THE EFFECT OF LITIGATION REFORM ON ARBITRATION[1]

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INTRODUCTION

When I was first approached to speak at this conference I was, frankly, puzzled. Why me? I thought. I decided that the organisers must have been desperate for a new face and that it would be churlish to deny them. I accepted the invitation thinking that I knew something about both litigation reform and arbitration and expecting I would easily knock up something enlightening and entertaining. When I came to prepare the paper, I realised with something of a shock that I had never had a case under the *Commercial Arbitration Act* 1990; and that not a lot has yet occurred by way of litigation reform. Nonetheless, I hope I can say enough about the topic to make it worthwhile.

I should begin with a definition. I will not attempt to define "arbitration". In this audience at least, I assume the old aphorism about the elephant applies: you may not be able to define it, but you know one when you see one. "Litigation reform" I take to refer to the changing of the rules of the litigation process so as to reduce the cost and delay of that process. Over the last few years there have been a number of such changes, and more are in prospect.

What application could litigation reform have to arbitration? After all arbitration was designed to be quick and to avoid legal technicalities. Unfortunately, it does not always work that way. Indeed, by the time of the publication of the nineteenth edition of *Russell on Arbitration* in 1979, arbitration was bedevilled by delay, technicality and cost. The editor, Anthony Walton Q.C., began that edition with a quotation:

> "Honest men dread arbitration more than they dread law suits"[2]

and commenced Chapter 11 with another:

> "The case did not reach a Decision: but went to Arbitration."[3]

As recently as 1992 my brother Dowsett addressed you on the topic *Delay and Frustration in Arbitration Proceedings.* As he then demonstrated, while the *Commercial Arbitration Act* 1990 attempted to deal with the problems, it had a number of deficiencies. I put the proposition today that there is scope for adaptation of the process of litigation reform to arbitration.

CASE MANAGEMENT

The first reform to which I would draw attention is case management. There is no simple definition of case management – indeed its content

can vary from the periodical review by one judge of difficult cases on a special list to the elaborate provisions set out in the 30 page manual on *Differential Case Management* published by the Supreme Court of New South Wales[4]. Case management on that scale is unlikely to be of concern to most arbitrators. Many of the techniques involved are related to the volume of cases dealt with by the courts – they are concerned with case flow rather than with individual cases. (A cynic might suggest that they are also concerned with sanitising court statistics.) Arbitrators generally do not have large lists to manage. Each arbitrator is responsible for his or her own cases from beginning to end. Each pending case is given individual attention and interlocutory orders are tailored to the particular case. It is true that an arbitrator does not have the full array of powers available to a judge, but well drawn agreements, coupled with the Act, provide most of the commonly used powers.

In that light, what does an arbitrator have to learn about case management? I suggest that case management is as much a matter of attitude as of powers and procedures. In this respect I suggest that there is room for more case management in arbitration. Even more than judges, arbitrators have operated on the basis of a tradition that allows the parties to the arbitration to control its progress and requires them to give it any momentum which it may have. I suggest the time has come for a more interventionist approach by the arbitrator.

When and how should an arbitrator intervene in proceedings? I cannot provide you with neat formulae to answer this question. Two general comments are possible. First, there will normally be more scope for activism at the interlocutory stages of proceedings than during the final hearing. Where particularly long hearings are involved, however, the scope for employing management techniques is increased. Second, the decision whether or not to intervene by order will usually involve a balancing process such as speed or efficiency against cost or unfairness. Always consider whether a suggested reform will add to the cost of the dispute to the parties. Let me give some examples.

Regular review of cases by way of directions hearings called by the arbitrator forces the parties to attend to their obligations or be seen to be dragging the chain by the arbitrator who will ultimately be deciding the case. That is a great incentive for them not to delay. However, too frequent conferences will impose financial burdens upon parties who cannot afford to pay solicitors and even counsel to attend them. It is not unknown for one party to seek frequent hearings as a tool of oppression. Regular review is a desirable feature of case management, but you must be careful not to increase costs unnecessarily[5].

To manage a case it is important that the arbitrator quickly gets a "feel" for the case. There is no substitute for thorough knowledge of the pleadings – and of their defects! Insist that the parties properly identify the real issues. With that knowledge it is sometimes possible to consider

shortcuts in procedure, but you must be careful not to allow a party to be deprived of a necessary step in the proceedings.

Third, do not limit your thinking to the precise interlocutory relief sought by the parties. Suggest another way in which a given problem might be solved. Sometimes the parties lose sight of the wood for the trees. On the other hand, be wary of ordering anything opposed by all parties. Try to obtain consensus, or at least to ensure that someone sees your proposal as desirable and adopts it. It is usually a mistake to assume that one knows more than all the parties.

Finally, consider always how the hearing will actually run. Interlocutory steps are always aimed ultimately at facilitating the hearing. Consider how evidence may best be given, e.g. by the use of prepared statements and document books. Relate this to the nature of the issues in the case and balance it against the cost and delay involved in preparing them. Remember, a process which saves time is not always the most appropriate process where credibility is in issue. Ask if contentious points of law can be resolved separately. Consider how expert evidence is to be given and tested.

In February this year there was published in *The Arbitrator* (Vol. 14, No.4 at page 209) an article by Ronald Bernstein Q.C., emeritus Vice-President of the Chartered Institute of Arbitrators[6].

Bernstein was concerned that arbitration was losing market share to other forms of dispute resolution – even (horror of horrors) to litigation! He warned that arbitration would dwindle even faster if it did not revolutionise its act. He suggested that the low efficiency of arbitration was due to the failure of arbitrators to take the management of arbitration into their own hands – he urged that they should be trained to take the conduct of proceedings into their own hands, preferably with but if necessary without the agreement of the parties' representatives. In his view, the only argument of substance against this approach was the risk that an arbitrator with an interventionist reputation might suffer a falling off of appointments.

There is in my view some force in the proposition that the reluctance of arbitrators to become involved in the management of the proceedings has led to a reduction in efficiency in the process of arbitration. I agree that arbitrators should become more interventionist. However Bernstein based his argument on the proposition that the parties' solicitors were not to be trusted to present an informed view about procedural matters. They act, he thought, in their own interests rather than in the interests of their clients. That has not been my experience in this jurisdiction, whatever might be the position in England. Sometimes lawyers will be a little too conservative and unwilling to take any risks in order to expedite matters. Sometimes this conservatism can be avoided by explaining your views on procedure in the presence of the parties themselves, as well as their representatives. I would however caution against the sort of approach

canvassed by Bernstein, of distrusting the parties' representatives. It is likely to lead to a breakdown in the arbitration process[7].

DISCOVERY OF DOCUMENTS

Another area where litigation reform has produced changes in court procedures is discovery of documents. Litigants are no longer required to swear an affidavit listing all the documents which are or have ever been in their possession, power or control relating to the matters in issue between the parties. Instead, they must either deliver copies of documents or notify their opponents when and where the documents may be inspected. The obligation now exists only in relation to documents in their possession or control which are directly relevant to an allegation in issue in the case. The "train of enquiry" approach enunciated in the *Peruvian Guano* case has been abandoned.

This change was justified by the Litigation Reform Commission on the basis that the previous system was putting the parties to great and unnecessary expense for little or no discernible benefit. I have not seen any objective evidence that this assumption in fact was correct. Certainly it is not supported by such studies as have been done into the discovery process in Australia. The Commission justified it on the basis of anecdotal evidence provided to it by a couple of solicitors working in one of its divisions!

Now I have no doubt that there were cases where the discovery process was abused. Indeed, while at the bar I was involved in one of the worst of them! A judge refused to limit discovery by the defendant, the Commonwealth of Australia, notwithstanding evidence that the documents to be searched occupied several kilometres of shelf space, many would have been of the most marginal relevance and the cost of full and complete discovery was estimated at some $33 million. (Ironically, the plaintiff was too successful for its own good. In separate proceedings, the Court of Appeal ruled that in view of the cost, particularly the cost of discovery, the action should be stayed until the plaintiff provided security for costs in the sum of $4 million – which was plainly impossible.[8])

Nonetheless in my view the argument about cost is generally exaggerated. It is very easy for a solicitor to run up large costs in assembling, perusing and listing all of the documents in the client's possession, power or control, especially in large commercial or building disputes. However, as a solicitor pointed out at the recent conference on civil procedure organised by the Litigation Reform Commission, that cost is not incurred as part of the discovery process. It is a cost which has to be incurred in any event. The additional cost involved in drafting an affidavit containing the list, having it executed and delivering it is trivial by comparison. Unreasonable cost is incurred only when an opponent demands that the list include further documents not discoverable without unreasonable expenditure of time and effort. Such cases were, I suspect,

quite rare.

Another area where cost was occasionally incurred unnecessarily was in the inspection process. Sometimes, through either incompetence, laziness or (rarely) impropriety, a party would discover a vast amount of irrelevant material. Sometimes an attempt was made to bury an important document in a mountain of trivia. This can put an opponent to quite unreasonable expense in reading and considering it all, and may result in the important document being overlooked. In the past we have not encouraged the injured party to apply for costs thrown away in such circumstances. We should do so. The new rules leave this problem untouched.

By now you will have gathered that I do not support the so called reform which has been introduced in this area. On the other hand, I certainly agree that there was a need to do something about the exceptional cases where abuse was occurring. In my view, that problem could have been dealt with quite adequately within the framework of the existing rules. It could have been dealt with by a change of attitude on the part of the judges. Instead of automatically ordering full discovery of documents in all cases, the judges should have given more weight to considerations of cost and oppressiveness, and should not have required parties to produce complete affidavits where to do so was unreasonable. Such an approach had always been taken in relation to interrogatories, and there was no reason why it should not have been taken in relation to discovery.

Should arbitrators adopt the procedure now in place in the courts? In my view, they should not. I would suggest that discovery continue to be ordered in the traditional way, as a general rule. On the other hand, arbitrators should be alert to the possibility that complete discovery can be oppressive. They should not be afraid in such cases to limit the process and to balance issues of cost against likely benefit.

How you limit discovery depends upon identifying what is the problem in giving complete discovery. Let me give you some examples of possible limiting criteria. One way is to limit discovery to specified issues. Another is to limit it to specified classes of documents. Classes can be defined in any way, by reference to the location of the documents, the date of the documents or the subject matter of the documents. Sometimes problems of cost can be met by having staged discovery. I have even heard of orders for discovery of samples of classes of documents, for example invoices, with a right in the opposing party to demand production of specific invoices if they exist. Sometimes an order can be made for the party seeking expensive discovery to have it only on terms that he or she pay the cost of it. The essence in my view is flexibility. This does not require a change in the rules relating to discovery – only a change in the tribunal's attitude.

Consequently, my advice is: don't adopt this particular "reform" – it throws out the baby with the bath water. Just be flexible, imaginative and fair in the orders you make.

ALTERNATIVE DISPUTE RESOLUTION

The most far reaching reform of the litigation process in recent times is the provision of power to the courts to order mediation or case appraisal of disputes. It is still too early to say how successful this change has been. My impression is that court-ordered mediations have enjoyed a fairly high rate of success (i.e. settlement of the dispute). There have not been enough court-ordered case appraisals held to form any judgment on them.

The salient features of the new system are that the court may make the order of its own motion, and that attendance at the mediation or appraisal is compulsory. I do not belong to that starry-eyed group of idealists which thinks that every dispute is capable of resolution by mediation. I am however satisfied that many disputes are capable of resolution by this process, even when the parties say they do not want to participate in mediation. You must remember that it is often difficult for a solicitor to advise a strong minded client to take this course. There is a considerable risk that the client will lose faith in the solicitor, perceiving him as not wanting to fight on the client's behalf. If the solicitor can say to the client, "Well the judge has ordered us to do it even though we didn't want to" the relationship can be preserved. There is of course no guarantee that the case will settle when it reaches mediation, but the nature of the process often pulls even recalcitrant litigants into line.

We are still learning how to use of the new rules, and in particular, how to identify cases suitable for referral. On the experience so far, I am satisfied that it would be desirable for arbitrators to be able on suitable occasions also to refer matters to mediation.

You will notice that I said "to refer matters to mediation". Despite the arguments which have recently been advanced to the contrary in *The Arbitrator*[9], I am firmly of the view that arbitrators should not normally themselves attempt to act as mediators in a matter which they are arbitrating. Why do I say that? It seems to me that the mediation process, involving as it does private meetings between the mediator and the parties and the confidential imparting of information to the mediator during such meetings, is quite inconsistent with the mediator's subsequently continuing in the role of an arbitrator. I do not see how justice could be seen to be done, or probably could even be done, in such a situation. I will not rehearse the arguments here in detail, although I am happy to debate them later if anyone wants to. I acknowledge the limited role which has been developed in America for the so called med-arb process; but as I understand it, that process has developed quite narrowly and has not been free from problems.

On the other hand, if the parties accept the risk of disqualification, I see no objection to an arbitrator acting as mediator in exceptional cases. It would only be appropriate to do this where the chances of success were high and the savings in mediation costs resulting from the use of someone already familiar with the case were substantial. It would not be a suitable

arrangement to adopt as a general rule.

This view does not overlook the existence of s.27 of the *Commercial Arbitration Act* 1990. As you probably know, that section provides that the parties to an arbitration agreement may seek settlement of their dispute by mediation, conciliation or similar means and may authorise an arbitrator to act in that process. It further provides that no objection shall be taken to the conduct of subsequent proceedings by him solely on the ground of his having previously so acted. The ambit of this protection is uncertain. It is unclear whether it prevents objection being taken to the conduct of the arbitration subsequent to a mediation on the ground not that the arbitrator has acted as mediator, but on the basis of what he did while he was so acting. Apart from that risk, there is in any event a high probability that the ultimate result of such an arbitration would be viewed as tainted by at least one party. There is also the risk that the conduct of the mediation would be inhibited by the desire of the arbitrator to avoid doing anything which might subsequently give rise to a challenge. In my view, an arbitrator should act as a mediator only in the most exceptional circumstances.

How then can a dispute which is before an arbitrator get to mediation? First, the parties may agree to refer it to mediation. Even if he has no compulsory powers, an arbitrator may often be persuasive. More commonly these days, the parties will have made some provision for mediation in the arbitration agreement. A properly drawn clause of this nature is valid[10], but care is required in drafting the clause to avoid uncertainty[11]. Such an agreement is enforceable at least through the courts. I have not heard of any case where an arbitrator has been asked to enforce such an agreement. I see no reason in principle why an arbitrator could not do so if the issue were properly raised. The question.night come before the arbitrator if the parties made application under s.25 of the *Commercial Arbitration Act* 1990, but otherwise the dispute over the clause might have to be referred separately to arbitration and consolidated if possible with the principal proceedings under s.26 of the Act.

The question whether even the Court would order specific performance of a mediation agreement appears to be undecided, but I see no reason in principle why it should not. There may be circumstances in particular cases which would lead to a refusal, e.g. futility, but that would have to be demonstrated by the evidence. Mere reluctance to participate would probably be insufficient to demonstrate futility. An arbitrator would have the same power to order specific performance in a dispute properly before him as the Supreme Court[12]. Alternatively, indirect enforcement might be achieved by staying the arbitration until the completion of mediation proceedings.

If the question of enforcement of a mediation agreement is not in a particular case within the jurisdiction of an arbitrator, there would appear to be no obstacle to its being enforced in the courts. It may well be proper

to adjourn the arbitration proceedings to allow such an application to be made.

Finally on this point, may I urge the need to proceed bravely but with caution. There is not a lot of authority in the area and, as I said before, we are all still learning.

TELEPHONE AND VIDEO LINK

The last of the reforms to which I would draw your attention is embodied in the amendments to the rules of the various courts permitting them to receive evidence or submissions by telephone, video link or other form of communication. In an arbitration any evidence is to be given orally or in writing and, if the arbitrator so requires, on oath or affirmation or by affidavit[13]. It might be argued that that provision is wide enough to include evidence by telephone or video link. Even if it is not, it is subject to any contrary intention in the arbitration agreement. There would seem to be no reason why the parties should not vary that agreement on the spot if they are willing for evidence to be given in this manner. That should cover most cases, since if there is disagreement about whether evidence should be given in this manner, it might be thought unlikely that an arbitrator would exercise the discretion to permit it.

I have taken evidence by both telephone and video link and I can assure you that they are both useful procedures. Of course, there are limitations to the telephone, and I would not recommend it as a medium for a witness whose credibility was in issue. Otherwise, it is a very cheap and reasonably effective medium. By contrast, proceedings by video link are very effective but expensive. They are worthwhile for a short witness who would otherwise have to come from far away; but I am told that a full day on video link would probably cost more than bringing the witness to the hearing. For all that, there may be cases where it is the only option.

On a more practical note, in either case, ensure that the party calling the witness has arranged for a bible to be available at the other end of the line if necessary.

CONCLUSION

What of the future? There are proposals afoot to make provision for the courts to dispense with rules of evidence and for court appointed experts. These provisions may have limited relevance to arbitrators since they are already not bound by the rules of evidence (unless the parties have otherwise agreed)[14], and arbitrators are often themselves experts. There may be some scope for amending the law to allow arbitrators to appoint experts from other disciplines in complex cases, so you should keep an eye on the progress of this particular reform. There are also proposals to amend the disclosure rules to require parties to disclose the names of all potential witnesses. This is a somewhat controversial proposal and again I suggest you keep an eye on its progress.

The process of litigation reform works slowly. However it seems to me inevitable that it must have an effect on arbitration. Some reforms will be suitable for adaptation to arbitration, albeit that there may be some need to amend the Commercial Arbitration Act. Others may be able to be implemented by arbitrators as matters of procedure. Arbitration is a useful and valuable part of our armoury for the resolution of disputes. Those involved as arbitrators should make sure that the reform process does not pass them by.

FOOTNOTES

1 Paper delivered to the Twenty-first Annual Conference of the Institute of Arbitrators Australia (Queensland Chapter), Coolum, 26th May 1996.
2 Citing *Robertson's History.*
3 Citing *Matthewson v Stockdale* (1806) 12 Ves. 270 at p.273.
4 Practice Note No. 88 (1996) 37 N.S.W.L.R. 609.
5 Consider whether a review might not be held by telephone.
6 R. Bernstein Q.C.: "Arbitration at the Crossroads: the Arbitrator as Leader? or Just Listener?", *The Arbitrator,* Vol.14, No.4, February 1996, p.209.
7 It is interesting to note that, inferentially at least, Bernstein sees nothing wrong with arbitrators acting in their own self-interest. His whole article is directed at retaining market share – a most commercial approach! Moreover, note that the only argument which he recognises as being of any substance against his approach is nakedly one of self-interest.
8 *Australian Commercial Research & Development Ltd v Commonwealth of Australia,* unreported, Court of Appeal 98/1994, 14th October 1994.
9 A.J. Bradbrook: "Section 27 of the Uniform Act – a New Proposal for Reform", *The Arbitrator,* Vol.9, No.3, November 1990, p. 107.
10 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 N.S.W.L.R. 194.
11 Compare *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd,* unreported, 28th March 1995, Supreme Court of New South Wales, Giles J.
12 *Commercial Arbitration Act* 1990, s.24.
13 *Commercial Arbitration Act* 1990, s.19.
14 *Commercial Arbitration Act* 1990, s.19(3).