond that.***

12 ***I agree with Smart AJ's view that there is no utility in making the order sought, but for the perhaps more fundamental reason that there is just no question of enforcement yet arising. In the absence of any question of enforcement arising, it would not be appropriate to grant leave to enforce the award.*** (emphasis added)

Singh v Singh (No 2)

[2004] NSWSC 225 (26 March 2004)
Supreme Court of New South Wales (Barrett J)

'Calderbank' offers of settlement whether offer open for one day only reasonably rejected – necessity for an element of compromise

Robert Hunt[1]

An issue of increasing importance in arbitrations and litigation is the use of *'Calderbank'* offers or Offers of Compromise under Rules of Court. This decision of Justice Barrett deals with two aspects of such offers, namely the time (and conditions) specified for acceptance of such an offer, and the necessity for some element of compromise in the offer.

In relation to those issues, his Honour said:

> *7 The plaintiff does not seek to argue that the defendants' solicitors' letter of 21 February 2003 was not a letter in terms of* Calderbank v Calderbank *[1976] Fam 93 admissible as such on the question of costs. What the plaintiff does challenge, however, is the reasonableness of the time allowed for acceptance. The plaintiff's solicitors in their letters say that the offer was not received until 24 February 2003, that is, the day immediately before that on which the offer conveyed by the letter was expressed to expire unless accepted in the meantime. The plaintiff's solicitors were thus given only one day in which to seek instructions from their client and, if those instructions favoured acceptance of the offer, to prepare and have executed the form of withdrawal of caveat delivery of which was necessary to constitute acceptance of the offer in accordance with its terms. The defendants have not sought to argue that the offer was received earlier than 24 February 2003 and I am satisfied that the timing was as stated in the plaintiff's solicitors' reply of that date.*
>
> *8 The plaintiff also says that it was reasonable for his solicitors to request further information dealing with the claims made by the defendants and, having regard to the correspondence, I agree.*

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9 ***I am satisfied that the plaintiff's rejection of the defendants' offer of compromise conveyed by their letter of 21 February 2003 (received on 24 February 2003) was not unreasonable given the unduly brief time allowed for acceptance and the reasonable requests for information so that the plaintiff's solicitors could properly advise their client. The offer conveyed by the letter of 21 February 2003 (received on 24 February 2003) and its rejection therefore do not constitute a basis for the making of an order for costs on the indemnity basis.***

10 *The alternative foundation for the defendants' claim to have costs assessed on the indemnity basis is the letter of 29 September 2003 from the defendants' new solicitors to the plaintiff's solicitors. That letter reads as follows:*

> *"We refer to previous correspondence and in particular to your letter dated 6th August, 2003. We note that it enclosed a letter dated 18th July, 2003 by which your client offered to settle on the basis that he receive one-third of the monies held in trust. We note that you sought a response to this offer by 18th August, 2003.*
>
> *We would advise that we consider this offer to have lapsed. However, we are instructed by our client to formally reject this offer.*
>
> ***We are instructed by our client to propose that your client withdraw the claim against our client, and that he bear our client's costs to date. We seek a response by 13th October, 2003.***
>
> ***We seek to remind your client that should he be unsuccessful in his claim against our clients, he may be liable for damages suffered by our clients together with the costs of the Hearing. We advise that we would be seeking costs on an indemnity basis.*** *We note that in this regard, your client has given to the court an undertaking in respect of damages, which our clients relied on in agreeing to place half of the proceeds of sale in trust."*

11 *It will thus be seen that the "compromise" on which the defendants seek to rely, for costs purposes, was their proposal that the plaintiff abandon his claim altogether and pay the defendants' costs – in other words, that the plaintiff effectively capitulate. The plaintiff says that the proposal cannot be regarded as a "compromise" at all in the sense relevant for present purposes.*

12 *In this respect, it is pertinent to quote from the judgment of Dunford J in* McKerlie v New South Wales *(No 2) [2000] NSWSC 1159:*

> ***"Orders for indemnity costs following the rejection of the offer of compromise pursuant to SCR Pt 52A r 22 and 'Calderbank' letters are becoming increasingly frequent. However, in my view such order should not be made as a matter of course, and certainly should not be made where there is no offer of a real or genuine compromise:*** Tickell v Trifleska Pty Ltd & Anor *(1990) 25 NSWLR 353;* Hobartville Stud Pty Limited v Union Insurance Co Ltd *(1991) 25 NSWLR 358."*

13 *His Honour also said:*

> *"I dealt with a similar application on 17 November last in the matter of* Bishop v State of New South Wales *(unreported – Dunford J – 17 November 2000) a defamation case where the plaintiff had been wholly unsuccessful and there was no existing order for costs, but the effect of the offer required the plaintiff to abandon his proceedings and avoid the risk of an anticipated order for costs. In refusing the application I said:*
>
> > ***'There was not in any real sense an offer to compromise the proceedings, but merely an offer to induce the plaintiff to abandon his claim; and in my view orders for indemnity costs should not be used to defer persons from bringing proceedings which they feel they are entitled to bring, even if those proceedings are ultimately unsuccessful. It is different if there is a compromise involved, such as by offering part of what the plaintiff claims or can reasonably expect to receive if successful.'"***

14 *The observations of Dunford J are apposite in this case. A defendant's proposal that the plaintiff simply capitulate is not to be regarded, for costs purposes, as an offer of compromise which may form the foundation for an order for indemnity costs. This is such a proposal.*

15 *Neither of the bases on which the defendants claim an entitlement to an order for costs on the indemnity basis has been made out. Costs awarded to the plaintiff will therefore be assessed on the party and party basis.* (emphasis added)

GRD Kirkfield Limited v First Trade Consulting Pty Ltd

[2004] WASC 158

Nicholas Floreani[1]

In this case Commissioner Odes QC, of the Supreme Court of Western Australia, provided a useful analysis of the legal principles governing an application for leave to appeal from arbitration proceedings, as well as, the approach to be taken on legal issues determined by a lay arbitrator.

This case involved an application for leave to appeal and an appeal against an arbitral award rendered under the *Commercial Arbitration Act 1985* (WA).

Facts

The applicant carried on business as a builder in Western Australia ('the builder') and the respondent was a property developer ('the developer'). In 2000, the developer undertook a development by extensively renovating a building situated at the corner of St Georges Terrace and Victoria Avenue, Perth. The development involved converting the building into a block of residential apartments known as the 'St George and Victoria Apartments' ('the project'). In order to fund the project, the developer came to a funding arrangement with St Georges Bank Ltd, whereby the bank lent the majority of the project capital and the remaining portion of the required funding was to be paid for by the transfer of completed apartments in the building to the builder and certain subcontractors in lieu of cash payments to them for the work and materials supplied.

The builder, together with what the arbitrator referred to as a 'stable of loyal subcontractors', were interested in providing goods, services and labour to the project and were prepared to accept payment for their claims in the form of a transfer to them of completed apartments or by a reduction in the purchase price for a completed apartment which would be transferred on the completion of the building ('secondary funding' or 'deferral arrangements').

It was common ground at the arbitration, that the builder tendered on the basis that it was prepared to defer payment to itself to the value equivalent to the purchase price of five apartments. Where the parties parted company before the arbitrator was whether there was a similar agreement in relation to subcontractors, namely, whether the builder would defer seeking payment under the Building Contract for the value of work completed by those subcontractors who had agreed to be paid by receipt of either a certificate of title to a completed apartment or a reduction in the purchase price up to a 'likely' value of $2 million..

1. Nicholas Floreani is a Barrister at Christopher Legoe Chambers, Adelaide.

The builder and the developer entered into a standard JCC-D 1994 lump sum contract to carry out the construction of the property in consideration of the amount of $17,925,000 exclusive of GST ('the Building Contract'). No reference was made in the Building Contract to the deferral arrangement on the part of the builder.

The parties together with the Bank subsequently entered into a Builders Side Deed or the Tripartite Agreement ('TPA') by which the Bank agreed with the Developer to fund the project, it being the condition of the provision of the financial accommodation to the developer that the builder enter into that deed for the Bank's benefit. The builder signed the TPA as a party.

The TPA provided that the builder acknowledged and agreed with the developer and the bank, that provided the practical completion of the works occurred by 30 June 2002, the builder would defer the balance of progress claims under the building contract when the cost to complete the works amounted to $1,800,000, which sum would be off set against the purchase of the strata titled units and the project.

The builder proceeded to work on the apartments and in March 2002 presented progress claim number 14 for certification. On 15 March 2002, the architect issued progress certificate number 14 in the sum of $1,427,629 (including GST) as due and payable to the builder on 22 March 2002. The architect thereafter issued progress payment certificate number 15 dated 11 April 2002, certifying the sum of $1,167,341 (including GST) as due and payable on 18 April 2002.

Upon receipt of the progress certificate number 14, the developer requested the builder to implement the deferral arrangements and provided the builder with a written schedule of subcontractors, which bought into account all the then known approved amounts due to the builder under the building contract including the value of the completed apartments, the names of a contact person and telephone numbers of the subcontractors who had agreed to defer making claims against the builder for work, labour and materials, the amounts of such deferral claims, and the amount paid to the builder by the developer to date.

The progress payment certificate number 14 was not paid. A dispute arose between the builder and the developer. The builder alleged the failure by the developer to pay progress payment certificate number 14 amounted to a breach of the building contract. The builder asserted that there was no obligation on its part to off set any amounts owing to subcontractors. On the other hand, the developer alleged that it was not obliged to pay the amounts in cash by virtue of the agreement requiring the amounts to the subcontractors to be off set as had been arranged earlier.

The builder then issued a series of notices requiring the developer to pay the amounts reflected in certificate number 14 and indicating that the builder intended to exercise its right to suspend the execution of the whole works should the developer fail to comply. In response to those notices, the developer sought to have the builder honour its promises and informed the builder that the developer could not pay the claims in cash because they had never been funded having regard to its deferral arrangements with the bank.

The builder then suspended the whole of the works from 14 May 2002 until 27 June 2002. In order to break the log jam occasioned by the suspension, a written agreement was entered

into between the builder and the developer on 27 June 2002 ('the heads of agreement') in which the builder agreed to return to work and bring the works to a practical completion as soon as possible in consideration of certain payments and on the terms set out therein. The builder recommenced work on 1 July 2002, and the architect issued a certificate of practical completion on 2 December 2002.

The Arbitration

The arbitration was conducted by a single arbitrator over 14 days during June and July 2002. An agreed bundle of documents comprising 14 volumes of written exhibits and two volumes of drawings were handed in. The arbitrator was, by agreement, to have regard only to those documents in the bundle to which reference was expressly made in the evidence.

On 8 December 2003, the first Interim Award ('the Award') was published, confined to issues of liability, the question of *quantum* to be resolved by the parties through independent quantity surveyors, failing that it was to be arbitrated. The arbitrator dealt with disputed variations, extension of time claims, suspension costs, liquidated damages, additional financial cost issues and interest on late payment claims. The relevant findings made by the arbitrator and those which were ultimately the subject of the grounds of appeal in the application were in that part of the award headed 'Issues Related to Project Funding Deferral of Cash Payments' and 'Suspension of Contract'.

The arbitrator found as follows:

> *I find that the May/June 2002 suspension of the contract by the builder was not only wrong but could have been obviated by own choice …*
>
> *If (sic) also find, as to the non-payment of Certificate number 14 by the proprietor in March, that this could not have been obviated by own choice because the non-availability at that stage of primary loan funds was the planned result of a jointly known paramount condition of funding …*
>
> *My finding is the suspension was invalid and that the non-payment of Certificate number 14 was valid for the not unreasonable period it took to pay.*

The Relevant Legal Principles for Leave to Appeal and Appeal

The applicant applied to the Court in terms of section 38(4(b) of the Act which required leave of the Court. The applicant relied on both grounds referred to in section 38(5(b), although the thrust of the argument was directed primarily to the manifest error of law on the face of the award.

Commissioner Odes QC acknowledged that central to the determination he was required to make was the question of whether the alleged error of the arbitrator was one of law and not of fact, as leave to appeal under the Act is limited to questions of law.

Referring to numerous authorities, Commissioner Odes QC extracted the following propositions as being most relevant to the question of what constituted an error of law:

1. There is no error of law simply in making a wrong finding of fact;
2. It is not a question of fact, but one of law, as to whether:

(a) there is any probative evidence in support of a particular fact; and
(b) whether a particular inference may be drawn from the facts found or agreed. Commissioner Odes QC referred to Mason CJ in *Australian Broadcasting Tribunal v Bond*,[2] and stated that it must be borne in mind that 'want of logic is not synonymous with error of law. So long as there is **some** basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn from illogical reasoning … no error of law has taken place.' (His Honour's emphasis)

3. It is an error of law where the arbitrator has failed to find the facts necessary to support his conclusion.
4. Errors of law will also be committed where the arbitrator has taken into account irrelevant facts, where the arbitrator misdirected himself as to the questions of fact which by law, he was required to answer.
5. The misapplication of legal principles as opposed to their misdescription constitutes an error of law.
6. A question of the proper construction of a contract is a pure question of law.
7. The question of whether facts constitute a breach of contract involves a question of law or of mixed fact and law.

In determining what constitutes 'a manifest error of law', Commissioner Odes QC found that 'such an error must be an apparent error of law evident or obvious on a preliminary basis. That does not mean that it must be determined without the benefit of adversarial argument', and further, referring to *Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd*,[3] an error is manifest if it is 'evident and obvious rather than merely arguable'.

Commissioner Odes QC referred to the submissions of counsel for the respondent who submitted that an over critical view should not be taken by the Court in relation to decisions of an arbitrator who is a non-lawyer and further, that section 38 of the Act placed constraints on a Court in deciding whether leave to appeal should be granted. In making those submissions counsel relied on a dictum of Parker J in *Masawa Australasia Pty Ltd v J Corp Pty Ltd*,[4] who observed as follows:

> *Section 38, like similar provisions in other jurisdictions, is concerned with finality in arbitration proceedings. It is designed to limit the intervention of the courts in arbitration. The philosophy of the new Act is that the election of parties to have their disputes resolved by arbitration should be respected in the sense than an award should not be criticised with an overcritical eye and the court should exercise restraint in seizing themselves of legal questions … From the nature of these additional requirements and the terms in which they are express, it is clear that legislature has sought to reinforce the policy of the provision against too ready intervention by this court.*

Counsel for the respondent argued that the correct approach to be taken to the award of an arbitrator is to adopt an holistic approach to the award, by analysing what in substance the arbitrator has found, rather than subjecting the award to microscopic scrutiny to determine whether there were errors of law to the discerned in particular passages of the

award.

Commissioner Odes QC, to an extent, shared that view:

> *It is understandable and indeed desirable in my opinion, that greater flexibility should be permitted in view of the findings of lay arbitrator by reason of the fact that a strictly legalistic approach could well undermine a form of proceeding which the parties have deliberately elected to invoke in order to settle their disputes. Where – as in the instant case – the arbitration is complex and technical, extending over several weeks, an over critical approach could well render the underlying purposes of such proceedings completely nugatory. The unravelling of technical building disputes by a lay arbitrator specialising in the building industry (in the instant case, an architect), should not generally be set to nought because he or she may not meet the exacting demands of the court of law in categorising with precision, the legal relationships existing between the parties. The parties may well be discouraged from resorting to arbitration if awards were to be overturned too readily because a lay arbitrator may be unable to evince the expertise of a lawyer in dealing with legal issues, which frequently arise.*
>
> *On the other hand it is important to note in adopting that approach that care must be taken to ensure that the court determining an application of this kind does not lose sight of the fact that it must ascertain what in essence the arbitrator has in fact found rather than what, on the facts before him, he should have found.*

Commissioner Odes QC was of the view that 'the function of the court, even on the most charitable and flexible approach, is to interpret the award, not rewrite it'.

'Manifest error of law'

Counsel for the builder argued that the arbitrators finding that it was manifest on the face of the award that no agreement was reached between the parties in relation to secondary funding or deferral arrangements by the subcontractors with the result that there was no obligation on the part of the builder to offset and/or defer payments due to them for the work. That being so the developer was obliged to pay certificate number 14 in cash and its failure to do so legally entitled the builder to suspend the works.

The builder's criticism of the arbitrator's award was that although the arbitrator concluded that there was an agreement, on his own findings, such agreement was incomplete and provisional because there were critical terms still to be negotiated. Moreover, although there was an obligation to cooperate with the implementation of the deferral arrangements, the content of, and the responsibility for, the obligation as found by the arbitrator were fallacious. It was accordingly argued that the manifest error of law appears on the award itself.

Counsel for the developer contended that if one looks at the award as a whole it appears that the arbitrator in fact found that the substratum to the entire Building Contract and TPA was an oral agreement by which there was an understanding between the parties that it was essential to the funding of the entire project that part of the funding would take the form of an offset by a deferral of payments to the builder and to certain subcontractors. Counsel argued that in substance the arbitrator's award considered as a whole cannot satisfy the

criteria of section 38(5) of the Act and does not therefore justify interference by the Court.

Commissioner Odes QC found that the arbitrator committed manifest errors of law on the face of the award in concluding that:

(a) the parties entered into an agreement; and

(b) any such agreement obliged the applicant to produce a satisfactory protocol to provide for secondary funding for subcontractors.

Commissioner Odes QC found, therefore, that the arbitrator erred in finding that the builder was not entitled to suspend the works by reason of such an agreement. Commissioner Odes QC, satisfied that the builder satisfied the requirements of section 38(5)(b)(i), and on the basis that the his findings had far reaching consequences on the outcome of the award, exercised his discretion to grant leave to appeal and remitted the matter to the arbitrator for his determination in accordance with the reasons outlined by him.

Brooking On Building Contracts

DJ Cremean BA Shnookal & MH Whitten (4th edition, Lexis Nexis Butterworths)

Graham Morrow[1]

For those working in the field of construction law, the nineteen chapters that comprise *Brooking On Building Contracts* have a familiar look to them and cover most areas which one would expect. One understandable exception is the area of adjudication, under the current (and forthcoming) state legislations on construction contracts/security of payments. This is mentioned in passing in various chapters, but not considered in detail.

I had incorrectly anticipated that the book would present the original cases quoted by other books/loose leaf services in the construction law field - this is not so. The cases used in this text have been comprehensively chosen to best provide authority or reasoning for the points made. They are not, like some references, predominantly from one state or jurisdiction; also pleasing is the willingness to endorse Australian cases rather than take the easier option of reiterating the cases quoted in the UK 'bible' (presumably Old Testament): Hudson's *Building & Engineering Contracts*.

The book seems to do simple things well, with each chapter being less than oppressive in length. It deals with basic but practical issues, such as the effect of not completing blanks in a building contract. It is not apparent from the text that three different authors were responsible for each completing specific chapters – this, and other aspects of the text, must please the original author.

Chapters 1-3 – Building Contracts / Contract Documentation / Contractual Doctrines

Rather than lead the reader in cautiously, the authors of this edition jump in with the alternative view to contract offer and acceptance, mutual manifestation of assent.

Although the popular standard forms are dealt with succinctly, the information conveyed may benefit further from tabulation. The writing style is very dense, without words being used unduly or wastefully. This is backstopped by extensive consideration of cases, for example, under the headings 'Parole Evidence Rule' and 'Surrounding Circumstances' no less than sixteen cases are referenced in two pages of text. As these cases are predominantly of recent origin, the book generally succeeds in currently stating the law rather than leaving it in England circa the age of the industrial revolution.

The authors clarify when an agreement is definite and enforceable, as opposed to indefinite and unenforceable. The distinction is drawn between 'subject to details' and 'subject to contract', but readers may benefit from a more detailed debate of this issue.

Quantum meruit is introduced in the context of illegality and then expanded upon when

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considering payment. The treatment of illegality in the text does not consider difficult cases such as *Great City Pty Ltd v Kemayan Management Services (Australia) Pty Ltd & Ors*.[2]

Chapter 4 - Implied Terms

A chapter is devoted to implied terms - this includes two useful cases for the criteria required for implying terms based on trade custom or usage. This chapter also considers business efficacy and particular implied terms, including workmanship, materials, best endeavours, efficacy of work, compliance with regulations, time for completion, progress payments and others. This chapter is a useful microcosm of the whole text. It is well ordered, logical and gives sufficient detail for readers to understand the legal position without extensive detail.

Through this the text fulfils two functions, it:

(a) gives a thorough outline to readers interested in a particular subject; and

(b) narrows the search to particular cases (as referred to) for readers familiar with the area of law, but requiring refreshing.

One minor criticism is that the implied terms of best endeavours and good faith do not include discussions of the most recent cases such as *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd*.[3]

The topic of site access for proprietors during construction is dealt with under the implied term 'Possession of Site' – it is not dealt with sufficiently. No mention is made of standard contractual forms allowing the principal (or agents) access to the works for inspection. Further, the domestic situation in Victoria is considered but no footnote with regard to other states is considered. The topic of possession of site, the contractor's authority/licence and the rights or otherwise of the principal is one of the few sections that could be dramatically improved.

The authors seem to have a fixation with sewage works, when considering both 'Ancillary Work by Public Authority' and 'Builder's Entitlement to Indemnity'. Perhaps it is so obvious that it does not require mentioning, both these can be contracted out of; also the normal position under a standard form contact is not considered. The text could benefit from such consideration, and from looking beyond the sewer.

Chapter 5 – Tenders

It may be a little known fact in the construction industry, but when work is put out to tender, a contract may come into existence whereby the prospective proprietor/developer agrees to consider all tenders fairly. How many industry participants are aware of the AS4120-1994 Code of Tendering? This sums up both the strengths and weaknesses of this text – it imparts a fair degree of knowledge, but not in sufficient detail that practitioners in the field could rely on it exclusively.

2. [1999] WASC 70.
3. (2003) 196 ALR 257.

The text is generally very good, but is marred by very minor discrepancies. An example is the assertion that tenderers are required to submit two tender prices (one inclusive/one exclusive of 'rise and fall'). Since about 1990, this has not been normal practice; in the reviewer's experience, rise and fall no longer merits consideration. In contrast, the section immediately following deals with *quantum meruit* and tendering costs very well and is very relevant.

According to the text, letters of intent:

- Do not normally give rise to any binding contractual obligation on the proprietor;
- Preparatory work carried out by a tenderer on the strength of such a letter can be allowed;
- There is a presumed intention that promissory statements included in a letter of intent create legal obligations in a commercial context.

This does not particularly help the reader and could have been better developed, such as the following section on 'Withdrawal of Tenders'.

The current Australian position regarding the postal rule of acceptance is stated in *Lamont v Heron*,[4] which allowed acceptance by a telegram taking up an option to buy and stating letter following. No mention is made of the validity or otherwise of email acceptance of an offer. Anyone needing a case regarding the geographic locations where a contract came into existence can refer to *Deer Park Engineering Pty Ltd v Townsville Harbour Board*.[5]

Chapter 6 – Time for Completion

Completion of building projects is a central and recurring theme throughout most building contracts and disputes. The danger of omitting to fill in the contract period in a contract is illustrated with the effect that the contract would revert to the common law position; completion within a reasonable period.

The text frequently makes accurate postulations, by reference to the (old) authority, and then considers the modern twists or considerations. The old test of Lord Dunedin as to whether a stated sum in a contract is a penalty (and hence unenforceable), rather than liquidated damages, is such an example. This is followed by consideration of cases such as *AMEV-UDC Finance Ltd v Austin*.[6] Useful authorities are given for the proposition that liquidated damages are to be applied per calendar day unless expressly stated to be working days.

Those lawyers who wish to obtain an unscrupulous advantage for their clients might consider the forfeiture deposit clause, which thankfully has fallen out of use in most developments. This clause allows principals to levy a deposit due from tenderers; if the lowest tenderer refuses to do the work at the tendered price, they then lose the deposit. The

4. (1970) 126 CLR 239.
5. (1975) VR 338.
6. (1986) 162 CLR 170.

principal is not seen as penalising that tenderer. This chapter, as in all construction law books, could benefit from more in depth analysis of the Court's attitude to various types of extension of time claims. The basics of the subject are well covered.

Chapter 7 - Rise & Fall Claims

Again, rise and fall clauses are well explained, giving ignorant lawyers enough information on this subject, but is detailed discussion of this subject really necessary? The most interesting point raised in regard to rise and fall clauses is what happens if they are void for uncertainty; either:

1. The rise and fall clause alone is inoperative, bearing the contract as a fixed value;
2. The invalidity of the rise and fall clause renders all the contract price clauses to fail for uncertainty, leaving the rest of the contract in place; work to be carried out for a 'reasonable price';
3. The contract is void for uncertainty; contractor can recover on a *quantum meruit* basis.

The parallel with the severability of arbitration clauses is highlighted.

Chapter 8 – Payment

Those representing builders and contractors should be particularly interested in this chapter. Subjects considered include entire and indivisible contracts, substantial performance, *quantum meruit* and taking benefit of the work.

Those lawyers outside New South Wales, Victoria and South Australia may not be familiar with the *Frustrated Contracts Acts* in those jurisdictions – the text would benefit from a statement of the common law in the absence of such legislation.

Lawyers not frequently working in construction can make the mistake of believing that monthly payments equate to acceptance of the work – the text will save such lawyers.

Discussion on *quantum meruit* should include the issue where a tenderer is required to provide services following close of tenders in anticipation of later accepting a contract for works. *Quantum meruit* may arise if the tenderer is later replaced by another, with the proprietor gaining the benefit of the work carried out.

The discussion of restitution on pre-contract expenditure could have been further developed. Negligent misstatements are also considered here.

Chapter 9 – Approvals & Certificates

Various issues are covered including the satisfaction of the architect, approval as a condition precedent to payment, waiver and *estoppel* of conditions precedent, certification, progress certificates, certificates of practical completion and final certificates. The authors are not afraid to identify cases which, in their opinion, have been incorrectly decided, for example where the contract prevents a challenge to an architect's certificate.

If the certifier gives a reason for not certifying (or presumably, not certifying the full amount claimed), the reason given for non-certification should be more than 'there is nothing due to you'. Authority is given that this refusal was not a statement of reasons for not certifying – it was found to be a mere statement of a conclusion. Unfortunately, the citation (1866) 2 WW & a'B (L) 193 may prove too elusive for most practitioners.

Practitioners should note that the doctrine of entire contract only applies where no interim payments are contemplated by the contract and presumably none made during the performance or otherwise of the works.

The obligation of certifiers to act honestly and fairly is covered and includes consideration of *Peninsula Balmain v Abigroup Contractors*,[7] but this obligation does not extend to a duty to comply with the rules of natural justice; fairness incorporating impartiality and independence is sufficient, as the certifier is not acting judicially.

The authors indicate that the terms of a building contract may be drafted to prevent the proprietor claiming a defect, by making the effect of a final certificate being a bar to defect claims. Some of the standard form contracts are mentioned in this context, but could benefit from more detailed consideration of the effect of their provisions. Final certificates are not covered by any 'slip rule'; equally, it appears that it is never too late to issue a final certificate, as a final certificate issued outside the time period of the building contract was still effective.

For a certificate to be final, the certificate must be unequivocal. To merely call a certificate final, but by its terms contemplate further work (for example by an accompanying letter) would result in a finding that the certificate was not 'final' in terms envisaged by the contract.

The Security of Payments/Construction Contract legislation is considered briefly under 'Approvals and Certificates', and mentioned elsewhere throughout the text.

Chapter 10 – Variations

Eager novices should be aware of the common law position regarding contracts which do not sanction variations. If the contract makes no provision for variations, and a proprietor insists on a variation, then where a proprietor insists upon a variation such conduct may amount to a repudiation of the contract. Such a situation would be unusual, as most contracts contain variation clauses. Builders should protect themselves by getting instructions in writing, if there is any doubt that the purported variation works are a variation. Some contracts allow the builder to confirm oral (or other) instructions – this allows an unscrupulous builder to adopt the 'floodgate approach' and use architect memos, letters, drawing revisions and site meetings minutes to be relied on in claiming alleged variations.

The text treats with brevity the subject as to whether builders can be paid/reimbursed in the absence of a written order, where such an order is a condition precedent to payment, a question impossible to answer with confidence. *Estoppel* may be a viable reply to a defence based on the absence of writing.

7. (2002) 18 BCL 322.

Chapter 11 – Defects & Damages

Damages are defined as:

> *[W]here a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*

In building contracts, this generally means the difference between the contract price of the work, and the cost of making the work conform with the contract, together with appropriate consequential damages, such as demolition costs.

When should damages be assessed? The general rule is that they should be assessed when the cause of action arose. There are, as always, exceptions to this rule; for example, if 'some other date is necessary to provide adequate compensation.' Such other date may be required to provide adequate compensation to a Plaintiff.

It is interesting to note that the measure of damages following breach of a building contract is not affected by whether the building proprietor has sold the property for profit, retained it or gifted it, to a third party. Equally intriguing is a list of authorities for stress and anxiety claimed as a result of building defects, the reviewer believes that the point that these types of damages are generally not recoverable should have been made, rather than left open. Other interesting successful damages claims are raised under 'Damages for Inconvenience'.

Chapter 12 – Determination

The common law right to determine a building contract, by virtue of repudiatory conduct, will not be excluded by a contractual provision entitling party 'A' to determine the contract in the event that party 'B' breaches the contract. Common law rights are not excluded by a contract unless the contract expressly states so. The courts have interpreted contractual rights to determine as being in addition to and therefore expanding any common law rights. The review of the builder's ability to determine under the main contract is thorough, but does not include reference to relevant legal principles, or consider the effect of an incomplete notice or incorrectly served notice.

A useful warning is sounded where over eager building proprietors post a notice of determination on the 14th day, where the contract allows 14 days from the date of the notice of default. Posting of notice in these situations is the giving of notice. If the 14 days have not lapsed, posting on the 14th day (to arrive on day 15) is premature notice, and therefore not valid.

Chapter 14 – Subcontracts

The difference between provisional sums, provisional quantities and prime cost sums is succinctly explained – readers would therefore have no reason to continually misuse these often misquoted terms.

Chapter 16 – Negligence

This is a succinct well-written chapter: we should remember that where a duty of care exists, there is not a duty of the caregiver to be correct but merely to be careful. Damages including a psychological component are noted as being possible in building cases in 'special circumstances'. Unfortunately, these circumstances are not given.

Chapter 17 – Architects and Engineers

Architects may find the section on copyright useful. Also useful is a clear explanation of the dual role of the Architect (or Engineer) as impartial certifier.

All Architects should consider carefully their contracts with their clients, and avoid the phrase 'periodical supervision and inspection' if proposed or included in their standard engagement. In *Florida Hotels Pty Ltd v Mayo*,[8] the legal meaning of these words were considered. It was found that Architects could not rely on the foreman to give notice of when concrete would be poured, and hence when formwork and reinforcement would be covered up because concrete was poured and it was found the reinforcement was defective – the Architect was found liable as he had failed to periodically supervise and inspect. Barwick CJ found that the architects had not 'made reasonable arrangements of *a reliable nature* to be kept informed'. This may appear to be a somewhat harsh decision – subsequent Client and Architect Agreements appear to have diminished these requirements.

Chapter 18 – Building Disputes

Four pages are dedicated to quoting the common building contract standard forms – this sector could have been better utilised by, for example, discussing case law on the applicability or otherwise of these clauses in AS2124 when tested in the Courts; what happens if neither Alternative 1 or Alternative 2 of Clause 47.2 has been selected in the appendix?

Arbitrator's fees are also considered in this chapter; a reference to the unsatisfactory behaviour of the arbitrators in *Sea Containers Ltd v ICT Pty Ltd*,[9] would have been appropriate for inclusion here.

Chapter 19 – Building Operations

By its chapter heading, 'Building Operations', implies concrete pumps cranes and the like for under informed lawyers. Instead is a chapter that considers the legal effect of building operations, such as trespass, nuisance, easements, rights of support and under pinning. These subjects are very useful for practitioner and lay person alike, and are often not considered, or not considered as discrete subject, in other texts.

Where an existing building has been built and has acquired a right of support, what happens if that building is demolished and replaced with a larger building exerting more

8. (1965) CLR 588.
9. [2002] NSWCA 84.

force on the adjoining soil? It is arguable that the right of support may be limited to the force which would have existed from the demolished building, and not the additional force from the new larger building. Although arguable, it is more likely that the right of support acquired by the building subsequently demolished will be terminated when a new and significantly different building replaces the demolished building.

The common law position regarding rights of support has been partially modified in New South Wales, by the introduction of amendments to the *Conveyancing Act 1999*. Underpinning is more heavily regulated and divergent; some states have no Regulations or Acts; most have, but these differ significantly from state to state.

Conclusion

This text should appeal to both those involved in the building industry and lawyers providing advice to clients involved in the building industry. The isolated issues where more detailed consideration may be merited do not detract from the comprehensive and useful nature of the text. Brevity does not permit investigation of every rabbit-hole. It will be a very useful reference for arbitrators and advocates involved in building matters; it is readable and well organised. The breadth of subject matter is extensive; many cases are considered or noted, making further research (where required) on a subject easier for the reader.

The subject matter of this text has evolved and compounded in the 30 years since the first edition appeared. In the past one good (or even adequate) text on this subject might have been enough – this is no longer so. In this context, this text will always suffer in a comparison to a constantly updated loose leaf service. However, it should still be a most useful addition to arbitrators, lawyers, construction professionals and all other industry participants alike.

Point of Clarification

Mond and Mond v Dayan Rabbi Isaac Dov Berger Casenote from *The Arbitrator & Mediator,* Volume 23, Number 2, August 2004.

It has been brought to my attention that in regard to one of the impugned courses of arbitrator's conduct, the right to object was found to have been waived, being the comments made by one of the arbitrators concerning hate email sent to Mr David Mond. Paragraphs 246 an 356 of the Judgment contains the findings.

Journal Committee

Notes for Contributors

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Russell Thirgood
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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.

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(f) Hyphens and dashes should be differentiated.

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