



the
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Volume 20

Number 2

July 2001

The Journal of
THE
INSTITUTE of
ARBITRATORS & MEDIATORS
—  —
AUSTRALIA



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Volume 20 Number 2 July 2001

THE
INSTITUTE *of*
ARBITRATORS & MEDIATORS
—[®]—
AUSTRALIA



PROSPECT

This issue may be cited as
(2001) 20(2)

ISSN 1446-0548

© 2001 The Institute of Arbitrators & Mediators Australia

Publisher

Prospect Media
Locked Bag 2222
Chatswood Delivery Centre NSW 2067

on behalf of

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Printed by

Ligare Pty Ltd
138 Bonds Road
Riverwood NSW 2210

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President's Message

As an organisation committed to the peaceful resolution of conflict, on behalf of the Institute I would like to express our deepest sympathy to the people of the United States of America and all other nations who lost loved ones in the violence and terror which struck Washington, Pennsylvania and New York on 11 September 2001. The world community is diminished by these criminal acts, and united in grief. The horror and disbelief we felt as we witnessed the attack on the World Trade Centre will never leave us; nor will our tremendous admiration for the courage, tenacity and spirit of sacrifice of the rescuers. They have reminded us of the best of humanity in the face of the worst.

Through dialogue and exchange, the great principles of resolution, we may yet achieve peace. If we can do so, it will be a fitting tribute to those who died so tragically on 11 September, and to the many others in the world whose suffering we have not witnessed, mourned or marked.

Closer to home, the Institute held its National Colloquium in Canberra, 'AMA — *The Next 25 Years* on 25 - 27 May 2001. I am pleased to say that this was the best-attended Institute function I can recall in more than 20 years as a member of the Institute.

As well as the discussion sessions (and social functions) which provided a great opportunity for delegates to meet and exchange ideas on the Institute and its future, the Colloquium program included some thought-provoking presentations from eminent speakers on the future of arbitration and ADR in Australia. We hope to publish those papers in future issues of *The Arbitrator & Mediator*.

In his paper, 'The State of ADR in Australia', Professor Laurence Boulle dealt with whether Australian ADR is keeping abreast of global trends in dispute resolution, and said that Australia is regarded as one of the two mature ADR environments in the world (the other being the USA).

The Institute has taken a leading role in promoting resolution of disputes in a timely and cost-effective manner, dating back at least to the various papers delivered at our 1996 National Conference. Our commitment is reflected in our *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)*, and our various education and CPD activities.

I have found that there is a good deal of overseas interest in what we have done in Australia to make commercial dispute resolution more efficient and

cost-effective. This seems to indicate that arbitration and ADR practice in Australia are at the leading edge of global trends in dispute resolution. Recently, the Asian Dispute Review and Committee D (Arbitration and ADR) and Committee T (International Construction) of the International Bar Association have published papers I have written on the Institute's new Arbitration Rules and the cost-effective resolution of construction disputes in Australia. Judging from the emails I have received in the short time since those articles have been published, there is significant international interest in the various techniques in common use in Australia to narrow issues and minimise time and cost, including the use of experts' conferences or conclaves.

Cost-effective arbitration of international disputes will be the subject of a full day session by Committee D at the Business Law International Conference of the IBA, to be held in Cancun, Mexico from 28 October to 2 November 2001. Hopefully the ideas exchanged during that session will provide food for thought on how we can further improve efficiency and reduce costs in arbitration and ADR in Australia.

In my view, one explanation for arbitration and ADR practice in Australia being at the leading edge of global trends in dispute resolution lies in the great support provided to the Institute, arbitrators and other third party neutrals by our courts. This is borne out by the (oft-quoted) remarks of the Honourable Justice Michael Kirby AC CMG of the High Court of Australia, namely:

Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.

I understand, however, that an area of concern to some judges is compliance by arbitrators with the rules of natural justice. Non-legal arbitrators sometimes experience difficulty in the practical application of the rules of natural justice to particular situations, including dealing with a party who is a reluctant participant in the arbitration and who may set about to delay or frustrate the arbitral process by declining to co-operate.

There are of course two aspects of the arbitral process in which non-co-operation may give rise to natural justice issues. The failure of a party to comply with directions made by the arbitrator may give rise to procedural fairness issues, in relation to whether a party has been given a reasonable opportunity to present its case or rebut the case of its opponent. The answer to those sorts of issues is readily ascertainable from the case law and various provisions of the Uniform *Commercial Arbitration Acts* (particularly sections 18, 34(7) and 37).

A more difficult situation arises where the non-co-operation involves declining to agree with something sought by the arbitrator, such as joint and several liability for the arbitrator's fees and expenses or provision of security for the arbitrator's fees and expenses. Some consideration was given to this question in a casenote which I prepared for the last issue of the *The Arbitrator & Mediator*, dealing with the decision of the English Court of Appeal, in *Andrews v Bradshaw* [2000] BLR 6. Another view of that decision is expressed in Toni de Fina's article in this issue.

This question has been the subject of consideration at the Master Classes for Grade 1 and Grade 2 arbitrators held in Sydney, Melbourne, Brisbane, Perth and Adelaide this year. Having taken part in Master Classes around Australia since 1999, I always find the debate engendered in the Master Classes particularly stimulating. The debates on this question in 2001 have been no exception.

I believe it is worth reinforcing the point made in Toni de Fina's article, that the nominee arbitrator should not be deterred from entering on the reference to arbitration simply because one party does not agree to be jointly and severally liable, or to provide security for, the arbitrator's fees and expenses.

To allow non-co-operative parties to frustrate the arbitral process in this manner would cause as much damage to the future of arbitration in Australia as the expenditure of excessive time and cost in the arbitral process. ☼

Robert Hunt, President.



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Conflict and dispute management – the new science?

Editor's commentary

In an acknowledgement of the negative impacts that conflict and disputes have on commercial agreements, the parties to long term commercial contracts are increasingly considering their approach to contracting in order to:

- manage conflict before it gives rise to dispute; and
- ensure that any disputes are resolved in as timely and cost-effective manner as possible.

The Institute's members have traditionally been involved in the latter issue of managing dispute resolution.

It is also important for members to be aware of the different types of procedure being used to manage conflict and avoid disputes arising. A general awareness of the broader conflict management environment will provide us with a greater capacity to assist parties in the selection and implementation of suitable procedures. New approaches to contracting may include an agreement to form a committee consisting of members of both contracting parties to oversee the implementation of the project, a form of 'partnering'. Another new approach is alliance contracting. This is considered in some detail in JK Bremen's article entitled 'Alliance contracting — why choose alliancing?' on p 13.

To carry on the theme of large infrastructure projects and the role of alternative dispute resolution, we have published an article by Norman Reich entitled 'Current and future trends for dispute resolution on significant dams and related projects in Australasia'. In this article Mr Reich provides a brief description of the various forms of ADR used in large infrastructure projects.

On practice matters, members will find useful the article of Robert Hunt in relation to the Institute's new rules for the conduct of commercial arbitrations and the article by Toni de Fina on how to handle a party to an arbitration agreement who refuses to agree to the arbitrator's terms and conditions of engagement as a tactic to thwart the arbitration. This article is a commentary on

the case note of *Andrews v Bradshaw* that appeared in the last issue at p 59.

In his article, 'Pitfalls in mediation', George Golvan QC provides some refreshing advice for conducting mediations: relax, be warm and friendly, retain a good sense of humour and proportion and let the parties do much of the work. Sounds good to me!

Very observant readers will have noticed our aborted attempt at reprinting in the Silver Anniversary edition an article by David Byrne (now Mr Justice Byrne of the Victorian Supreme Court) entitled 'Evidence for arbitrators' that was first published in 1981. While one must read this article with the article's age clearly in mind, it is an excellent summary of some of the basic rules of evidence.

Observant readers will also note some new names and some names missing under the heading 'Journal committee' on p iv. I would like to express my sincere thanks to those members of the committee who have freely given of their valuable time for the benefit of the journal. They are Dr Clyde Croft SC, George Golvan QC, Maurice Phipps QC and Hugh Foxcroft QC. The Institute has been very fortunate to have had such a high calibre of personnel contributing to its journal. I would particularly like to express my gratitude to Dr Clyde Croft SC for his vision and personal support over several years and for a contribution to the journal and to the Institute that has been second to none.

At the same time I welcome the new members of the Committee and trust that we will continue to deliver a high quality journal for our members.

Finally, I thank all contributors to this issue of the journal and trust that our members and readers will find the contributions both enjoyable and of value. ☺

Grant Holley, Editor.

Letter to the editor

17 April 2001

Dear Sir,

In the February 2001 issue of the journal of the Chartered Institute of Arbitrators and Mediators there is an article by Douglas Jones, a fellow of our Institute, with the heading 'Expert determination and arbitration'.

This article will perhaps reduce the enthusiasm of those who advocate expert determination instead of arbitration in dispute resolution.

The table on p 26 of the journal sets out the differences between the two procedures. From this table the defects of expert determination as distinct from normal arbitration may be summarised as follows.

1. The courts have no power to stay court proceedings in favour of expert determination agreements.
2. Failure to specify procedures under an expert determination agreement may void the agreement for uncertainty.
3. An expert determination agreement may be void on the basis that it purports to oust the jurisdiction of the courts.
4. Experts have no legislative protection from liability for negligence.
5. An expert's decision can only be enforced on the grounds of breach of contract.
6. A foreign expert's decision can only be enforced as a foreign judgment or else sued upon in place of enforcement — the New York Convention has no relevant authority.
7. The expert has limited authority in minimising delays.
8. Expert determination may be unsuited to all types of disputes.

The author's final paragraph sums up the whole article:

None the less, even if it is nearly impossible to ascertain a practical reason for choosing expert determination over arbitration, it is clear that expert determination has struck a chord with business people and governments, particularly those in the construction industry. Parties may choose expert

determination because of their traditions, the attitude with which they embark on the project, or because expert determination is suited to particular types of disputes. The choice is open to various influences and ultimately the decision will depend on where one wants to sit along the ADR continuum. But the warning remains that, in choosing expert determination over arbitration, parties are agreeing to forsake an internationally enforceable award and an established system of domestic and international laws, in favour of what may be prove to be illusory advantages of speed, reduced cost and informal procedure.

As an arbitrator for many years, one wonders why an expert determination agreement which includes a compliance clause does not automatically become an arbitration agreement under the simple definition of an arbitration submission as an agreement in writing to refer disputes to an independent person whose decision shall become final and binding.

As has been said before: an arbitration does not cease to be an arbitration by giving it another name.

F McCardell LFIAMA

Evidence for Arbitrators

David Byrne*

Preliminary Observations

Evidence is essentially the means of proving a fact before a tribunal. Seen as such, it represents the bricks from which a case is constructed. The mortar in this image represents the argument. Thus, where it is sought to prove that a binding contract between two parties contains a certain term:

- the evidence is the document, or oral testimony from a witness as to signature; while
- the argument is that where parties execute a written form of agreement, the terms of that agreement are all to be found in the document.

The word 'evidence' is often used as a shorthand expression for 'admissible evidence'. Thus you may hear a judge say to counsel, in rejecting hearsay testimony, 'That's not evidence'. In this lecture I propose not to use the word in this sense. In as much as we shall be concerned with notions of admissibility, I shall attempt to use the full expression 'admissible evidence'.

One final word of warning. The law of evidence has its origins in the 18th and 19th centuries, when issues of fact were determined by juries. This should be borne in mind. Many of the rules of evidence were designed to simplify the decision-making task of the jury and to exclude material which the simple juror might find distracting. Nowadays, except for criminal trials, the tendency is for trial by judge alone. This has led to a considerable watering down of the more technical rules by judges as a matter of practice, and to legislative change. It is common for a judge to avoid deciding a difficult evidentiary point by saying that he or she receives the evidence 'subject to objection'. The objection is then

* Barrister at Law Melbourne Victoria. [Editor's note, now Mr Justice Byrne of the Supreme Court of Victoria and an Honorary Fellow of the Institute]. This article first appeared in *The Arbitrator* 1981 vol 1, p 4. An attempt to republish it in the Silver Anniversary edition in November 2000 unfortunately resulted in only two pages being printed. Note that the article was written prior to the Uniform *Commercial Arbitration Acts* that provide that arbitrators are not bound by the rules of evidence.

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forgotten as the case proceeds unless the particular piece of evidence becomes of critical importance. Notwithstanding this tendency, the rules of evidence may be complex and bewildering. The standard text on the subject, written by Professor Wigmore, runs to 11 volumes in its 1940 third edition.

It is not the purpose of this article to provide comprehensive instruction upon this subject. The idea is to lead to an understanding of the basic principles and purposes of the law of evidence so that an arbitrator may be able to deal with problems which arise in arbitrations, for these problems must be decided instantly. Often it is difficult when two lawyers solemnly assert differing positions as to the admissibility of a document — or, when one party is unrepresented, to ensure that the represented party obtains no unfair advantage by putting inadmissible material to the arbitrator.

Strictly speaking, proceedings before an arbitrator are subject to the rules of evidence. This must be recognised. However, this rule is mitigated by a number of practical considerations.

1. The parties very often will not be concerned to raise technical objections.
2. Parties often consent to the reception of non-contentious material.
3. It is not easy to upset an award for a failure to adhere to the rules of evidence. This is particularly the case where the arbitrator receives evidence which is inadmissible, in contrast to the position where he or she refuses to receive material which a party wishes to place before them. Therefore it is better to err on the side of generosity.
4. Often the parties are not represented by lawyers, so technical questions do not arise.

The role of evidence therefore should be understood: it is to provide the arbitrator with the material which they may use to reach their decision. This material may be:

- a formal admission (although strictly speaking this is not really evidence);
- oral testimony on oath of witnesses;
- documents;
- real evidence (for example, a core sample of concrete) which includes observations upon view; or
- the experience and expertise of the arbitrator, (in contrast to a judicial tribunal which approaches the problem with the innocence of a newborn babe).

The following is not evidence:

- the submissions or arguments of lawyers, building consultants or parties;
- unsworn statements; and
- questions — it is the answer, not the question, which may be acted upon.

The law of evidence affects these materials in three different ways:

- (1) rules affecting admissibility;
- (2) rules affecting the manner of receiving evidence; and
- (3) rules affecting the use which may be made of evidence.

We shall consider each of these rules in turn.

Rules affecting admissibility

Principle of relevance

The basic principle is that relevant material is admissible, but it is often difficult to determine relevance. This involves an examination of issues.

1. What are the issues?
2. Does the material make the suggested conclusion more or less probable?
3. The issue of credit — generally it is proper to attack the credit of a witness, but not to reinforce the credit of a witness.

To provide an example: did a builder agree to perform the work by a fixed date or did he merely give an estimate of time? The proprietor is contending for the firm date. Relevant evidence would include:

- conversations between the parties on this point;
- the fact that at the time of the agreement the plans had not been finalised;
- a letter from the proprietor to his bank manager after the date of the agreement stating that the completion date was uncertain;
- evidence that the builder applied for an extension of time; and
- the fact that the proprietor is a convicted perjurer.

Irrelevant evidence would include the following facts:

- the proprietor had written a letter to his bank manager saying that he had

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agreed to a firm completion date (as opposed to evidence that the proprietor had written to the *builder* confirming the fixed completion date);

- the builder had refused to give firm completion dates on other jobs; and
- the builder has a reputation for integrity and fair dealing.

Rule excluding without prejudice statements

The policy of the law is to promote compromise. Thus, when parties are negotiating, concessions made by a party will not be used against that party provided:

- (a) the concession was made as part of the settlement negotiations; and
- (b) the statement was made without prejudice.

Thus, when, following the appearance of large cracks in a building, the proprietor writes in outraged terms to the builder demanding that he return to make good, the following evidence might be useful:

- the builder apologised and said he provided inadequate footings;
- the builder agreed to come back to carry out rectification works without charge; or
- without such an agreement, the builder returns and sends no bill.

These are all consistent with an admission of fault by the builder. Contrast this with the situation where the builder denies liability but says without prejudice he will return and make good without charge. This statement may not be led in evidence or put in cross-examination to the builder.

Consider the question of an offer of cash settlement. The House of Lords has drawn a distinction between three situations where the builder offers a cash settlement:

- an open offer;
- a without prejudice offer; or
- a sealed offer.

No use whatever — including on the matter of costs — may be made of a without prejudice offer. The open offer is available to the arbitrator as part of the evidence. Thus when the proprietor knows he will be found liable to pay

something, he may wish to put before the arbitrator that he is being reasonable. The sealed offer is a procedure which falls between the two. The arbitrator knows that the proprietor was made an offer, but not the amount of it. It is opened after the award is made and may affect the question of costs.

Rule excluding communications between clients and legal advisors

Again this is an exceptional privilege accorded to parties as a matter of public policy. As such it is limited in scope to:

- communications between lawyer and client;
- documents brought into existence by the lawyer, client or a third party; and
- documents written for the sole purpose of instructing the lawyers, obtaining legal advice or conducting the case (*Grant v Downs* (1976) 135 CLR 674).*

In our example, privileged information would be:

- conversations and correspondence between either party and their lawyers; and
- the engineering report for purposes of arbitration.

The following information would not be privileged:

- a letter from a client to a solicitor which deals with fund raising for the building;
- a report from a consulting engineer procured for the purpose of rectifying defects; and
- a document acquired from a third party for use in arbitration which was not brought into existence for that purpose — for example, if the proprietor were to ask for and obtain the architect's file.

Nat Employers Insurance v Waind (1979) 24 ALR 86.

* Editor's note: this article was written prior to the decision of *Esso Australia Resources Ltd v Commissioner of Taxation* (Cth) (1999) 74 ALJR 339 in which a dominant purpose test was preferred to the narrow sole purpose test.

Rule against hearsay

Hearsay is an out of court statement of a person not called to give evidence. This is not admissible because the maker of the statement is not available to be tested by cross-examination or assessed by the arbitrator.

For example, if the question was whether the proprietor had authorised a variation by instruction to the foreman, the builder cannot give evidence that the foreman told him he received such an instruction.

It is common for non-contentious hearsay, such as a soil test report, to be received by consent, as this saves expense. This is a matter for the good sense of the parties.

Statutory provisions admitting documentary evidence

All States have an Evidence Act which, among other things, governs the admissibility of documentary evidence — see, for example, s 48 of the *Evidence Act 1995* (NSW).

Evidence as to credit

A witness may be cross-examined as to credit, but the attacking party must accept the answers given — they cannot, as a general rule, lead evidence against the credit of a witness. You cannot lead evidence in support of credit of your own witness.

Thus, the proprietor may be cross-examined with a suggestion that he habitually seeks to avoid paying his debts by dreaming up complaints. If he admits this fact, no problem. But if he denies this fact, the arbitrator is not entitled to assume that because the question has been asked it is true. The builder is not entitled to lead evidence to disprove the denial, as this would open up irrelevant issues. The proprietor is not entitled to reinforce his denial by leading evidence of his good commercial reputation.

However, it may be difficult to draw a distinction in some cases as to credit or issue — for example, an allegation that the builder is a drunkard.

Note that there is an exception which would permit the builder to prove a conviction notwithstanding a denial.

Rules affecting the manner of receiving evidence

Documents

An arbitrator should constantly bear in mind that a relevant document must

be proved. A contract is proved by a witness verifying the signatures. A letter is proved by a witness saying he or she posted it and producing a carbon copy. In most cases, therefore, proof is dispensed with by agreement. When in doubt the arbitrator should ask all parties whether there is any objection to the document being received.

Where there is a contest the parties and the arbitrator are entitled to require strict proof. For example, it is not inconceivable that a letter might go astray.

Photographs

Like documents, photographs should be proved by the photographer or a person present at the time they were taken. Another method is for a witness to verify that the photograph actually shows a picture of its subject matter, as photographs can be touched up. When in doubt, seek consent.

View

It should be remembered that the view and what is said on the view may be evidence.

Witnesses

In most cases witnesses are the principal source of evidence. They should be sworn.

The choice of witnesses is a matter for the parties; the arbitrator may not call witnesses. The arbitrator may take into account the failure of a party to call an apparently available witness, but the failure of a party to call a witness does not of itself entitle the arbitrator to assume that the witness would have given any particular evidence. For example, assume our builder alleged an extra was authorised by the proprietor in the presence of the foreman, but the proprietor denies this. An unexplained failure by the builder to call the foreman may embolden the arbitrator to accept the proprietor's evidence, but the failure to call the foreman would not of itself entitle the arbitrator to reject the builder's evidence.

The manner of presenting the evidence, in the sense of the order of witnesses, is a matter for the parties. The arbitrator should be careful not to take over the proceedings, especially when the parties are represented, although he or she may make suggestions.

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It may suit the arbitrator to hear all the evidence on one issue from both sides before moving to the next issue — for example, to go through a list of defects, hearing from both sides on each item. He or she may invite parties to do this, but it would be unwise to oblige them to follow this procedure. It should be remembered that the parties know more about the case than the arbitrator, at least at the beginning.

Normal procedure is for the applicant to go first, by calling his or her witnesses and examining them. They are then cross-examined by the opponent. They may be re-examined by the applicant. There is no right of further cross-examination except by leave.

Examination in chief

This is done by question and answer. Questions should be relevant to the issues. Leading questions — that is, questions which suggest an answer — are not permitted. This prohibition is not enforced for merely formal matters.

Cross-examination

This is done by question and answer. Questions should be relevant to the issues. Questions may be directed to credit, but the cross-examiner is bound by an answer to a question as to credit. The duty of counsel is to put his or her case to opposing witnesses. This is a useful indication to all parties and to the arbitrator as to the likely areas of real contest.

Re-examination

No leading questions are permitted. Questions may be directed only to matters upon which the witness was cross-examined, not to new matters overlooked in examination in chief (except by leave).

Role of arbitrator with respect to witnesses

An arbitrator may ask questions, but he or she should not enter into the arena by attacking a witness. This may require self restraint, but the best judges are quiet judges.

An arbitrator should be slow to interfere, especially when the parties are represented. He or she should be very slow to stop cross-examination as this may amount to misconduct or be construed as bias. However, he or she may require parties to refrain from unfair questioning such as double questions (Have you stopped beating your wife yet?) or questions which are based on incorrect statements of evidence.

It is very doubtful that an arbitrator has the power to refuse to hear evidence, even where a party calls an expert in a field within the expertise of the arbitrator which the arbitrator may think a waste of time or even a vexatious prolongation of the hearing.

In all these situations, remember that the legal representative (assuming competence) knows where he or she is going. Remember also that a hint will usually be sufficient and effective, especially if it produces the consent of the parties.

Above all, remember that it is difficult to upset an award where the parties have been given free rein. It is easier to establish misconduct or departure from the rules of natural justice from a positive act of an arbitrator than from their inactivity.

Order of proceedings

The normal procedure is for the applicant to call all of his or her evidence and then close their case. In the absence of agreement to the contrary, this procedure should be observed. The applicant also calls evidence in reply to the cross-claims of his opponent and evidence to meet any allegations put to his or her witnesses in cross-examination.

It is only in exceptional cases that the applicant is entitled to re-open their case and submit more evidence (except for putting documents to an opponent witness in cross-examination). Such an exceptional circumstance would arise, for example, if the respondent failed to put a matter of complaint in cross-examination but then led evidence on it in their own case. The test is whether the applicant could have reasonably foreseen the need to call the evidence.

Conclusion

The basic principle that should guide the arbitrator is one of fairness to the parties. When in doubt, an arbitrator should admit the evidence — no one will know whether they acted upon it. Parties should be left to run their own case. ☼

Alliance contracting — why choose alliancing?

*J K Bremen**

When is alliancing appropriate?

Construction and mining projects in Australia have a reputation for being 'dispute ridden'. Over the past few years there has been an industry backlash and calls for alternative approaches to both project delivery and dispute resolution.

The traditional contractual approach has been an adversarial one. As a result, a culture of variations and claims, price blowouts and litigation has come to characterise the building, construction and mining industries in Australia. This has had a significant impact upon the performance of industry in terms of productivity and efficiency. Industry concerns have led to demands over the past decade for alternative approaches in project delivery and dispute resolution which encourage the prevention and resolution of disputes.

As a response to the concerns of the industry a variety of 'co-operative' delivery structures (such as partnering) were developed to encourage parties to co-operate and to complete project work on time and within budget — with mixed results. While these 'co-operative' structures employ different approaches to the allocations of cost, time and risks compared to traditional lump sum contracting arrangements, they have been unable to consistently deliver a co-operative environment which successfully facilitates the prevention and resolution of disputes.

The project alliance is a method of delivery which (for the 'right' project) promotes a non-adversarial, mutually profitable environment for project participants. Alliancing offers a new paradigm for the principal/contractor relationship. The underlying rationale for alliance contracting is to use the contract itself (via 'commercial drivers') to motivate the principal and contractor to work together to achieve a mutually beneficial goal.

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Alliancing represents an alignment of the financial interests of the principal and the contractor, thereby providing a financial incentive for parties to co-operate. Abrahams and Cullen describe alliancing as:

A project alliance may be defined as an agreement between two or more entities which undertake work co-operatively, on the basis of sharing project risk and reward, for the purpose of achieving agreed outcomes based on principles of good faith and trust and an open-book approach towards costs.¹

Typically the parties to an alliance agreement will function as an alliance team: as separate entities to the organisation of the individual contracting participants. Despite sometimes being known as a 'virtual corporation', an alliance team is not to be regarded as a separate legal entity such as a company, partnership or joint venture. The advantage of this is that an alliance is relatively easy to dissolve at the conclusion of the project, or upon termination during the project itself. Project participants should be wary and ascertain whether any alliance agreement, particularly any charter, results in unintended legal obligations (that is, fiduciary obligations) being imposed upon the parties.

Before I descend into the detail of alliance agreements themselves, it is appropriate to spend a minute or two looking at when a project alliance is the most effective method of delivery for any given project.

The alliance model is one that lends itself to major projects that will (for example) benefit from flexibility in the way in which the works are executed and also in projects where scope is uncertain. The model is generally best used in larger, complex projects rather than one-off design and construction jobs. Furthermore, the alliance model is an appropriate model to use in circumstances where the relationships between the parties to the alliance (principal, contractor, subcontractor and so on) are ongoing ones and where it is likely that the parties will be doing business with each other on future projects. Thus, while a project alliance is directly relevant to one particular project, it is often part of broader strategy between companies seeking to informally align with one another and, accordingly, to build a relationship.

Thus the alliance model is not one that lends itself to quick 'profit taking' by any of the parties and instead adopts a long term view.

Other speakers in this seminar will address the history of alliancing. What I

¹ 'Project alliance in the construction industry' (1998) 62 *Australian Construction Law Newsletter* at 31.

will do at this stage is provide some examples of when alliancing has been used in Australia and make a comment on its effectiveness.

While it is arguable that alliancing can be used in smaller projects, the projects that we have seen are largely those to do with major projects or infrastructure. We have also seen the alliance model widely used in the mining industry. Alliancing in these circumstances has proven remarkably successful.

Selecting alliance participants

There has been a great deal written about the importance of selecting the appropriate alliance participants. In 1998 I was visiting Canada and had the opportunity to talk with Bonita Thompson QC, a leading advocate of alliancing and co-operative project delivery in Canada and the United States. She had just written a short paper, entitled 'Five steps to assessing partnering readiness', which argued that the success of any 'co-operative project delivery structure' (be it partnering or alliancing) was determined at the very outset by the selection process. The importance of selecting the right participants to an alliance cannot be overstated. It is imperative that the parties to the alliance are aware of the goals of the alliance and are committed to them. What I thought I would do here is not outline the characteristics that are necessary for the participants, as that has been done in countless articles, but rather outline the process whereby the participants may in fact be selected.

It is often the case that prospective alliance participants need to commit considerable resources to bid for the project. Accordingly, alliancing is generally best suited to major projects where the parties have the interest and the resources to commit to such a selection process. Nonetheless, getting the selection process right is crucial to the success of the alliance.

Ordinarily all participants in the selection process will receive some payment from the principal for taking part (workshops, interviews, and so on). This will usually be done on a 'cost' basis with no allocation for profit or overheads in respect of participation in the process. However, it is not unusual for the successful alliance participants, at a later date, to be able to recover a margin of profit for their participation in the selection process (dependent upon the overall performance of the project).

The alliance agreement will ordinarily consist of the agreement itself (which takes the form of a contractual document) along with a number of annexures containing things such as scope and so on. One of the annexures is usually an 'alliance charter' (although it may be a separate document). The alliance charter

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Alliance partnership projects

Year	Project alliance/ owner	Non-owner participants	Outcome *
94-96	Wandoo B Oil Platform WA Ampolex	Leighton Contractors Dawson Brown & Root Joint Venture Ove Arup Pty Ltd Keppel Corporation	Highly successful alliance — \$13 m under budget.
94-97	East Spar Project WA (oil and gas) WMC Resources Limited	Kvaerner Oil & Gas Clough Engineering	Outstanding outcomes. — winner of industry awards.
96-99	Hot Briquetted Iron (HBI) WA (iron ore) BHP	Various	[Information unavailable]
97-2000	Northside Storage Tunnel Project NSW (water management) Sydney Water	Transfield Tunnelling Connell Wagner Montgomery Watson Kilpatrick Green	Achieved significant cost savings and efficiencies.
98	National Museum Acton Point ACT - Building Commonwealth Government	Ashton Raggatt McDougall Robert Peck Von Hartel Trethowan Civil & Civic Tyco International Honeywell Limited Anway & Company	[Information unavailable]
2000	Inner Northern Busway - Section 1 Qld (urban development) Queensland Department of Transport	Transfield Construction Queensland Henry Walker Eltin Contracting GHD Pty Ltd Halcrow Pacific Pty Ltd	This alliance was terminated due to political difficulties between local and State governments.
2000	Pacific Motorway Package #3 Qld (road infrastructure) Queensland Department of Main Roads	Thiess Contractors SMEC Australia	Reached practical completion five months earlier than original forecast.
2000-2002	Gladstone Area Water Board Awoonga Dam Raising Project	Sun Water PPK Consultants Thiess Contractors	[Information unavailable]

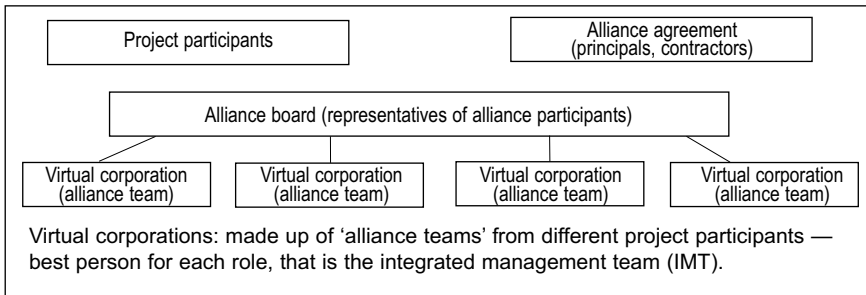
**Source: Ross J, seminar presented to the Institute of Engineers, 17 August 2000.*

is a broad statement by the participants as to the way in which they wish the project to proceed. While the charter appears, on its face, to be a broad 'motherhood' statement, it can (and in my view will) serve to inform the way in which the contract is interpreted in the event that a dispute arises. Furthermore the alliance charter has the potential to impose other duties upon the participants (such as potential fiduciary duties).

Structure of the alliance

While I won't examine the structure of the alliance itself in great detail — instead, I shall examine the documentation of the deal on a practical level — I thought it appropriate to broadly outline the way in which an alliance might look.

Typical Alliance Structure



The anatomy of an alliance agreement

What I thought I'd do here is give you a basic overview of the way in which an alliance agreement is likely to be put together. Each alliance is slightly different but there are certain key parts of the alliance agreements which will be inherently the same. Rather than provide an overview I thought it may be more useful to describe clauses from actual alliance agreements and to comment on them so that you can get a 'flavour' of what an alliance is all about.*

* Editor's note: this version of Mr Bremen's article has been edited, for the sake of brevity, to refer only to those clauses that characterise an alliance agreement and those that are most relevant to conflict management and dispute resolution. For a full copy of the article please contact the Editor.

Overriding commitments

Commitment to alliance principles

The alliance participants hereby commit to work together in a manner so as to achieve the successful delivery of the alliance works.

This clause seems to us to say little, although it may have quite a substantial impact upon the way in which the courts interpret the agreement generally. What we mean by this is that it goes to suggest that there is a duty on the parties to act in good faith in respect of the contract. This will affect the way the contract is interpreted and the participants' obligations in respect of the contract itself. Nonetheless, it is in keeping with the general principles of alliancing and accordingly cannot be dispensed with unless there is a shift to a more traditional delivery model.

The alliance participants have developed, committed to and signed off the Alliance Charter in Schedule X. The alliance participants undertake to adhere to the principles set out in the Alliance Charter ('the alliance principles').

The alliance charter is likely to be viewed by a court as either a part of the alliance contract itself or as a collateral contract that goes to inform the interpretation of the alliance contract. The impact that the alliance charter has upon the participants' obligations under contract will be significant. Accordingly, the sorts of obligations that go under alliance charter will be crucial to the way in which the contract is to be interpreted and accordingly must be approached with the requisite caution.

Commitment to act in good faith

Each alliance participant undertakes to conduct its activities arising out of this PAA in good faith. Acting in good faith in this case includes:

- (a) being fair, reasonable and honest;
- (b) doing all things reasonably expected of it by another alliance participant and by this PAA;
- (c) not impeding or restricting another alliance participant's performance; and
- (d) giving as much weight to the interests of the project as to one's own self-interest.

There is a great deal in this clause but we note that there could still be more,

as the definition is 'inclusive'. In particular it colours the obligations of the contractor in respect of the things that it promises to do under the contract. Any disclosures that it makes needs to be honest and any exercise of rights under the contract needs to be seen as fair and reasonable. Furthermore, there is an obligation for the parties to do all things reasonably expected of them by another alliance participant (although quite what this means we are unsure). Perhaps this subclause could be clarified. In respect of the obligation not to impede or restrict another alliance participant's performance, we are of the view that this could also adversely affect the contractor's rights under the contract. The most concerning section is (d): 'giving as much weight to the interests of the project as to one's own self-interest'.

This clause indicates that the contractor may be unable to act in its own self-interest in respect of its exercise of a right under the contract. This obligation is a significant one. We do not think that this obligation necessarily imposes a fiduciary obligation on the contractor, although it comes close (a fiduciary duty is a duty to act in the interest on another party over one's own). What it does do is significantly limit the options that the contractor will have in respect of exercising its rights regarding things like termination.

Project alliance board

Establishment duties and authority

The PAB is hereby established with an overall charter to administer this PAA and provide guidance to the alliance participants with respect to the work under the alliance.

This clause provides for the establishment of the project alliance board (PAB).

The alliance participants must implement all decisions and directions of the PAB (and of the owner where expressly provided for in this PAA) in respect of the work under the alliance given in accordance with this PAA.

This clause provides for the obligation upon the contractor to comply with all directions of the PAB (the contractor will be represented on this board). Furthermore, the contractor must comply with all of the directions of the owner (where the owner has a right to direct under this contract).

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Representation

The PAB will consist of one or more senior representatives from each of the alliance participants (the PAB Members).

This clause provides for the membership of the PAB. The contractor would wish to ensure equal representation on the PAB with other alliance participants — in particular, the principal — and perhaps a weighting over the designers. We consider this important despite the requirement for unanimity for the PAB's decisions (see clause below).

At the time of the execution of this PAA and unless and until advised otherwise by an alliance participant the PAB Members are those persons nominated in the Annexure.

It is imperative that the contractor select the appropriate personnel for membership of the PAB. As will become evident later in the contract, PAB decisions need to be unanimous. Accordingly, an appropriate person or persons with the appropriate interpersonal skills needs to be nominated for this role.

Subject to clause X.X.X, an alliance participant may replace its PAB Member(s) at any time, or nominate a substitute (substitute PAB Member) by giving notice in writing to the other alliance participants at least 24 hours prior to the change in representation.

This clause provides that the members of the alliance board may be changed with 24 hours notice.

The alliance project manager or acting alliance project manager may not act as a substitute PAB Member.

This clause simply provides that the alliance project manager may not sit on the PAB.

In respect of any matter which is within the powers of the PAB as contemplated by this PAA, the individual PAB Members (and their substitute PAB Members) are hereby authorised to bind the alliance participant they represent to the decisions of the PAB.

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This clause provides that the contractor's representative(s) on the PAB can enter into binding agreements with the PAB in respect of the contract. What this means is that the contractor will be contractually bound by its representative on the PAB. Accordingly, it would be appropriate for a senior person to be appointed to this role who has the autonomy to make these decisions on behalf of the contractor.

Voting and decision making protocols

Subject to clause X.X.X, all decisions by the PAB will be by vote as follows:

- (a) each PAB Member (or substitute PAB Member) will be entitled to cast a vote;
- (b) all votes must be cast; and
- (c) every decision by the PAB must be unanimous — that is, it must be supported by all PAB Members.

This clause provides that the PAB members have an equal entitlement to vote and that each decision must be unanimous. Accordingly, the composition of the PAB (that is how many members the contractor has on the PAB) is crucial.

Duties of the PAB

The duties of the PAB are to:

- (a) set policy and give philosophical direction for the alliance within the boundaries set out in this PAA;
- (b) appoint persons to the integrated management team (IMT) referred to in clause X.X, monitor the performance of the IMT and implement appropriate measures to correct undesirable trends;
- (c) set, review and revise limits of delegated authority as appropriate;
- (d) issue various directions, approvals and decisions as required by this PAA;
- (e) initiate and/or approve the commitment of reasonableness to the project and provide corporate support as necessary;
- (f) resolve any differences/issues that are referred to it; and
- (g) provide leadership and set a visible example for all to see of the alliance principles in action at a senior level.

The PAB has a wide brief. It sets policy and direction for the project. It is responsible for the appointment of persons to the IMT. It can issue directions. It can commit resources. It is responsible for dispute resolution. Accordingly, those

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persons that the contractor appoints to the PAB need to be skilled in the appropriate areas.

Meetings of the PAB

Prior to the date of practical completion, the PAB will hold a meeting at least every month.

The PAB will hold monthly meetings.

After the date of practical completion, the PAB will meet as often as is necessary to enable it to fulfil its duties under this PAA.

The PAB may meet after the date of practical completion.

Minutes of meeting

The alliance participants will arrange for a secretary ('the PAB Secretary') who will attend all PAB meetings.

This is an administrative responsibility that is necessary.

The PAB Secretary will record all resolutions of the PAB and all actions arising out of each PAB meeting.

We have no comment in this regard other than to say that the contractor should ensure that it gets a copy of all of these resolutions and actions arising out of each meeting (and the minutes).

Resolution of disagreements

Procedure for handling disagreements

The alliance participants will try to settle any alliance disagreement in good faith in a manner consistent with the alliance principles.

This poses an obligation of 'good faith' in respect to the resolution of disputes. Good faith is defined under the PAA (refer our comments above) and the impact that this duty has upon the resolution of disputes and the exercise of rights under the contract is a significant one.

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If, despite their efforts, an alliance disagreement remains unresolved, an alliance participant, if it wishes to pursue the matter, may give written notice to each of the other alliance participants requesting that the alliance disagreement be considered by the PAB.

This clause provides for a method of ADR. What we mean by this is that a dispute may be referred to the PAB for consideration. This is in keeping with the standard alliance approach.

The PAB will consider any alliance disagreement referred to it and will give due consideration to submissions by all alliance participants, to any recommendation by the alliance project manager in respect of the alliance disagreement and to any other relevant information.

This clause provides for a number of things. Firstly it provides (by implication) that alliance participants will be able to make submissions to the PAB in respect of disputes. Secondly, it requires the PAB to have regard to these recommendations (and to those of the alliance project manager) and to 'any other relevant information'. The PAB will then make a decision. This is the only dispute resolution clause provided for under this contract. That said, the contractor needs to be aware that its rights in respect of resolving disputes by third party mechanisms (arbitration or litigation) will be limited by the operation of this clause. Certainly, the contractor will be required to go through this procedure before it has any consideration of other forms of dispute resolution.

No arbitration or litigation

Except as provided in clause X.X.X below it is the intention of the alliance participants:

- (a) that the PAB will deal with any Alliance Disagreement and the Alliance Participants will do their utmost to ensure that the PAB is able to fulfil this crucial function effectively and efficiently;
- (b) that there will be no arbitration or litigation between the Alliance Participants on any Alliance Disagreement.

This clause purports to oust the jurisdiction of the court in respect of the resolution of any disputes that arise between alliance participants during the project. Clause (a) seems to us to impose an obligation of the parties to do

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their very best to ensure the PAB can resolve a dispute. If the PAB is unable to resolve the dispute there is a bar upon any arbitration or litigation in respect of any 'alliance disagreement'. The 'alliance disagreement' is defined in Schedule 1 as 'any difference of opinion and/or conflict between the alliance participants arising out of the work under the alliance, the alliance works or this PAA'.

This is a very broad definition. This clause, on its face, catches any sort of dispute that might arise out of this project. We have some concerns as to whether or not agreements like this are enforceable. There is certainly case law which suggests that they are not (*Novamaze v Cut Price Deli* [1998] 1421 FCA). In any event, given the uncertainty, there is an equal possibility that it is enforceable. Such clauses in alliance agreements are yet to be tested. The contractor needs to be aware that by entering into an agreement such as this it may forgo any rights it has in respect of arbitration or litigation of disputes arising out of the project. This is a very important issue to consider when determining whether or not this agreement is commercially acceptable to you. One view is that some alternative (albeit limited) is preferred.

A failure by any alliance participant to perform any obligation or discharge any duty under or arising out of this PAA will not give rise to any enforceable obligation at law or in equity whatsoever save and except to the extent that the failure also constitutes an event of default.

This clause also purports to act as a bar to actions in respect of any breaches of obligations under this contract. The exception to this is an 'event of default'. Event of default is defined in Schedule 1 as follows.

An event of default is deemed to occur if an alliance participant:

- (a) commits an act or omission amounting to Wilful Misconduct in relation to any significant duty, obligation, term, condition or stipulation arising out of this PAA;
- (b) fails to take out or maintain an insurance policy that it is obliged to take out and maintain pursuant to clause X in accordance with the requirement set out in clause X;
- (c) fails to honour an indemnity expressly provided under this PAA;
- (d) refuses to rectify an alliance defect as directed under clause Y; or
- (e) refuses reasonable access for an audit referred to in clause Z.

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An event of default is also deemed to occur if an alliance participant:

- (a) informs another alliance participant in writing or creditors generally that it is insolvent;
- (b) commits an act of bankruptcy;
- (c) has a bankruptcy petition presented against it;
- (d) is made bankrupt;
- (e) has a meeting of its creditors called with a view to:
 - (i) entering into a scheme of arrangement or composition with creditors;
 - (ii) placing it under official management;
- (f) enters into a scheme of arrangement or composition with creditors;
- (g) is subject to a resolution passed at the meeting of its creditors to place it under official management;
- (h) is placed under official management;
- (i) has a receiver of its property or part of its property apportioned;
- (j) is the subject of an application to a court for its winding up, which application is not stayed within 14 days;
- (k) has a winding up order made in respect of it; and/or
- (l) has execution levied against it by its creditors, debenture holders or trustees under a floating charge.

Wilful Misconduct means:

- (a) an intentional act or omission by an Alliance Participant carried out with disregard for the harmful consequences for another Alliance Participant, but does not include any error of judgment, mistake, act or omission, whether negligent or not, made in good faith by an Alliance Participant; or
- (b) failure by an Alliance Participant to make a payment to another Alliance Participant which has become due under this PAA.

Accordingly, on its face, the contractor may have some rights, for instance in circumstances where a project alliance participant goes into liquidation or becomes insolvent. In any event, this clause may also operate as a bar to actions and has very serious implications for the contractor. This is not an uncommon clause (indeed it is standard) in respect of alliance agreements, although it is clear that it will materially impact upon the contractor should any aspect of the project fall into dispute.

In our view there also must remain some degree of residual uncertainty as to whether the operation of the *Trade Practices Act 1974* (Cth) is excluded.

Other important clauses

Alliance contracts also contain clauses that typically:

- ensure the transparency of all payments made under the PAA;
- deal with the appointment of an external auditor who reports to the PAB — whilst the external alliance auditor will be the owner's agent, he or she will have access to the contractor's books and records in respect of the project;
- note that the contractor can also appoint the external auditor to act on its behalf to audit the owner's books;
- require the retention of records;
- give the terms of compensation, which usually consists of a three limb compensation model providing for the 'real' cost for work undertaken, a fixed lump sum for project and non-project specific overheads, and pain share/gain share; and
- provide a variation procedure, requiring standard forms and supporting information to be submitted to the PAB for review and possible certification.

Risks to contractors

The principal risks to contractors are:

- profit;
- disputes clauses ('no disputes'); and
- the need to be flexible.

Benefits for contractors

The principal benefits for contractors are:

- potential (higher than usual) profit;
- relationship building; and
- 'repeat' business.

The obligation of good faith

This obligation is one which has been growing in Australian law for some time. It is clear under an alliance that parties have an obligation to act in the

interests of another party (in certain circumstances) where that interest is in the best overall interest of the project (rather than their self-interest). This produces an interesting legal conundrum. Overlaid with the idea of good faith, this introduces an element of uncertainty to projects.

Good faith includes:

- being fair, reasonable and honest; and
- doing all things reasonably expected by the other party to the contract.

Sir Anthony Mason says he thinks it probable that the 'concept of good faith' embraces no less than three related notions:

- an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
- compliance with honest standards of conduct; and
- compliance with standards of contract which are reasonable having regard to the interests of the parties.

The notion of good faith (and other equitable duties) that may be imposed by the courts when interpreting alliance agreements introduces considerable uncertainty into the project participants. This will be an area to keep a close watch on for the future.

Conclusion

Alliancing represents an effort to increase the efficiency with which projects are delivered (through the use of 'commercial drivers') and to share 'risk and reward' between principals and contractors. The delivery structure has proven very successful and, in the appropriate project, should be given consideration. Nonetheless, for a contractor, entering in a project alliance carries with it substantial risk and it is imperative that contractors are alive to the risks prior to embarking on the alliancing adventure. ☼

Andrews v Bradshaw — a differing view

*A A de Fina**

The case of *Andrews v Bradshaw* [2000] BLR 6, heard in the English Court of Appeal, was the subject of reporting in Volume 20 No 1 of *The Arbitrator & Mediator*.

Particular attention was focused on the opinion of Mance LJ expressed obiter dicta in the following terms:

On the face of it, although this was not a point pursued directly as a matter of complaint before us, it was unwise and inappropriate for the arbitrator, after accepting appointment by the President of the Royal Institute of Chartered Surveyors, to enter into a one-sided agreement of this nature and to receive any payment under it from only one party ... He was, of course, quite entitled to ask both parties whether they would agree to such an agreement, but he should not, I think, have entered into such an agreement with only one party once the other party refused to do so.

A possible consequence of following this line of reasoning is that a party, drawn to arbitration against its will, can refuse to agree to either or both the level of the arbitrator's fees or the provision of security for such fees and, as may be, other costs or expenses incurred by the arbitrator in the conduct of the arbitration.

An obvious effect of such refusal will likely be to abort, avoid or delay the arbitration and possibly allow the recalcitrant party to avoid its original agreement to submit to arbitration.

This type of conduct by a party, although not common, is certainly not unknown in Australia.

Training by the Institute of Arbitrators & Mediators Australia reinforces the

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necessity of obtaining prior approval from the parties as to the level of fees or reimbursement to an arbitrator and the necessity of securing fees, costs and expenses by the lodging of funds in escrow. The Institution's Practice Notes on the preliminary conference reflect these requirements.

The requirement for prior agreement of fees is soundly based and security for fees, costs and expenses makes sound commercial sense. Both are consistent with the traditional or conventional arbitral practice in most common law jurisdictions.

On the other hand, a party, having subscribed to an agreement to submit to arbitration, should not be able to avoid that agreement, a resulting arbitration and any obligations that might consequentially flow by taking the simple position of refusing to agree the arbitrator's proposed fees or refusing to lodge security.

However, an arbitrator is not necessarily unarmed in such circumstances of lack of agreement or refusal. The 'uniform arbitration Acts' — the arbitration Acts now in force in all States and Territories of the Commonwealth — deal with costs at s 34. By s 34(1), absent a contrary intention expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) are in the discretion of the arbitrator and an arbitrator may:

- (a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;
- (b) tax or settle the amount of costs to be so paid or any part of those costs; and
- (c) award costs to be taxed or settled as between party and party or as between solicitor and client.

Section 35 of the 'uniform Acts' provides as follows:

35. Taxation of arbitrator's or umpire's fees and expenses

- (1) If an arbitrator or umpire refuses to deliver an award except on payment of the fees and expenses demanded by the arbitrator or umpire, the Court may, on application made by a party to the arbitration agreement, order that —
 - (a) the arbitrator or umpire deliver the award to the applicant on such terms as to the payment of the fees and expenses of the arbitrator or umpire as the Court considers appropriate; and
 - (b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

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- (2) Notwithstanding that the amount of the fees or expenses of the arbitrator or umpire may be fixed by the award, those fees or expenses may, on the application of a party to the arbitration agreement or of the arbitrator or umpire, be taxed in the Court.
- (3) The arbitrator or umpire and any party to the arbitration agreement shall be entitled to appear and be heard on any taxation under this section.
- (4) Where the fees and expenses of an arbitrator or umpire are taxed in the Court, the arbitrator or umpire shall be entitled to be paid by way of fees and expenses only such sum as may be found reasonable on taxation.

In some widely recognised and applied institutional rules there is express provision to overcome circumstances where one party refuses or fails to pay amounts ordered by way of security. For example, the Rules of the International Court of Arbitration of the International Chamber of Commerce at art 30(3) provide, *inter alia*, as follows:

The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. ... However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other party fail to pay its share.

The provisions of the ICC Arbitration Rules must be distinguished from the normal circumstances that might arise in Australia in domestic arbitrations, as the monies are payable to the ICC which, at the conclusion of an arbitration, determines in its discretion the fees that shall be payable to an arbitrator consistent with a scale of fees forming part of the Rules. Those fees are paid by the ICC from monies lodged with the ICC.

However, this is not the case in the UNCITRAL Arbitration Rules. The UNCITRAL Rules were created by an arm of the United Nations and are widely recognised and applied as representing neutral and appropriate rules for the conduct of arbitration. These Rules provide, at art 41, as follows.

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

...

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4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

The costs referred to in art 41 are defined in art 38 which also empowers the arbitral tribunal to set its fees in the following terms.

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The terms 'costs' includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Additionally, art 39 provides the basis for the arbitrators' fees and the possibility of independent review in the following terms.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in

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international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Under the UNCITRAL Rules it is the tribunal itself making orders in a similar manner to the normal conduct of domestic arbitrations in Australia.

A consequence of failing to obtain agreement on level of fees or the payment of security monies in escrow may be that although the arbitrator may have fees, costs and expenses ultimately settled pursuant to the provisions of s 34 and s 35 of the uniform Acts the arbitrator will, in actuality, be funding the arbitration, even if only by bearing the costs and expenses. An arbitrator may also be denied the opportunity for progressive payment of fees, a facility which may be both reasonable and necessary, at least from the arbitrator's point of view, in long running matters.

If the intention of the recalcitrant party is to avoid the arbitration, then the proposition of Mance LJ in *Andrews v Bradshaw* — that the arbitrator was entitled to ask both parties whether they would agree to an arrangement where only one party agreed the level of fees, costs and expenses and lodged security — would appear to be a futile exercise. The party that did not agree to the arbitrator's fees or to pay security in first instance for the purposes of avoiding or delaying the arbitration would have little reason to agree that the arbitrator could proceed upon agreement for payment made only with the other party and actual payment only by that other party.

While it is open to each arbitrator to determine whether or not they proceed

with an arbitration, the proposal or inference that it would be unwise or incorrect to proceed with an arbitration in circumstances where only one party has agreed fees and/or lodged security monies does not necessarily act to the advancement of arbitration as a dispute resolution mechanism or to ensure justice.

There are legitimate means to overcome any perceived problems if an arbitrator is so minded. Such means may be to rely upon s 34 and s 35 of the 'uniform Acts', to proceed without agreement but to record clearly and precisely the circumstances as they have arisen and the reasons for proceeding, or to adopt a position of refusing to deal with a cross-claim (subject to the particular circumstances allowing such avoidance).

The common wisdom in Australia — that if the arbitrator does not obtain agreement from both of the parties to an arbitration to his terms and conditions of engagement then the arbitrator should withdraw — does little to advance arbitration as an appropriate means of resolution of commercial disputes.

An arbitrator has as much a duty to proceed with an arbitration when it is appropriate to do so as to withdraw from an arbitration, particularly if the reason for withdrawal plays into the hands of the recalcitrant party.

Caution there must be — but not in abrogation of duty. %

The Institute Of Arbitrators & Mediators Australia Rules for the conduct of commercial arbitrations

*Robert Hunt**

Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.¹

Over the past decade or so, there has been an increasing trend in many countries away from traditional litigation and towards arbitration as a means of determining commercial and construction disputes. By the late 1980s, the practice of arbitration in the common law world had become bogged down with processes derived from litigation which, unfortunately, made the practice of arbitration much less efficient than it should otherwise have been.

It is fair to say that litigation or arbitration of construction disputes in the traditional manner became enormously time consuming and expensive. Of their very nature, construction disputes are usually complex. Claims by contractors often involve large numbers of disputed variation claims or extra-contractual claims, as well as claims for extension of time to recover amounts deducted as liquidated damages for late completion. Such claims are usually met by substantial claims by proprietors for damages for defective and/or incomplete works, and claims for liquidated or general damages for late completion. Attempts by drafters of contracts to limit liability (by insertion of contractual clauses restricting the circumstances in which claims for additional payment could be made) were countered by a good deal of inventiveness in the framing

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1 The Honourable Justice Michael Kirby AC CMG of the High Court of Australia, in an address delivered at the opening of a new Dispute Resolution Centre operated by the Institute of Arbitrators & Mediators Australia in Melbourne on 27 July 1999 — see Volume 18 number 2 of *The Arbitrator* (September 1999), at 107.

of extra-contractual claims, invoking the provisions of fair trading legislation, implied terms of good faith and reasonableness, and principles of estoppel and unconscionability, to name but a few.²

Within the last decade, in recognition of the increasing unpopularity of arbitration because of the resultant increase in cost, there have been concerted efforts throughout the common law world to conduct arbitration in a manner which is not a mere imitation of court processes and to thereby make use of arbitration's natural advantages.³

The Institute of Arbitrators & Mediators Australia *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)*, introduced in August 1999, provide a structural framework for the use of 'novel approaches, different techniques and a new psychology' in the conduct of both international arbitrations and Australian domestic arbitrations.

The new Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)

The objective of the new Rules is to provide an arbitral framework for the just resolution of disputes in a manner which:

- is both expeditious and cost effective;
- is consistent with the statutory requirements for the conduct of arbitrations; and
- preserves the fundamental right of parties to a dispute to agree on the manner in which their arbitration is conducted, by providing default provisions which are expressed to be subject to the contrary agreement of the parties.

2 In construction and other technical disputes, the time and costs associated with experts' reports form a very significant part of the overall time and cost of preparing a matter for hearing, with costs often approaching (or even exceeding) the legal costs. By way of illustration, a study by the Australian Institute of Judicial Administration in 1992 found that, in a major class of litigation in one Australian state (Victoria) involving relatively simple technical issues, expert witness expenses accounted for between 16 and 27 per cent of the cost of cases.

3 Recent examples include the *Arbitration Act 1996 (UK)*, the *Arbitration Act 1996 (NZ)*, and the *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Arbitration Rules)* adopted by the Institute of Arbitrators & Mediators Australia on 13 August 1999.

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The new Rules, as well as the Institute's *Rules for Conduct of Commercial Mediations* and the *Rules for Expert Determination of Commercial Disputes*, are available at the Institute's website at <www.iama.org.au>.

The new Rules are arranged in three Parts.

Part I (Preliminary) contains various machinery provisions dealing with such matters as nomination and appointment, the commencement of the arbitration process, and replacement of an arbitrator who, after entering on the reference to arbitration, becomes incapable of continuing.

Part III (General) contains various facilitative provisions, including:

- definitions of various terms used in the Rules (Rule 16);
- application of the Rules being subject to the statute law which governs arbitration in the place where the arbitration is held and any other agreement of the parties (Rule 17 para 1);
- application of the Rules to domestic arbitrations and, subject to Rule 21, to international arbitrations, terms which are defined in Rule 16 (Rule 17 para 2);
- the counting of days (Rule 18);
- procedure when there are multiple arbitrators (Rules 19 and 20); and
- application of the Rules to international arbitrations, subject to the UNCITRAL Rules (Rule 21).

There is a distinction to be drawn between two types of provision contained in Part II (the Arbitral Procedure), namely:

- rules which impose duties on the arbitrator and the parties, and which are expressed in mandatory terms (Rules 10 and 11); and
- the remaining Rules which set out various procedural provisions, and which are expressed to be subject to the contrary agreement of the parties or any applicable statute law.

Rules 10 and 11 are as follows.

Rule 10 General Duty of Arbitrator

1. The Arbitrator shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the matters in dispute.

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2. The Arbitrator shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to be heard on the procedure adopted by the Arbitrator.

Rule 11 General Duty of Parties

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

Rules 10 and 11 are expressed in mandatory terms so that parties who choose to adopt the Rules for the resolution of international or Australian domestic disputes can be confident that there is an express written commitment by the arbitrator and the other party or parties to achieve a just resolution of the dispute as expeditiously and cost effectively as possible.⁴

The provisions contained in the other Rules in Part II are expressed to be subject to the contrary agreement of the parties or any applicable statute law. Those other provisions include:

- extension of the arbitration beyond the particular dispute notified, to other disputes under the agreement (a term defined in rule 16) by right or on terms (rule 9);
- waiver of a right to object to jurisdiction or the manner in which the arbitrator conducts the arbitration, unless that objection is taken expeditiously (rule 12);
- the power of the arbitrator to make such directions as to procedural and evidentiary matters as he or she sees fit (rule 13 para 1);
- incorporation of the default procedural provisions contained in Schs 1 and 2 (rule 13 para 2);
- the use which the arbitrator may make of views, and obtaining of technical and legal assistance by the arbitrator, subject to complying with the requirements of natural justice (rule 14); and

⁴ Rules 10 and 11 are based on ss 33 and 40 of the *Arbitration Act 1996* (UK).

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- the time at which, and the circumstances in which, the arbitrator shall deliver the arbitral award (rule 15).

The default provisions contained in these Rules are also directed to ensuring that disputes are determined expeditiously and cost effectively.

Under Rule 13 para 2, unless the parties otherwise agree, the default procedure in Sch 2 applies to arbitrations conducted under the Expedited Arbitration Rules, and the default procedure in Sch 1 applies to arbitrations other than those conducted under the Expedited Arbitration Rules. Schedule 2 provides a default procedure with a predetermined timetable for the arbitration to be, as far as possible, conducted on documents. In contrast, the default procedure in Sch 1 maximises the flexibility of the arbitrator and the parties in devising a procedure which is custom made for a particular dispute after it arises.

As noted above,⁵ in construction and other technical disputes, the time and costs associated with experts' reports form a very significant part of the overall time and costs of preparing a matter for hearing, with costs often approaching (or even exceeding) the legal costs. Schedules 1 and 2 provide a mechanism whereby this time and cost may be greatly reduced.

Schedule 1 provides that the arbitrator may make such directions and rulings as the arbitrator considers reasonably appropriate, including in relation to such matters as:

- defining the issues in dispute (paras 1 and 2);
- narrowing the issues by various means, including meetings, experts' conclaves⁶ and the preparation of joint experts' reports (paras 3 and 4);
- providing factual information to enable the issues to be narrowed (paras 5, 6 and 7);
- hearing of the remaining issues, and preparation for it (paras 8 and 9); and
- service of offers of settlement without prejudice except as to costs (para 10).

5 Justice Michael Kirby above note 1.

6 I should perhaps explain the reference in the Rules to 'experts' conclaves'. Notwithstanding that the Concise Oxford Dictionary defines 'conclave' as 'meeting place or assembly of cardinals for election of pope; private meeting', the term is widely used in Australian dispute resolution circles as a term of art for a meeting between technical experts, chaired by an arbitrator or mediator, to narrow the technical issues which will ultimately require resolution (where the parties and their lawyers may be present, but do not usually actively participate).

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In making such directions and rulings, the arbitrator is bound by the duties imposed by rule 10.

Schedule 1 is intended to give the arbitrator, in consultation with the parties, the utmost flexibility in determining a procedure which is fair, expeditious and cost effective according to the circumstances of the particular dispute, rather than imposing a defined procedure as set out in Sch 2.

In contrast to Sch 1, Sch 2 is intended for disputes which can, by and large, be determined based on documents, such as disputes where issues of credit either do not arise or are minimal.

Schedule 2 sets out a timetable for the various steps to be taken in providing the arbitrator with the documentary information necessary for determination of the dispute expeditiously and cost effectively. It expressly provides that the times fixed under Sch 2 may be varied by agreement of the parties or, in the absence of agreement, on proper cause being shown to the arbitrator.

Schedule 2 contains some flexibility, in providing that:

- the arbitrator may, if he or she considers it appropriate, modify the timetable to enable issues which would otherwise be the subject of experts' reports to be narrowed by meetings, experts' conclaves and joint reports in terms which are similar to those contained in Sch 1 (paras 5 and 6 of Sch 2); and
- the arbitrator may make such other directions or rulings as he or she considers appropriate, including rulings for defining issues, narrowing issues, providing factual information to enable the issues to be narrowed, and service of offers of settlement without prejudice except as to costs (para 7 of Sch 2).

The arbitrator is then to determine the matter based on the written material unless they determine that an oral hearing is necessary to explain or resolve conflicts in the written material in relation to one or more of the issues in dispute, with any such oral hearing being limited to that extent and conducted as soon as practicable and at a time and in a manner determined by the arbitrator (paras 8 and 9 of Sch 2).

Conclusion

The Institute of Arbitrators & Mediators Australia is committed to integrity, innovation and standards of excellence in the provision of expeditious and cost

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effective dispute resolution services. The new *Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules)* reflect that commitment.

By choosing to determine their disputes under the Institute's new rules, parties or lawyers involved in international arbitrations and Australian domestic arbitrations can be confident that the arbitrator will be committed to determining the dispute fairly, expeditiously and cost effectively. ☼

Pitfalls in mediation

George H Golvan QC*

According to the *Shorter Oxford Dictionary* a 'pitfall' is a 'hidden or unsuspected danger, drawback, difficulty or opportunity for error'.

To illustrate the meaning of the word in context, the *Shorter Oxford Dictionary* quotes the popular singer Neil Sedaka who profoundly observed, 'My life too has had its brief summits and sudden pitfalls'.

The word owes its derivation to a concealed pit into which wild animals would fall and be unable to escape.

Like Neil Sedaka, most mediators have also experienced those brief summits or highs when the parties are able to let go of a debilitating dispute and are willing to commit to a resolution. Some of my most rewarding experiences as a mediator have been when the parties are able to ignore me and enter into a process of constructive negotiations between themselves, empowered by the realisation that they can actually communicate effectively with one another.

By the same token, most mediators have also experienced the sudden pitfalls which can occur during the mediation process, which sometimes result in protracted and exhausted negotiations, even after significant progress has been made, collapsing in acrimony over what seems to be a relatively small difference or a minor issue.

In writing this paper, which focuses on the pitfalls encountered by mediators, I do not propose that there is a foolproof method for conducting mediations, because there is none. Sigmund Freud once remarked that there were three tasks that were impossible to do well: run a country, raise a child and conduct a psychoanalysis. To this list can be added the task of mediating a dispute. It has also been pointed out¹ that mediators may wish and strive to be impartial, even-handed, impeccably trustworthy, empathetic and clear sighted; however, these objectives may soon be found to conflict with the need to overcome resistance, promote compromises and orchestrate a settlement of the dispute.

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1 Kressel K 'An exploratory analysis of role strain in international mediation' in Rubin J Z (ed) *Dynamics of Third Party Intervention* Praeger New York 1983 p 198.

In my experience, although mediation is not an easy task, there are a number of reasonably predictable pitfalls which can confront mediators in many mediations, but which can often be anticipated in advance and overcome by adopting effective strategies. Some of the pitfalls are obvious, such as the need for impartiality and neutrality which are vital to the mediation process. Some are less apparent and need to be watched for. I want to identify some of these pitfalls and suggest a number of preventative strategies.

Failure to control the process

One of the frequent dangers which can occur in a mediation is that the parties or their advisers attempt to dictate to the mediator how to conduct the process. This can include a range of procedural issues, such as:

- how long the mediation should take;
- the location for the mediation;
- whether there should be a joint session;
- who should attend the joint session;
- whether the parties themselves should talk, or only their legal advisors;
- the speaking order of the disputants;
- what are the issues in dispute;
- the order in which the issues in dispute should be addressed;
- which of the parties should make the first offer; and
- whether written terms of settlement, confirming an agreement in principle, should be prepared at the mediation conference, or subsequently by the parties.

These are all non-substantive process issues which should, if possible, be determined by the mediator rather than developed by the parties themselves. The mediator is selected for his or her process skills and should control the process, whilst the parties control the negotiations and the outcome. This means endeavouring to follow a particular process or set of negotiation procedures which the mediator knows, through training or experience, gives the best opportunity for resolving the dispute. I invariably follow a time honoured, established process which I know works for me. It is important, in my experience, that mediators ensure that the process which they prefer to use is not derailed, even with the best of intentions. Attempts by the parties to dictate the process is more often than not a recipe for problems and I make every effort to ensure that

the process which I desire to follow is observed. This is not done by adopting a dictatorial attitude; rather, by taking a firm and persuasive approach on process issues. For example, the mediator may say at a joint session:

Mediations seem to work better if each party has the opportunity to present their concerns without interruption. It seems to me, that the following are the key issues in dispute between the parties, and I propose to identify them on the whiteboard.

At this mediation, the mediator is in control of the process and the parties are in control of the outcome, so that it is important that we discuss the issues in an organised way.

Generally, with some degree of gentle persuasion, the parties accept the mediator's control of the process. On some occasions, I have even been willing to abort the mediation rather than to allow one of the parties to hijack the process by what I considered were unreasonable procedural demands.

Failure to listen

Perhaps the most significant error which many mediators make — and for that matter some arbitrators and judges — is a failure to listen. It is not surprising that the mediator, who has the job of chairing the negotiation sessions, is inclined to talk and frequently intervene, when in fact what the disputants are really looking for are listening skills. I regret that this is a particular problem of lawyer mediators. If I were to give myself instructions at the beginning of every mediation they would be to listen more and interrupt less. At a meeting of some 50 experienced commercial mediators at a facilitated workshop in Queensland in August 1999, the feature which they selected as most important in a chosen mediator was listening skills.² It is only by listening that a mediator is able to carry out the necessary diagnosis of the problems, which enables the mediator to pick up on what the *real* issues are between the parties, where their important interests and needs lie and, broadly, where they are coming from in the dispute. This allows the mediator to set the foundation for generating suitable options for settlement. Professor John Wade of Bond University prepared a summary of practices emphasised by the experienced

2 Wade J H 'What skills and attributes do experienced mediators possess?' LEADR Conference, 21-22 August 1999, Gold Coast, Australia.

mediators and arrived at the telling conclusion:

An overwhelming emphasis of good practice and of what has been learned in the school of hard knocks by this group is — listen, listen, listen. There is magic in the air.³

Listening in the context of a mediation requires mediators generally to use active listening as a communication technique in which the mediator decodes a verbal message and restates it back to the speaker to allow the speaker and the mediator to verify that the message has been understood.⁴ Active listening can be used in the context of picking up on the emotions which are being expressed.

‘You are obviously hurt and disappointed by what was done.’
‘Yes I was, I felt that my employer had not appreciated what I had contributed to the company.’

Active listening can also be used to confirm the issues and concerns of the parties.

‘Am I correct in understanding that what is important for you is to have fair recognition of the time and effort which you put into building up the business?’
‘Yes it is, all I want is to be treated fairly.’

When parties believe that they have been listened to and understood, they can relax and move on. The focus of the mediation then moves from anger, recrimination and justification to searching for a mutual solution to specific issues.

Active listening should also take place not only in the joint session, but also in private, or caucus sessions, when the parties are sometimes more frank and explicit about the real needs or interests which they need to fulfil to obtain a satisfactory resolution.

My practice in virtually every mediation is to directly ask the parties in private session what each party’s important goals and interests are in the dispute. I emphasise the responses by visually identifying them on a whiteboard.

3 Wade, above note 2.

4 Moore C W *The Mediation Process* Jossey Bass San Francisco 1986.

Typical of the responses which parties give are the following.

'I want to get on with my life.'

'This case needs to be settled because I can't afford to spend any more time in conferences with lawyers.'

'I would prefer not to expend any more on legal costs.'

I also carry out a further intervention strategy in which I request each of the parties in private session to place themselves in the 'shoes' of the other party in order to identify what they believe to be the 'goals' of the other party to the dispute — although the response are often along the lines of 'greed', 'they just want money,' or 'revenge', the question forces the parties to focus on the important interests and concerns of the other party which need to be satisfied before a mutual solution can be reached.

Active listening skills are, of course, not merely demonstrated by restating or rephrasing what has been said, but also by eye contact and in body language. It is more important, in my view, to make eye contact with a speaker and symbolise understanding by nodding your head or appropriate facial gestures than to take detailed notes of what is being said. There is indeed magic in the air, if you listen for it. If you fail to do so, you will miss valuable clues and opportunities.

The opening offers pitfall

I want to address a 'concealed pit' which often presents itself at the opening offers stage of the mediation, into which a mediator can easily fall and may never be rescued. Usually, two important issues arise at the stage at which negotiations are ready to commence.

1. Which of the parties is to make the first offer?
2. When should the first offer be made?⁵

In my view, it is very much a mediator process decision as to which party will be approached to 'get the ball rolling' in the negotiations. By and large there is an expectation that the respondent to a claim puts the first offer on the table.

5 Wade J H 'The last gap in negotiations — why is it so important? How can it be crossed?' ADRJ May 1995 at 93.

On some occasions, particularly when there are lawyers involved, the parties may seek to avoid making the first offer and mediators should prepare a strategy for this possibility. This may result in a test of wills involving process. A common strategy which I use is to advise a party in private session that there can be important advantages in making the first offer, as the first offer is the foundation upon which the later negotiations rest — a reasonable first offer is likely to elicit an equivalent response. Sometimes it is desirable for the mediator to be quite firm and make an intervention along these lines.

‘We could spend quite some time debating which party is going to make the first offer. I think that the mediation process would be better assisted if you started the ball rolling and we could at least see how far the parties are apart.’

A firm intervention of this kind is usually sufficient to persuade a party to formulate a first offer.

What kind of first offer should be made?

In my experience there are two kinds of offers which are frequently made to open negotiations. The first is what is known as the ‘soft high’ offer, or what has been described as a maximalist or extreme opening offer in which the party making the offer gives away very little. The second is what is known as a ‘final offer’ first offer, in which a party says, ‘We intend to put our best offer on the table and the other side can take it or leave it’.

Both these kinds of offers present a real risk of aborting the mediation at an early stage. The soft high offer, particularly when used against an experienced negotiator, may result in considerable anger on the basis that the offer simply confirms how ‘unreasonable’ the other side are, or the fact that they are not really bona fide about negotiating a resolution. This may result in the offeree refusing to make a counter offer, walking out of the mediation, or as more usually occurs responding by making an extreme counter offer, which then leads to incremental bargaining with a very large last gap to cross. The final offer first offer invariably results in a counter offer, as a result of which the initial offeror may have difficulty in continuing with the mediation without losing face.

For that reason, I invariably separate the disputants before any offers are made, and press the parties in private session to make reasonable opening offers by pointing out the potential disadvantages of ‘high soft’ or ‘final offer’ first

offers. I also usually communicate the first offers in a way that will hopefully deflect angry reactions by 'damage control' to keep the mediation process on track. For example, if despite my requests an offeror decides to proceed with a high soft first offer, as is often the case, I point out to the other party in private session, before introducing the offer, that although the first offer may appear to be 'high' or 'unreasonable' it is not unusual for parties at mediation to start with a high initial offer; this does not mean there may not be considerable room for negotiations to take place. I often indicate that in my experience, generally the best way to respond to such an offer is to 'change the game' by putting forward a reasonable counter proposal. I also have no hesitation in telling the parties that mediation is a little like a predictable game or ritual, in which the parties expect to negotiate, and where there is invariably a ritual of exchanges of offers no matter how attractive the opening offers may seem. The style and substance of the opening offer generally establishes a precedent for the remainder of the negotiations. An effective mediator will anticipate the potential difficulties which may occur and develop strategies to encourage the parties to open reasonably and to be clear and consistent in their communications.

The last gap in negotiations pitfall

Negotiations in a mediation almost always reach a last gap, which has to be surmounted before a settlement can be achieved. This last gap generally occurs following lengthy negotiations, at the stage where both parties refuse to make any further concessions. The effective mediator needs to have a range of strategies available to deal with this likely contingency. Sometimes the final gap to be crossed can be ridiculously small in the context of the dispute but may occupy an important point of principle in the eyes of the disputants. At other times, the gap can be significant or almost uncrossable.

What can the mediator do?

A number of explanations for this last pitfall to a negotiated resolution have been suggested by Professor John Wade in the context of family disputes.⁶ I consider that some of these have equal application in commercial and construction disputes:

6 Wade, above note 5.

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- the desire to cling to the conflict, which for some parties almost gives a meaning to life;
- unfinished emotional business, when the parties cling on to the dispute until some emotional need such as sense of anger or betrayal is acknowledged;
- the 'I have given up so much already' syndrome, in which each side insists that they have been making concessions all day and require the other party to make the final concession;
- a sense of having been tricked, in which one side believes that the other side commenced by exaggerating the first offer and now seeks to take advantage of this by 'splitting the difference';
- commercial advisers seeking to prove their worth by insisting upon coming out ahead by 'winning' the last gap; and
- recriminations for lost time and money for which the other side has to be punished for the disappointment caused by the dispute.

What can readily be seen is that the cause, or causes, of the last gap can involve a range of possible diagnostic explanations. It presents a challenge for even the most skillful mediators to anticipate the problem, diagnose a hypothetical cause and establish a variety of strategies to help the parties to 'cross the gap', in order to prevent a premature collapse of the mediation before all possible solutions have been exhausted.

Professor Wade⁷ suggests 15 methods which can be used to break the impasse of the last gap. These range from tossing a coin to the mediator simulating a tantrum to force the parties into making further concessions. My own strategies range from suggesting a face saving solution, which is put forward as the proposal of the mediator and can be accepted by both parties without loss of face, or expanding the pie by adding some further item of value which corresponds to some particular interest or need of either of the parties; for example, 'if the other side is willing to pay \$100,000, would you be willing to accept it in instalments over three months?'

Crossing the last gap is one of the major, if not the major, conundrum for every mediator. The problem can often be overcome by good third party management skills, involving a diagnosis as to why the difficulty is occurring and having a range of possible strategies available to deal with the problem.

7 Wade, above note 5.

A lack of patience and persistence

It is important for mediators to appreciate that mediation is often a lengthy, difficult and frustrating process that requires a considerable measure of time, patience and innovation. One of the major pitfalls of inexperienced mediators is to attempt to conduct a mediation within an unrealistically short timeframe, sometimes proposed by the parties themselves, or allowing the mediation to collapse before all the possibilities have been explored. Interestingly, the survey of experienced mediators placed persistence and patience as the second most essential quality that they would realistically like to find in their chosen mediator, just below listening skills.

In my experience it is remarkable how often negotiations that appear hopeless can, with a measure of patience and persistence, result in a concluded resolution. This does not mean that I do not impose deadlines or threaten to terminate the mediation unless further progress is made; these are strategies which I occasionally use as valuable mediator interventions. It does mean that I try a number of different intervention strategies before I am willing to terminate a mediation conference. Usually, rather than concluding a mediation process, I will try to adjourn the matter over to another date. This gives the parties an opportunity to reassess what has taken place to date and to come up with some possible new options or ideas, or reappraise their existing negotiating stances.

Conclusion

Virtually every mediation has the potential for unexpected problems which require contingent strategies. However, it should be appreciated that mediation is not a process like psychoanalysis, which should only be attempted after many years of training and self-analysis. It is more a discipline which demands an understanding of the process, the development of a repertoire of readily available strategic interventions to keep the process on track and deal with potential problems, some ability to relate to parties on an interpersonal level, and a large measure of patience and persistence.

Returning back to the survey of experienced mediators, a consistent theme which came from this group is the strong emphasis which should be placed upon the mediator not trying to work too hard, but rather, trying to relax, being warm and friendly, retaining a good sense of humour and proportion, and letting the parties in the process do much of the work. Try it sometime! ☼

Current and future trends for dispute resolution on significant dams and related projects in Australasia

*Norman Reich**

Dams are different

Significant dams and related projects, such as hydroelectric power generators, water supply and irrigation projects, are distinct from many other large construction projects because of the nature of their construction, using largely natural materials and involving extensive excavation in water courses, underflow and underground, for tunnels, shafts, machinery halls and pump chambers.

Such projects involve strict time factors relating to cost effectiveness and risk minimisation (particularly for projects such as riverbed works and diversion works). Further, they involve tight specifications because of the potential catastrophic consequences of failure and the large amount of costly labour and equipment working long hours to achieve important milestone dates.

The nature of the work — dealing with many ‘unknowns’ — leads to disagreements between the parties, which often result in protracted disputes.

Governments now have a very different attitude to investment in such infrastructure. Government bodies and public utilities are themselves undergoing radical change, privatisation and segmentation. Consequently, significant changes in the way such projects are initiated, executed and operated are occurring.

Changes to dam project execution

In the past, dam construction projects have not differed from other projects in the traditional relationships usually established: the owner and contractor are parties to the construction contract, with the other parties involved, such as a Superintendent and the designer, being contracted to the owner.

Owners have, more often than not, been Government bodies or public utilities. They have built, owned and paid for such infrastructure.

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However, Governments across Australia, New Zealand, PNG and many parts of south east Asia and the Pacific are extricating themselves from these types of projects.

Utilities are being privatised and private companies now compete for the provision of water, power and other facilities. Governments' preferred role will be to monitor; to ensure there is no failure, either in the delivered dam or adjacent works or in the private financial arrangements for the project, and that the facility is suitable for its purpose when (and if) it is handed back at the end of a concession period. It is likely that a private owner will have carriage of the project.

The project will have to be profitable. The days of a dam or a power station being built in a particular location at a particular time to satisfy a political need are over. In some circumstances, governments may initiate such projects and will sometimes design them to then be handed over to the private sector for implementation. However, there is likely to be a continuing trend towards private sector initiation, with the market determining priorities on the basis of a return on investment.

Relationships on such projects will multiply. Instead of one entity as the owner/principal, there is likely to be a sponsoring consortium involving one or more contractors, one or more financial institutions, possibly an operator company and a guarantor entity.

A recent International Congress on Large Dams (ICOLD) paper¹ has documented the relationships on such a dam project. Fig 1 shows the typical arrangement. The same paper identifies many of the risks that now come into such a project (Fig 2). There are 29 categories of such risk outlined, each a potential affect of one of the relationships. Another recent ICOLD paper² gave the relationships involved in the 670MW Birecik Hydroelectric Project in Turkey. Fig 3 shows the complexity of those relationships.

The sponsoring consortium will usually take responsibility for the design and delivery of the project and for the project performing to its expectations. This may involve the consortium developing a design prepared by an entity other than that responsible for design to the consortium. Within the consortium there is likely to be a consortium leader, usually termed the 'sponsor', who is likely to

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- 1 Brenner R P, Laufer F and Krumdieck M A 'Technical risks affecting the financing of dam projects: identification and evaluation' ICOLD 19th Congress Vol 1 p 1211.
 - 2 Kiresch T and Verwomer M 'BOT — A concept for private sector financing demonstrated on the model of HPP Birecik, Turkey' ICOLD 19th Congress Vol 1 p 59.
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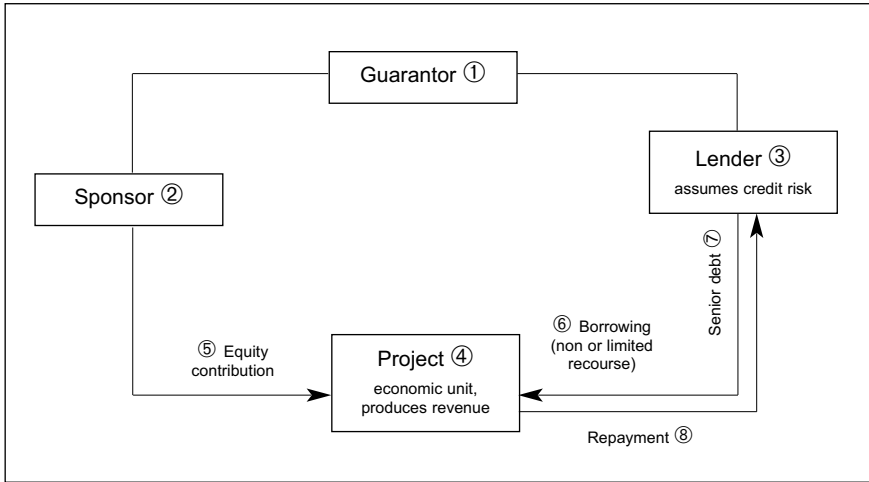


Figure 1: Typical arrangement for project

be the guarantor for the completion of the project. There will be contractual relationships between each entity in the consortium, who will usually be jointly and severally bound. In the event that the sponsor is not the guarantor, another large contractor with the resources to ensure completion in the event of unsatisfactory performance, will be involved.

Performance bonds are a way that completion is guaranteed in other countries, particularly in the US, where an insurance company specialising in the provision of such bonds guarantees the completion of the project. To protect their interests, the performance bond provider monitors the project on a regular basis. As soon as there is a perception of anything awry, there is a right for intervention in some form. The bond provider will have a formal relationship with the sponsor and the consortium.

Some construction works clients mooted these bonds in Australia in the 1980s, but the concept was vigorously opposed by the construction industry as an extra layer of cost and 'supervision' on the contractor. However, in future dam and related projects, where so much emphasis will be on project performance and completion, they may reappear.

Changing contractual relations — impact on resolution of disputes

Future projects will become more and more complex in the interconnecting relationships between the many parties involved. These relationships

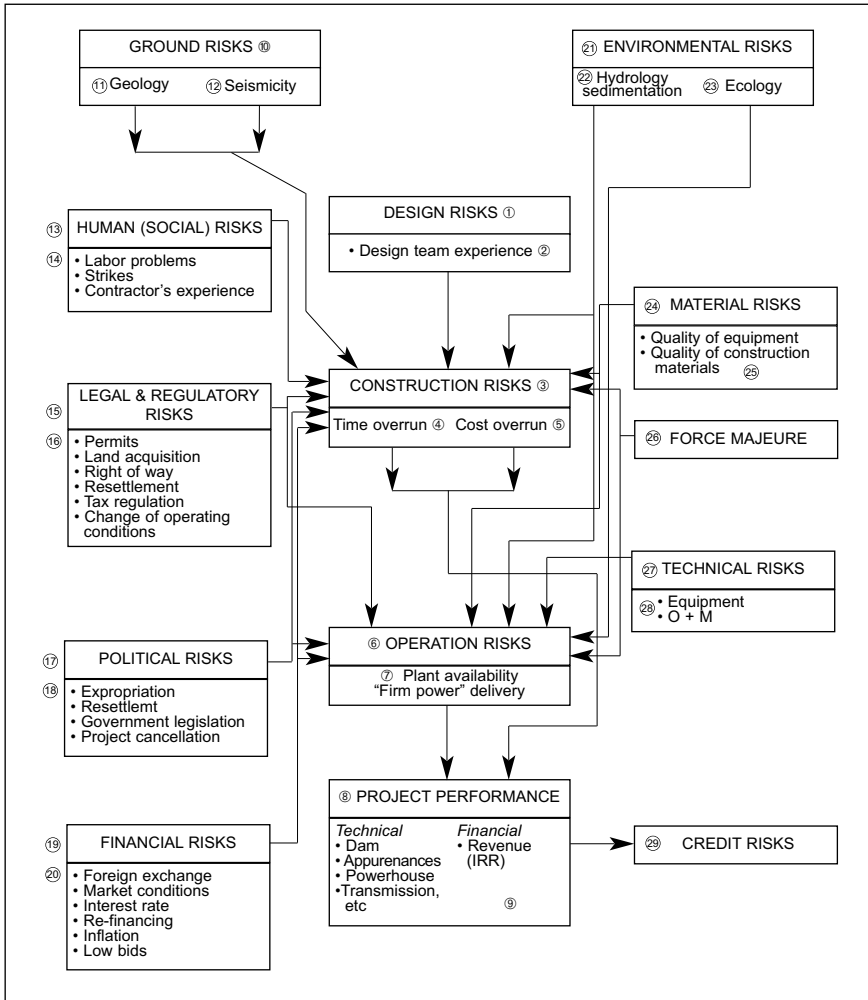


Figure 2: Classification and interrelationships of risks in a hydropower project

themselves will become more complex. For example, design will involve converting a requirement into a performance parameter. Instead of designing a tunnel to take a certain volume of water at a certain velocity, the designer will have to size the opening, the alignment, size the lining, provide the quantities

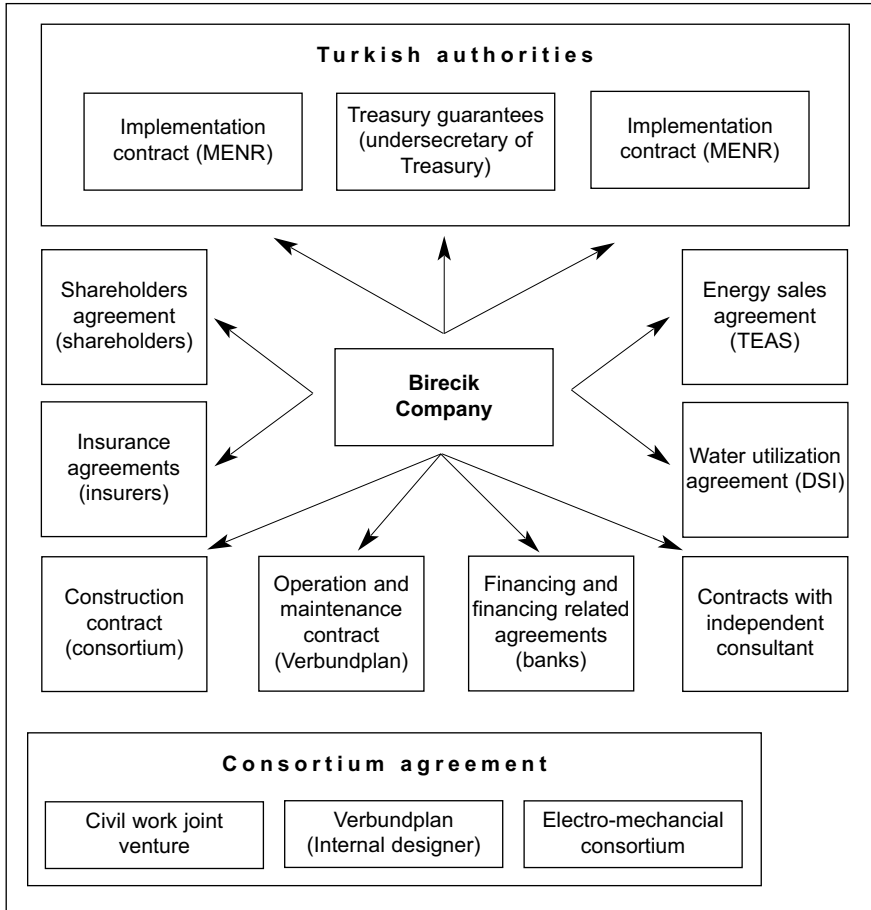


Figure 3: Birecik Hydroelectric Project, Turkey

and contingencies, evaluate the risks, such as poor rock or a geological fault, and take responsibility so that if the tunnel is built to his design and it does not meet the performance criteria, there will be severe cost penalties for the consortium, who will look to the designer and his insurers for recompense. Similarly, if the quantities of concrete in the tunnel lining are significantly over those provided for in the tender, the designers are likely to be brought into the accountability loop.

Problems in the tunnel design will flow on to the construction and cause delays, which may see the project finish late and lead to claims by the operator against the constructor in the consortium.

The relationships will thus be multi-reliant, where a failure in one relationship will have a potential 'domino effect' on the other relationships in the project.

These projects will be driven by the need to meet time constraints and by cost efficiency. This will become critical as the projects become larger and the competition for such projects become more intense.

The multi-relationship nature of these projects, with the emphasis on time, will see the responsibilities of the many players laid down in tighter and tighter legal agreements. Responsibilities will be onerous. Potential for damages for unsatisfactory performance will be formidable.

Governments are unlikely to be the customer for the power from a hydro plant, or the water from a dam. That role is likely to be played by a privatised electricity onseller, or a corporatised irrigation authority.

The current state of the transurban motorway project in Melbourne illustrates this aspect. The State Government is an interested bystander to the difficulties with the delays resulting from the electronic toll collection system, tunnel leaks and contractual disputes between the main contractor and subcontractor. The government is principally concerned with the political and safety aspects.

The contractor and subcontractor will be very careful to protect themselves from any blow out in costs that will impact on their competitiveness. They will be led by boards of directors who will be accountable for policy, set parameters for performance and who will want to ensure their relationship with the project is clearly documented and the extent of their exposure to liability is limited and defined.

The parties within the project structure will be looking to build relationships for the long term. This has been the trend in Europe. Contractors there have found that their separate cultures can become meshed over time if they do projects as joint ventures or a consortium. Their experience indicates that they work more effectively with some designers than others, they become familiar with the requirements of particular operators and gain the confidence of certain providers of finance.

There will be a variety of professional disciplines involved: civil engineers, mechanical engineers, electrical engineers, equipment suppliers as well as financiers, bankers, investors and consumers.

Participants in the bigger projects can come from different countries. This will introduce an international context for such projects. Alliances, partnerships and future work relationships will be built. The participants will have an interest in continuing relationships, and will want to conduct their commercial affairs in a way that enhances these arrangements.

Likely types of disputes

Each one of the 29 risks enumerated in Ref 1 and shown in Fig 2 are potential causes of disputes. Projects will become more performance driven: the power station will have to produce 1000 MW, the irrigation project to supply 100,000 hectares. Time, money and assurance of meeting the performance specifications will be the key requirements.

Program, cashflow disputes

The constructors will want to build up as much float as possible as a buffer to potential set backs. They will optimise program, equipment and resources to achieve this. Program interdependencies will thus exist all through the project, with key milestone dates to be met. Payment by the financiers to the constructors will likely be made on the basis of meeting these milestones. Balancing programs, time, float and cashflow is a likely cause of recurring dispute. Such disputes must be quickly resolved, or they could have significant flow-on effects.

Site and resources disputes

The contractors will be sensitive to the potential problems flowing from geology and topography and the availability, quality and volatility of labour, plant and materials resources. Strikes and industrial disruption will be an area of concern, especially where operatives from different companies — even from different countries — are working side by side. A small subcontractor's labour problems could lead to project disruption across the board, with heavy consequential costs. Again, timely resolution is going to be of paramount concern.

Warranty disputes

Material suppliers will have to warrant their product and its performance.

There will be technical risks involved in the supply of turbines, pumps and so on; these may be in the performance of the unit itself or in the level and cost of maintenance.

Designers will have to warrant their design and, for major items like darn failure, which would have a catastrophic affect on the project, peer review looms as virtually a mandatory requirement.

Warranties can lead to potential disputes. These types of disputes are likely to involve more than one party in the matrix of parties and are likely to be more complex and require more involved procedure for resolution.

Financial, legal and insurance disputes

Sizeable dam projects of the future will inevitably be faced with many challenges in the financial sphere, such as foreign exchange movements, inflation, interest rate changes and changes in prices for project inputs and outputs. There are also potential changes to tax regimes and government regulations. There will be disputes relating to the various levels of insurance carried by the participants and the different types of policy, coverage, excess and exclusions.

Environmental and native title disputes

This dispute category includes potential environmental and site peculiar disputes covering native title, Aboriginal heritage, land acquisition, facility relocation, sedimentation, ecology, site care and rehabilitation. A good example of a project being stopped, after contracts were let, because of Aboriginal heritage issues, is the Hindmarsh Island Bridge in South Australia. These latter types of disputes will need technical input as well as efficient, timely and cost effective methods of resolution. At this stage, the mechanics for timely resolution of these disputes do not appear to be in place.

Initiators of such projects, participants and their advisors will need to pay careful attention to the contractual documentation, so that the appropriate manner of resolution is specified. The time taken to resolve disputes on modern projects is frustrating.

However, it is doubly frustrating because often time is wasted with arguments between disputants about the form and forum of dispute resolution when these can be specified and agreed before contracts are signed.

How such disputes will be resolved

Arbitration

Arbitration is older than litigation. In the earliest construction contracts, where the parties could not negotiate their differences themselves, they hired a respected third person to assist them. Arbitration was a private, cost effective and timely process, carried out by respected men more interested in the technical points of a dispute than its legal points. These men, the arbitrators of the time, had standing to confidently carry the day.

Parties would represent themselves. They would tell it as it was, warts and all. The result was usually an equitable and timely resolution. Most disputes were resolved before the project was completed.

Legal aspects have gradually infiltrated the process.

C Y O'Connor, one of WA's great early engineers, had the 'unfortunate' experience of being forced into Court by a contractor, one William Noah Hedges, who wanted to have O'Connor disallowed from arbitrating on a dispute between the contractor and the Government on a contract for the Donnybrook to Bridgetown railway. O'Connor, in defending his position in his affidavit³ to the Court stated:

As regards Government contracts generally, I would wish to sound a word of warning, viz. That if the practice which seemed to be recently growing up of regarding a Government contract merely as a stepping stone to profits to be derived from a big law suit were to continue, the effect of it would be that the letting of such contracts would become so dangerous as to be prohibitive, and that whereas there was a time when all contractors, such as Messrs Brassey, Peto, Betts and Dargan and many others of that class, all thorough experts, went into the business of making legitimate profits by their legitimate earnings, there seemed a tendency of later years for people to go in for contracts, who were bush lawyers, or employed bush lawyers rather than expert workmen, and who cared not how the work was done, having no reputation to lose, so long as they made money out of it ... thus leading to continual bickering between the Engineers and the Contractors.

3 Affidavit of Charles Yelverton O'Connor in the Matter of an Arbitration between William Noah Hedges and Her Majesty the Queen and in the Matter of the *Arbitration Act 1895*, in the Supreme Court of Western Australia.

O'Connor, who was also the Government's Engineer-in-Chief, was found to be unbiased and proceeded to arbitrate the case. That was in 1899. It is interesting to contemplate what a solicitor representing Hedges in 2000 would have done with such an affidavit.

Arbitration became progressively more legalistic. Most cases got bogged down in the process of seeking a stay of the proceedings pending a stated case from the Court. This logjam was supposedly cleared when this device was rendered ineffective by a series of unified Commercial Arbitration Acts passed by the States in the 1980s. Arbitration got a new lease on life.

The legal fraternity received new stimulus from a decision in the Supreme Court of NSW⁴ which ruled that a party in arbitration could not be denied legal representation. Arbitration was embraced by the lawyer's desire for process. Argument about admissibility of evidence, discovery, 'expert' reports, hearsay and so on dominated proceedings. Resolution of the disputes took ever longer.

Overseas too, there are major concerns with the performance of the arbitration system. In the US, construction disputes are often handled through the Construction Industry Arbitration Rules (CIAR). These rules permit the parties to submit evidence and allow the arbitrator to evaluate its admissibility without regard to the standard rules of evidence. With these procedures, the arbitrator may subpoena witnesses and evidence, but the broader powers of discovery are not available. Even so, a survey⁵ of the performance of arbitration in the US found:

In general, arbitration takes roughly half as long as other dispute resolution techniques. In California, arbitration may require up to two to three years from the final administrative hearing, whereas with litigation, a case may take up to seven years.

In the UK, there has also been soul searching. Much has been written about a so called 'sea change' in the conduct of dispute resolution by the release of the 1996 *Arbitration Act*. One such paper⁶ asks:

4 *The Commissioner of Main Roads v Leighton Contractors & Ors* Supreme Court of NSW 4 July 1986, per Smart J.

5 Hester W T, Kupremas J A and Thomas H R 'Arbitration: A look at its form and performance' *Journal of Construction Engineering and Management* American Society of Civil Engineers Vol 113 p 353.

6 Patterson S 'Sea-change or Beached Whale?' *Arbitration* Vol 63 No 2 p 135.

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The real question is whether the response of those who arbitrate will be sufficiently flexible and sufficiently authoritative to enable full advantage to be taken of the new provisions.

'Stop clock arbitrations' are becoming popular in international dispute resolution. These are arbitrations where both parties are allotted a fixed or relatively short period of time for complicated disputes. This requires the parties to put as much of their case in writing as possible and to limit cross examination.

Arbitration is showing signs of struggling to get its house in order and become relevant to today's projects.

Meanwhile, the promoters and implementers of these projects are looking at what is wrong and studying the alternatives. To them, arbitration is still seen to take too long, is too expensive and unwieldy.

In my opinion, today's arbitrators cannot blame the lawyers. They have allowed the lawyers to take over, to the detriment of the clients of arbitration, by not exerting strong leadership and shying away from making a decision for fear of being dragged into court.

There has been a good deal of navel gazing by the profession as to how this can be corrected. Justice Douglas Drummond encapsulated most of the issues in a 1996 paper.⁷ Among his comments on the challenges of arbitration was:

In my opinion, the strongest challenge to arbitration as the preferred mechanism for resolving complex disputes, will come from the court system.

The courts are referring cases to referees and monitoring progress, as well as introducing innovations to improve their case management. Timeliness, progress and costs are observed. Parties such as financiers and insurers are more comfortable in a court environment.

Arbitration is under intense competitive pressure from all the other processes of dispute resolution.

In a 1997 paper⁸ the then President of the Chartered Institute of Arbitrators,

7 Justice Douglas Drummond 'Is arbitration unattractive in the 90s?' *The Arbitrator* August 1996 p 73.

8 Beresford Hartwell G M 'Cost-effective arbitration: the commercial way to justice' *The Arbitrator* May 1997 p 7.

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GM Beresford Hartwell dealt with 'Cost effective arbitration: the commercial way to justice', stating that:

Much of the cost and delay in modern arbitration results from seeking to produce, in what is essentially a private commercial forum, the procedures and practises of Courts of Law and I want to address the question as to why the legal system should be involved in commercial matters at all.

Arbitrators must take control from the earliest stage. Two further quotes from this paper point the way to go:

Have a preliminary meeting at which the real protagonists are present, and invite them to discuss the likely issues. Let them tell the arbitrator their troubles, informally, to enable him or her to get a handle on the dispute. Formal preliminary meetings are a waste of time if all that happens is that an Order for Directions is made with the usual trimmings. A computer could do that. Time and again, I have found that an informative preliminary meeting results in a settlement.

Furthermore:

If I have failed to give you a specific blueprint for cost efficient arbitration, it is because the one skill an arbitrator must have, in my view, is skill in designing an optimum procedure or set of procedures to deal with the immediate case.

Complex disputes on large dams and related projects should be able to be effectively arbitrated. However, the process followed by the chosen arbitrator must be timely, effective and final for the disputants to be prepared to tread the arbitration path.

New approaches to arbitration come into the industry from time to time. The more simple, timely and cost effective they are, the more likely they are to satisfy the key objectives of the participants in the complex projects where 'time is money'.

While arbitration struggles to maintain its relevance, there has been a popular move to alternatives, including alternative dispute resolution (ADR).

Mediation/conciliation

The mediator is an independent third party who assists the parties through individual meetings with them as well as joint sessions with both parties

present. He focuses on their real interests, and tries to exclude their emotional positions. He looks for win/win situations.

The conciliator is usually more interventionist than the mediator. In the absence of an agreement between the two parties, the conciliator makes a recommendation, which by prior agreement, if not dissented from by one of the parties within a time period, becomes binding and resolves the dispute.

This distinction between mediation and conciliation, is however, not universally accepted. Many believe the two forms are synonymous.

Mediation/conciliation is an ideal medium to resolve issues such as program and cashflow, and site and resources disputes. The processes are quick, economical and, as the aim is to arrive at a win/win situation, there are no perceived 'losers', hence there is a strengthening of future relationships. Confidence is built and trust enhanced. Mediation can be used for multi-party disputes, although the process becomes more complex as more parties are involved.

There is a certain amount of risk involved in embarking on these processes. They require a good deal of preparation. If the dispute is not resolved, it can make the future resolution more difficult.

Mini trial

The inaptly named 'mini trial' is not a trial at all, it is really an executive tribunal. Each party presents the issues to senior executives of both parties, who are usually assisted by a neutral chairperson. The parties may present their case formally through lawyers or they may do the presentation themselves. The chairperson is likely to be a respected expert on the subjects of contention and may give advice on the likely outcome of litigation. After presentation of the issues, the executives attempt to negotiate a settlement. The advantages of this approach are:

- a lengthy hearing is avoided — resolution may only take a few days;
- each party can present its case professionally; and
- an outside person with objectivity can guide the executives who ultimately settle the case.

The mini trial is most suited to a two party dispute and can involve highly technical and complex detail in evidence. A successful mini trial enhances future relationships. It can be applied to programming and cashflow,

site and resources and warranty type disputes. It is economical in time and cost.

Expert appraisal/determination

Under this form of resolution, the parties agree to refer their dispute to a mutually agreed expert who examines submissions, usually in writing, from both sides and provides them with an appraisal. Normal practise is for the parties to agree beforehand (often it is spelt out in the contract) under what circumstances they will treat the expert's appraisal as binding. Often, expert appraisals are an agreed (by the parties to the contract) precursor to arbitration/formal court proceedings. Expert appraisals are appropriate for most of the technically orientated disputes, where detail can be aired without the formality of hearings. It is most effective when it is kept simple.

Court processes

The Supreme Courts in the various states of Australia have established processes which make the handling of technical and financial disputes that come out of large projects more efficient and they are continuing to come up with new ones.

There are court appointed referees who act in much the same way as arbitrators. Usually technically orientated disputes are referred to them. A Supreme Court judge monitors the case, makes orders on legal aspects of the case and hands down a judgement, taking account of the referee's report.

Some of the Supreme Courts are introducing rules to make these processes more efficient. One has introduced a rule where all expert reports, even if they are only in draft form, are discoverable. This is a powerful weapon against the lawyer who commissions report after report until he finds one that supports his client's case.

Others are limiting discovery to a pre-agreed number of documents only, overcoming the enormous costs of the discovery process. Others are offering court appraisals, where a judge hears a presentation from the parties to the dispute and gives a 'without prejudice' view on the result. If the commercial negotiations from there do not result in a settlement, his view is taken into account in the ordering of costs at the end of the case. Some jurisdictions are insisting on mediation before a case comes before the court. Others have introduced the concept of court appointed mediator.

All these initiatives are designed to make the court process more efficient and more competitive in the dispute resolution field.

Dispute review boards

Dispute review boards (DRB) have been widely and successfully used on major dam and related projects in the past. They are particularly popular in the US and are mandatory on certain World Bank and Asian Development Bank projects.

In the past, they have been particularly applicable to the traditional form of building these projects; that is, simple owner/contractor relationships where each party appoints a member to the board and those two members then appoint a third person, who acts as chairman.

The major advantage of this process is that the DRB meets regularly on the site, is aware of all site and project issues and can usually quickly resolve them.

The DRB process, if it is effective, is really a dispute avoidance process. Where it is successfully implemented, festering differences can be dealt with in an appropriate and timely manner by the board and mutual respect between the contracting parties grows as the project progresses.

It is cost effective, particularly on projects larger than \$100 million, where the expenditure on the process is likely to be in the range of 0.2 per cent to 0.3 per cent of the total project cost.

For smaller projects, the concept can still be implemented using a one person board, although a process for mutual selection should be outlined in the contract documents.

The challenge for DRBs is to continue to be effective in resolving complex issues that will come out of projects where multiple parties are involved. The process can be designed to do this but careful preparation must occur in the project concept stage.

On some complex projects in the US, a single board has been set up by the principal and the sponsor contractor. This board is advised in the documentation for the myriad of subcontracts on the project as constituted and available on a specified basis to hear and advise on or resolve disputes on these other contracts.

The DRB process may also be applicable where a large contractor is guarantor — that is, takes all the risks until the facility is operational, but employs significant 'second tier' contractors to do segments of the work — for the overall delivery of a dam related facility, for example, a power station. The DRB would

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then be set up to act between the guarantor contractor and his second tier contractor/s.

Key requirements for the successful provision of the DRB are the availability of adequate numbers of potential board members who are trained and experienced in the subtleties of its operation. The industry is by nature an incestuous one, with many potential candidates having to rule themselves out because of conflicts of interest.

A variation on the theme of the DRB using a dispute resolution advisor (DRA) has been developed in Hong Kong for complex building works, such as hospital reconstruction, which seems particularly appropriate for the types of projects being considered.⁹ The DRA system is a new and innovative approach to total dispute management. It has been described as:

a non-binding hybrid ADR process in which a neutral third party, the DRA, is appointed from the commencement of a contract to identify potential disputes, advise on the settlement of disputes, and assist in the resolution of disputes until completion of the contract.

DRA appears to borrow elements from the DRB model, arbitration and ADR formats, uses 'partnering' techniques to re-orientate the parties' thinking and encourage different forms of negotiation by using a tiered dispute resolution process.

Often on complex projects, a 'rights based' resolution procedure is needed to act as 'a precursor to clarify the parties' rights in an issue before an interest based resolution can be sought. The DRA system also embraces 'expert determination/appraisal', where the DRA recruits a neutral evaluator to provide a non-binding opinion on the dispute. It also assimilates the mini trial process, by the involvement of senior executives after the DRA has issued a report on the issue.

The advantages of this system derive from a unique design which embraces attributes of dispute prevention and resolution. These characteristics include: early start; its expeditious, economical, consensual and flexible process; and, the system remains under the parties' control. DRA seems appropriate to consider for all the types of disputes mentioned.

Another variation of the DRB process has recently been used on a major

9 Tsing H C 'Dispute resolution advisor system in Hong Kong — design and development' *Arbitration* Vol 63 No 2 p 67.

Australian infrastructure project. The principal selected and appointed a neutral multi-discipline three person 'project audit team'. The audit team visited the project on a quarterly basis, or more frequently as required. Its status was such that it could recommend solutions to all project problems, such as: project sequencing; programming issues; progress, resources, technical and environmental problems; quality assurance; as-built documentation, and so on. It acted to focus on project delivery by mediating differences as they occurred. The challenging project finished on time and budget with no outstanding dispute issues remaining.

Conclusion

The dispute avoidance/resolution industry is entering a very competitive environment, especially applicable to the complex structures that come with the significant dam and related projects in the region. If it can provide effective solutions then there is the prospect of significant opportunities for practitioners.

The challenge of the future for dispute resolution in significant dam projects and their like will be to find the most appropriate of the variety of processes that are now available to fit the ever more complex arrangements of such projects. ❧

Case note: Bengalla Mining Co Pty Ltd v Barclay Mowlem Construction Ltd

Application to set aside subpoenas and decision
on role of the arbitrator in setting aside the subpoena

Paul Venus*

The decision of the Equity Division of the Supreme Court of NSW in *Bengalla Mining Co Pty Ltd v Barclay Mowlem Construction Ltd*, [2001] NSWSC 93 (28 February 2001) demonstrates the limits of an arbitrator's role concerning the issue of subpoenas.

The decision was given after an interlocutory application made to the Supreme Court of NSW in an arbitration between Bengalla Mining Company Pty Ltd ('Bengalla') and Barclay Mowlem Construction Ltd ('Barclay'). The arbitration concerned a dispute over, amongst other things, alleged disruption to work that Barclay was performing for Bengalla under a contract for the construction of an open cut coal mine. The arbitrator had entered on the reference and directions had been given for discovery of 'lists of documents by bundle'. This discovery was provided by Bengalla and included lists of documents held by the supervisor of the contract, Sedgman Pty Ltd.

Barclay claimed that the discovery was inadequate and issued subpoenas to Bengalla and Sedgman. Bengalla applied to set the subpoenas aside, Sedgman was prepared to comply with the subpoena. The application to set aside the subpoena was made one month prior to the scheduled commencement of the main hearing of the arbitral proceedings.

Under s 17 of the *Commercial Arbitration Act 1984* (NSW) (the Act), the court may, on application of any party to an arbitration agreement, issue a subpoena requiring a person to attend for examination before an arbitrator, produce specified documents to the arbitrator or do both.

Counsel for Barclay submitted that the subpoenas were not too wide, were not seeking discovery and that the Court should leave it to the arbitrator to decide on the validity of the subpoenas. He argued that the parties had referred

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all matters relating to their dispute to the arbitrator.

In advancing the line of argument that the issue should be dealt with by the arbitrator and not the Court, Counsel for Barclay seemed to rely upon the principle that in agreements to arbitrate, 'the Court should have no part in the dispute resolution process, save to the limited extent provided by the *Commercial Arbitration Act 1984* ... and, if it be applicable, the Court's inherent jurisdiction' (*Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1994) 35 NSWLR 704 at 706; see also *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 at 674-5).

Further, reference was made to s 18(3) of the Act, which provides that if a party fails to comply with a subpoena, the arbitrator may continue with the arbitration in default of compliance. However, no reference is made in the decision as to how this supported Barclay's case. It might be assumed that Barclay was asserting that the fact that a subpoena was not complied with need not stay the arbitral proceedings and therefore if the arbitrator decided to continue despite the conduct of Barclay, that was a decision for the arbitrator.

However, Justice Hodgson (chief justice in Equity) did not agree. The Court decided that it:

should not simply leave it to the arbitrator to decide whether compliance with subpoenas should be required. The subpoenas are orders of [the] Court, and a breach of those orders could involve contempt ... if the order contained in the subpoenas is such that it should not have been made, [the] Court should correct the situation.

The Court did note one possible exception to this position. It held that:

it may be that, if [the] Court took the view that certain details of the subpoena were appropriate to be worked out by the arbitrator, then the Court could make an order staying compliance with that aspect of the subpoena, and leaving it to the arbitrator to determine the extent to which that aspect should be complied with.

It could be that the Court had in mind a situation where an arbitrator could assist by bringing to bear relevant expertise in better defining the parameters of classes of documents sought by subpoena.

The other orders made in the decision related to the oppressiveness of the subpoenas that had been issued and were not relevant to the issue of the limits of the arbitrator's role in the issue of subpoenas.

In conclusion, this case demonstrates the limits of the role that the arbitrator has in the issue of subpoenas. While able to be involved in the management of the subpoena process, it seems that the Courts will keep to themselves the right to determine substantive issues about the issue, modification of and setting aside of subpoenas. ✂

Case note: Multiplex Constructions Pty Ltd v Suscindy Management Pty Ltd

Abandonment of arbitration

*David Talintyre**

The decision of Einstein J in *Multiplex v Suscindy* (2000) 16 BCL 436 in the Supreme Court of NSW indicates that mere silence over a considerable period of time may not be sufficient to establish that an arbitration or arbitration agreement has been abandoned.

A series of contractual disputes between the parties were referred for arbitration in 1993. Interlocutory steps were performed at what his Honour described as 'snail's pace'. A number of timetables were breached. By April 1996, the parties had exchanged pleadings, witness statements and expert reports.

In May 1997 the parties' experts conferred in a 'without prejudice' meeting in an attempt to narrow the issues in dispute. Multiplex led evidence that the purpose of this meeting was to demonstrate to Suscindy's expert that, when alleged errors in his report were taken into account, the quantum of Suscindy's claim would be reduced to such an extent that Suscindy would realise it was not worthwhile to pursue the matter further.

Multiplex led evidence that, following a verbal report from its expert that the deficiencies in the Suscindy's expert report had been explained and not rebutted, Multiplex formed the view, from the lengthy period of time which then elapsed after May 1997 without Multiplex being aware of any further action on Suscindy's part, that Suscindy had abandoned the arbitration. On that basis, Multiplex decided not to pursue its counterclaim and to 'call it quits'.

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Suscindy's evidence (which his Honour considered important) was that at no time did it 'overtly communicate' to any person that it was Suscindy's intention to abandon the claim and that Suscindy was never informed that Multiplex intended to abandon its counterclaim or the arbitration.

In September 1997, the arbitrator requested both parties to advise whether they intended to proceed with the arbitration. Shortly afterwards, Suscindy indicated to the arbitrator that it was in the process of reconstructing its claim on the basis that it would either expedite settlement or, if the matter proceeded to arbitration, would shorten the arbitration. This was apparently not communicated to Multiplex, whose files were transferred to new solicitors and archived.

Effectively nothing further occurred until July 1999, when Suscindy's solicitors requested the arbitrator to indicate when he would be in a position to hear the matter. In September 1999, Multiplex communicated to Suscindy that it was of the view that the arbitration had been abandoned by consent. Suscindy's solicitors replied the following month, denying that the arbitration had been abandoned. Multiplex then sought an undertaking from Suscindy that it would not pursue the arbitration, failing which Multiplex would commence proceedings to restrain or terminate the arbitration. That undertaking was not provided by Suscindy.

In March 2000, after being notified that the arbitration had been set down for hearing for six weeks commencing 3 July 2000, Multiplex commenced proceedings seeking injunctive relief to restrain Suscindy from taking any further steps in the arbitration. The interlocutory proceedings required consideration of the strength and bona fides of Multiplex's case, and the balance of convenience.

Einstein J dismissed the application. He held that although the Court had no inherent power to enjoin arbitration proceedings for want of prosecution, the Court can do so if it appears in the circumstances that the parties have created a contract of abandonment of the arbitration agreement.

His Honour cited with approval what was said in *Tankrederei Ahrenkeil* (The Multibank Holsatia) (1988) 2 Lloyd's Rep 486; namely, that to establish a contract of abandonment, it is necessary to show that:

- a clear inference to be drawn from the inactivity of one party is that it does not wish nor intend to proceed with the arbitration, and thus offered to abandon it;
- the clear inference to be drawn from the inactivity of the other party is the acceptance of the offer to abandon the arbitration; and

- this second inference represented, or at least did not conflict with, the second party's understanding of the position.

His Honour was not satisfied that either of the first two inferences could be drawn in this case. As a result, the question of the third inference did not arise. In reaching his conclusion, his Honour considered it important that the arbitration had travelled a considerable distance by May 1997, albeit at a snail's pace. He expressed the view that because the parties had moved at such a leisurely pace for so many years, to justify an inference of abandonment it was incumbent upon Multiplex to prove something more than the mere passage of time or, if passage of time alone was to be relied upon, to show a passage of time of a different magnitude. He did not consider that the period of more than two years which elapsed between the experts' conference and Suscindy's attempt to revive the matter was sufficient to satisfy this test.

That was sufficient to dispose of the case. His Honour said that if he had been required to consider the balance of convenience, he considered that the balance of convenience was in favour of the arbitral proceedings going ahead, principally because both parties had completed the majority of their preparation for the arbitration and Multiplex had unreasonably delayed seeking injunctive relief. His Honour considered that Multiplex's delay warranted special consideration, in that it was entirely inappropriate in circumstances where an arbitral hearing requiring very detailed work by both parties was rapidly approaching and Multiplex must have known that Suscindy was continuing to prepare for the arbitral hearing. %

Case Note: Abigroup Contractors Pty Ltd v BPB Pty Ltd

Court references when one party objects

*David Talintyre**

The recent decision of Byrne J in *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261 (2 June 2000, Supreme Court of Victoria) demonstrates that courts in States other than NSW are probably less inclined than their NSW

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counterparts to refer questions to a referee when that course is opposed by a party.

Abigroup was awarded a contract by Vic Roads to construct a freeway extension in Victoria. BPB, a consulting engineer, assisted Abigroup with its tender by supplying preliminary designs and subsequently provided final designs for the project. Abigroup claimed that differences between the two sets of designs resulted in it incurring significant additional costs which it sought to recover from BPB.

His Honour identified two important engineering issues from the pleadings and invited the parties to consider whether any issues might be usefully referred to a referee. Abigroup put forward a set of questions for a referee to deal with, essentially, all issues in the proceedings except costs. BPB opposed the reference and sought to defer the matter until witness statements had been delivered.

Although noting that references out of court have often proved to be a useful tool in the efficient management of these types of cases, Byrne J refused Abigroup's application. In reaching that decision, his Honour followed the earlier decision of Beach J in *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762.

In the earlier decision, Beach J followed two Queensland cases (*Silk v Eberhardt* [1959] QWN 29 and *Honeywell Pty Ltd v Austral Motors Holdings Ltd* [1980] Qd R 355) and held:

Where a party to litigation wishes the sort of dispute which normally calls for judicial determination to be tried by a judicial tribunal, it will only be in cases of an exceptional nature that his wishes will be disregarded and the matter referred to an arbitrator or special referee. In my opinion, the so-called complexities of the matters pointed to by the plaintiff in support of its application do not constitute special circumstances in the present case.

Beach J endorsed the view of the Queensland judges that the court should not, except in exceptional circumstances, impose the expense of a reference upon an objecting party and that a judge is particularly appropriate to determine conflicts of fact, including technical facts.

Byrne J noted that *Taylor's* case, and the Queensland cases upon which it is based, have commanded support in Queensland, WA and SA. His Honour discerned from this case law that the reluctance of the court to make an order for reference against the wishes of a party is driven by various matters, namely:

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- the duty of the court to provide a judicial forum for the determination of issues for litigants who seek it;
- the terms of the rule under which the order for reference is made; and
- practical considerations such as relative cost, expedition and efficiency.

His Honour held that an applicant for an order for reference should show that the questions to be referred are appropriate to be enquired into before the other questions in issue in the proceedings. Following *Taylor's* case, it must also be demonstrated that the case is of such an exceptional nature that the genuine wishes of the other party for a judicial determination should be disregarded. His Honour was not satisfied those requirements had been met here. In particular, it had not been demonstrated that a reference on all issues except costs would be more economical or expeditious than a trial before a judge.

In contrast, the decision in *Taylor's* case and the Queensland decisions on which it is based have not been followed in NSW. In *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd* (1987) 8 NSWLR 123, Smart J held that the Court should consider application for reference without any predisposition to make or refuse an order depending on the wishes of one party. Smart J made the point that delays in Court lists often disadvantage plaintiffs while defendants were often less dismayed by the prospect of a distant trial. Further, in an industry as fluid as the construction industry, witnesses move interstate to other projects and memories become less reliable with the passage of time.

Smart J said that, where an application for reference is opposed, the Court will consider all of the circumstances, particularly:

- the suitability of the issues for determination by a referee and the availability of a suitable referee;
- the delay before the court can hear and determine the matter and how quickly a suitable referee can do so;
- the prejudice the parties will suffer by reason of any delay;
- whether the reference will occasion additional costs of significance or is likely to save costs; and
- the terms of any reference, including the issues and whether they should be referred for determination or inquiry or report. ✕

Case note: State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd

Arbitrator's procedural rulings / interim award — exercise of Court's power under s 47 Uniform Commercial Arbitration Acts

Robert Hunt*

The decision of Byrne J in *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd* [2001] VSC 76 (23 March 2001, Supreme Court of Victoria) is the first case of which the writer is aware arising under the Institute's 1999 Rules for the Conduct of Commercial Arbitrations.

The proceedings in the Court concerned claims made by the State of Victoria to the arbitrator that certain documents be not produced or disclosed on the ground of public interest immunity. The arbitrator received evidence, heard submissions on the claims to immunity and, having inspected the documents with the consent of the parties, determined that many of them should be produced and made available for inspection by Seal Rocks and its representatives. The State sought declaratory and other relief to the effect of reversing the arbitrator's ruling, pursuant to ss 43 or 47 of the *Commercial Arbitration Act 1984* (Vic) (the Act) or, alternatively, pursuant to the inherent jurisdiction of the Court.

His Honour held he had no power to set aside the arbitrator's determination on any of the bases argued and dismissed the application.

It was submitted that the determinations of the arbitrator were interim awards and therefore 'awards' within the meaning of s 4 of the Act. His Honour referred to what was said by Kirby P (as he then was), speaking for the majority of the Court of Appeal, in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, where such an argument was described as 'hopeless' by Kirby P, when he observed that an award of the kind contemplated by the Act is one which is a final step in the arbitration (at 672). Byrne J then said, at para 13:

The availability of the power in the arbitrator to make an interim award does not detract from this. It is, historically, a power conferred on an arbitrator by agreement or statute to deal successively with matters referred to arbitration, a power which was denied at common law. Interim in this expression is not to be understood as merely temporary. It is clear that a decision of the arbitrator is not

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an award of any kind unless it disposes of a matter referred to arbitration. It is not appropriate to describe a merely procedural decision as an award.'

An argument was then put to the Court that s 47 of the Act endowed the Court with a general supervisory role in procedural matters to ensure that the arbitration was conducted fairly, on the authority of the decision of the South Australian Full Court in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1990) 55 SASR 327, at 354-356. In rejecting that submission, his Honour said, at para 19-20:

It was, however, put on the authority of the decision of the South Australian Full Court in the South Australian Superannuation case that this Court is endowed by s 47 with a general supervisory role in procedural matters to ensure that the arbitration is conducted fairly. I was referred, too, to a number of single judge decisions including three of this Court, where the existence of this jurisdiction appeared to have been accepted or, at least, not rejected. I think it is fair to say that, on this point, the reasoning underlying the majority decision of the South Australian Superannuation case, but not its authority, has suffered a mortal blow at the hands of Rogers CJ Comm D. Its authority, in the context of an Australia wide legislative scheme, has been impugned by *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*, where the Court of Appeal held that s 47 does not provide a ready entitlement to secure a review of interlocutory orders made in an arbitration; the section "is intended to empower the Court, in cases properly before it, to make interlocutory orders to the extent that it is not elsewhere specifically provided for in other sections of the Act".

For my part, I prefer to follow the *Cockatoo Dockyard* case and the reasoning of Bollen J, in dissent, in the South Australian Superannuation case. Section 47 is not available as a source of power to enable the court to review an interlocutory decision of an arbitrator made within power. Accordingly, s 47 may not be called upon to support the present application.

Finally, an argument was put to the Court that the orders sought may be made pursuant to the inherent jurisdiction of the Court. On the authority of what was said by Kirby P in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (at pp 675-676), it was accepted that this jurisdiction exists only in respect of determinations and orders of an arbitrator which are beyond the scope of the arbitration.

His Honour noted the powers available to an arbitrator to make directions or rulings in respect of evidentiary and procedural matters pursuant to rule 13 of the 1999 *Rules for the Conduct of Commercial Arbitrations*.

It was submitted that where the arbitrator's conclusion on public interest immunity was not properly founded, then the arbitrator was acting beyond power and the Court might intervene. In rejecting that submission, his Honour said, at para 25:

Faced with the strong line of authority which would deny to the court any inherent jurisdiction generally to review a procedural determination or evidentiary ruling of an arbitrator, I would be very reluctant to act upon the distinction which these submissions would require the court to draw. The submission provides no line to indicate when an error by an arbitrator on such a point is an excess of power and therefore reviewable, or when it is merely an error of fact or law within the scope of the arbitration, which is not. Nor was any suggested, whether by reference to the egregious nature of the error or otherwise. The acceptance of such a distinction would place an intolerable burden on the arbitrator and perhaps on the parties an unacceptable prospect of interruption to the arbitral process by application to the Court. Nor was I able to derive comfort from the suggestion put by counsel for the State that I should limit my acceptance of their submission to cases involving public interest immunity. ❧

Case Note: Walter Construction Group Ltd v Walker Corporation Ltd

Is GST payable on a Court judgement or Arbitral Award?

Robert Hunt

There have been various decisions of State Supreme Courts which indicate that a judgment in contested proceedings is not a 'supply' on which GST is payable under *A New Tax System (Goods & Services) Act 1999* (Cth) (the GST Act), such as to be recoverable as damages in those proceedings.

Section 9-5 of the Act defines a 'taxable supply' as follows:

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You make a **taxable supply** if:

- (a) you make the **supply for consideration**; and
- (b) the supply is made in the course or furtherance of an **enterprise** that you carry on; and
- (c) the supply is **connected with Australia**; and
- (d) you are registered, or **required to be registered**

However, the supply is not a taxable supply to the extent that it is **GST-free** or **input taxed**.

Section 9-10 (2) of the GST Act provides as follows:

- (2) Without limiting subsection (1), **supply** includes any of these:
 - (a) a supply of goods;
 - (b) a supply of services;
 - (c) a supply of advice or information;
 - (d) a grant, assignment or surrender of real property;
 - (e) a creation, grant, transfer, assignment or surrender of any right;
 - (f) a financial supply;
 - (g) an entry into, or release from, an obligation:
 - (i) to do anything; or
 - (ii) to refrain from any act; or
 - (ii) to tolerate an act or situation;
 - (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

In *Interchase Corporation Ltd v ACN 010 087 573 Pty. Ltd.* [2000] ATC 4552; [2000] QSC 013 (23 June 2000), White J of the Queensland Supreme Court said:

It is not easy to see how a court giving judgement or the payment of a judgement sum or the granting of a stay of execution could constitute a 'supply' within the meaning of the GST Act.

A similar view was expressed by Underwood J in the Tasmanian Supreme Court in *Shaw v Director of Housing* (No 2) [2001] TASSC 2 (8 February 2001). His Honour held that upon the defendants making payment of the judgement sum, the plaintiff would not be making a 'supply' within the meaning of s 9-10, because the proper construction of the GST Act 'evinces a legislative intention not to include in the word 'supply' the release of an obligation that occurs

independently of the releasor’.

Recently, in *Walter Construction Group Ltd v Walker Corporation Ltd* [2001] NSWSC 283 in the NSW Supreme Court, Hunter J held that GST was not payable on the judgement in the proceedings. He said:

[At 479] In my view, the imposition by the Court upon Walker Corporation to pay the judgment debt as ordered in these proceedings does not constitute a supply by Walter Construction in the form of a supply of goods or services, of advice or information, of a grant, assignment, surrender or release of any kind, nor is it a financial supply.

[At 480] Further, in order to make the supply a ‘taxable supply’, it must be one which ‘you make ... for consideration’. I have been unable to see any room for ‘consideration’ in the supply said to be, or arise out of, the judgment in these proceedings.

[At 481] To the extent that there has been a merger in the judgment of Walter Construction’s causes of action relating to the project, that does not involve any release grant, assignment, surrender, transfer or creation of a right by Walter Construction. It is a merger by operation of law. Payment of the judgment debt is in no different category. It operates to satisfy the Court’s judgment, without creation of a right, release, assignment or the like by Walter Construction.

In the *Walter Construction* case, Hunter J expressly referred to a Draft Ruling issued after the hearing by the Australian Taxation Office (ATO) relating to the possible application of GST to judgements, and said that he had not had regard to that Ruling.

The Draft Ruling (GSTR 200/D23) expresses the ATO’s opinion of when GST is payable on settlements and judgements. In summary, the Draft Ruling expresses the view that GST will be payable if there is ‘sufficient nexus’ with an earlier supply and that earlier supply is a taxable ‘supply’ within the meaning of the GST Act.

Although the Final Ruling by the ATO will be a Public Ruling for the purposes of the *Taxation Administration Act 1953* (Cth), a taxpayer is free to challenge the ruling. A court or tribunal may then take a different view of the matter, as has already happened in the three cases referred to above. ☼

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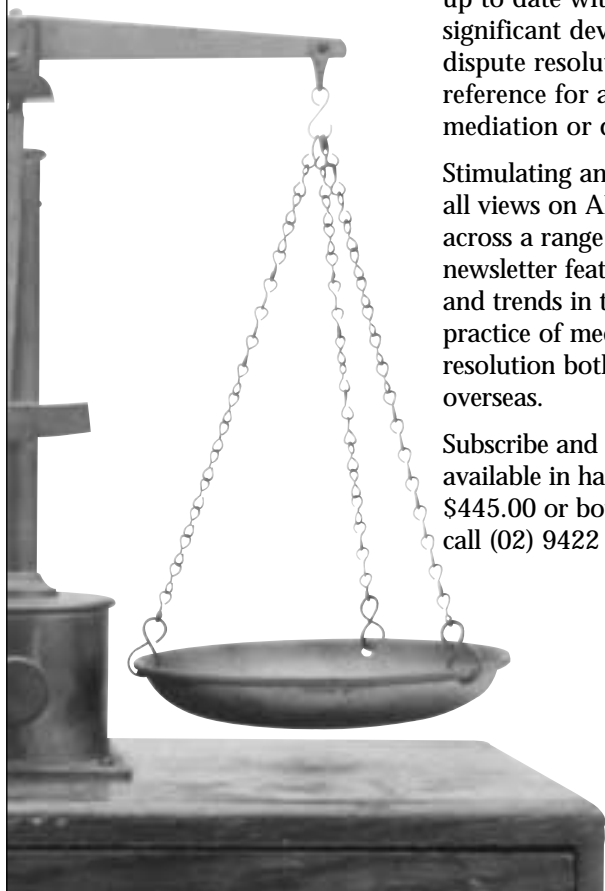
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