Is the Australian arbitrator disadvantaged over his UK counterpart?

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Introduction

Firstly, let me say how delighted I am to be back in 'Oz' after such a long break and particularly how happy I am to be in my beloved Melbourne. Although I worked and lived in all State capitals except Perth and Darwin I was always a Victorian at heart.

When your administrator kindly sent me the booking form to complete, she also sent one for the talk you were to be given by my friend and colleague Neil Kaplan. I could not help noticing that you were asked to pay $A35 for Neil and only $A30 for me. I must applaud your administrator for demonstrating what I intend speaking about tonight – flexibility of approach. Whether what I am about to say is even worth $A30 only you can be the judge of that.

So to business – flexibility of approach. That is, exploring to the full the one clear advantage that arbitration enjoys over litigation – flexibility of procedure.

Before I consider with you some of the ways that we introduce flexibility into our proceedings (some of which, will, no doubt, be familiar to you and others perhaps, new), I will first lay to rest the bogey of mediation/conciliation, which I am told is gathering momentum in Australia.

Let me say this, arbitrators throughout the world are going through an extensive navel gazing exercise, particularly in the common law jurisdictions. The cry goes up:

> "The lawyers have hijacked the proceedings."
>
> "Arbitrating is indistinguishable from High Court procedures except that it is more expensive because you have to pay the arbitrator and not the judge."

These are commonly heard complaints and I must agree that there is a fair degree of justification in them.

But I hope to show you that it need not be that way. First through mediation/conciliation. I make it clear that I am not against this form of settling disputes. Indeed, I am in favour of any form of horse deal which leads to a settlement. For, be under no illusion, that's precisely what mediation is all about – rough justice!

Forget fairness, a resolution based on each party's rights and obligations; a full, final and legally binding enforceable conclusion to the dispute and recognise mediation for what it is – a sophisticated and not inexpensive compromise.

I shall briefly explain why I consider that ADR generally is not the answer to our problems. Then go on to try to identify just what those problems are, which I suspect are equally applicable here as in the UK, and then, finally, consider what we as practising arbitrators can do about restoring arbitration to its rightful place as *the* alternative form of dispute resolution, attempting at the same time to compare what we can now do in the UK – by virtue of the provisions of the AA '96 and what you can do under your *Commercial Arbitration Act* 1984. I can only approach this latter task with the skimpiest of knowledge of your Act and practices for that, please forgive but I'm sure one or two kind people amongst you will take the opportunity of putting me right in the question period which follows.

ADR

Let us dwell for a moment or two on mediation. This, as you will all know only too well, is part of the fashionable ADR vogue imported from the States. ADR is currently enjoying some success in the UK and I gather, also here in this country for the very reason that the alternatives are so expensive. However, on a day by day comparison, ADR can be twice as costly as arbitrations but, of course, should occupy far fewer days.

There are several forms of ADR and I will not bore you with the distinction between conciliation and mediation at this stage, with which I have no doubt, you are all thoroughly familiar, but suffice it to say, that mediation is the intervention, by invitation of the parties, of an independent third party in the dispute, who, by shuffling back and forth between the parties, in a series of meetings, attempts to draw them towards a settlement.

Clearly, if it works it inevitably means a compromise with nobody winning; it is a horse deal with the most powerful party probably compromising less than the other.

In considering ADR the distinction between it and litigation/arbitration should be borne in mind. Quite simply the latter sets out to achieve a fair result in accordance with law and justice whereas ADR specifically does not.

Thus if you are a powerful concern with a strong negotiating position (and no ethics) you choose ADR. If you are the child of the poor or an honest man, you turn to the court or to an arbitrator to redress the balance.

ADR suffers from the following disadvantages –

- No guarantee of a successful outcome or, indeed of any resolution.
- Much time and money can be wasted on an abortive mediation, conciliation attempt.
- Does not lend itself to complex disputes such as occur in construction.
- Outcome is non-binding – only enforceable through suing on the contract – back where you started!
- Might find yourself statute barred if ADR consumes too much time.

The difficulty with mediation is that, in order to work, the parties have to very carefully prepare their ground. There is one school of thought which says that this means that you must have gone sufficiently through the discovery process to know the case against you and this will also require expert reports, witness proofs, etc. When you get that far you have spent quite a lot of money; no less than you might have done to get to the same stage, say, for example, if you had been pursuing the same dispute through arbitration.

The one perceived advantage of ADR, over normal sensible negotiation between senior principals, is that neither side is seen to make a first move towards settlement which some interpret as a sign of weakness.

Of course, negotiation is the best form of dispute resolution and one, I am confident, is practised by those of you here today who act as party's representatives. In this regard we all need to put more effort into teaching negotiating skills and establishing negotiating procedures. This is particularly so where it is desirable to maintain good working relationships with the parties to the dispute.

There are many who agree with me that there is little difference between mediation and negotiation. Mediation is merely a more costly and more sophisticated form of negotiation which employs the, not inexpensive, services of a third party facilitator.

Mediation, or indeed negotiation *per se*, is what any sensible organisation will try off it's own bat, without the intervention of a highly paid third party, before resorting to other forms of dispute resolution. As over 80% of all such cases settle in the end, if you are advising a client then why not negotiate *yourself* to start with and save yourself a great deal of aggravation and money?

One recent UK report suggests that disputes under £500,000 would suit mediation. Why the authors should reach that conclusion I am not at all clear. I can only say that the most cost-effective form of dispute resolution depends entirely on the nature and complexity of the dispute, not on the amount in dispute. Dispute resolution organisations cannot offer arbitration as the preferred solution.

You will gather from this that I feel passionately about arbitration and its role in dispute resolution.

Also, let me be clear about mediation, of which I know many of you are strong advocates.

Certainly, I accept that mediation has its place in the Community Justice Centres in New South Wales for example, which I understand resolve inter-personal frictions that arise within local communities.

Also, perhaps, there is a role for mediation in the less complex single issue commercial disputes, but I do not believe that it is the answer in the majority of the more complex commercial disputes.

So, as I am clearly suggesting that mediation and other forms of so called ADR are not the answer, I believe that we must look to redress the perceived deficiencies of arbitration.

He who pays the piper...

The starting point to tackle the unsatisfactory state of arbitration, is to consider the people who make the whole process possible – the parties.

A 1993 Report from a Working Party appointed by the Council of the Chartered Institute of Arbitrators cited the following comments from consumers of arbitration in the UK which I suspect applies equally to domestic arbitrations in this country. These consumers said –

- We expected the arbitrator to look at our problems and tell us what to do.
- We never expected to end up in a kind of court.
- Arbitrators are too timid and too slow. They appear to lose control of the proceedings when senior counsel argues procedural points.
- The ability of the arbitrator to recall evidence given and other matters, is questioned.

A common complaint was that arbitrators failed to control proceedings effectively – both at the interlocutory and hearing stages. This report has identified:

> "...clear evidence that there are occasions when neither party recognises the arbitral process as that which they envisaged when signing a contract with an arbitration clause."

In acknowledging that in many instances modern arbitration has become lengthy and costly, I am sure that your experience is the same as mine and you would agree that this could be said to have occurred as a result of the following –

- Greater complexity of regularly used contract forms and contracting procedures.
- An understandable desire of parties to seek appropriate specialist and/or legal advice in submitting their case.

- Where lawyers are involved, they tend to seek to adopt procedures with which they are most familiar, i.e. those which apply in litigation.
- Weak and inexperienced arbitrators, uncertain of their ground and failing to keep a tight rein and maintain the momentum of the reference.
- Time wasted and costs unnecessarily incurred by such things as:
  - delays by a reluctant party; in delivering of proofs; in meetings of experts; in the provision of Further and Better Particulars, etc.;
  - inadequate or changes in Pleadings; and
  - reluctance to give discovery.

Whilst acknowledging that the parties' wishes are to be considered, broadly speaking the objective which the arbitrator should be striving to meet are:

i) *Costs* – these should not be allowed to become disproportionate to the amount in dispute.
ii) *Speed* – the determination should be as quick as is reasonable, bearing in mind the complexities of the issue.
iii) *Hearing* – this should be as short as reasonable to allow proper airing of the issues with the maximum use being made of the arbitrator's experience and expertise and with adjournments being avoided wherever possible.
iv) *Procedures* – (by which I take to cover both interlocutory and those at the hearing) to be tailored to the reference and not following mindlessly a normal and familiar pattern.

All of these objectives are addressed by the provisions of the *UK Arbitration Act* 1996 (which I shall refer to from now on as the '96 Act) which also makes it quite clear that party autonomy is paramount.

That is the non-mandatory provisions, of that Act, give the parties the opportunity to make their own choices and only if they fail to make a choice is it left to the arbitrator to exercise his discretion as to the procedure to be followed.

Having said that there *is possible conflict between the arbitrator's duty under s.33:*

(a) act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of this opponent, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined.

and *the parties general duties to co-operate under s.40:*

(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
(2) This includes:
  (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal; and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

Lord Justice Saville, one of the authors of the '96 Act, has gone so far as to suggest that if an arbitrator does not take:

> "... a strong pro-active role in determining how to proceed... (he) may find (himself) at the wrong end of an application for his removal... If he has failed or refused properly to conduct the proceedings, including a failure to conduct them, or make an award with all reasonable dispatch... He may be removed."

Thus the arbitrator's role is not to sit like a sponge soaking up the evidence which is then squeezed out in order to write his award, but to adopt the most suitable means of a fair resolution of the dispute, bearing in mind all the circumstances of the case.

The duty now imposed on arbitrators by the '96 Act, to be more pro-active or hands-on is not always appreciated by all parties. However, there are, of course, *sanctions for non-compliance with the arbitrator's directions* and these are set out in s.47 and s.73. Thus, if say a reluctant respondent is deliberately delaying matters the arbitrator would be able to refer him to his duty on s.40 with the full knowledge that the court will support him if he was obliged to impose sanctions.

This, I believe, is one of the keys to the potential success or otherwise of this new Act – the support given to the creative, flexible arbitrator by the judiciary. Provided he is fair then, I have been assured by the most senior judges in the land, that he will be supported. I just hope that the message is passed on to the judges of the first instances who are not always quite so phlegmatic.

It is quite right that the arbitrator cannot override the jointly expressed wishes of the parties but he will be allowed, and, indeed has a duty imposed upon him, to bring to the parties' attention the activities of that very rare species, those professional advisors who, in Lord Justice Saville's words:

> "are anxious for their own ends to 'churn' cases so as to extract the most money from their clients. If the tribunal suspects that this is going on, the solution is to require those advisors to inform their clients of the view of the tribunal that there is a better way of conducting the arbitration and to ask for an express assurance from the clients themselves that notwithstanding this they are themselves in agreement on how they wish matters to proceed."

Then, if it becomes clear that the parties themselves have made this expensive choice, or more likely confirm their complete confidence in their advisors, then the arbitrator now, for the first time, can resign (s.25). Previously, death was almost the only way out. Having said that, I am totally against resignation and would prefer arbitrators to stay in place to continue to attempt to conduct the reference as cost-effectively as they are allowed, but at the same time, recording his disapproval to any relatively expensive or delaying procedures agreed to by the

parties' representatives, always bearing in mind that nature and complexity of the dispute and the amount of money at stake.

I will not expand upon this important duty as I know that Geoffrey Beresford-Hartwell gave a talk to this Chapter last year on the *Arbitration Act* 1996.

Note, however the s.33 duty to avoid unnecessary expense and the arbitrator's power to cap or limit the successful party's recoverable costs, by virtue of s.65 or to decide what costs shall be recoverable (s.63).

Cost as an acceptable proportion, say no more than 25%, of the amount in dispute is a desirable objective. The amount that a party actually expends is not within the arbitrator's power to control.

The choice of representation is entirely the party's but whether he can recover the cost of employing someone to represent him is another matter; the arbitrator can however influence that choice to a limited degree. For example, in a relatively straight-forward dispute involving a small sum of money, the arbitrator could indicate, at an early stage – possibly at the preliminary meeting when he has learned what each side of the dispute is in broad terms – that his impression is that it is probably not 'Fit for Counsel' and, if he is of the same mind at the conclusion of the reference, then he will so mark his award. If he determines the costs (as taxation by the arbitrator under the '96 Act is now called), or they are taxed by a taxing master of the High Court, then, under these circumstances counsels' costs will almost certainly be disallowed.

Most arbitrators do not exercise their discretion over the use of counsel often enough. Is this perhaps a reflection of the inevitable inadequacy of the arbitrator's own legal knowledge – if they knew as much law as the lawyers, representing the parties, could he say more readily and, at an earlier stage, whether the dispute was 'Fit for Counsel' or not? Alternatively, even if the arbitrator has a sound legal background, he may not, in the early stages of an arbitration, be sufficiently apprised of the issues in dispute to make a judgment about the necessity to use counsel.

Of course, I acknowledge that in very limited cases, under s.20 of your '84 Act, a party can be denied the right to be represented by a legal practitioner, so in that respect you are ahead of us in the UK but, as I say, only in very limited circumstances, i.e. relatively small cases.

The arbitrator should, and indeed I have shown, by virtue of s.33 of the '96 Act must, influence costs by exercising firm control of the conduct of the reference which he should establish at the preliminary meeting; the first contact with the parties and their representatives. Having said that, the judge's words in *Town & City Properties v. Wiltshier* [1988] 44 BLR 109 must be borne in mind. In this case it was held that:

> "The arbitrator may be 'master of the proceedings' but neither speed nor saving of costs can justify his disregarding the parties' expressed desires to have that to which they are entitled, namely an arbitration held in the proper manner."

In this case the arbitrator had expressed the view that the hearing should take a form of meetings between himself and technical representatives of the parties. The employer protested, requiring a hearing with oral evidence, cross examination and speeches.

The arbitrator had said earlier that, as considerations relevant to the dispute primarily related to quantity surveying practice and procedure, the involvement of counsel was unlikely to be a justifiable cost. Today, under the '96 Act, I believe that an arbitrator would be perfectly justified in adopting a procedure opposed by one party only, if he considered that his proposed procedure was the most suitable under the circumstances. Note that the judge in *Town & City* referred to *'the parties'* not merely one party's expressed desire.

As part of the arbitrator's attempt to control costs, my view is that the arbitrator should invite the parties in person to be present at the preliminary meeting, as well as their representatives, as at the end of this meeting the parties themselves will be fully aware of what they are letting themselves in for, in terms of the arbitration, as this often leads to an early settlement.

The agenda for the preliminary meeting and the subsequent direction from the arbitrator – preferably ordered 'By Consent' of the parties – will establish time saving devices.

These devices contrive to govern the pace of the interlocutory process and to some extent the length of the hearing by setting a tight, but realistic, timetable; restricting orality; limiting the number of witnesses, both of fact and of opinion; limiting discovery, etc.

The effective arbitrator will monitor the interlocutory process all the way to the hearing to ensure that the parties do not drag out the reference. He should be prepared to proceed *ex parte*, after due and proper notice, i.e. a Peremptory Order, as specifically provided for by s.41(4) of the '96 Act, where one party persistently ignores his directions.

There are suggestions that, in certain circumstances the arbitrator should consider predetermining the length of the whole reference including, in particular, the length of the hearing. This device is certainly used with effect in America. (See the AAA Construction Arbitration Rules – section 56 as follows):

> "The Hearing: Generally, the hearing shall be completed within one day, unless the dispute is resolved by submission of documents under section 37. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven days."

Arbitrator's expertise and the use of experts

The essence of the arbitral process is that it is presided over by someone professing expertise in the subject matter of the dispute. Thus, in the interests of the parties' costs, this expertise should be exploited to the maximum.

The Working Party Report, referred to earlier, noted that:

> "there were several criticisms which suggested that Arbitrators were failing to make their understanding clear, so that advocates felt obliged to continue their arguments to no real purpose. It seemed that, even when Arbitrators had read the papers fully, they were loathe to indicate their thinking."

This gives force to my own view, that arbitrators should be more willing to interrupt counsel and indicate that they fully comprehend the point that is being argued and thus shorten a particular line of repetitive examination. Witness after witness being examined on the same matter is quite pointless when the arbitrator has taken the point and, of course, is wasteful of the parties' costs.

It is accepted that interventions, (or questions asked in clarification – to avoid it being said that the arbitrator acted inquisitorially, unless, of course, he is specifically so empowered under s.34(2) (g) of the '96 Act) are best left to the end of the re-examination of a witness. However, provided interventions are not too frequent, I am assured by my barrister colleagues that they welcome hearing from the arbitrator from time to time as it gives them a valuable insight into the effect that their advocacy is having on him. (Or at least it shows the advocate that the arbitrator is still awake!). These interventions are equally valuable in demonstrating to counsel the level of the arbitrator's own knowledge on the subject matter of the dispute.

After studying the pleadings and the hearing bundle, and prior to the hearing the arbitrator can point out those issues on which he is knowledgeable and therefore those on which he requires the minimum of evidence and those areas on which he requires guidance including, specifically legal points.

This process can be achieved by informing the parties' representatives, that, at the beginning of the hearing he wishes both parties to review the issues outstanding, as they see them, in the fond hope that the issues have been narrowed during the interlocutory period, probably through meetings of the parties' experts.

So much for the arbitrator's own expertise and his method of conveying this to the advocates. What of the experts themselves?

The use of experts in arbitration is probably the most single wasteful source of the parties' money. These experts are frequently inadequately instructed; sometimes the instructing solicitors themselves do not know what they want from their experts. Indeed, some instructions are no more than, *"read the files and write me a report"*. In effect saying *"go home dig a hole in your garden and pour my client's money into it!"*

I have heard it suggested that the arbitrator should warn the parties that he may disallow costs of any expert whom he finds to have been unnecessary having regard to his own expertise. This sounds attractive, but would it, or has it ever, worked in practice? At what stage do the instructing solicitors determine the

extent of the arbitrator's knowledge in order to make a valid judgment on the restriction of the use of the expert?

Having said that there are a number of useful procedures that I employ to maximise the benefit of using experts whilst minimising their costs. There is what I refer to as the Sir Laurence Street method – your former Chief Justice of New South Wales – in a nutshell swearing in experts of similar discipline at the same time – no doubt, you are all familiar with it. Then there is my own system of exchanging written questions from one expert to the other with provision for replies and questions from the arbitrator. I do not have the time to go further into these methods at this stage but can do so during questions if someone wishes to explore the matter further.

Winds of change

Having identified some areas of common concern, I devote the balance of this paper to areas where, given more thought, amendment or change, I believe that the arbitral process could possibly be improved.

Appropriate procedure

The arbitrator should at all times be alert to the general measure of the costs of an arbitration bearing in mind, that, as I have already stressed, if possible they should not be disproportionate to the amount in dispute. This, I am sure applies equally on this side of the pond as it does in the UK where s.33 of the '96 Act imposes this *as a duty*. Where the parties are prepared to battle out the issues irrespective of the costs the arbitrator has little choice but to accede to the parties' self-destructive behaviour but, of course under ss. 63 and 65 of the '96 Act can limit the amount that the successful party recovers.

Far more thought *must* now be given by the UK arbitrator, by virtue of s.33, to the most appropriate procedure, bearing in mind the nature of the dispute, and not, as frequently happens, blindly follow their 'normal practise'. Provided the parties do not agree otherwise and the arbitrator is left with all the s.34 powers then the UK arbitrator has wide scope for total flexibility of procedure including acting inquisitorially. I read s.18 of your '84 Act as giving similar powers in which case you are not disadvantaged here.

Leadership from the arbitrator

There exists an impression, if not a reality, that by and large, English arbitration is too much 'a pale imitation of the High Court', and is not now sufficiently its own creature to command the respect of its potential users. The accusers cast blame, for such perceived inadequacies, on the legal profession. Whilst there is some justification for this such critics should be firing their primary shots at the arbitrators whose task it is to display leadership.

As Lord Reid said:

> "arbitrators need encouragement to break out of the present mould... arbitrators, already encouraged by judges, can promote innovation."

Splitting issues

In construction disputes arbitrators should always consider the possibility of splitting quantum and liability. Initially determining liability, issuing an interim award and sending the parties away to settle quantum, only to return if they cannot agree. This would certainly work in a great number of construction cases and save substantial party costs.

Equally well there are often preliminary issues which can be determined which, again, will effect substantial saving in cost by not pursuing issues which depend on their outcome. For example, it is pointless proceeding with full pleadings for damages for loss and expense and arguing set off where there has been no initial agreement on what comprises the contract documents.

These can often be a mixture of references to a main contract, a sub contract, a sub sub contract, standard terms, standard order forms and standard acceptance forms – many of which might conflict and have different interpretations of loss and/or expense and allow or restrict set off to varying degrees.

Clearly, in an instance like this, the sensible thing is to have a short hearing culminating in a Declaratory Award as to what is, or what comprises, the contract documents. From this point on the issues in dispute may well be significantly narrowed.

Although the question of whether there are any preliminary issues is often raised as a regular agenda item at the preliminary meeting, arbitrators should never lose sight of the fact that issues suitable of being resolved as a preliminary issue may well emerge from the pleadings and again, if there could be a significant saving in time and cost, he should suggest that the parties consider that course of action.

Having identified the issues – some of which can be defined as 'technical issues' – in construction disputes, these would include *inter alia*, variations, defects and possibly some elements of delay – the arbitrator could suggest that he sit in with the parties' quantity surveyors, have full inquisitorial powers and authority to use his own expertise to the full, to determine each such item in dispute, not requiring oral evidence – either quantum; liability or both – the lawyers for each side being entitled to sit in as much, or as little, of that 'technical' hearing as they wished.

Control of evidence

Arbitrators should seek to improve their own evidence management skills with the objective of controlling the quantity and quality of evidence adduced before them.

Arbitrators are frustrated by the use of experts who testify directly the opposite of each other, sometimes days or weeks apart although an experienced arbitrator will have full notes of what the previous expert says. It is far simpler, for all concerned, if the experts are examined closer together.

One device is to swear both experts in at the same time and if, for example, there is a long Scott Schedule to work through, allow alternate counsel to examine and cross-examine each expert on a particular item in that Scott Schedule, thus disposing of it once and for all. This has the added advantage for the arbitrator that his evidence is more manageable – both expert's evidence on the same item, in the Scott Schedule, being juxtaposed in his notes rather than being located several books apart.

Clearly to a large extent the quality of the evidence is outside the arbitrator's control and any attempt to stifle a witness, because he is giving poor quality or effectively useless evidence, could be subject to a misconduct allegation. Nevertheless, the arbitrator should be alert to such a situation and at least be prepared to point out his concern to counsel.

Quantity of evidence is a little easier for the arbitrator to deal with. If he feels that one side is 'over-egging the pudding' and producing far too many witnesses covering the same issues, then, no doubt, having given warning at the preliminary meeting when the number of witnesses was determined, the arbitrator can reflect this excess in his award on costs.

His Honour Judge Bowsher, in an article for Arbitration – *Methods of Avoiding Delay in Arbitration* – made a useful suggestion when he said:

> "Try to persuade counsel to give advance notice of any questions which they wish to ask in cross-examination which will require research or lengthy calculation."

Clearly doing so will save possible costly adjournments during the hearing which is the most expensive phase of any reference.

Restricting orality

It is now becoming commonplace for construction arbitrators to save expensive hearing time by restricting orality at the hearing. This is being achieved in a number of ways –

i) Exchanged Proofs of Witnesses of Fact admitted as Evidence in Chief.
ii) Similarly, Rebuttals to these Proofs exchanged prior to the Hearing.
iii) The arbitrator invited to read a core Bundle of Principal Documents prior to the Hearing.
iv) Advocates' Opening and Closing Submissions to be in writing.
v) Limit the length of oral argument.

'Legal expert'

This next suggestion will probably go down like a lead balloon to an audience, which I understand is composed largely of lawyers, however, in some cases, and I stress in *some*, far too much time is spent at hearings by counsel (or solicitors) examining witnesses on purely factual dispute items. Admittedly, counsel's role is that of advocate – for which he is trained – but there are many instances, in the smaller construction cases, where this role could be performed adequately by a lay advocate, who is already part of the team by virtue of his role as an employee of one of the parties or perhaps as a so called expert witness. Under these circumstances, costs would be dramatically reduced if counsel's role was reduced to one of pure legal argument. Thus, in such a case, each side would appoint a 'legal expert' to assist the arbitrator to understand the law as it relates to the rights and obligations of the parties' relevant to the issues in dispute.

These legal experts would be briefed in exactly the same way as technical or scientific experts. They would prepare reports which will be exchanged and list matters on which they agreed and those on which they did not.

It would obviously be those matters on which they did not agree which would need to be aired and argued before the arbitrator unless, of course, he also wished guidance on some of the other legal points – if they were complex – on which they agreed.

The early preparation of a joint legal report would almost certainly narrow the issues and, in some instances, to such an extent that it would undoubtedly lead to more early settlements.

Whilst Professor Uff, quite rightly in my submission, suggests that:

"Arbitrators must be cautious not to deny the right to proper representation"

There is nothing to prevent the parties agreeing to limit or restrict legal representation, in the interests of cost. Such a restriction is, for example, imposed by Rules in a number of commodity arbitrations as indeed, it is already in smaller cases in this country.

The right of a party to proper representation does not necessarily mean that he is entitled to present arguments through the medium of lawyers – see also Devlin L.J.'s comments in *F.E. Hookway v. Alfred Issacs & Sons* (1954) I Lloyd's Rep. 491, where he held that a decision to exclude lawyers properly arrived at would probably be unimpeachable, and moreover, *Mustill & Boyd* sees no reason to doubt the validity of an agreement excluding or limiting legal representation in ordinary commercial arbitration.

Difficulties can arise however where one party is legally represented and the other not. The important point for the arbitrator to observe is the fundamental tenet of fairness and equal treatment of the parties.

As I read s.20 of your Act, if no provision is contained within the arbitration agreement as to the form of representation, then leave shall be granted if the arbitrator is satisfied that this will shorten the proceedings and reduce costs as the applicant would be otherwise disadvantaged. Although the intention and effect is clear that, unless provided for in the arbitration agreement, the basic premise is not to have lawyers in these smaller arbitrations, bearing in mind the arbitrator himself may need assistance with the law, then there could – even under this Act – be no objection to parties having legal experts.

Ian Menzies, a leading construction arbitrator and former chairman of the Chartered Institute of Arbitrators, has said, of this suggestion:

> "I am not sure that adopting the legal expert approach would lead to more settled reference but it might lead to earlier settlements."

Time limit on reference

Shortening the span of the arbitrator's engagement is a sure way of cutting overall costs

Why not develop some arbitration clauses to reduce time delay and cost in an arbitration? For example, a start to finish time of X days (see JCT Arbitration Rules).

Arbitrators could consider restricting the length of oral argument, as is done by the Supreme Court of the United States where counsel are typically restricted to half an hour. If an arbitrator did decide that this was appropriate and truncated all argument, this would be neither misconduct (or serious irregularity, as it is now called under the '96 Act) nor an error in law.

Even a lawyer does not have an unfettered right to address his tribunal for as long as he wants. *Banque Keyser Ullman v. Scandia* (UK) (1990) 3 WLR 384 per Lord Templeman.

In the American Association Survey, conducted in 1992, the most frequently mentioned negative trait was time wasting at the hearing – too many witnesses, too much detail, too many irrelevant documents and cross-examination too lengthy:

> "The arbitrators found it especially onerous to have lawyers invoking rules of evidence, using more objections than necessary."

Arbitrators often found advocates being too adversarial and unco-operative, also too manipulative, emotional, antagonistic and unforthcoming about facts. The author of this survey suggested that lawyers should sit through two arbitrations, carefully observing the differences between arbitration and litigation.

More active role for Chartered Institute of Arbitrators

The desirability of a more hands-on approach from appointing bodies is worthy of consideration It has also been suggested that the Chartered Institute of

Arbitrators, in the UK, as the vehicle for this 'profession', should play a greater co-ordinating role particularly with the trade associations.

This view was expressed strongly by James Mackie, an ex-Director General of GAFTA, in interview for my MSc dissertation. His view was that the Chartered Institute should make it clear that they had no intention of interfering with the associations and were not taking over their Rules and procedures but could, and should, assist in improving the education of the associations' arbitral members, through the organisation of seminars, setting special examinations, tests of competence, etc. He believed that, if this happened, the associations would move towards formal recognition of Fellowship of the Chartered Institute as a pre-qualification for appointment as arbitrator of the association. However, he stressed that this should never be the sole qualification.

Another American study – *Black and Wolf. Knowledge and Competence – Current Issues on Training and Education*. 1990, recommends that administering associations should improve their services of tracking and communicating arbitrators' qualifications and levels of experience and expertise to the parties. To this end they should be involved in hearing – observe opening statements and go to the hearing, from time to time, to observe the performance of the arbitrator.

More involved approach with parties

The robust arbitrator, who is truly going to take charge of the proceedings, should be prepared to discuss openly with the parties, or their representatives – possibly at the preliminary meeting – matters which may be to their benefit and should try to persuade them to be sensible – not to waste time and money on side issues, or procedural matters which, at the end of the day, will not make a ha'p'orth of difference; to bring to the arbitration the sort of attitude of mind that people are gradually coming round to bringing to ADR. The object of the exercise is to get rid of the dispute so everyone can get on with his or her life. If they bring that sort of attitude to arbitration then things would be a lot better – better for arbitration and better for the parties.

One approach worth considering with the parties in certain cases is the arbitrator's power to act as an *'amiable compositeur'* or act *'ex aequo et bono'*. This power is now available to the UK arbitrator by virtue of s.46 of our '96 Act, provided both parties agree in writing and which, of course, has been available for some time to the Australian arbitrator, by s.22 of the '84 Act.

More independent evaluation of performance

In my dissertation, I considered a number of ways in which an arbitrator's performance can be evaluated. In this regard I noted that the American Arbitration Association have started to get involved in hearings to the extent that they sit in and observe the performance of their appointed arbitrators.

In the other American survey, to which I referred earlier, it was said that customer satisfaction should be monitored by a questionnaire of the arbitrator's competence, addressed to the parties, subsequent to the conclusion of, but prior to the award, in the proceedings.

I have also made a similar suggestion to the RICS but certainly would not advocate seeking the parties' comments in between the end of the hearing and prior to the publication of the award. Admittedly, to wait until the dust has settled once the award has been published, would mean that the losing party may not be as objective as he could be in his assessment – this factor could, and would, have to be taken into account by the body making that assessment.

Quality Assurance

In *'Criticisms of Arbitration'* the Chartered Institute's Working Party Report, referred to earlier, the suggestion was made that consideration has been given to the introduction of Quality Assurance and personal assessment of arbitrators. However, the report concludes that as only the more experienced and professional arbitrators are likely to adopt such techniques:

> "it seems unlikely that either technique would lead to a more vigorous and less formal activity by arbitrators."

Perhaps the possibility of Quality Assurance should not be dismissed too lightly – although it may not translate itself into more effective control, or a greater flexibility of approach, but it may provide some comfort to the currently disillusioned major consumers of arbitration services who themselves are implementing such procedures within their own organisations.

Annual 'MOT' for arbitrators

I am sure we would all agree the need for regular training and updating of arbitrators' knowledge and skill.

This view is certainly shared by the American Arbitration Association where they suggest that arbitrators should be obliged to undergo training sessions devised to keep them aware of the latest developments and to create a forum for exchange of views on the propriety and success of various procedures and guidelines.

Publication of awards

The possibility of publishing arbitral awards (suitably sanitised) could be explored. There are obvious advantages in building up a nexus of specialist authority.

Lessons from Hong Kong

Finally, there are some lessons we can learn from Hong Kong which are certainly worth consideration. These include the following –

(i) Money being paid into court by a party to an arbitration with the same effect as a payment into court in a civil action.

(ii) An arbitrator may act as a conciliator provided both parties agree in writing. This, I am told, follows a long established practice in China where conciliation and litigation are a combined process and if this fails, I am given to understand that no objection is taken to the same person continuing as arbitrator. I believe that a similar combination of conciliation and arbitration is built into the Hong Kong Airport Core Programme contracts.

(iii) The strict rules of evidence were abolished for arbitration (s.14(3)(a)).

(iv) Anyone can appear in an arbitration regardless of whether or not that person is qualified as a lawyer and the costs of that unqualified person are reasonable (s.2F).

(v) A settlement agreement is treated as an arbitration award and is enforceable as a judgment of the court (s.2C).

Conclusion

It seems to me, from a brief reading of your '84 Act, that most of the suggestions that I have made in this paper for making arbitration more cost-effective could, and may already be being implemented by practitioners in this country.

Your Act, it seems to me, is an improved version of old '50 and '79 Acts but not so as improved as our '96 Act. Specifically:

Section 19(3) of the '84 Act has similar provisions to our s.34(2)(f)-(g) i.e. subject to the right of the parties to agree otherwise, the arbitrator can decide –

- Whether to apply the strict rules of evidence.
- Whether and to what extent to take the initiative to ascertain the facts and the law.
- Whether and to what extent there should be oral or written evidence or submissions.

Under s.22 of your Act, provided the parties agree in writing, you can act as *'amiable compositeur'* as indeed, we can under s.46 of the '96 Act. But I should be very interested to learn how often any of you have been given that power.

Your s.23 – *Interim Awards* – seems to me to be similar to the provision in our old '50 Act and not as wide as the power we now enjoy under s.39 AA '96 to make a provisional order for payment of money or other appropriate relief (this is one of three instances, under our Act where the parties have to agree to give us this power). Contrast your s.23 with our s.47 which covers awards on different issues.

Section 24 of the '84 Act empowers the arbitrator to order specific performance. We not only have this power by virtue of our s.48 but also a range of other remedies, some of which the Australian counterpart may have but none of which are specifically spelled out as in our '96 Act, viz:

Unless agreed otherwise, the power to –

- Make a declaration.
- Order payment in any currency.
- Order a party to do or to refrain from doing something.
- Order rectification, setting aside or cancellation of a deed or other document.

On jurisdiction s.25 of your Act overcomes the problems that we have encountered in the UK in the past, where the arbitrator's jurisdiction has been confined to those disputes initially specifically referred to him. Now under the '96 Act he has power to rule on his own jurisdiction, which means that he can overcome some of the jurisdictional challenges previously encountered. You seem to have even wider powers, by virtue of s.25 of your '84 Act, to deal with such challenges, so again, one up to you.

Section 26 of '84 Act gives the Australian arbitrator wider powers of consolidation than those enjoyed by the UK arbitrator under s.35 of the '96 Act, where such consolidation can only occur if all of the parties agree. It is this lack of ability of joinder in multi-party cases which is often held to be a disadvantage of UK domestic arbitration. Indeed, with the non-commencement of s.86 of the '96 Act, the English courts now have no discretion, to stay court proceedings if there is an arbitration agreement, over such matters as multi-party actions, a disadvantage, it would appear, not suffered by the Australian arbitrator.

This lack of discretion is currently causing concern amongst some of the more prolific users of arbitration in the UK to the extent that because of it I have been told that arbitration clauses are now being struck out of standard contracts altogether. So, as I say, your s.26 with its wider powers than our s.38, gives the Australian arbitrator an advantage over us.

Another area which it could be said you have an advantage over us is in your s.27 – *Settlement of disputes otherwise than by arbitration.* (An odd item to find in an Arbitration Act!) Nevertheless, despite the difficulty of changing hats, the Australian arbitrator may be authorised to act as a mediator or conciliator and if that does not work pick up the reins as arbitrator, presumably forgetting all the confidential matters which have been disclosed to him in the process of the mediation! There is no similar provision in our '96 Act.

Interestingly the '84 Act spells out, in s.37, the duties of the parties to co-operate with the arbitral process. This is a similar provision to that of the duties of the parties under the '96 Act to:

"...do all things necessary for the proper and expeditious conduct of the arbitral proceedings."

It has been suggested that if a party fails to observe the provisions of this section it may be in breach of contract with the other party. I wonder if such an action has ever been brought under s.37 of the '84 Act.

What about areas where the UK arbitrator might score over his Australian counterpart.

There are a number of these, *inter alia* –

- The award of interest. Section 31(4) of your '84 Act would seem to preclude the award of compound interest whereas s.49 of our '96 Act specifically empowers the arbitrator (provided the parties have not agreed otherwise), to award compound interest – a power not even enjoyed by a High Court Judge.
- Procedural and evidential matters covered by our s.34, some of which I have already identified as relating to s.19 of your '84 Act. Other powers which you do not specifically have are for the arbitrator to decide:
  - when and where any part of the proceedings is to be held s.s[(2)(a)];
  - the language of the proceedings [s.s.(2)(b)];
  - whether any and if so what form of written statements are to be used and if these can be later amended [s.s.(2)(c)];
  - the extent of discovery [s.s.(2)(d)]; and
  - whether and in what form questions should be put and answered by the parties [s.s (2)(e)].

By s.37 of our '96 Act we have power to appoint to legal advisers, experts or assessors, of course, subject to the parties blocking this power by rare agreement.

Another area where specific powers are spelled out is in s.38 of our Act – *General Powers Exercisable by the Tribunal.* These include, *inter alia*, power to –

- Order security for costs.
- To give directions concerning the property which is the subject of the proceedings e.g. to order samples to be taken, etc.
- Order the preservation of evidence.

I am sure that I could find other examples but weighing things in the balance we, in the UK may well have more powers more clearly spelled out, but it seems to me that there is little or no impediment to the Australian domestic arbitrator using the same imaginative use of flexibility of procedure to restore the good reputation of arbitration as *the* preferred alternative to litigation.

I say this with some confidence after reading the seminal judgment of Rogers L.J. in the Supreme Court of New South Wales in *Imperial Leatherware Company Pty Limited v. Macri & Marcellino Pty Limited,* 11 April 1991, which confirmed that this degree of flexibility is certainly available to arbitrators in Victoria (even if it is questionable to those in South Australia).

In this case the Judge, having refused to follow the Full Court of the Supreme Court of South Australia in *South Australian Superannuation Fund Investment Trust v. Leighton Contractors Pty Limited* (unreported 30 November 1990), where the Court took the view that arbitrators were free to conduct proceedings as they saw

fit in uncomplicated informal arbitrations, but were required to comply strictly with Court Rules in complex arbitrations.

Rogers C.J. cited a great number of authorities – both Antipodean and UK – in support of his rejection of this proposal. Broadly speaking, this case gives judicial authority to my contention that, subject to the overriding principle of fairness, or what some call natural justice, an arbitrator is entirely free to decide, certainly on procedural and, to some extent, on evidential matters.

This principle was restated as recently as early this year by the Court of Appeal in *Fletamentos Maritimos SA (Marflet) v. Effjohn International BV* (1997) LTA 96/7721/B (unreported), Friday 21 February 1997, Simon L.J., Morrit L.J. and Waller L.J., CA, where it was held that:

> "...there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award."

In conclusion, if there is one message that I want to leave with you, it is this.

Arbitration has strayed too far from its original roots. It developed out of the Courts of Pied Powder – arbitration of commercial disputes, by commercial men employing commercial criteria. Arbitration by merchants with dust on their boots from the marketplace that they have just left.

We could do well to remind ourselves of Aristotle's words (350 BC):

> "It is equity to pardon the human failing, to look at the law giver and not the law, to the spirit and not to the letter; to the intention and not to the action... To prefer the arbitrator to the judge, for the arbitrator observes what is equitable whereas the judge sees only the law."

We need more emphasis on the practical resolution of technical disputes with less legal involvement and a far greater exercise of the most powerful tool that the arbitrator wields – FLEXIBILITY. Flexibility of procedure, if employed sensibly, undeniably gives an arbitrator a head and shoulders advantage over litigation on the same issues. This is the message that we practitioners must get across to the consumers of arbitration – mainly through example or face the possibility of arbitration ceasing to be the predominant alternative method of dispute resolution.

Where, in this country, it seems that arbitration has lost ground, it seems to me that given the will, and I stress the will must be there, you already have most of the tools for achieving a full recovery to robust health.