

Arbitrate or perish in a pile of paper

Properly conducted arbitration can be quicker and cheaper than courts, writes **Frank Costigan**.

Arbitration, properly conducted and without mimicking court procedures, is a very valuable tool for the resolution of disputes, both commercial and personal.

It can result in faster resolution and lower cost. It has served the community well for a long time.

I believe it will continue to do so.

However, there is a serious problem in cases where arbitrations mimic court proceedings with all their attendant costs and delays.

There was a time when it was thought that the use of computers would reduce the amount of paper. The contrary has proved to be the case. Forests have been destroyed, not only in the production of original documents, but in the use of discovery in major litigation.

We all know of cases where many folders of documents are produced in litigation and only a small percentage bear on the issues in the case.

This is partly caused by a well-developed sense of paranoia by each party, coupled with a certainty that some damning documents will be found in the opponent's files if enough work is done.

If an arbitration is allowed to follow this course there is little value, apart from confidentiality and the ability to select one's own judge, in choosing it rather than litigation.

Nevertheless, there remain great advantages in arbitration, properly conducted. It can be much quicker and less expensive.

Historically, arbitration was a process designed to allow parties in dispute to have that dispute decided at an early date, confidentially, without undue delay and without interference by the courts.

As then chief justice Andrew Rogers said in 1991 *Imperial Leatherwear Co Pty Ltd v Macri & Marcellino Pty Ltd*: "The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a court are mimicked. Nor is there anything in the requirement to provide 'procedural justice', which requires adoption of the pleadings and procedures of the courts.

"What is required is that the parties enjoy the benefits of natural justice consistently with requirements of arbitrators for dispensing with technicalities, with discovery, and in doing away with interrogatories."

The failure, in many cases, to follow this judgement can be ascribed to the

parties, their legal advisers including counsel, and the arbitrator. The overriding blame must rest with the arbitrator.

Domestic commercial arbitrations are governed by the Commercial Arbitration Act. Under that act, arbitrators are given wide authority to conduct the proceedings in such manner as they think fit.

Arbitrators are in a better position than judges to control this paper war – section 14 of the act gives statutory clout. But even more than that, arbitrators have the capacity to sort out the real issues early in the arbitration and limit discovery to crucial documents.

They must, of course, act fairly between the parties, but subject to that requirement they have a wide discretion to make orders that simplify and shorten the hearing.

It is completely consistent with this philosophy that every attempt should be made by the arbitrator and by the parties to identify the real dispute between the parties and to plan procedures that will enable those disputes to be disposed of fairly, efficiently and with as much expedition as is sensible.

The process of arbitration is designed to provide a service to the community, particularly the business

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community. The ability to provide that service efficiently is affected by speed of resolution, privacy and cost. The most important decision in this respect to be made by the contesting parties is in the choice of arbitrator.

Is the arbitrator to be a lawyer, an engineer, a builder or an architect? Will he or she be available within a reasonable time to perform the task?

It is in this area that the advantages of arbitration are most easily seen. Resolution of a dispute in a court involves the acceptance of a judge provided by the system and the inevitable delays in court lists.

Parties should be able to choose an arbitrator who will be available at short notice.

The recent promulgation by the Institute of Arbitrators & Mediators Australia of its Fast Track Rules demonstrates how arbitration can be responsive to commercial expectations concerning process and costs.

■ *Frank Costigan, QC, is a grade 1 arbitrator and mediator with the Institute of Arbitrators & Mediators Australia and a fellow of the Chartered Institute of Arbitrators (UK).*

Victorian bar rejects 'good faith' proposal

Matthew Drummond

The Victorian Bar has rejected a call from the Victorian Law Reform Commission for a statutory obligation of good faith to be imposed on all parties involved in litigation.

The centrepiece of the VLRC draft report on reducing litigation delays and costs is to hold everyone involved in litigation – lawyers, parties, insurers and funders – accountable to duties to act honestly and in good faith.

But the bar opposes the breadth of the reform, and said in a further submission that the term "good faith" was too nebulous a concept to be enforceable.

"The bar is not aware of any systemic problem of unbridled adversarialism in Victoria," the submission said. "In short, there is no good reason to go beyond the NSW approach of introducing a statutory overriding purpose to remind parties of their duties in the conduct of civil litigation."

The bar is also wary of pre-action protocols that it believes may delay litigation and invite unnecessary satellite suits, rather than streamline hearings.

But barristers support the VLRC's proposal to give courts power to refer matters to alternative dispute resolution.

The final VLRC report is due in September.



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