



President's Say

I am honoured to be re-elected as President by the incoming Council. When I look back over my first year as President, it has been both demanding and stimulating to serve as President at this important stage in the Institute's development.

I would like to thank the retiring members of Council, namely Alan Swann, Hugh Foxcroft S.C. and Dr Ian Eilenberg, for their contribution as Councillors. I would also like to welcome our three newly-elected Councillors, Stephen Hibbert, Geoffrey Markham and Patrick Pinder. It is already apparent that the new Council has a good mix of experience and fresh thinking, which should stand us in good stead in the future.

The Colloquium in Canberra on 25 - 27 May 2001 certainly proved to be a highlight of my first year as President. As well as providing an opportunity for members and their guests to get together in very convivial surroundings, the main object of the Colloquium was for members to discuss the future direction of the Institute, including key issues such as what we want the Institute to be, what services the Institute should be providing to members and the community generally, and how best to promote the interests of the Institute and its members.

As well as being the best attended Institute Conference I can recall in more than 20 years as a member, the level of enthusiasm and participation in discussing these important issues was very high, and certainly augers well for the future of the Institute. The mood was well summarised by WA Chapter Chairman Phil Faigen, in the closing session on 27 May, when he said the one thing he would say to members who did not attend the Colloquium is 'Why were you not there?'

With the benefit of the views expressed at the Colloquium, at its meeting on 21 June 2001, Council resolved to refine the existing Committee structure, to optimise the use of our resources in dealing with the challenges and opportunities of the year ahead. Each of the new Committees is chaired by a member of the Executive. The Vice-Chairs of the various Committees are Councillors with the exception of Grant Holley, who is the Editor of 'The Arbitrator & Mediator'. All Councillors are members of at least one Committee. The new Committee structure is as follows:

Committee	Chair	Vice-Chair
Education & Prof Development	Robert Hunt	George Strohfeldt
Professional Affairs	Ian Nosworthy	David Waldby
Practice Notes Rules & By-laws	Janet Grey	Patrick Pinder
Journal	Robert Hunt	Grant Holley
Membership & Profile	Tony Commisso	To be advised

Council

In May 2001, the elections for Council for 2001/2002 were held. The following members were elected to the Council:

ACT Chapter:	Tony Commisso
NSW Chapter:	Janet Grey, Stephen Hibbert, Robert Hunt & Geoffrey Markham
Queensland Chapter:	George Strohfeldt & David Waldby
SA Chapter:	Ian Nosworthy
Victorian Chapter:	Dr Ian Eilenberg & Stephen Gunn
WA Chapter:	Patrick Pinder & Clive Raymond

Dr Clyde Croft S.C. remains a member of Council ex officio, as Immediate Past President.

In late July 2001, Dr Ian Eilenberg resigned from the Council. In accordance with the Articles of Association, the casual vacancy will be filled by Barry O'Mara.

Executive

The new Council met for the first time on 25 May 2001, before the Colloquium at the Hyatt Hotel Canberra, and elected the Executive for 2000/2001 as follows:

President	Robert Hunt
Senior Vice-President	Ian Nosworthy
Vice-President	Janet Grey
Treasurer	Tony Commisso

Dr Clyde Croft S.C. remains a member of the Executive ex officio, as Immediate Past President.

Expert Witnesses

On 20 July 2001, 'The Australian Financial Review' reported on the introduction of a new Practice Note (No 121) to streamline the way parties use expert witnesses in litigation in the Court. The report said:

'The new rules are contained in a practice note that is intended to encourage faster resolution of proceedings and reduce or even eliminate the need for expert witnesses to attend court and give evidence.

The practice note empowers judges to order expert witnesses from opposing sides of a case to confer and produce a joint report aimed at minimising and identifying the areas of disagreement.

Judges can order expert witnesses to identify the areas in which they agree, the matters that are in dispute and the reasons for any disagreement.'

Sound familiar?

In the Institute's Rules for the Conduct of Commercial Arbitration (including the Expedited Arbitration Rules) introduced in August 1999, Schedule 1 provides that the directions which an arbitrator may make may include:

- '3. The holding of further Preliminary Conferences, meetings between experts and/or representatives of the parties, or Experts' Conclaves chaired by the Arbitrator, so as to narrow issues in dispute, including the time at which and manner in which they are conducted and who may attend, and preparation of any written document recording the results thereof.
4. The preparation of joint reports by experts engaged by the parties following any meetings between such experts or any Experts' Conclave, recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for any such disagreement and their respective contentions in relation to same.'

It is good to see the Courts are catching up!

Peace Operations Negotiation Course

Members attracted to a somewhat different application of the dispute resolution techniques we use in the Institute may be interested to hear of two day intensive Course being conducted through the auspices of the Griffith University Key Centre for Ethics, Law, Justice and Governance and Paximus Pty. Ltd.

The flyer says of the Courses:

'A two day intensive step-by-step easy-to-use guide for preventive diplomacy, crisis management, peacemaking and peacekeeping based on interactive real-world lively scenarios

delivered by highly experienced peacekeepers developing user-friendly techniques for "third generation" peace operations.

This enjoyable, action packed, fast moving course proceeds over two days (20 hours) in eight separate skills-based learning brackets of simulated interactive role playing negotiation scenarios, derived from actual compact case studies, which chart the emergence of a hypothetical armed conflict followed by a peacekeeping mission. Risking workplace litigation for breach of duty of care, most governments and NGOs send people to these dangerous multi-million dollar peace operations without training. Many operations are poorly planned and badly executed. The benefits of the course are for safer, more effective and cheaper peace operations. These state-of-the-art, practical, low cost, high utility, risk minimal tools for peace interventions, will help avoid and terminate war, save life, reduce suffering and save reconstruction money. Engaged by the US Army Peacekeeping Institute and Brown University, the course author's material is to be included in the forthcoming US Army Peacekeeping Harmonisation Manual. This is a course about ethically getting what you want without giving in, turning confrontation into cooperation, and protagonists into partners. Although concentrated on peace operations, where the stakes are high, involving life and death and the future dangerously uncertain, the specialist sought-after skills imparted by this cutting edge training course, also have direct application in other spheres of other human activity such as at work and at home.'

In the past, these Courses have been conducted in Canberra and Dili, East Timor. Further Courses will be conducted in Sydney in October 2001 and Melbourne in November 2001. For further details, contact the Course leaders, Mark Plunkett (former UN Special Prosecutor) on 0418 171 700 or (07) 3236 1044 or Dr Robert Murfet on 0417 211 436 or (02) 6282 0388.

Robert Hunt

Stop the PRESS!!!!

IAMA Wins Evaluation Funding for Family Dispute Programs

The Institute has been successful in tendering for part of the Commonwealth Attorney-General's 'Professional Development for Family Dispute Management Practitioners' programs. These programs are designed to improve family dispute management practices for practitioners in private practice. It is part of a large-scale national development program to promote good dispute management practice among key practitioners. There will be two principal parts to the program. One sub-program will be directed at legal practitioners in private practice and the other at counsellors, mediators and other family dispute resolution practitioners.

The key principles underpinning the strategy are the 1996 reforms to the Family Law Act. The strategy aims to guide separating couples, subject to appropriate screening, to use counselling, mediation and conferencing first, rather than becoming adversaries and litigants by turning to the Courts. The purpose is

to create an environment that is "child inclusive" and respectful of the interests of the child.

The Institute has been given the task of evaluating the two programs that are soon to be implemented. **We are interested in forming a "Reference Group" to provide feedback to the evaluators. If you have experience as a family dispute practitioner and want to get involved please give me a call((03) 9607 6908 or email ceo@iama.org.au).** For the purpose of the tender we had previously joined a consortium of experts in this field to bid for funds. We will use several of the consortium members to help us conduct the evaluation that will take place over the coming year. The CEO will be busy meeting the various bodies conducting the programs (these include Griffith University, Relationships Australia, La Trobe University and Success Works [Melbourne]) and arranging the necessary contracts, liaison etc that will be necessary. Further updates on the consortium will be provided as the programs get under way.

Want to be noticed?

The National Newsletter goes out to 1500 eminent lawyers, architects, building consultants, engineers, accountants, academics etc. and into the libraries of many of our leading institutions.

If you want your conference, meeting or special event published at no charge, then send it in to national@iama.org.au

If you want to advertise your services, it's simple. Send the script by email and we will include it.

Rates are very competitive:

1/4 page: \$75
1/2 page: \$150
Full page: \$275

PS Have you got an Institute tie (\$27.50), lapel badge (\$9.00) or polo shirt (\$33.00) yet? If not, email National Office national@iama.org.au and place an order.

The New IAMA Website

They weren't quite as fast or spectacular as one of those backyard makeovers we see on TV, but anyone visiting the IAMA website lately will definitely notice that the renovators paid a visit.

To avoid disorientation when you find the previous layout has changed, here is a quick guide to the new website.

- Home Page** The place to start! From here you can visit any of the main sections listed below. There's also a search engine to scour the entire site for a particular topic, name or term.
- News** As well as the newsletter, this is where to find the recent IAMA announcements.
- Resources** The Resource Centre is where visitors can find answers to the most commonly asked questions about alternative dispute resolution. Our various rules and policies are also on the site.
- Directory** As well as chapter-based directories of all IAMA members, arbitrators are listed according to grades and there's a complete list of mediators as well. This needs some further work. You can email us, from the website, changes to your entry.
- About IAMA** A collection of basic information about the rationale and functioning of the IAMA.
- Courses** Details of courses offered by the IAMA.

Publications A place to find IAMA press releases, and (in coming months) an archive of the most recent issues of *The Arbitrator and Mediator* complete with a powerful search facility.

Forum The place to meet and air your views. There are two parts in the Forum: Bulletin Board: a place to pose questions and air your views. Messages remain on view for sixty days. Chat Room: a place for IAMA members to discuss topics either in an open forum, or in private. In order to discourage non-IAMA use of this facility, it is necessary to register with the national office to use the Chat Room.

Links Here's a collection of sites related to ADR on websites all around the world. It's a rich resource covering a huge range of topics.

It looks all new and shiny, but the website is not perfect, and never can be. The world of ADR changes, and we'll attempt to make the website reflect those changes. Your comments, advice and suggestions are therefore always welcome - just click on the email address at the bottom of the Home Page!

P.S. The membership directory constructed from scratch over the last year, is also soon to face some dramatic new developments - watch this space!

The CEO Report

The Third Sector

IAMA belongs to that often forgotten part of the Australian community that is sometimes termed, by theorists and academics, the 'third sector'. We rest alongside a wide variety of organisations including clubs, charities, churches, unions, co-operatives and so on. These organisations are distinguished by a number of factors including a tendency to be democratically governed, initiated by private interest and initiative and limited or constrained in their economic behaviour. They often have super-ordinate goals to some higher ideals and to serve their membership and/or the public good. They are very unlike business or government organisations.

Professor Mark Lyons of the University of Technology in Sydney, in his book titled *Third Sector (Allen and Unwin, Sydney 2001)*, estimates that they contribute 3.5% to GDP and turn over \$57 billion compared to the current expenditure of about \$52 billion by state and Territory governments. They mobilise most of the 2.3 million volunteers in the country and employ over half a million people. Despite all this Professor Lyons and others who study them say they are in decline. Membership and voluntary contributions have fallen off.

The reassuring thing is that most of us are not like the 1920s blacksmith who saw a horseless carriage go by and wondered what it had to do with him.

As Francis Fukuyama, author of *The End of History*, argues, in his brilliant polemic on human nature and the reconstitution of social order titled *The Great Disruption (Profile Books, London 1999)* we, in western societies, are facing the severe decline of social capital. Third sector organisations provide much of that social capital but the essential fuel for this - voluntary labour - has been declining. For example, volunteering in Australia has fallen from almost a third of the population in the early 1980s to less than 20%. In the 'Olympic City' of Sydney, which lauded its volunteers at the Games, it has fallen to 12%.

Many third sector organisations now face stiff competition from commercial competitors in a governmental policy framework that gives this concept (competition) precedence. Despite subsidising and supplementing essential services third sector organizations are often ignored in policy debates and have been heavily burdened (along with small business) by the new tax regime most recently but by steadily expanding regulatory frameworks over several decades.

The impact on management of professional associations in recent times reflects a range of these and other related issues. This is highlighted by a report from the American Society of Association Executives called "*Facing the Future: A Report on Major Trends and Issues Affecting Associations*" (1999, USA). It describes the generational changes in the last 20 years between "old" and "new" boards of these organisations. These are listed in the table below.

OLD AND NEW BOARDS

OLD BOARDS	NEW BOARDS
Administration	Governance
Little diversity	Much diversity
Few computer skills	E-commerce
Loyalty	Split loyalties
No competition	A lot of competition
Meetings central	Variety
Provider driven	Member driven
Management	Leadership
Managing finances	Utilising finances strategically
Committees	Ad hoc
Non-profit	For profit
Maintenance	Development
Agenda driven	Mission driven

The ADR Field

Within the next twenty-five years there will also be continuing change within the ADR field with four major trends intensifying and continuing. These are:

- Internationalisation - as the economy globalises and the communication revolution continues many more disputes will no longer be confined by national boundaries. One offshoot of this will be a further emphasis upon processes that are not hemmed in by relatively rigid legal and procedural processes defined with jurisdictional limits. There will be a further move to more informal processes in the international arena. The Institute will have to become part of these processes and move from a local to a regional and international stance.
- Computerization - the use of the Internet to help manage conflict is only in its infancy and will continue to grow exponentially over the coming decades. We need to expand our resources in this area and be prepared to innovate.
- Increasing Regulation - it is likely that there will be an increasing expansion in the number and range of regulations seeking to place boundaries around the conduct of a variety of ADR processes. There are now well over a hundred pieces of legislation in this country that have ADR related provisions. As well there is likely to be an increasing amount of case law impinging upon the ADR practitioner. This may place some strain upon the continuing practice of what is sometimes termed 'evaluative mediation' (more accurately termed conciliation or non-binding arbitration).
- Institutionalisation - from its beginnings in community-based and government programs to their present position in business, universities and government bureaucracies the ADR movement is going to continue to expand rapidly and move into all of our major social systems. People use these processes for a variety of reasons - cost, privacy, timeliness and low risk. Increasingly, they will use them simply because they have the opportunity for the first time or because they have no other choice.

The reassuring thing is that most of us are not like the 1920s blacksmith who saw a horseless carriage go by and wondered what it had to do with him.

Strategic Management

To manage their various issues requires a strategic approach. This is an approach that encourages not only looking at long-term and short-term issues but an approach that works at the macro level as well as the micro level.

Probably the first thing to do is establish a number of operational principles. A list of the most essential is provided below. They are the things an organisation must constantly be guided by.

- Set and communicate clear organisational objectives
- Develop the organisation to be ready for and accustomed to change
- Be future focused
- Integrate our planning
- Maintain our hybrid and polyglot nature
- Be de-centralised but with central oversight and control

At the micro level there are a number of issues that require attention in any organization. These include:

- Administration of Committees and Sub-Committees
- Membership records and tracking
- Financial recording and reporting
- Collaboration/communication between Chapters
- Staff supervision and employment
- Professional development and training development
- Profile development

These, in a nutshell are also the challenges facing the organization. So far the prognosis is good and we are some way towards being the premier ADR professional organization in Australia.

The Colloquium

The recent Colloquium was a great experience for me as members from all round Australia joined in discussing many of the issues outlined above. I was particularly gratified by the enthusiastic and open way in which members debated many of the questions presented. The organization by Tony Commisso and his committee from the ACT chapter were sensational and this ensured a smooth program.

The New National Council

The new National Council was elected with three new members at the AGM that took place on the 25th May 2001 as part of The Colloquium. Names and details of the Council are provided elsewhere in the newsletter. The AGM also voted to incorporate in the Articles of Association a two-year term for Councillors beginning in 2002. The Executive of the Council will still be elected upon an annual basis.

No Fee Increase for 2002

At its recent meeting the Council (21/6/01) decided not to increase subscription fees for the 2002 year. Subscriptions for the next year will be sent out in October of this year.

Peter Condliffe
CEO

M E M B E R S H I P C A R D

Your new membership card is enclosed.
If any details are incorrect let us know (national@iama.org.au)

Mediation - can it work for the building industry or not?

A Discussion

Chaired by Phil Faigen who introduced the speakers:

Paul Marsh: Barrister, Chairman of the Builders Registration Board, Chairman of the Building Disputes Committee;

Darryl Retallack JP: Builder, Member of the Builders Registration Board and Building Disputes Committee, Council Member of the Master Builders Association;

David Forrester: Barrister, Mediator, Deputy Chairman of Building Disputes Committee;

Brian Wales: Quantity Surveyor, Project Manager, Mediator.

Paul Marsh

Paul picked up from his Breakfast Address of the 23 January. A point of that address was:

How Mediation would be seen to be just and what is the criteria for success in Mediation. He had previously discussed the differing philosophic views held by sections of society:

1. People with no reality outside their own perception. Paul quoted the Hindmarsh Island dispute as an example where enquires and attempts to reconcile the views proved to be futile.
2. People with objective reality within their own perception that can be ascertained through the evidence in a dispute resolution process.

These two positions have an affect on the way that resolution is attempted.

In the first instance, where there is no perception of reality, the use of evidence to determine facts in a dispute resolution (ADR) process is likely to prove futile.

In the second instance, where there is a perception of reality then both systems of dispute resolution (determinative and consensual) can work. The question is: 'Can mediation work for the building industry?'. The answer is a qualified 'yes'. The answer depends on two issues:

1. The criteria used to measure success; and
2. What is meant by "Mediation".

If mediation is the process by which the parties arrive at agreement after considerable preparation leading up to; but short of an arbitration or litigation, where the parties are fully informed by way of formal claim and defence, procedures for discovery and exchange of interrogatories, this is a process that successfully happens often. But such 'mediations' may prove to be as costly as arbitration or litigation.

In contrast, if mediation means (what some people might see as a 'pure' mediation process) a less formal (and costly) process, where people are not as well informed due to the absence of the costly preparation leading up to an arbitration or litigation there is the risk that decisions will be made that are not fully considered.

Any person can deliberately make an ignorant and ill-informed decision without obtaining advice. This is their right. But the potential risk for unjust decisions is not acceptable in the community. And there is always the risk that such decisions will be

subjected to post mortem and there may be downstream recriminations. In such circumstances there appears to be a reluctance in the community for people to be responsible for what they do.

This suggests, that for successful mediation, there will be some degree of informed knowledge on the part of the participants. That is, some of the costs of preparation must be incurred.

As an industry regulator, the Building Disputes Committee (BDC) is interested in resolving disputes at the minimum cost. For the disputes dealt with by the BDC the cost of an informed mediation could be as high or higher than for an arbitration. So unless some value can be assigned to a negotiated decision that will not be appealed the mediation process is not as economic as a determination by the BDC.

People involved in the building industry come from each extreme of the range of knowledge of dispute resolution processes. Builders, developers and such people continuously involved in the industry can be expected to have at least a working knowledge of dispute resolution processes or have ready access to advice. At this level mediation may have some benefit.

At the other extreme there is the domestic home buyer for whom everything is a new experience especially disputes and the resolution process. It is these people that need the benefit of an acceptable dispute resolution process that is less costly. At this end of the scale of disputants the process of mediation is less likely to provide acceptable cost-beneficial results.

David Forrester

We have to be clear about the difference between mediation and conciliation.

In Mediation there is a person that acts as an independent chairman who does not attempt to tell the parties where they should finish up. By various means the mediator should imply and point out to each party the weaknesses in their case but not, in effect, telling them what to do.

In Conciliation the conciliator acts as an independent chairman; but the parties agree that, if they cannot reach mutual agreement, they may request the conciliator to point out to them how he thinks they may or may not go in a court and what sort of a situation they should arrive at. David described an experience with mediation in the Supreme Court where the Registrar acted as a conciliator by encouraging the parties to settle.

David made two points in relation to the building industry:

1. In the cottage industry mediation as a process is not very relevant. The parties are very emotional about the issues. They want a black and white decision from a third party to determine the issue.

Mediation is technically possible at the end when the dispute is about completion and the final payment.. When there is a trade off of completion work against the final payment as agreed. This second case is seen as the only application of mediation as a useful tactic.

It is rare that two parties come before the Building Disputes Committee and are so desperate to settle the dispute that they will work together before a mediator to arrive at a resolution.

For disputes arising from large commercial and industrial building developments, mediation can be a very useful technique. Very often disputes are of values of variation orders, latent conditions and similar issues. There are many ways in which a mediator can facilitate dispute resolution in this sector of the building industry.

2. An arbitrator has to listen to, weigh the evidence and make a decision based on that evidence. On the other hand a mediator has no decision-making role in the process. A mediator is there to help the parties reach their own conclusions and reach a result that the two parties can live with.

The problem with arbitrators conducting a mediation is the temptation to attempt to conciliate, with the downstream risk of being seen to be too interventionist and so being blamed for, in hindsight, an unsatisfactory result.

Mediation is very different from arbitration and requires different skills. Practitioners in both fields need to be extremely careful in mediation to allow the process to run its course without intervention by the mediator that is, in effect, conciliatory by nature.

Darryl Retallack

Darryl explained that he is a practising builder and not a legal person. He believes in maintaining dialogue with owners, subcontractors and others involved in a building. When builders stop talking to owners is when they disagree. And when they disagree they become very emotional and a dispute can arise.

Darryl expressed his view of a mediation as two parties with a gulf between the money amounts expected by the parties. He sees the mediator as helping the parties to agree on some amount between the two extremes.

In such circumstances the strong party is going to win and the weak party is going to lose. The strongest person in the mediation is always going to be the winner. This cannot lead to a just decision if the only criteria for winning or losing is the strength of one of the parties.

The strength of a party maybe financial, negotiating ability and personality. If a builder or developer is offered a mediation, they can be expected to weigh up the strength of their position before accepting.

To ensure a just decision, dispute resolution needs to be by arbitration or litigation.

The situation usually is that the two parties wish to approach an independent person, tell their stories and achieve an acceptable decision even though each of the parties falls short of their expectancy. This process should not involve a lot of preparation. If a lot of preparation is justified then the dispute may as well go directly to litigation.

Brian Wales

Brian's experience includes many mediations in the building industry most of which were construction oriented. All of the mediations were with developers, builders and constructors and large self-contained subcontractors; a group that, for convenience, can be called 'builders'.

These builders fall into two distinct groups:

1. Builders who were seeking a quick, cheap resolution to the dispute, a dispute they would likely be willing to compromise on but for some reason the parties to the dispute cannot find common ground themselves. They often get emotional about the injustice they see they have been subjected to. They see a third party by way of a mediator is needed to listen to them in caucus and point out their strengths and weaknesses; but the usual experience is that the parties want to unburden themselves to someone. It is also found that the prevailing economic climate has quite a bearing on the type of ADR they chose.
2. Builders who strongly preferred mediation to arbitration. This preference was driven by a previous unsatisfactory experience with what they regard as the unpredictability of an arbitration award. They feel they have a greater control or influence on the final result of a mediation as the process worked towards conciliation and a conclusion. They are usually experienced builders with good documentation control and a resident claim staff. They see that mediation gives them a good look at the other parties case; and, if there is any intent by the parties to settle, then a compromise is found.

Of course there are builders that will chose to arbitrate, or at least commence the process as a threatening move towards an early settlement.

Other speakers have highlighted that builders often have more skill and experience with dispute resolution than their customers. This is a natural product of the industry.

It has been Brian's experience that many of his mediations have eventually become conciliations when the parties seek an opinion of the mediator on a settlement, more particularly for money issues. If it is the wish of the parties changing from mediation to conciliation to effect a resolution it is not seen as a problem.

One weakness with mediation (or conciliation in the building industry is the lack of enforceability of mediated agreements where money has to be settled. A signed mediation contract has far less weight than an arbitrator's award and less support from the court.

Can mediation work in the building industry? The answer is a qualified yes. But mediation can certainly be difficult in the cottage industry.

There was spirited discussion from the audience based on individual experiences.

One impression from the audience response was that mediation has a wide range of meanings to practitioners of ADR in the building industry and elsewhere. Editor.

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The Mysterious case of Meadowsweet v Bindweed

Commentary

Members of AMINZ who are also members of the Chartered Institute of Arbitrators will probably have been as interested as I was to read the May 2000 Journal in which the awards of five leading arbitrators were presented on the facts of the above Clayton's case (papers only with no oral evidence).

The facts (for the benefit of non-members) were that the respondent accepted an offer (in the form of an estimate) from the claimant to carry out certain construction works in the respondent's garden (a new conservatory selected by the respondent from a catalogue, a new hedge, a fish pond, a rockery and a paved area). There was a counterclaim for 'social undermining' and rebuttal of the main heads of claim, and there were also issues of VAT, whether or not late and partial payment entitled the respondent to a discount and the standing of what appeared to be an open offer. Quantum was about £10,000.

As an engineer, I have an analytical frame of mind and was moved to make comparisons between the awards, and to distil the various outcomes. Two of the arbitrators were lawyers, one was an engineer and two were quantity surveyors. The longest award (14 pages) was by the engineer (who also charged the highest fee) and the shortest by the QC (6 pages and the second lowest fee). The highest and lowest award were by the two lawyers, leaving the three technical arbitrators lying within +5/-10% of the average of their three awards - perhaps (dare I say it) an indication that technical arbitrators are more likely to reach a consistent or realistic quantum in a technical arbitration, but that lawyers are more likely to achieve value for fee money and a well written award.

My findings are on the opposite page for the benefit and curiosity of other members.

THE REVIEW

The May 2000 Journal of the Chartered Institute of Arbitrators contains "*the fruits of an experiment*" as it was expressed in the Editorial introduction to the Journal, by publishing the Clayton's Awards of five distinguished UK Arbitrators on a fictional complaint by a landscape gardener against its former client. The pleadings and the evidence are set out in the Journal, together with the five Awards and notes from each of the Arbitrators intended for the benefit of their respective Pupils. As a professional engineer, I have an inquisitive and analytical bent, and have therefore indulged myself in a potential learning exercise by examining the differences and similarities between the various Awards. I have set out below (in no particular order), those which appear to me to be the most interesting of my findings.

1. **Quantum.** The values of the claim and the counterclaim were about the same (£11,710 and £12,602 respectively). There was widespread agreement on the quantum found for the Claimant with four of the Arbitrators awarding the sum of £9,972 and one at £10,526. There was not the same commonality in respect of the counterclaim, with the amounts ranging from £20 to £2,251.
2. **Costs.** There was about as much variation as there could be on the number of variables available. Two allowed the costs to lie where they fell, and one each allocated calculated costs to one party or the other or shared the costs between the parties (the latter a particularly complicated distribution of costs taking up a full two pages to explain).
3. **Interest.** There was a given rate in the contract between the parties (8.0%), and this was therefore used by all of the Arbitrators for interest up to the date of the Award. One of the Arbitrators increased the rate to 14% (without explanation) from the date of the Award up to the payment date. Despite this, the quantum of interest varied from £125.11 to £468.97.
4. **Arbitrator's Fees.** Two of the Awards shared the fee equally between the parties, with a third distributing the fee in proportion to the degree to which the Arbitrator perceived each party to have been successful. These Awards were on the basis of the Rules of the Arbitration that each party would normally bear its own costs and would share the costs of the Arbitrator. However, two of the Arbitrators took the view that the whole of their fee should be paid by the net loser.
5. **Length of the Award.** Most of the Arbitrators said in their notes to their pupil that Award authors should keep their award simple (one of them even quoting the KISS principle), and four of them did succeed in keeping the length of the Award down to within the range of 6 to 9 pages. The fifth Arbitrator ran to 14 pages, and it is perhaps not surprising that this was the same one who took two full pages to allocate costs (see item 2 above).
6. **Quotation or Estimate.** One of the matters to be decided was whether the offer to carry out the work was a lump sum, or whether the inclusion of an item for supply and erection of a conservatory which was priced as "*£4000 approx.*" allowed for some variation in the price to be charged for that item (there was a claim for an additional payment of £630 on that particular item). The word *estimate* appears twice on the face of the Claimants offer to do the work. None of the Arbitrators would agree that inclusion of the word *estimate* or the abbreviated word *approx.* entitled the claimant to adjustment to the offered price and, in particular, to any additional money. I also find it very surprising that none of the Arbitrators mentioned at all the possibility that *approx.* might also have entitled the respondent to a reduction in price in the right circumstances.
7. **Open Offer.** The Claimant made an open offer to settle part way into the proceedings. Only two of the Arbitrators took the conventional route and argued that the offer was better than the Award on the counterclaim and so awarded costs to the Claimant. One of them compared the offer with the original claim less the actual offer, but did not consider it further because the resulting amount was less than the net award. The fourth Arbitrator mentions the open offer in the preamble, but failed to mention it in the argument on costs despite awarding in favour of the Claimant. The fifth Arbitrator failed to mention the offer at all in his Award.

8. **Gender Balance.** All of the arbitrators were men. I find it a bit surprising in this age of political correctness that no women were invited to take part in this valuable learning exercise.
9. **Arithmetic.** The Claimant made a post acceptance offer to the Respondent that it would reduce its price by 10% if it were paid 50% of the total price prior to the start of the work. Half of the offer amounts to £5540, but the amount actually paid was only £5040, ie. less than half of the offer - most of the Arbitrators missed this discrepancy. However one of them did notice but argued that the variation to the contract would have been based on half of the reduced price, despite the fact that even this did not compute. No doubt I am splitting hairs, and it would not have affected the outcome, but I was left with the feeling that they had all left an untidy loose end which diminished the level of certainty of all of the Awards.
10. **VAT.** There was a question to be decided whether or not VAT was payable. Most of them ducked the issue to some degree and fell back on the expedient that this was a matter to be decided by Her Majesty's Customs and Excise. There was a strong indication that the Claimant was not VAT registered, despite its original estimate having quoted its price as *£11,080 plus VAT*. All of the Arbitrators declined to include VAT in the quantum of the Award.
11. **Overall.** There was little consensus on individual award items, with the exception of the hedge (which was cut and dried on the facts and the expert evidence), and the matter of social undermining (the latter partly because the only evidence on the matter was really hearsay and therefore not admissible).

12. **Arbitrator's Skills.** There were two lawyers, two FRICS and one civil engineer. Only one of them therefore had a background in the "building" industry, when the principle issues were essentially construction issues. It is perhaps significant that the engineer was the only one to recognise the merits of the extra effort the contractor had to expend to deal with the problems associated with a conservatory selected by the owner against the advice of the builder.

Conclusion

It is notorious that five experts will generate five opinions about the same set of facts, and Arbitrators would be no exception to this generality. The Editor admits that the facts were drawn up so that there were issues that could go either way, and concludes that there is often no "right" answer to a dispute. The editor compares the disparity of the Awards with the examples of split decisions in the House of Lords where there may be five separate judgements by the sitting Law Lords. The variation of the net amount payable at the end of the Arbitration was from about two thirds of the mean of the five Awards to a little over one and a half of the mean. Some of the Awards were better set out and more easily read and absorbed than the others, and again this is not unexpected. In some ways the notes to the pupils were more interesting and helpful than the actual Awards.

All in all a very valuable and interesting edition of the Journal, and dare I say it, probably the only one which I have actually read from cover to cover.

Michael Palmer
 BSc(Eng), FIPENZ, FAMINZ(Arb)

(This commentary first appeared in the March 2001 edition of the AMINZ Newsletter. Reprinted with permission.)

An eminent arbitrator returns to his parked BMW to find the headlights broken and considerable damage. There's no sign of the offending vehicle but he's relieved to see that there's a note stuck under the windshield wiper.

"Sorry. I just backed into your Beemer. The witnesses who saw the accident are nodding and smiling at me because they think I'm leaving my name, address and other particulars. But I'm not".

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Arbitration Seminars by the NZ Law Society

The New Zealand Law Society is running a series of seminars throughout the country on *Arbitration in the 21st Century*.

The presenters for these seminars are David Williams QC and Fred Thorpe. **David Williams QC** is the Vice-President (Arbitration) for AMINZ and is a member of the LCIA Court of International Arbitration, London and also is the New Zealand representative who sits on the ICC Court of Arbitration, Paris. **Fred Thorpe** is a partner in Russell McVeagh, Auckland, and is a Fellow of AMINZ.

The seminar programme will cover -

A review of the practice of the Arbitration Act 1996
Arbitration clauses, agreements
Arbitral terms of reference
Procedural Choices
Confidentiality Issues
High Court Amendment Rules 2000
Some leading arbitration cases

The dates and venues for the seminar are -

Dunedin	18 September
Christchurch	19 September
Wellington	20 September
Hamilton	25 September
Auckland	26 September

This arbitration seminar forms part of the NZ Law Society's continuing legal education programme. AMINZ members are invited to attend the seminars and the Law Society has kindly waived its standard non-member charge for those attendees who hold a current membership with AMINZ.

Brochures and registration forms will be posted in August. Further information about the seminars may be obtained from the AMINZ office.

Standards for alternative Dispute Resolution Launched

On the 13th June this year the Attorney-General, Daryl Williams launched a report prepared by the National Alternative Dispute Resolution Advisory Council (NADRAC) on standards for ADR (alternative dispute resolution).

The report follows extensive consultation in relation to an earlier discussion paper, *'The Development of Standards for ADR' (March 2000)*, including forums in each capital city.

The report contains 21 recommendations for government and non-government agencies involved in ADR, and provides a framework for the ongoing development of ADR standards.

In particular, the report calls for ADR service providers to adopt and comply with self-regulated codes of practice, and for the inclusion of such codes in any agreements for the provision of ADR services. It also usefully outlines a range of knowledge, skills and ethical standards which may be adapted into a code of conduct. This is something the Institute may be able to develop as part of its professional development regime.

The report and further details can be obtained at www.nadrac.gov.au or the NADRAC secretariat on 02 6250 6897.

D I D Y O U K N O W ?



That the financial Services Reform Bill 2001 will require financial service licensees to have external and internal dispute resolution schemes approved by ASIC. We are presently making enquiries about registering IAMA's Industry/Consumer Rules as such a scheme. For further information about these schemes go to www.asic.gov.au

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DELAY AND DISRUPTION IN CONSTRUCTION CONTRACTS

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This book is intended to provide, in an accessible format, clauses that address all the significant issues that contracting parties face, and in any event should consider, when they decide to draft a dispute resolution clause for an international contract. Those who wish immediate access to suggested language may turn directly to the Appendices. Those who wish to understand the analysis that leads to the suggested language should read the text.

THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION

Kluwer Law International

The Hague

Hard Cover, March 2001

ISBN 90-411-1511-0. 128 pp

PRICE: EUR 53.00/US\$46.00/GBP 32.00

STOCKHOLM ARBITRATION REPORT (SAR)

US\$110. Two Issues Per Year. ISSN 1404-1715

The Stockholm Arbitration Report (SAR) is a new 500+ page international arbitration publication that will be published twice a year by Juris Publishing, Inc. on behalf of the Stockholm Chamber of Commerce (SCC) Institute. The new format, which replaces the previous yearbook, is being introduced in response to the increasing resort to arbitration in Sweden by non-Swedish parties, as well as to the new Swedish Arbitration Act and the SCC Institute's new Rules, which both came into force on 1 April 1999.

INTERNATIONAL COMMERCIAL ARBITRATION

Commentary and Materials

Expanded Second Edition by Gary Born

Kluwer Law International

February 2001

Hardbound, 1172 pp.

ISBN 90-411-1559-5

PRICE: EUR 213.00/USD 185.00/GBP 130.00

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Asia Pacific Mediation Forum

Reconciliation:

A Conversation Beyond Cultural Boundaries

Adelaide, South Australia

29 November - 1 December 2001

The World Mediation Forum is a not-for-profit global organisation committed to the ideals of continuing education, learning and promotion in the field of conflict management and dispute resolution. Delegations are currently being formed in different regions and countries around the world. Regional and national

forums are convened bi-annually in the years between the global WMF Congresses. The next global WMF Congress will be in Buenos Aries in 2002.

Updates on the Asia Pacific Mediation Forum will be posted on the Ausdispute Website: www.ausdispute.unisa.edu.au

A Guide to Arbitration Practice in Australia

This publication will provide practical guidance in the discipline and practice of commercial arbitration. Edited by Vicki Waye of Adelaide University's Law School, all contributions to the text have been made by notable authors in their specialised fields.

The book is divided into two parts. The first deals with the practice of arbitration, including arbitration's role as a method of dispute resolution, the procedures recommended for effective arbitrations and the manner in which arbitration hearings should be held. The second part of the book discusses legal principles which commonly arise in commercial arbitration and with which arbitrators require familiarity to determine matters according to law.



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