THE ARBITRATION ACT AND CRITICISMS OF SECTION 27

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Why is alternative dispute resolution now championed by all and sundry when society has statutes such as the Commercial Arbitration Act 1984? To answer that, one must reflect on recent history and recognise the legislative amendments that have been made and ponder the reasons for those changes, and question if parties rights to natural justice have been affected.

Arbitration has a long history in dispute resolution throughout society and until recently was the main avenue for the resolution of disputes relating to commerce outside the court system. As the structure of justice has been forced to recognise the requirements for efficient case management of matters before it, as well as the law, it has sought to give arbitration more stature and inevitability. That was made possible by this Legislation. Originally it was considered prudent to empower arbitrators,

> ... to order the parties to a dispute to take such steps as the arbitrator thinks fit to achieve a settlement of the dispute. [58]

and also attempted to assist the same person to arbitrate so as to prevent delay where the settlement conference failed. [59]

This section of the Act was not being used to great effect because it was seen by many as uncertain and as a result was destined for change. This change occurred with the introduction Commercial Arbitration (Amendments) Act 1990 which came into force 25 January 1991 where it repealed and changed section 27.

In the new section it withdrew the power of the arbitrator to order the parties to a settlement conference as apart from the formal hearing, and gave back to the parties the power they had always had, and that was:

> ... may seek settlement of a dispute between them by Mediation, Conciliation or other similar means [60]

It is the writer's opinion that parties did not require this right to be enshrined in statute, but it appears the legislators were keen to be seen as advocates of alternatives to structured dispute resolution as, possibly, a fillip to Australia's Japanese and Asian Trading Partners. They seemed to recognise that delay could occur if these settlement conferences failed and therefore maintained the sub section (2). But a new sub section was added and that has caused wide spread debate ever since.

The new sub section (3) states:

> Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1)

This amended section had for the first time included other means of dispute resolution by definition.

History has shown that a continuing loyalty to arbitration had been expressed by men of commerce, as the chosen means to resolve their disputes. It has been suggested that self interest is the obvious reason, but why should that be condemned. In commerce, time is directly related to money and it is recognised as inefficient when the parties are required to educate the bench and sometimes counsel in trade and usages terms. The benefit of expertise in the field of the dispute would make that task unnecessary.

It has also been suggested by Sir Ninian Stephen, in an address to The Institute of Arbitrators, Australia, that arbitration is both the product and nurturer of commerce[61] and that arbitrators are no strangers to the contract, the subject of the arbitration. This he recognises as an advantage. But the legislature and judiciary are at considerable pains to make arbitration an attractive alternative to the use of the curial system. In some places, these moves have been met with strenuous and vocal resistance from the consumer lobby.[62]

What matters may be arbitrated? Russell points out that all disputes affecting civil rights in which damages only are claimed, are suitable and that has been further defined as breaches of contract, breaches of promise of marriage, trespass, slander, questions relating to tolls, tithes, or the purchase price of property.[63]

In 1974 the Standing Committee of Attorneys General recognised the need to rejuvenate the law of Commercial Arbitration in this country. That committee considered in its deliberations the question of conciliation as the topic had been addressed by the Australian Capital Territory Law Reform Commission. In 1976, the Law Reform Commission of NSW also addressed the recommendations made in the same report but concluded at that time that conciliation is more a matter for education than for legislation.

Still, when the 1984 Commercial Arbitration Act was amended the then Attorney General, Mr. Paul Landa in his second reading speech said of clause 27:

> ... third, provision has been made in clause 27 for the holding of pre-arbitration conferences. Often disputes can be solved quite promptly if the parties are bought together in an informal atmosphere and given an opportunity to air their, views [64]

But in the amendment to that Act, it withdrew the power of the Arbitrator to order the parties to a settlement conference as apart from the formal hearing, and gave back to the parties the power they had always had, and that was:

> ... to seek settlement of a dispute between them by mediation, conciliation or similar means.

Mr. John Dowd, the New South Wales Attorney General of the day, pointed out that the new section provided for greater control by the parties of the process. It was his opinion, that as the process is consensual and the parties should be free to decide the nature and the content of the arbitration, to allow an arbitrator to override that autonomy and compel attendance at a settlement conference or other procedure, is a departure from that principle and could lead to unfairness.[65]

But these amendments gave birth to the controversy relating to the inclusion of the words natural justice, that has raged ever since.

Natural justice is a long established principle and many a bench throughout Australia has vigorously enforced it. In *Bunge (Australia) Pty Ltd V Crest Mills Pty Ltd*, Macfarlan J. defended just that and set aside an award principally because the arbitrator interviewed one party in the absence of the other and the information received was not conveyed to the other side.[66] It is noted that in this instance the denial of natural justice occurred in an arbitration but the debate is whether the facilitator in one form of resolution can then change hats, so as to speak, and continue as an arbitrator.

Section 44 of the Act gives the power to the Court to remove an Arbitrator for misconduct and Section 4 defines misconduct as :

> ... corruption, fraud, partiality, bias and a breach of the rules of natural justice.

Many commentators have voiced their opinions as to the suitability of this section. T J Forbes deals with the concept of natural justice and he informs us of the Privy Council summary as being;

> ... first, the person accused should know the nature of the accusation made; secondly, he should be given an opportunity to state his case; and thirdly, the tribunal should act in good faith.[67]

Mr. Stephen Charles Q.C. adds that the rules of natural justice require the arbitrator to have no interest in the outcome of the arbitration.[68] He is fearful that the scope of the power given to the arbitrators under the amended Act carries with it a danger for the unintentional breach of the rules of natural justice.

At Section 27 (2) of the Commercial Arbitration Act it states;

> (2) Where:
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> (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
>
> (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute, no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.[69]

He uses the example of a conciliator firstly sitting with the parties and pointing out the strengths and weaknesses of their cases and suggesting possible bases on which the matter might be settled, and that attempt not being successful, then proceeding to arbitrate the matter as the Act suggests. The conciliation process may well have involved the facilitator in forming or stating a *prima facie* opinion or involving him/her in conclusions as to the rights or liabilities of one or other party before any evidence had been offered or received. S/He may well have met with the parties privately. In this situation, s/he may be affected by bias and thus fail the fair-minded person test and move into the realm of technical misconduct.

Further to that, it is apparent that for these suggested processes to have a chance of success, the facilitator often will be required to get into the ring with the parties and in doing so, throw aside the mantle of the impartial umpire. It will require active involvement often in a manner inconsistent with observing the rules of natural justice. Those actions would therefore remove the *solely* provision of sub clause (2) with possible dire consequences. But a change of roles as is contemplated by the Act would also require the facilitator to become an assessor.

That is fraught with danger and could possibly be against the dispute resolution clause in the contract. The court has ruled that parties can combine those two significantly and fundamentally different roles.[70] But that decision has been judged as unfortunate and a contrary view has been strongly argued by Marcus Jacobs[71] in his text book where he quotes a learned author's opinion that the benefits in attempting to combine the functions of mediation/arbitration as set out in the Act, are debatable.[72]

J.D. Fine states that:

> Section 27 of the uniform Act must come to be understood as being symptomatic, a well intentioned but fundamentally flawed misconception of the proper place of ADR mechanism in the practice of Law. Given the fundamental assumptions of Western Law in general and common Law systems in particular, ADR cannot be successfully be graffed onto any existing adversarial and adjudicative dispute resolution mechanism – albeit either Litigation or Arbitration.[73]

Sharkey and Dorter[74] express an equally partisan opinion of the benefit of the section. They indicate three main practical objections, they being;

- that the settlement attempt must be without prejudice,
- they too are opposed to med/arb based on the natural justice problem
- the apparent inability for the facilitator to make a recommendation as to cost to date if the settlement conference fails and proceeds to arbitration.

The judiciary appears to have been divided in its opinion over the years. Even though some of the people responsible for the comments have since left the bench, one view was that it may dispose of disputes speedily.

Another consideration, aside from the natural justice difficulties posed by section 27, is the extent to which settlement attempts can succeed when

undertaken by the person who will adjudicate if settlement is not reached.

Basic to the ADR process is the trust and confidence that the facilitator must establish with the parties. This enables them to disclose openly and forthrightly the weaknesses in their arguments while in closed session with the facilitator. It is often the open airing of these weaknesses with the neutral third party that brings the parties to the appropriate psychological point where a settlement can be crafted.

It is unlikely that the dispute resolver, who may at some stage be required to make a binding decision on the merits of a dispute, will develop the level of trust required to allow concessions of apparent weakness to be made. This further undermines the effectiveness of the section 27 process.

Rogers J. then of the Supreme Court of New South Wales Commercial Bench, was heard to make the comment:

> ... the arbitrator or umpire has power to take such steps to achieve a settlement as he may think fit. What is contemplated is conciliation.

and

> Nonetheless, I do believe that the concept of an attempted settlement by conciliation or mediation is to be strongly supported and attempts at settlement are vital if these disputes are to be disposed of speedily.[75]

It should be noted that the Judge was in control of the lists at the time.

A little later Mr. Justice Smart of the same court indicated a similar view, but where Rogers appeared to recognise the possibility of the speed of resolution, Smart J preferred to rely on the personal presence and influence of the arbitrator at a preliminary conference where s\he can bring pressure on the parties sufficiently to bring to their attention the possible result if certain facts are proven. Neither of these prominent lawyers appeared to relate these actions to the natural justice issue.

But in 1993 Sir Laurence Street, took a totally contrary view at a forum discussion, where he directed attention to the expectations of the parties.[76] His view was that for an arbitrator or Judge to venture into the area of settlement promotion there is created a continuum. This runs from commending settlement consideration to the parties on through to cajoling them to settle and on through to applying pressure to them to settle, with no clear demarcation lines evident. He even went as far as to suggest that in the beginning there could be no objection to the conduct of the facilitator but by the end of the conference, such conduct as described would be plainly not permitted in the normal course of events.

His advice was for arbitrators to proceed with great caution and to be aware that one or more of the parties could receive an impression that s\he had already decided the issues prior to any formal evidence being received. This, of course, could lead to intervention by the court under section 44 of the Act. He also reminded those present that legal advisers, as well as the parties, may possibly interpret contrary intent into the facilitators actions or words and thus misread the arbitrator's intention.

His final word on the matter was that for an appointed arbitrator to venture from one role into another and having failed, then attempting to retrace his\her steps, would place that person in an untenable position. His recommendation for arb/med, – but never arb/med/arb was voiced as was it published.[77]

Other learned authors appear to take the same view. Tom Arnold's discussion relates to the med/arb process where a situation is created at a classic mediation. There the parties agreement does not reach all issues, but because of the trust and rapport achieved, require that the mediator become an arbitrator and rule on those left unresolved in the form of a binding decision. Even though this process initially does not seem so problematic, he sees the final resolution as described as potentially dangerous.[78]

It is interesting to note that Asian dispute facilitators seem to take a different position with regard to the changing of the roles. The Hong Kong Arbitration Ordinance contains a similar provision to our section 27, where the arbitrator is authorised, with the parties consent and request, to act as a conciliator.[79] The section states that if a conciliation fails, the same person reverts back to the role of arbitrator but requires the arbitrator then to disclose to each of the parties material matters which had been disclosed in confidence by the other. This is, it appears, the Chinese approach for as they say, who better than the failed conciliator to be the arbitrator. This is a wholly consensual section and only applies if the parties wish it and for as long as they do.

This attitude would be considered unacceptable in this country as one would wonder if parties would truly enter into the conciliation or mediation process as well as disclose their true position if they were aware that if the process failed, all the information conveyed in one process would automatically be used in the next process.

It is therefore obvious that for an arbitrator to attempt to assist parties resolve their disputes by way of Section 27, is for that arbitrator to sit below the sword of Damocles. It is accepted that for conciliation or mediation to have any chance of success, the facilitator must be reactionary, proactive and innovative and must at some time in the course of meetings, subconsciously indicate a preference for a position. Even if one of the other methods of ADR were being attempted, the same would be the case, with the result that only very experienced facilitators appear willing to wear two hats. Many lawyers and arbitrators consider the section inappropriate and its use too risky. They fail to appreciate that the section has been included in the statute to be used whenever the interests of the parties can be focused on a result having regard to the just, quick and cheap disposal of their dispute. One should remember that this criteria was the genesis of arbitration before sophistication of representation and case presentation became the norm.

FOOTNOTES

58 Commercial Arbitration Act1984 No. 160 '
59 Op Cit Section 27 (2b)
60 Commercial Arbitration (Amendments) Act 1990, Schedule 1(4) Section 27 (1) (A)
61 Sir Ninian Stephens, John Keays Memorial Lecture 1991 – The Institute Of Arbitrators Australia
62 Dodd s enquiry into the Residential Building Industry- P. 47 – Building Action Review Group
63 Anthony Walton & Mary Victoria. Russell On Arbitration 20th Edition. 1982, P. 22
64 NSW Hansard 18 October 1984 A P. 2160
65 NSW Hansard 22 November 1990, P. 10377
66 (1961) N S.W.R. 181
67 Disciplinary tribunals, J F Forbes, p 56.
68 Commercial Arbitration In Australia, Stephen Charles QC 1bc1211
69 Commercial Arbitration (Amendments) 1990 Section 27 (2) P 7
70 Hammond-V- Wolt (1985) V.R. 108.
71 Marcus Jacobs. Commercial Arbitration Law And Practice. The Law Book Company Ltd 1990 At P. 6476
72 Section 27 (1)
73 J.D. Fine. Continuum Of Chasm? (1989) 6 Journal Of International Arbitration, 27 At P35.
74 John J.A. Sharkey & John B.Dorter, Commercial Arbitration, 1986, Law Book Company Limited At P87.
75 Mr. Justice Andrew Rogers. Then Chief Justice Of The Commercial Division Of The Supreme Court Of NSW Paper To Institute Of Arbitrators Australia March 1988.
76 Sir Laurence Street The institute Of Arbitrators Australia NSW Chapter Members Discussion Forum The Effective Use Of Section 27, 18 November 1993.
77 Sir Laurence Street The Language Of ADR 66 ALJ 194 At 197.
78 Tom Arnold. Patent Alternative Dispute Resolution Handbook P15.2
79 Hong Kong Arbitration Amendment (No.2) Ordinance 1989 Section 2b.