Meeting Disputants' Needs in the Current Climate: What Has Gone Wrong With Arbitration and How Can We Repair It?

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This paper identifies several impediments to the effective operation of domestic arbitration processes in Australia. We commence with an outline of the background to arbitration, and how it differs from traditional Court processes, noting that arbitration has a very important role to play. We then argue that a number of barriers are preventing this role from being fulfilled. We conclude by offering some suggestions for how these impediments can be resolved to ensure the health and livelihood of domestic arbitration in Australia. This discussion is timely as the current global financial crisis will inevitably lead to disputants being increasingly cost conscious, seeking to get more "bang for their buck" and attempting to resolve disputes expeditiously. If arbitration can be repaired now, the current economic climate presents a unique opportunity for it to flourish in Australia and fulfil its potential as the cost effective, speedy and efficient dispute resolution mechanism it was always intended to be.

How is domestic arbitration different to court processes?

Arbitration was conceived in response to perceived imperfections in the traditional Court system.[2] Its defining characteristic and virtue was simply that it is different to judicial processes yet leads to a resolution of disputes between the parties. It did not mimic the lengthy, expensive and technical procedures of litigation, but instead promised to provide a more flexible and efficient means of resolving disputes. Often arbitrators were people with technical expertise in the area in dispute who were respected by the parties for that expertise. It is clear that arbitration has hundreds of years of pedigree to substantiate its value and importance as an alternative dispute resolution method. However, it is also clear that many

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This paper does not purport to be a detailed analysis, at an academic level, of all that ails domestic arbitration law and practice and all that will fix it. Rather it is distilled from the 30 years of practical experience in the trenches of an arbitration practitioner sceptical about the likelihood of change, but hopeful that it might happen, as tempered by the 10 years of experience of a more youthful practitioner with more youthful optimism.

2 See Justice Lander, 'The Perception of the Courts to the Role of Arbitration in Dispute Resolution Process' [1995] 11 *The Arbitrator* 167.

of the same procedural criticisms once made of traditional Court processes - chiefly delay, expense and excessive technicality - are now also true of arbitration.

Before the landmark decision in *Scott v Avery*,[3] Courts were largely distrustful of arbitration and reluctant to accept its legitimacy. This mistrust arose, in part, from perceived deficiencies in the arbitral process such as its expense, lack of finality and the difficulty of enforcing arbitral awards.[4] The Courts' opposition to arbitration was at least partly motivated by financial self-interest and the threat posed to the Courts' *de facto* monopoly on binding dispute resolution. Jurisprudence before *Scott v Avery* reflected the fact that judges in those times often were paid by disputants and, accordingly, earned a purse in respect of the cases they heard. Arbitrators were seen as a threat to the finances of judges if the Courts could be excluded from hearing disputes. Arbitrators and judges were direct financial competitors. This is one of the chief reasons why Courts were initially reluctant to enforce arbitration clauses. This was discussed by Spigelman C J and Mason P in *Raguz v Sullivan*:[5]

> The common law's opposition to arbitration also stemmed from less worthy perspectives. The desire for exclusive control will often have an economic motive not far below the surface. With arbitration, it was not just the barristers whose livelihood was threatened. In the famous case of *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121, the House of Lords settled the validity of arbitration agreements that made an award a condition precedent to any right of action under a contract. This decision ended much judicial conflict and judicial opposition that was shrouded in technicality and arcane learning. However, the canny Scot Lord Campbell lifted the curtain on judicial opposition:
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> *"My Lords, I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration. Now, I wish to speak with great respect of my predecessors the judges; but I must just let your Lordships into the secret of that tendency. My Lords, there is no disguising the fact, that as formerly the emoluments of the judges depended mainly or almost entirely upon fees, and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil.... Therefore, they said that the Courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law."*
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> This frank self-revelation must have caused quite a stir, which is probably the reason why it does not appear in later, revised reports of the decision. Contrast 28 LT 207 at 211 and 5 HLC 811 at 853 where the passage has been replaced with "It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.

Scott v Avery marked a turning point in the attitude of the Courts and their traditional opposition to the arbitral process, but the Courts have never totally shed their scepticism of arbitration.

3 (1856) 5 HLC 811 (*'Scott v Avery'*).

4 See *Raguz v Sullivan* (2000) 50 NSWLR 236, [46] (Spigelman CJ and Mason P).

5 (2000) 50 NSWLR 236, [47]-[48].

To understand the modern role of arbitration, it is important to consider what litigants want and what the Courts were traditionally unable to offer them. In the following sections, we will address some of these considerations in turn:

(a) confidentiality;
(b) privacy;
(c) expertise of arbitrators;
(d) reduced costs;
(e) speedier final resolution;
(f) flexibility;
(g) preservation of a continuing business relationship; and
(h) avoidance of crowded Court lists.

Some of these considerations are illusory if you look at them more closely in terms of the practice that is currently employed by arbitrators and practitioners. However, it is clear that these prevailing benefits remain to varying degrees, and can be reinvigorated appropriately if:

(a) the domestic arbitration legislation is critically revised with the primary objective of ensuring uniformity;
(b) training of arbitrators is improved;
(c) a more sympathetic judicial climate is fostered (where grounds for judicial review/intervention are minimised) which will encourage arbitrators;
(d) practitioners are re-educated on arbitration process so as to minimise mimicry of Court procedures;
(f) the taxation of costs is more commonly exercised by arbitrators themselves;
(g) we have effective arbitration rules; and
(h) we have effective arbitral bodies and institutions.

If there is any doubt at all about the desire of the commercial community for an alternative to the Court system which is speedy, efficient and cost-effective, even if it sometimes delivers imperfect justice, one has to only look at the way in which adjudication under the *Building and Construction Industry Security of Payments Act 1999* (NSW) has been embraced by the construction industry in NSW. It may be imperfect and the determinations are often arrived at by what lawyers might traditionally consider to be 'questionable' reasoning, but the commercial community has adopted and embraced adjudication with open arms. As Laurie James noted in his excellent article on 'New Directions in Arbitration':

> parties who have been through a determination see how an independent third party views their respective contentions and are inclined to think that the outcome would have been much the same if the parties had fought out their case to the utmost before an arbitrator.[6]

Confidentiality

The confidentiality that is purportedly offered by arbitration proceedings is often cited as one of its chief advantages. However, when one looks more closely, confidentiality in arbitrations is not automatic and parties must take their own steps to ensure it applies.

6 Laurie James, 'New Directions in Arbitration', [2006] 12 *The Arbitrator and Mediator* 13, 15.

The High Court decision in *Esso Australia Resources Ltd v Plowman*[7] was not an encouraging decision for arbitration in Australia in that it held that arbitrations, although private, were not confidential in the absence of express agreement. This decision is at odds with the position in the United Kingdom, where arbitrations are regarded as implicitly confidential.[8] In practice, however, *Esso* was not a body blow to arbitration as parties can ensure an arbitration is kept confidential by inserting an appropriately drafted confidentiality clause in their agreement. The case was seized upon around the world, however, and particularly by our immediate neighbours as a good illustration of why Australia is not a suitable venue for arbitration and particularly international arbitration. The decision also came as quite a surprise to many practitioners.

It is interesting to note the position in Singapore, where Courts have the power to seal not only the Court records, but also the records in respect of the arbitration, from disclosure. The Courts in Singapore have that power in respect of both international and domestic arbitration. This demonstrates the lengths that other countries in the international arbitration market - our competitors - are prepared to go to in order to ensure confidentiality remains available to the parties.

Privacy

One of the chief attractions of arbitration to commercial parties is supposedly the privacy that the arbitral process affords. In particular, commercial parties can avoid publicity over a dispute or its outcome and commercially sensitive information can remain confidential. This is particularly attractive where the parties have an ongoing contract in place and wish to preserve their commercial relationship. From a more practical perspective, witnesses who may be intimidated by public Court proceedings and formalities may also be more comfortable giving their evidence in a private arbitration with third parties excluded from the process. Arbitration still offers this benefit, but again we note with interest that this benefit almost completely disappears if one or both parties challenge the arbitral process in the Courts. Suddenly what was private to the parties is on the Court record for the whole world to see. In a country which prides itself on an open independent Court system where justice is not only done but seen to be done, it is commonly accepted that Court proceedings should be open to the public, but is this necessarily a virtue when dealing with judicial challenges to arbitral awards? We suggest not. Clearly both parties went into the arbitral process expecting it to be private. Why should privacy be lost when one party decides to challenge an award in the Courts? Again, the practice in the High Court of Singapore is instructive, where proceedings involving challenges to international arbitral awards, or to any aspect of the arbitration itself, may be held in camera by the Court, with all matters, including the existence of the challenge and the identities of the parties and arbitrator able to be suppressed by the Court. Is this one reason why Singapore is booming in growth as an international arbitration centre and Australia is not? We suggest it is. In our submission, privacy is often what the parties want and it is something we should go to some lengths to preserve.

Expertise of Arbitrators

In the days when trade arbitrations were popular, the expertise of arbitrators was generally perceived to be a real benefit of arbitration over the Court process. In recent years the increased unavailability of

7 (1995) 128 ALR 391 (‘*Esso*’).
8 See *Dolling-Baker v Merrett* [1991] 2 All ER 890.

arbitrators with technical or trade expertise ('trade arbitrators') leads one to conclude that the attraction of 'expertise' may be more of a myth than a real benefit. Laurie James refers to the 'heyday' of commercial arbitration as the time when arbitrators were expected to act as an expert on the basis of their own professional training and experience, conducting 'look and sniff' arbitrations.[9]

The reality is that there are now few Grade 1 building arbitrators with technical expertise available to be appointed as arbitrators in building cases. The majority of Grade 1 arbitrators are lawyers or retired judges. Additionally, there is not enough work available for specialist trade arbitrators to enable them to make a living from arbitration alone. This has been caused by a number of factors. First, an increasing emphasis has been placed on fora such as the Victorian Civil and Administrative Tribunal Domestic Building List,[10] while the *Domestic Building Contracts Act 1995* (Vic) has made it almost impossible to have domestic housing contracts disputes referred to arbitration.[11] Historically, that work was considered the 'bread-and-butter' training ground for domestic arbitrators, and without that work, there is not enough work left for Grade 1 arbitrators with trade qualifications to learn their craft as arbitrators and to obtain practical training, much less make a living.

Second, in Victoria special referees are rarely appointed under court processes. The result is that trade arbitrators are unable to learn from the Court reference process, unlike the position in New South Wales, where referees are often appointed. The only equivalent training ground for building arbitrators is the security of payment system; however, the fast-track process created by that legislation allows 'quick and dirty' justice and does not form a proper judicial training ground for trade arbitrators.[12]

Finally, industry bodies (such as the Housing Industry Association, the Master Builders Association and the Royal Australian Institute of Architects and similar bodies) faced mounting criticism over the conduct of some arbitrators who they appointed. If, for example, an arbitrator was appointed by these bodies and the arbitrator was subsequently criticised for an arbitral award that did not suit the consumer, the industry body found itself exposed to criticism that it was not adequately fulfilling its mandate. As a result, those industry bodies have stepped away from the appointing role in the arbitral process, and trade arbitrators have largely lost their support. Quite simply, it is now politically more expedient for industry bodies to join the chorus of critics of the arbitral process when something goes wrong, than it is for these bodies to embrace the process in the very many cases where it works without fault. In doing this, it is our view, despite the short term political benefit to the industry bodies, that they do their members a disservice in not supporting arbitration and depriving their membership of its benefits. Some of you may recall that IAMA, previously known as the Institute of Arbitrators Australia, was itself born out of this tension. The industry bodies saw benefit in the creation of IAMA, and were encouraged to make IAMA the nominating body in their standard form contracts, largely as a means of being able to take a step back from the arbitral process. In doing so, they would no longer be criticised for nominating 'one of their own' as arbitrator. Unfortunately, this has also created some distance between IAMA and

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9 James, above n 5.

10 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic). The VCAT Domestic Building List is part of the Victorian Civil & Administrative Tribunal and exists to resolve domestic building disputes between home owners, builders, insurers, architects and others. VCAT has unlimited jurisdiction to hear and determine domestic building disputes, including domestic building insurance claims.

11 See *Domestic Building Contracts Act 1995* (Vic) s 14, which makes any term in a domestic building contract that purports to refer disputes to arbitration void.

12 See *Building and Construction Industry Security of Payment Act 2002* (Vic).

these very same industry bodies. Regrettably, industry bodies also no longer encourage their senior and respected members to train as trade arbitrators. IAMA should foster and re-establish links it previously had with those bodies to encourage their members to reconsider their training as trade arbitrators.

It must also be remembered, however, that we have seen the unfortunate impact of Court intervention on this aspect of the arbitral process. Many of us remember the decision in *Road Regenerating and Repair Services v Mitchell Water Board*.[13] The learned judge in that case indicated that at one stage he was considering ordering the Institute of Arbitrators Australia, which was not a party in the litigation, did not appear nor had any role in the hearing, to pay the cost of a successful application to have an arbitrator removed for misconduct purely on the basis that His Honour thought that the Institute, as the nominating body, should bear responsibility for the conduct of the arbitrator it had nominated. Understandably this led to a high level of concern within IAMA.

In summary, the lack of sufficient opportunities for arbitrators to develop practical arbitration skills has resulted in very few trade arbitrators being available to be appointed. Couple this with the increasing supervision of arbitrators by the Courts, and the mimicry of the judicial process imposed upon arbitrators by the Courts, and it is easy to see why the pool of trade arbitrators is drying up. This has led to increasing numbers of qualified lawyers acting as arbitrators, which has adversely affected the way arbitrations are conducted, and the popularity of arbitration as an alternative to the Courts has suffered.

Reduced Costs

One of the purported benefits of arbitration is that it is cheaper than Court proceedings. However, from a cost perspective, it is apparent that the arbitration process is not necessarily less expensive than Court proceedings at all. The increased costs of arbitration has been caused largely by arbitrations mimicking Court procedures, a topic which we shall touch on further below. Indeed, in many cases arbitrators allow legal practitioners appearing before them to drone on without limits (to an extent which they would not dare to do before a judge) for fear of being subsequently criticised for misconduct in not having allowed a party to properly and fully present its case.

The *Commercial Arbitration Act 1984* (Vic) allows for a process where costs are to be taxed on appropriate Court scales (normally County or Supreme). As a result, it is not necessarily cheaper if you apply the Court scales, (especially if one considers that an arbitrator is paid on an hourly rate) to go to Court rather than arbitration. When one considers that the average arbitrator charges between $250 and $650 per hour during an arbitration hearing, it is potentially more expensive than a Court process in which the adjudicator is funded by the State, not the parties. To avoid this criticism, arbitrators have to do it 'better', faster and more cheaply than the Courts, and yet their training, and the degree of Court supervision encourages the opposite.

By contrast, in international arbitration, and particularly ICC arbitration, a percentage of the amount in dispute is charged for administration costs and fees of the tribunal. The procedure under the Singapore International Arbitration Centre Rules ('SIAC') fixes an amount that the arbitrator can charge by reference to the amount in dispute and the arbitrator often has to do the work for that lump sum regardless of the amount of work involved.[14] He or she agrees to do so as a condition of their appointment. In Singapore under the *International Arbitration Act* (Cap 143A) the SIAC Registrar, who is experienced

13 *Road Regenerating & Repair Services v Mitchell Water Board & Anor* (Nathan J, Unreported, Supreme Court of Victoria, Nathan J, 15 June 1990).

14 *Arbitration Rules of the Singapore International Arbitration Centre* (3rd ed, 2007) r 26.

in international arbitration, has the power to assess costs. For domestic arbitrations in Singapore under the *Arbitration Act 2001* (Cap 10) the Registrar of the Court has the power to tax costs, which is similar to the Australian position.

In Australia under the Commercial Arbitration Acts ('Uniform CAAs'), and in many international jurisdictions, the arbitrators themselves have the ability to assess the costs or they can refer the costs out to a Court taxing officer. The arbitrators usually have the benefit of knowing the case, its complexity and the arguments that have been run and have first-hand knowledge of the conduct of the parties during the arbitration. Compare this to a taxing officer at the Supreme Court or the County Court in Victoria who comes to the matter fresh and may have no background in assessing the costs of arbitrations at all. And yet under our Uniform CAAs we rarely see arbitrators fixing costs or taxing them, largely because they have been intimidated by the lawyers into not doing so. It has even been suggested that arbitrators may be misconducting themselves if they exercise such a power because they do not have the necessary expertise to do so. In the 1986 edition of their text on Commercial Arbitration, Sharkey & Dorter stated:

> However it is generally not an advisable course for arbitrators to tax the costs of the parties. The arbitrator will not ordinarily be so equipped as the court is to determine those costs and the primary function of the arbitrator in this context ought be that of providing the necessary formula which will enable the court to fix the costs.[15]

We query why this should be so. If an arbitral tribunal in an international dispute can adequately discharge such a duty, and they do so regularly, why is it not possible for a domestic tribunal to do so? We note that this sort of submission did not discourage Mr John Coghlan, one of our very senior and more experienced trade arbitrators, from doing his own taxations. John was content to hear parties' submissions on costs, allow evidence of the costs to be led before him and then tax them as he saw appropriate. We are not aware of any case where this practice by Mr Coghlan was successfully challenged.

This also leads to another criticism of domestic commercial arbitration, which is its abject adherence to the costs rules of the Courts. There is no doubt that the Uniform CAAs and the Court's decisions on arbitrations not only encourage, but practically mandate, that arbitrators deal with costs in the same way that Courts do. One sees lay arbitrators making costs awards differentiating between party/party and solicitor/client costs. Awards often provide for taxation of costs by taxing officials of the various courts. Arbitrators are told that costs should 'follow the event'. If they deviate from accepted legal norms in domestic Court litigation, they must carefully explain why. They are encouraged to follow established (for which read 'Court') practices or they will be misconducting themselves. It is hard to understand why, as a matter of domestic legal policy, this should be the case. Why should arbitration and costs orders in arbitration mimic Court process?

In the international sphere, tribunals frequently have powers under institutional rules to determine costs as they see fit.[16] Tribunals commonly ask for evidence of what the parties have paid their respective lawyers and consider bills prepared on the basis of hourly rates for people involved. The arbitrators then allow, adjust or reduce bills as they see fit, often with only cursory regard to Court practices, but with much more regard to the context of the arbitration itself. At an extreme one even finds the views of Judge Holtzman, as quoted in Redfern & Hunter, as follows:

15 John Sharkey & John Dorter, 'Commercial Arbitration', Law Book Company, 1986, 263.
16 ICC Rules of Arbitration, Article 31.

> Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.[17]

Irrespective of whether you agree or disagree with such a sentiment, it does illustrate the differences in approach between arbitration and court processes.

In our submission there is no reason in policy why domestic arbitrators should be constrained by Court rules on costs. If the parties intend such a constraint, there is no reason why they cannot expressly opt in to such a regime or adopt such a regime through an appropriate set of rules. As a matter of policy, it is difficult to see why this should be mandated by the Act or imposed by the Courts.

A Quicker Result

The belief that the average arbitration is quicker than Court process is now seen as a fallacy when compared to some Courts. Chief Justice Spigelman recognised this fact when, speaking at an International Commercial Arbitration Conference in Sydney, His Honour stated that he saw 'little evidence that commercial arbitration is in fact quicker and cheaper than decision-making processes by commercial judges.'[18] That this is the case is not the fault of the arbitral process itself. Rather, we suspect, it is a comment on those who participate in it or supervise it.

From a procedural perspective, there does not appear to be any clear advantage to arbitration above Court processes if all it does is mimic the Court process. Certainly, the standard arbitration process bears many resemblances to that used in Court proceedings: (1) points of claim; (2) points of defence; (3) points of counterclaim; (4) discovery; (5) lay and expert witness statements; (6) request for further and better particulars; and (7) formal hearings conducted on adversarial lines. Noting this similarity, Chief Justice Spigelman continued:

> many believe that commercial arbitration mimics court processes too often and to a greater extent than it should. This restricts to a significant degree the extent to which arbitration delivers in fact on its potential to be cost effective.[19]

It is difficult to understand why it is a requirement of giving the parties natural justice that we also have to impose on them a requirement to have pleadings, discovery, witness statements and a full common law trial. At the international level, civil law practitioners seem to accept that one can have justice without all the trappings of the common law. We quote from the judgment of Chief Justice Rodgers in *Imperial Leatherware Pty Ltd v Macri & Marcellino*:[20]

17 Alan Redfern & Martin Hunter, '*Law and Practice of International Commercial Arbitration*' (4th Ed, Sweet & Maxwell, London, 2004) 399.

18 Chief Justice Spigelman, 'Opening Address' (Paper delivered at the International Commercial Arbitration Conference, Sydney, 10 August 2007).

19 Ibid.

20 (1991) 22 NSWLR 653.

> I would venture to suggest that one reason why parties submit to arbitration is so that they should avoid "pre-trial pleading, discovery and other procedures of the court." This is so whether the arbitration is long and complex, or short and simple. 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 courts. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities, with discovery, and doing away with interrogatories. The proper requirement that each party have full notice of the case to be made by the other and a full opportunity to prepare and answer that case does not require pre-trial pleading, discovery and other procedures of the court. In other words, with due respect, I do not follow his Honour in the view that arbitrators are required to "follow as closely as reasonably practicable the pleading practice of the Supreme Court."

And yet despite such strong encouragement by such an eminent judge we have, as practitioners and arbitrators, indeed gone back to what we know best and what we feel comfortable with - an impersonation of a civil trial in the Courts. In doing so, we have opened the process up to pleadings challenges, endless requests for further and better particulars, discovery wars and complaints about the form and content of witness statements. As a result, arbitration proceedings are now sometimes longer than Court proceedings and often more expensive.

A further competitive threat to domestic arbitration is posed by the reforms to the Courts themselves. On 28 May 2008 the Victorian Law Reform Commission released its Civil Justice Review Report.[21] The Civil Justice Review Report provides a comprehensive analysis of the civil justice system in Victoria and contains a number of recommendations aimed at reducing the time and expense of litigation, and simplifying its processes. Some of the proposals discussed in the Civil Justice Review Report include:

(a) an extension of the docket system;
(b) an express power to permit judges to call witnesses;
(c) greater use of telephone directions hearings and technology;
(d) the fixing of earlier and more determinative trial dates;
(e) greater control over interlocutory disputes;
(f) greater emphasis on requiring parties to try and reach agreement on discovery issues before seeking orders from the Court;
(g) judicial discretion to direct expert witnesses to confer, to try and reach agreement and prepare a joint report specifying matters agreed and not agreed and the reasons for disagreement;
(h) the establishment of a Costs Council.

The above measures would go a long way to narrowing the distinction between arbitration and Court proceedings and could result in arbitration losing its fundamental attraction as an alternative mode of dispute resolution if all it is, is a shadow of a Court process.

21 Victorian Law Reform Commission, *Civil Justice Review Report,* Report No 14, (28 May 2008).

It is worth noting the current practice in the Supreme Court of Victoria in respect of building and construction disputes. The Building Cases List is currently governed by Practice Note 1 of 2008 - Building Cases a New Approach. That practice note sets out an approach which aims to achieve just and cost effective outcomes by recognising that 'the conventional litigation process when applied to twenty-first century building disputes, makes it difficult to achieve economy and efficiency.'[22] Many of the procedural changes brought about by this 'new approach' appear to transpose features from international arbitration in order to achieve simplification. Some of these features include:

(a) greater judicial management of the litigation process, including a greater willingness amongst judges to use the apportionment of costs to encourage quicker, fairer litigation;
(b) a constantly updated information sheet;
(c) a procedural conference attended by the lawyers and the persons responsible within each of the parties for the litigation to discuss resourcing issues;
(d) the resources conference report to be kept on file;
(e) special orders/directions including, inter alia, electronic trials, time limits for the trial or parts of the trial, and power to direct conclaves of experts.

As of 19 June 2009, the Supreme Court Rules were amended to establish the Technology, Engineering and Construction List (**"TEC List"**), which replaced the existing Building Cases List. The Honourable Justice Peter Vickery is the Judge in charge of the new TEC List.[23]

The underlying rationale of the Court's approach in the TEC List is that litigation of matters involving technology, engineering and construction disputes should be approached by the parties, the lawyers and the Court with particular attention to time and cost and to the budgeting of both. To this end, the Chief Justice of the Supreme Court has ratified a Practice Note, which applies to all matters in the new TEC List.[24] The Practice Note addresses administrative as well as procedural aspects of litigation with a view to minimising, the resources and associated costs devoted to, and incurred by the parties in matters which have traditionally been both complex and costly to litigate. To that end, the new TEC List adopts many of the features of the pilot program which was introduced into the Building Cases List in early 2008. In addition, the new process expressly gives the Court the power to conduct limited time, chess-clock hearings and to sit with assessors who can provide technical assistance to the judge hearing the matter.

Last year, the County Court in Victoria adopted a procedure whereby the Court would fix a trial date on the occasion of the first administrative mention of a building case. The County Court has promised that parties in building cases will be provided with a hearing within twelve months of a matter being commenced.[25] This is in circumstances where a free judge, experienced in construction cases with the power to hear and enforce orders, is available. The County Court has also sought to adopt traditional 'arbitral features' such as limiting discovery and interrogatories.

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22 See speech by the Honourable Justice Byrne, 'Building Cases - A New Approach: Origins and Outline of Practice Note 1 of 2008', (Speech delivered at Building Disputes Practitioners' Society, Melbourne 19 March 2008), 1.

23 Supreme Court (Chapter II, Amendment No 1) Rules 2009, SR no 30/2009, amended on 26 March 2009.

24 Victorian Supreme Court Practice Note 2 of 2009.

25 See PNCI 1-2009, Operation and Management of the Building Cases Division, 10 December 2008 which indicates this practice will be continued.

The developments in the Court system pose a significant threat to arbitration as the Courts attempt to adopt many of the features which traditionally made arbitration attractive. Some of you might note the irony of a situation where Courts which have traditionally done much to fetter the abilities of arbitrators to adopt flexible processes, and innovative techniques to determine arbitral matters are now themselves adopting just such techniques. Even chess-clock hearing times are now on the agenda. If arbitration is to remain relevant, and to distinguish itself from the Courts, then we need reform.

IAMA has taken steps to address criticisms of the pace with which arbitrations are conducted. The IAMA *Fast Track Arbitration Rules*, which were launched on 1 June 2007, offer parties a procedure which can deliver a rapid result. The question remains as to how often these rules are used in practice. These rules require an arbitration to be completed within 120 days of the commencement of the process and require an arbitrator to deliver their award within 150 days. The rules impose ambitious procedural deadlines, which can be varied to a limited extent only in exceptional circumstances.[26]

The question also remains as to what litigant would elect arbitration in preference to Court process. If we consider a recent international arbitration in which we were involved, the arbitration proceedings lasted approximately five years. There were 23 hearings dealing with directions and interlocutory applications, five expert conclaves and four substantial hearings addressing liability and quantum. The first liability hearing alone lasted over 25 days, with the arbitral tribunal eventually publishing its award with respect to liability nearly a year later. The award was over 400 pages in length. In other words, in this case there was very little difference between the arbitration process and so-called 'mega-litigation' taking place in the Supreme Court or Federal Court. It is a legitimate question whether this is different or any better than traditional Court processes. Then again, international arbitration has other reasons for its growing support.

Preservation of a continuing business relationship

The myth that arbitration, unlike litigation, preserves a continuing business relationships has long been debunked. One only has to be involved in one arbitration under adversarial rules to know how bruising the process is. Having said that, arbitration does have potential in this area which litigation in the Courts cannot compete with.

When domestic housing arbitrations were still common, and where the practitioners were experienced and sensible, it was not at all uncommon to cut procedural corners to achieve quick results which allowed the parties to put their dispute behind them. It was not uncommon to fashion an arbitration process where an experienced trade arbitrator conducted a hearing on site often without the parties having legal representatives present but where the parties' cases were articulated in a written narrative form of pleading prepared with the assistance of their lawyers. The arbitrator would hear the owner and the builder's story, often in an inquisitorial, but relaxed fashion (and still on oath) on the building site and then after inspecting the works and using his own expertise, make an award. It was quick, effective and cheap and the parties could get on and finish the job and move forward with their relationship.

Alternatively, we have recent experience of the Eastlink project involving the dispute between ConnectEast Pty Ltd, the project sponsor, and TJH, the project builder, over what was known as the

26 See IAMA Arbitration Rules, 1 June 2007, which incorporate the IAMA Fast Track Rules: <www.iama.org.au>.

Semi-Final Payment Claim dispute.[27] We will comment further on that case below. The process followed in that arbitration was quick and relatively inexpensive and allowed the parties to get on with the project.

In our view, there is still significant merit in the proposition that a properly structured arbitration process, conducted by experienced participants, can be useful in resolving disputes so as to enable the parties to preserve their continuing business relationship.

Avoidance of crowded Court lists

Avoidance of crowded Court lists is still attractive in cases which would otherwise go to the Supreme Courts of the various States. While Courts such as the County Court of Victoria now provide a speedy and efficient path through to trial for building cases and while the Supreme Court of Victoria in adopting new and expedited processes in its proposed TEC List, the conduct of cases in the upper levels of the Court system still takes far too long, especially after the matter is set down as ready for trial. Unfortunately, one to two year delays are still common in the Courts and here arbitration can still offer distinct advantages over crowded Court lists.

Legislative impediments to domestic arbitration in australia

The Uniform CAAs have been operational for over 20 years, and there have been few changes during that time (subject to what we say in the footnote below which demonstrates the Uniform CAAs are not truly uniform).[28] Considering the extensive power that this legislation confers upon arbitrators,[29] parties to arbitrations may benefit from those powers being utilised more frequently and effectively. For example, section 14 of the Uniform CAAs enable an arbitrator to conduct proceedings in such manner as they think fit. Section 19 provides the arbitrator with significant flexibility to determine how evidence is to be submitted. Section 27 empowers the arbitrator to order that a mediation take place prior to the arbitration hearing.

Clearly, these are extensive powers. They allow arbitrators in Australia to do what a Court cannot do: cut corners. In these powers lies the potential for arbitrators to distinguish themselves from Court processes. However, there are two overarching impediments to arbitrators employing the above mechanisms effectively.

The first is that arbitrators are concerned not to misconduct themselves under the Uniform CAAs. An award can be set aside where the arbitrator has 'misconducted the proceedings' or where the award has been improperly procured.[30]

The second is the extensive leave to appeal provisions under section 30.[31] These grounds include where a parties' rights have been 'substantially affected' and there is either a manifest error on the face

27 See the decision of Justice Byrne in *Thiess Pty Ltd and Anor v ConnectEast Nominees Co Pty Ltd* [2008] VSC 287.

28 We note with interest the position in South Australia, where their equivalent Act was amended by the State Labor government in 2007 to become the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA). It appears that the amendments were motivated by the 'Work Choices' legislation. They enable employers and employees to have an alternative agreement making scheme with access to the relevant South Australian Industrial Relations commission. There is a perception that this has resulted in the South Australian Act deviating from the uniform national model.

29 See *Uniform CAAs* ss 14, 19, 27.

30 See section 42 of the *Commercial Arbitration Act 1984* (Vic).

31 In Victoria, see *Commercial Arbitration Act 1984* (Vic) s 38.

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.

The extent to which a Court will intervene in the arbitral process depends on how widely or narrowly the Courts interpret these provisions and it is in the interpretation, rather than the provisions themselves, that the problem lies.

Consider the recent decision of the Full Court of the Supreme Court of Victoria in *Oil Basins Ltd v BHP Billiton Ltd*,[32] where the adequacy of reasons formed the basis for an application for leave to appeal both under section 38 of the Victorian Act and on the grounds of misconduct by the arbitrators. The essence of the *Oil Basins* decision is that, depending on the expertise and level of skill of the arbitrator, the Court will in practice bring to bear a higher standard in regards to the provision of adequate reasons. This results in the rather surprising situation that a litigant has a better prospect of success in appealing against the same award if made by a Grade 1 arbitrator with particular expert training than against a Grade 3 arbitrator with lesser qualifications! The authors respectfully suggest that this is a regrettable result and contrary to commonsense. Unfortunately, the message from *Oil Basins* appears to be that the Courts require the arbitration process to mimic Court processes to ensure that any potential argument in respect of this ground of appeal is anticipated.

A further impediment, which arises from the private nature and contractual foundation of arbitration, is the inability of arbitrators and litigants to join third parties such as subcontractors to arbitral proceedings except in certain circumstances. While the Uniform CAAs contain substantial and sophisticated provisions allowing for consolidation of arbitration proceedings where there is, for example a string of contracts which have the same or similar arbitration clauses (such as often exists in the construction context where there are interlocking or adjacent contracts between the owner, the contractor and a sub-contractor). These provisions are of little assistance where there are no identical or no sympathetic arbitration clauses between different parties in the contractual chain. This often leads to situations where arbitration is merely a prelude to further litigation. Many of us have acted in litigation seeking to recover monies from a third party subsequent to awards made against our clients in a related arbitration. The Court will be asked to consider the same issues which were agitated during the arbitration. If there were power to join the third party to the arbitral proceedings, much time and expense and duplication could be avoided.

Judicial impediments to domestic arbitration

Judicial Mistrust of Arbitration

As we have already noted, there is a long tradition of judicial mistrust of arbitration. Even if one accepts the background to this hostility as explained in *Scott v Avery*, and the fact that the reluctance by the Court to support arbitration was fundamentally a threat to the purse of the judges (a view which we believe is possibly a bit unfair and narrow), those considerations are no longer relevant. Nevertheless, it is interesting that judicial distrust still remains to arbitration in many quarters, as is evidenced by the decision in *Oil Basins*.

32 [2007] VSCA 255.

The recent decision in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[33] is a move in the right direction by the Federal Court in Australia. In that case the Full Court of the Federal Court widened the scope of the application of the arbitration clause to interpret it to include issues ancillary to the formation of the contract.

At the risk of committing legal heresy, we suggest that a strong case can be made for limiting judicial interference in the arbitral process much more extensively through legislative reform. The Courts, especially in more recent judgments, have demonstrated a reluctance to exercise judicial restraint when called upon to interfere in the arbitral process. More and more arbitration has mimicked Court function and process, thereby making it less of an alternative to the Courts and less attractive to the commercial community. As recent cases have shown, incrementally but consistently the Courts have encroached more and more in the arbitral process. The time has come for Parliament to do with the arbitral process what it has done with the adjudication process. The role of the Courts, and the circumstances allowing for judicial intervention, need to be strictly curtailed by legislation. Despite pronouncements by the High Court of Australia in cases such as *Australian National Parks and Wildlife Services v PMT Partners*[34] that:

> In substance, the respondent founds its submission upon the principle that access to the courts should not be precluded by contract unless there are clear words to that effect, coupled with the proposition that a clause limiting such access will be strictly construed. We have expressed our view as to the relevant scope and purpose of the Act as it applies to the contract. The statute advances the object of non-curial resolution of disputes. Subject to any special considerations attending the exercise of the judicial power of the Commonwealth (which do not arise here), the nub of the matter was expressed by Windeyer J in *Felton v Mulligan*. His Honour said:
>
> *"But the grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts cannot be accepted in this second half of the twentieth century as pronouncement of a universal rule."*

As soon as we thought that the previous *Hammond v Wolt*[35] interpretation that a conditional arbitration clause was really an option to arbitrate, rather than an arbitration agreement as the parties contemplated, had finally been dispensed with by the High Court, it snuck in again by the back door in South Australia in *Stevens Constructions Pty Ltd v Zorko*[36] and in Victoria in *Equuscorp Pty Ltd v Wilmoth Field Warne*.[37]

Who would have thought that the nature of the reasons to be given by an arbitrator depended upon the degree of judicial experience and training of the arbitrator rather than the objective requirement of merely according the parties a way of knowing why they had won or lost without regard to whether they agreed or disagreed with the reasons?[38]

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33 (2006) 238 ALR 457.
34 131 ALR 377, 391.
35 [1975] VR 108.
36 (2002) 81 SASR 316.
37 [2003] VSC 279.
38 See discussion of *Oil Basins* above on page 127 of this article.

Unfortunately in reality, the current domestic legislative regime permits intervention in certain circumstances by the Courts, who still see arbitration as a competitor or as an 'inferior' process which needs control or regulation. The only way to overcome this, in our view, is for Parliament to legislate them out of the process or to severely restrict their ability to intervene.

Lack of Procedural Uniformity

Aside from continued distrust of the arbitration process by the Courts, a further impediment is lack of uniformity in the approach taken to arbitration by Courts in each Australian jurisdiction. It has been proposed that a solution to this could be that the only Court which has the power to intervene in domestic arbitration should be the Federal Court. This might ensure that there is consistency of approach to commercial arbitration.[39]

We note that Question H in the Discussion Paper released by the Commonwealth Attorney General for the Review of the *International Arbitration Act 1974* (Cth) raises the possibility that the Federal Court of Australia be given exclusive jurisdiction to deal with matters arising under the *International Arbitration Act 1974* (Cth).[40] Whilst it appears that the Chief Justices of each State and Territory are unanimous in their disapproval of this proposal,[41] the proposal has been met with approval by some in the profession.[42] With the greatest respect to each of the Chief Justices, we are of the opinion that granting the Federal Court exclusive jurisdiction for matters arising under the *International Arbitration Act 1974* (Cth) would be taking a giant step towards a uniform national approach, and would assist in concentrating arbitration expertise, at least from a judicial perspective, within the Court. We would go so far as to say that a referral of State powers over domestic arbitration to the sole jurisdiction of the Federal Court would be an even better step, but that would probably result in great deal of political agitation on the part of State Governments and would be nothing other than an aspirational goal on our part.

The International Arbitration Model

The model used in international arbitration is instructive. *The International Arbitration Act 1974* (Cth) certainly offers a simpler enforcement procedure with international acceptability, but there remain significant problems. Some of them are currently being addressed by the review of the Act commenced by the Federal Attorney–General late last year. In particular, the review is seeking to address problems such as those presented by the decision in *Eisenwerk v Australia Granites Ltd*.[43] In that case, the parties had agreed to resolve their dispute in accordance with the ICC Arbitration Rules. The Court held that by adopting the ICC Arbitration Rules, the parties had opted out of the UNCITRAL Model Law, an unfortunate result which is at odds with international practice and the objectives of the Model Law which

39 In particular contrast the apparently simple enforcement of the foreign award on its face by the Federal Court in the recent decision of *China Sichuan Changhong Electric Company Ltd v CTA International Pty Ltd* [2009] FCA 397 with the more interventionist approach of the Supreme Court of New South Wales in *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317.

40 Commonwealth of Australia Discussion Paper, 'Review of the International Arbitration Act 1974', November 2008, 9.

41 Comments by the Chief Justices of the States and Territories on the Review of the International Arbitration Act 1974, 10 December 2008.

42 See for example the submission of Clifford Chance dated 26 January 2009 in response to the discussion paper, 32-34. The authors commend this paper as the comments set out within it provide a commercially focused response to the Commonwealth's discussion paper.

43 [2001] 1 Qd R 461 ('*Eisenwerk*').

seeks to promote uniformity. The Court in *Eisenwerk* came to this result by a particular interpretation of section 21 of the *International Arbitration Act 1974* (Cth). This case was followed in Singapore in another case dealing with an international arbitration award, concerning a petrochemical plant in Melbourne, Australia, in *John Holland Pty Ltd v Toyo Engineering Corporation (Japan)*.[44] This decision looked at the equivalent provision in the *International Arbitration Act* (Cap. 143A) of Singapore. The two cases caused instant consternation in international arbitration circles and the Singapore legislature, ever quick to see a threat to its growing international arbitration industry, quickly moved to amend the Singapore Act to remove the problem. It is telling that it has taken so long to consider addressing the problem in Australia.

As discussed above, there are also significant problems related to consolidation of international arbitration proceedings — for example, issues with joining subcontractors to an international arbitration. This can ultimately have the unintended effect of multiplying and protracting the disputes that arise out of a particular project. While the *International Arbitration Act 1974* (Cth) provides a consolidation option, it suffers from the same deficiencies (and a few more of its own) as the provisions under the Uniform CAAs, including the fact that the parties have to opt into it.[45] These, and other issues, are in need of legislative reform.

A recent study conducted by PWC has examined the statistics on the enforcement of arbitral awards.[46] It concludes that most corporations are able to enforce international arbitral awards within one year and recover more than 75 per cent of the value of the award. From this, it is equally clear that in many cases an arbitral award will not be the subject of enforcement processes, but rather will subsequently form the basis of a negotiated settlement. It is a truism in international arbitration that your award is only as good as the Court system in which you ultimately have to try to enforce it. If the Court system is unsympathetic, the award may be useless.

There are undoubtedly significant advantages of international arbitration over domestic arbitration and litigation in national Courts. These include access to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[47] which provides for the recognition of arbitration clauses and, in theory, the enforcement of arbitral awards in any Convention country. Another is that you escape the insular jurisdiction and peculiarities of the local Courts. As the PWC study notes the ease of enforcement is not always given effect to in international arbitration. If an unsuccessful respondent only has assets in a jurisdiction which is sympathetic to that respondent and the arbitral award is not necessarily enforced by the respondent's national Courts, particularly in certain jurisdictions in the region where the judiciary is sympathetic to local respondents, the award may be valueless.

This problem is discussed in the context of the Philippines in a recent article by Custodio Parlade.[47] It concerned a case in the Philippines about an ICC arbitration which had been conducted in Australia, but with Singapore as the legal 'seat' of the arbitration. In the particular case reviewed in that article, the Philippine Court of Appeals refused to enforce an arbitral award stating it was 'null and void as a

44 [2001] 2 SLR 262.

45 See s 22 of the *International Arbitration Act 1974* (Cth).

46 PriceWaterhouseCoopers and the School of International Arbitration, Queen Mary University of London, 'International Arbitration: Corporate Attitudes and Practices' (2008).

47 Opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (*'New York Convention'*).

48 See Custodio Parlade, 'Judicial Review of Arbitral Award: Violation of Public Policy as Ground for Refusing Recognition of Foreign Arbitral Award' (2008) 4 *Asian International Arbitration Journal* 175.

matter of law and Philippine public policy'. The Philippines has adopted the New York Convention and the Model Law. According to the Court of Appeals, the arbitral award infringed Philippine public policy by stating that 'costs follow the event.' The Philippines is a no cost jurisdiction. Accordingly, in declaring the award null and void, the Court of Appeals stated that the arbitral tribunal had *'gravely abused its discretion when it casually disregarded substantive Philippine law in favor of an alien principle of 'costs follow the event'*.

It appears the Court of Appeals was of the view that it had the power to declare the award void rather than unenforceable notwithstanding the fact that this remedy is not available to the Philippines Courts under the *New York Convention* or under the Model Law.

We therefore do not suggest that international arbitration is perfect in all cases. Nor will adoption of the Model Law or a limitation on the role of the Courts solve all problems. However, as an initial dispute resolution mechanism, international arbitration is better than the process offered by many Courts at first instance. Unfortunately at the enforcement stage, one often has to venture back into a domestic Court to enforce the arbitral award and, depending on where the relevant assets against which execution is sought are located that may not be an auspicious experience. But even this dilemma has its legislative solutions. For example, in China it is now claimed to be the law that no lower Court can refuse to enforce apparently properly made international arbitral awards which comply with the technical requirements of applicable Chinese law without first referring that decision to a higher Court for consideration. In practice, this acts as a brake on the ability of a lower Court to refuse to enforce the award. We are informed that in Germany applications for leave to enforce foreign arbitral awards bypass the usual lower Court structure altogether and go straight to the higher Courts to ensure less parochialism and more consistency in enforcement of awards. A suggestion therefore that all applications in respect of international arbitrations in Australia should be dealt with by the Federal Court would not be seen by our trading partners or international parties as anything revolutionary.

Practical Impediments To Arbitration

Ability and Quality of Arbitrators and other Practitioners

It is our experience that every domestic arbitrator has his or her own *pro forma* orders for domestic arbitrations, which include points of claim, points of defence and counterclaim, points of reply, witness statements, transcripts and discovery. In many cases these pro-forma orders merely mimic the orders one might receive in Court at the first directions hearing. Very few of those standard orders address whether a without-prejudice mediation should be held, for example, exercising the arbitrator's powers under s27 of the Uniform CAAs. This is largely because practitioners have inured arbitrators to follow Court process closely and take an unfavourable view if it has not been followed. We submit that practitioners bear a large share of responsibility in respect of the failure of domestic arbitration when it mimics Court process.

We have already noted the extent to which arbitrators tend to mimic Court processes and have expressed some views about what we believe to be undesirable about this process. But not all of the news is bad. Two recent cases in which we have been involved provide us with some hope that arbitrations can be conducted as a commercial alternative to Court proceedings in the true spirit of the legislation and hope that there is some basis for saying 'it is not time to throw the baby out with the bathwater just yet'!

Case Study 1

The first case involved parties to an ongoing contract, which they both wanted to remain on foot. The correct interpretation of the payment provision under the contract was the subject of some controversy: the contractor believed that it was not being paid enough, while the principal believed that it was paying too much.

One party was from Western Australia, the other from Tasmania, but with an overseas parent company which took an active interest in the matter. The site where the contract was being performed was Tasmania, the contract was subject to Tasmanian law and in default of agreement, the hearing was to be held in Tasmania. One party retained Melbourne lawyers, the other party retained Sydney lawyers and the arbitrator was from Sydney. The parties agreed to conduct the initial preliminary conference in Sydney and subsequent conferences by telephone or video-link. The mediator ultimately appointed was from NSW and it was agreed that the mediation would take place in Sydney.

At the preliminary conference the arbitrator made expedited procedural orders which included a reference to mediation. Along with orders as to exchange of statements of case and limited discovery, exchange of evidence and fixing a hearing date, the arbitrator ordered the parties to agree on the identity of a mediator by a certain date failing which the arbitrator would nominate one. The parties were also directed to conduct the mediation by a certain date so as not to disrupt the arbitrator timetable and to regularly report back to the arbitrator.

The procedural orders also recorded a virtual 'mission statement' for the arbitration to the effect that the parties intended the arbitration to be fast, expeditious and inexpensive to the extent possible.

During the initial stages of the arbitration, strict pleadings were not used but 'pleadings' were instead in a narrative form. Limited discovery on the basis of certain restrictive categories was used; and the parties had to articulate precisely what they wanted and those documents only were produced. There was limited dispute about discovery and both parties sensibly dealt with the issue. The procedural orders provided for the parties to refer the issue of discovery to the arbitrator if a dispute arose which the parties could not resolve.

The hearing date was also fixed at the end of a very short pre-hearing timeframe, so the matter would have been concluded in six months if a negotiated settlement had not been reached.

Following the exchange of statements of case (but prior to the submission of evidence), a mediation was held before an independent third party (not the arbitrator, but a retired judge), which resolved the parties' dispute.

The practitioners involved in this arbitration were experienced in arbitrations and the arbitrator was a practical and experienced arbitrator with dual legal and technical training who was concerned not to mimic Court proceedings. He had a firm grasp of arbitration law and practice and quickly identified the issues and, with the parties, agreed orders appropriate to the dispute.

Additional issues arose during the arbitration which led to an application to widen the ambit of the proceedings. The *pro forma* dispute resolution clause in the relevant Australian Standard contract provided for a staggered negotiation process which had to be completed before a matter could be formally referred to arbitration. Instead of requiring the applicant to go down the strict procedural path dictated by the dispute resolution provisions of the contract, the arbitrator applied s 25 of the relevant Uniform CAA, extending the ambit of the arbitration so that he could hear all of the disputes between the parties

at once. In reaching his decision, the arbitrator adopted the principles laid down in the Western Australian decision of Master Sanderson in *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd*[49] that, where an arbitration is already on foot, additional disputes do not have to progress through the dispute resolution provisions of a contract before the ambit of an arbitration may be extended to encompass them. Master Sanderson's decision provides an interpretation of s 25 which, if we might respectfully say so, is consistent with the objects of the Uniform CAAs and, in our opinion, rightfully champions the *Imperial Leatherware* 'school' of pragmatic, efficient arbitration procedure.

The process was not without its hiccups - all of which were managed by the parties and the arbitrator who was available to conduct telephone conferences at short notice. Ultimately the matter settled in mediation two months before it was due to go to hearing. That was a fortunate result as the parties and arbitrator had not yet finally decided whether the hearing would be held in Sydney, Hobart or, as a compromise, in Melbourne.

Case Study 2

The second case involved a Victorian toll road project. Traditionally it would have taken the Courts more than twelve months to deal with the dispute but, in this case, the parties needed a quick outcome. Importantly, all of the parties had that same objective - a speedy result. All the lawyers on both sides, including counsel and solicitors, were experienced arbitration practitioners and the parties were sophisticated commercial parties who agreed to a fast-track arbitration process. The arbitrator was an experienced commercial arbitrator and senior counsel. The procedural orders provided in that case are illustrative of the pragmatic approach adopted by the parties and provided, inter alia:

(a) a strict definition of the questions to be addressed by the arbitrator;
(b) an estimate of the time of the hearing;
(c) that the parties were to deliver statements of agreed facts and agreed documents together with an agreed statement of technical terms on the questions to be addressed;
(d) the parties were to exchange written submissions on the questions and then reply submissions one week later.

Once it was agreed that the contract would be evidence on its face, the dispute was heard on the basis of the agreed facts, the agreed documents and the submissions. No oral evidence was heard. A short oral hearing was held. An award was handed down and a result obtained three weeks after the hearing. The entire process took less than three months.

Regrettably, but understandably given the amount in dispute, the parties subsequently proceeded to Court on the dual basis of an appeal against the award as well as on the basis of alleged technical misconduct. However, the matter was referred to an extremely experienced arbitration judge, the Honourable Justice Byrne, one of the three judges who have been appointed by the Supreme Court of Victoria to deal with arbitration matters, pursuant to the Court's Commercial Arbitration Practice Note. The matter was heard by the Court and a judgment handed down within a matter of weeks from the initiation of the Court process.

49 (Unreported, Supreme Court of Western Australia, Sanderson M, 10 February 1999).

Lessons to be learnt

These two case studies have a number of things in common.

First, they involved sophisticated parties who were clear in their objectives and who were able to drive their practitioners to expedite the process.

Second, the practitioners involved were experienced in arbitration process.

Third, the parties had well-trained, robust arbitrators who were prepared to be pragmatic in respect of the process and avoid costly and inefficient duplication of Court processes.

Fourth, the arbitration process was not a duplication of the Court process, which is an important aspect in itself.

Fifth, the parties used the legislative framework in the way in which it was intended to be used.[50]

Finally, the scope for judicial involvement was limited, but when the Court process became involved it was quick, effective and supportive of the arbitral process.

In short, the above case studies are examples of arbitration proceedings meeting disputants' expectations in terms of providing a pragmatic, flexible and commercial alternative to the Court process.

A major impediment to arbitration in Australia is the manner in which practitioners advocate and expect arbitration process to be conducted. It is unfortunate that some practitioners, whether for tactical purposes, through inexperience or for other reasons, seek to raise pedantic procedural points that are inimical to efficient dispute resolution. As noted by Chief Justice Spigelman in His Honour's address to the First Indo–Australian Legal Forum:

> Many persons involved in commercial arbitration are critical of the way in which legal practitioners adopt the full panoply of formal trial procedures for the course of an arbitration, including all of the traditional delaying techniques such as requests for particulars, interrogatories, disputes about disclosure of documents and the formal steps of examination in chief, cross-examination and re-examination, as if conducted under formal rules of evidence.[51]

We believe this is a cultural issue which should be addressed through re-education and training practitioners in arbitration process. Indeed it is the view of many, including Justice Mason, President of the Court of Appeal of the Supreme Court of New South Wales, that lawyers can be counter-productive to the arbitral process unless they have undergone 'intensive re-education.'[52] This re-education includes a change in practice mandated by arbitrators themselves. In our experience, there can be no doubt that pro-active, well-trained and experienced arbitrators who have the respect of the parties can do much to mould the arbitral process to the benefit of the real players and payers - the commercial parties involved in the dispute. The opposite is also true. Inadequately trained and inexperienced arbitrators reluctant to exercise their powers often preside over clumsy processes.

Unfortunately, advocating and promoting training in arbitration practice in this forum is largely preaching to the converted. In order to effect the necessary cultural change, the message needs to reach

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50 See above Part 2 for discussion of ss 18, 19, 27 of the *Uniform CAA*s and the powers those sections confer upon arbitrators.

51 Chief Justice Spigelman, 'Commercial Litigation and Arbitration: New Challenges' (Paper presented at the First Indo–Australian Legal Forum, New Delhi, 9 October 2007).

52 Justice Mason, 'Changing Attitudes in the Common Law's Response to International Commercial Arbitration' (Paper presented at the International Conference on International Commercial Arbitration, Sydney, 9 March 1999).

the general pool of litigators who are less frequent participants in the arbitration process that arbitral matters should not be pursued as if they were judicial ones.

We note that the National Alternative Dispute Resolution Advisory Council of Australia has recently launched a discussion paper on Alternative Dispute Resolution in the Civil Justice System.[53] The discussion paper states that its aim includes identifying strategies to remove barriers to, and provide incentives for greater use of, ADR as an alternative to the Courts. One of the key proposals discussed in the paper is promoting public awareness of ADR, including, inter alia, through a high profile and ongoing promotional campaign. The paper also identifies the need for improved education and training for ADR practitioners. We are of the view that many of the issues raised in this article regarding arbitration process could usefully be addressed in the proposed promotional campaign and education/training of ADR practitioners.

Conclusions

Arbitration has a very important role to play, but it will only flourish in Australia if a number of reforms are implemented. In our view, these include:

(a) An overhaul of the domestic arbitration legislation.
The advent of the supposedly Uniform CAAs throughout Australia in the 1980s was a welcome development. For their time the Uniform CAAs represented a huge step forward in arbitral law reform and heralded an era where there was much greater prospect for the development of uniform arbitration practices throughout Australia. However, the Uniform CAAs still adopted essentially the UK model of Court supervised arbitration. While this has provided a legislative regime much more conducive to one national arbitration market (as is evidenced by the national focus of IAMA) it has not really been fully successful. One still finds parochial legislative approaches - such as the South Australian Act now being used as one of the vehicles for industrial relations law reform to become the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA). The States have at times also been slow to adopt necessary amendments to the Acts in a timely manner so as to retain uniformity. The staggered periods over which the States and Territories adopted amendments to enable consolidation to be effectively made (the current uniform approach being reflected in s26 of the *Commercial Arbitration Act 1984* (Vic)) being but one example. Different judicial approaches to what are supposed to be uniform sections are but another example - the approach to granting of stays we referred to above when discussing the decision in *Hammond v Wolt* is but one minor example. Of greater significance is the growth of international arbitration throughout the region and its significance to regional commerce. Countries such as Singapore, now a major international arbitration venue in this region, have been quick to recognise the potential of this growth and have been responsive to harmonise their domestic and international legislative frameworks, while still retaining necessary differences between the two to allow for local requirements and greater supervision by the Courts of domestic arbitration. In our submission, many factors point to the desirability of there being one national Arbitration Act regulating both domestic and international arbitrations conducted in this country. Consistent with international practice, we see no reason why this could not be based on the UNCITRAL Model Law as its statutory backbone with opt in and opt out provisions as considered desirable.

53 NADRAC Issues Paper, 'Alternative Dispute Resolution in the Civil Justice System', March 2009.

(b) Improved training of arbitrators

The industry needs to provide good quality arbitrators, which will only happen with a combination of skilled people (including trade based arbitrators) trained well through courses such as those offered by IAMA and arbitrators being allowed to maintain their skills and expertise through ongoing training and practical experience. Just as practitioners should not attempt to mimic the Court processes, so too should legally trained arbitrators be encouraged to recognise the different nature of their role. The point was eloquently stated by Geoffrey Hartwell:

> the arbitrator must forget any idea of pretending to be a Court or anything like it. We have arbitrators who wait for everyone to assemble and then expect them to stand up when the arbitrator comes in. I daresay they would parade holding a nosegay and with a clerk, a tipstaff and a mace carrier if the opportunity offered. It is not that kind of affair. There used to be an offence, on the high seas, of improper aggrandisement. It was committed by merchant ships and others who wore the ensigns of warships without authority. It is committed by arbitrators every day and ought to stop.[54]

Small domestic housing arbitrations used to be the training ground for many practitioners - arbitrators and lawyers - in the art of arbitration. Those days are gone and will probably never return. There is no doubt, however, that in this area nothing provides better training than hands-on experience. One way of fostering this experience is for industry bodies to again embrace IAMA and for IAMA to cultivate strong and effective links with industry bodies Aside from IAMA being receptive to what industry bodies need, we recognise that there is only so much which the arbitral model, and IAMA as an organisation, can achieve in the absence of a better legislative regime. We are confident that the senior executives of the major building industry bodies are well aware of the fact that the days when arbitration was a club which resolved disputes concerning industry matters by members, through members and for the benefit of members are gone. What we advocate is that they embrace the benefits which arbitration can offer their members as compared to traditional litigation. Likewise, judges in States other than NSW should be encouraged to use extensively special referees in specialist areas, such as building cases. The conduct of special references in NSW has seen a greater pool of trained and willing arbitrators being available in that State while the pool has shrunk in other States.

At the risk of another heresy, we doubt very much that New South Welshmen are any more temperamentally suited to being arbitrators than are their brethren from other States. Experience has shown that NSW judges are possibly a bit more robust in supporting references while accepting their imperfections. As a result they have been more encouraging of them.

All of these matters are aimed at achieving a greater pool of trained arbitrators who are available to do arbitration work. We recognise the Catch 22 nature of this dilemma — you need good people to do the work but you need the work to train good people — but a start has to be made in training.

(c) A more sympathetic judicial environment

The judicial approach to arbitration could encourage arbitrators in a number of ways. First,

54 Geoffrey Hartwell, 'Cost-effective Arbitration: The Commercial Way to Justice' [1997] 16 *The Arbitrator* 7, 16.

the appointment of specific specialist judges to a panel to hear arbitration matters, as has recently been done in Victoria (and Singapore), is clearly desirable. The quality of the judges, the speed with which they deal with matters, and the fast track processes which the Courts adopt are all very strong and clear factors which have combined to make Singapore such an attractive seat for international arbitrations. Second, the current state of domestic arbitration evidences that State Courts are probably unlikely to manage arbitral processes in an efficient and uniform manner. Domestic arbitration is in our view in such a malaise that it needs to be completely refreshed. We suggest it be centralised under the Federal Court's jurisdiction alone.

This will go some way to ensuring that judicial management of arbitral proceedings is adequately performed in a uniform manner. However, for this to occur, cooperation from State Governments would be required as each State would need to 'opt in' to such an arrangement, such as occurred when the Corporations Law was centralised. How realistic this is, is of course subject to debate. In the absence of such an initiative, all States should have a specialist list of judges who hear commercial arbitration appeals.

We also believe there is much to be said for limiting the role of the Courts, and a narrowing of their ability to intervene in, arbitration matters. The heavily Court supervised model which we have inherited from the United Kingdom is not appropriate to international arbitration in our region of the world. We venture to suggest that it is also no longer appropriate for domestic arbitrations. The case law in relation to arbitration has shown clearly that, by and large, our Courts, especially at the intermediate appellate level are indisposed to accept or appreciate that arbitration is not meant to mimic litigation, and that justice is not always delivered by Courts exclusively.

As the growth in security of payment applications has shown quite starkly in NSW, commercial people do not always want 'perfect' justice at great cost. Quite often, they require a quick resolution to a dispute with sufficient process and reasons for them to be able to live with, even if they disagree with the result. We recommend the introduction of legislation, together with the introduction of a framework based on the Model Law, which further restricts the role of the Courts in arbitration.

(d) Training other practitioners and cultural change

Lawyers should be deterred from advocating that arbitration mimic Court processes so that they are able to obtain effective remedies for their clients through arbitration. Practitioners need to be re-educated so as not to adopt an intellectual 'shortcut' which mimics the Court process. Instead they ought to be inventive and aware of the ambit of powers available to arbitrators, and not be bound by the four corners of pleadings thereby reducing the expense and time wasted on extensive discovery. Lawyers are not just conservative - they are somewhat recidivists by nature, prone to continuously falling back on what they have done before because it is familiar and easy. We do not advocate excluding lawyers totally (although that may be appropriate in simple and smaller matters) but we do advocate retraining them. As their clients or their own industry bodies are unlikely to know enough, or have enough motive, to force such training it probably needs to be encouraged in part by well trained and robust arbitrators who actively participate in determining the arbitration process. One often hears it said that it is, after all, 'the parties' arbitration' and they should be left to determine how it is to be conducted. While there is a large element of truth and commonsense in this, especially in a judicial environment which might be perceived to be hostile to adventurous arbitrators, this

cannot be allowed to be a reason for arbitrators abrogating their role and responsibilities. The truth is that in practice most parties in arbitrations just do not know what options they have for resolving their dispute in a cost effective manner. They are heavily reliant on their legal advisers and, if they receive conservative advice, will usually give equally conservative instructions for their lawyers to march by. There is no reason at all that we can see for an arbitrator not to be pro-active in recommending how matters should be prepared for hearing or for making recommendations on how hearings should be conducted.

(e) Arbitrator input into costs issues

Arbitrators need to be encouraged in the appropriate cases to deal with costs themselves so that they have a direct input on how those decisions are made. Where one party has behaved scandalously, even if it is ultimately successful, an arbitrator should be able to adjust the award of costs so as to reflect that behaviour. The arbitrator, not a Court taxing official, is in the best position to quantify the amount of the cost penalty which should be imposed. Arbitrators should be encouraged to make greater use of these powers.

(f) Fewer grounds for judicial review

Even if the more radical positions we have suggested are not adopted we believe the legislature should increase the threshold before a Court can intervene in the arbitral process for technical misconduct or through appeal processes. Losing parties need to face the reality that if they adopt an arbitration process for dispute resolution, that process is ordinarily binding, and the Courts will not hear a complaint by a litigant simply because the outcome was not what they expected.

More importantly, Parliament should make it very clear to the Courts that this is its intent, and specifically that the role of the Courts is limited.

(g) Better arbitral rules

The importance of arbitral rules which facilitate a quick and efficient dispute resolution process cannot be overstated. The IAMA Arbitration Rules (incorporating the IAMA Fast Track Arbitration Rules) are a breath of fresh air and a long overdue reform. They provide a wealth of opportunities for parties to fast track their process, or to indulge the pursuit of a more perfect justice, as the parties or the arbitrator may wish to adopt. Their acceptance by industry bodies, and those responsible for standard form contracts (such as Standards Australia) would in our view be a welcome development in making arbitration more attractive.

For international disputes, the ACICA Rules provide another welcome model which navigates its way through some of the more problematic issues in the International Arbitration Act 1974 (Cth)54 while still being based on the UNCITRAL Arbitration Rules.

Australia has arbitral rules which are modern and progressive and give arbitrators significant scope for just dispute resolution. We need to encourage their use.

(h) The role of institutions

Finally, we have the role of arbitral 'institutions' themselves. IAMA has for over 30 years now provided strong leadership in policy developments in arbitration law and practice, in providing rules and in administering arbitrations in various ways. Its role is well established, it is progressive and it has shown itself to be flexible. We see little need to supplement its functions at the domestic level with other bodies.

54 Such as the *Eisenwerk* decision and the difficulties thrown up by section 21 of the *International Arbitration Act 1974* (Cth).

At the international level, ACICA has in recent years, and especially under the Presidency of Professor Michael Pryles, taken huge steps to promote the capabilities of Australia and Australians in the international arbitration arena. Although our geographic remoteness means that we will always have difficulty in attracting international disputants to Australia (unless one or both are Australian), modern technology does much to ameliorate this constraint. The reforms we have suggested would in our view strengthen the claim that Australia and Australians are active participants in international arbitration.

Other bodies such as ICC, LCIA and CIArb also have a role to play, both because of their standing internationally and their international reach.

We would strongly urge each participant to embrace a co-operative approach to progressing the interests of arbitration, both domestic and international. In our view, IAMA is clearly the peak body - and very logically so - for domestic arbitration. ACICA, itself formed out of IAMA many years ago, performs a similar function in international arbitration. At times, these interests will differ - but normally only at the margins. At times, they will inevitably compete for the same areas of arbitration work, although those occasions should be rare.

Bodies such as CIArb should not be seen as competitors. In our experience, they do not want to be or try to be. They perform strong functions in promotion of arbitration as a dispute resolution methodology, as well as in education.

Arbitration is a big church - it has room for many worshippers and participants, all of whom are different. That does not mean that these arbitration bodies cannot work together and co-exist. In fact, clearly the contrary is true and it is pleasing to see even greater co-operation between these bodies.

Closing

A strong case can be made out, in our submission, for a Federal intervention in domestic arbitration with co-operation from the States for necessary referrals. Arbitration needs reform of its supervising laws and there is much to be said for consistency based on recognised international practices, including adoption of the UNCITRAL Model Law at Federal and State levels for international and domestic arbitration, for centralisation of supervisory control in the Federal Court of Australia and for much more limited scope for judicial review and intervention. To paraphrase our current Minister for the Environment and his old band Midnight Oil, ‘the time has come, a fact’s a fact, arbitration belongs to the parties, let’s give it back’. Given the current economic climate, with a new economic world order approaching, coupled with the review of the *International Arbitration Act 1974* which is currently on foot, the time to reform domestic and international arbitration in Australia is now.

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