Dispute resolution: The consequences where parties are unable to agree on an appointee's terms and conditions for acting

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Introduction

When a dispute arises between the parties to a contract which provides for an alternative dispute resolution process instead of resort to litigation, the disputant parties often find themselves unable to reach agreement on the selection of a person or persons to act in the role of the dispute adjudicator. In the event of such a disagreement, the dispute resolution clause in the contract will frequently stipulate that a named third party or institutional body such as the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) or the Institute of Arbitrators and Mediators Australia (IAMA) be empowered to make the nomination of a suitable person.

A person who has been nominated for the resolution of a dispute will establish with the parties that there is no conflict or other impediment to undertaking the role. He or she will then need to obtain the agreement of the parties on their terms and conditions for acting, including payment of professional fees and expenses and provision of an indemnity against liability that may arise from undertaking the role. It is in seeking this agreement that problems can arise, problems serious enough to derail an efficient alternative dispute resolution process.

Seeking the parties' agreement on fees and terms can be an awkward and most singular moment, a Dickensian moment, where one can have empathy for poor wretched bookkeeper Bob Cratchit, nervously asking Scrooge for his pay and a miserable half day off on Christmas day. It doesn't seem to matter whether one is seeking fees for $500 a day or $5000 a day, or whether seeking an indemnity from the parties to cover all manner of incompetence and unbecoming behaviour or merely the usual indemnity. But when facing the cold looks of the parties at this point, one can be forgiven for inwardly gasping: 'what if they reject my terms and conditions – is that the end of my gig'?

The difficulty in obtaining agreement on terms and conditions is more often than not due to the reluctance of only one party, usually the respondent to the dispute, who may be seeking to draw out the process or to pursue litigation to avoid alternate dispute resolution (ADR). Thus, whilst resolving the impasse over terms and conditions may be focussing the mind of the dispute resolver, of far greater importance is the right of the willing party, let's assume the claimant, to efficiently get on with the ADR process to the extent it is entitled under its contract.

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This paper examines the potential consequences of one party to the dispute refusing to agree on an appointee's terms and conditions for performing the adjudicatory role. Two questions arise:

- First, is there a difference in meaning or effect where the dispute resolution clause provides that the dispute resolver is to be 'appointed' by the appointing body as distinct from being 'nominated'? If the clause uses the expression 'appointed', does this have the effect of binding the parties to that appointment and precluding any objection by a party to the expert so appointed (other than on proper grounds such a conflict or apprehension of bias etc)?
- The second question is, does one party's refusal to agree on the dispute resolver's remuneration or other terms mean that the appointment to conduct the matter must fail - because no contract of appointment to undertake such a role can be concluded or that the dispute resolution clause is void for uncertainty because of the absence of material terms about the an appointee's terms and conditions?

The *Nepean* Case

These issues were recently considered by the Court of Appeal of the Supreme Court of Victoria in the unreported case *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* (Nepean).[2] The case concerned the right of the landlord, Nepean, to resist the appointment of a person to conduct an expert determination on the grounds that the agreement between Nepean and Abnote was unworkable because:

- It was not obliged under the dispute resolution clause to enter into an agreement with the expert to effect the appointment, and
- There was uncertainty as to terms for appointing an expert to act[3]

Nepean repeatedly refused to enter into an agreement for the appointment of a person to conduct the expert determination by refusing to agree to terms sought by the expert providing for indemnification. Whilst the case is concerned with appointments for an expert determination, it also provides insights in respect of nominations or appointments to act as an arbitrator, mediator or adjudicator.

The court's decision rested on three findings:

- Whilst the expression 'appoint' is capable of having several different meanings, in the context and construction of the particular contract, 'appoint' meant that, once the appointing body made the appointment, the parties could not undo that appointment, even though the contractual agreement with the specified appointee remained to be entered into
- Second, where the terms and conditions of the appointee for acting were not stipulated in the dispute clause of the contract, it is an implied term that the appointment is on terms which are reasonable
- Third, the parties will be compelled to enter into an agreement with the appointee on such reasonable terms. The effect is that the appointment process cannot be frustrated by one party refusing to sign an agreement with the appointee

It is important to note that the Nepean decision was made in respect of an appointment for an expert determination where that form of ADR, similar to mediation, is not generally supported by legislative regulation, such as exists in the fields of arbitration and adjudication.

2 [2009] VSCA 308 (18 December 2009) per Warren CJ, Nettle and Bongiorno JJA.

3 *1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd* [2009] VSC 317 per Pagone J, [9] – [11].

The facts of Nepean may be briefly stated. Nepean, the owner, leased commercial premises to the lessee, Abnote. It was a term of the lease that the owner obtain a planning permit within a specified period to enable it to make certain improvements to the premises. Abnote alleged that Nepean failed to comply with this term and issued a notice of termination under the lease. The lease provided for expert determination in the event of a dispute. If the parties could not agree on the selection of an appropriate expert, which in this case required legal expertise, the lease required as follows.

Clause 12.4:

> *the President of the Law Institute of Victoria …* **to appoint** *an independent practising barrister or solicitor to resolve the dispute or to determine whether the dispute involves legal interpretation of this agreement … [bolding added]*

Clause 12.6(a):

> *Any person* **appointed** *under … clause 12.4 must act as an expert and not as an arbitrator, and the expert's written determination will be conclusive and binding on the parties. [bolding added]*

Relevantly, the President appointed a legal expert and the expert sent Abnote and Nepean his terms and conditions for acting. It included a release and indemnity from liability while acting as expert. Nepean objected that the scope of the indemnity was too wide. Given this disagreement the expert, being unable to conclude his agreement to act, declined the appointment. Successively, two other experts requesting similar indemnities were appointed by the President of the Law Institute with Nepean again rejecting on the basis that the scope of the indemnity was too wide. Again, because of this, each of the experts declined the appointment. On the last occasion, Abnote sought from the Supreme Court of Victoria a mandatory injunction to compel Nepean to sign the agreement appointing the last nominated expert including the release and indemnity as sought by the expert. The trial judge granted the injunction compelling the landlord to sign the expert determiner's agreement upon the terms sought.[4] This was upheld by the Court of Appeal.

The Court of Appeal's reasoning for its decision on each of the three main points may be summarised as follows.

First: Meaning Of 'Appoint' And Nominate'

The court stated, by reference to the House of Lords authority, *Tradax Export SA v Volkswagenwerk AG*,[5] that the word appoint may vary in meaning according to the context in which it is used. It noted that in some cases 'appoint' may be no more than a synonym for 'nominate' but in others the power of appointment may include power to set terms and functions of the expert.[6] However, the court held that 'appoint' in the context of cl12.4 of the parties agreement, must mean the conferring upon the expert selected by the President of the Law Institute the function of resolving the dispute. The use of the

4 *1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd* [2009] VSC 317 per Pagone J,
5 [1971] QB 537 Lord Denning MR, Salmon and Edmund-Davies L.JJ at 546.
6 *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd*, paragraph [23].

expression 'appoint' must be construed as precluding any objection by a party to the expert appointed by the President. If it were not so, the mechanism provided for in the agreement could be rendered useless where a party refused to accept the nomination for whatever reason.[7] The court stated that it is unlikely that the parties having agreed to a mechanism to achieve the independent appointment of an expert would permit frustration of this by either of them being able to continually reject an appointed expert.

Thus, by the parties adopting cl12.4 in the form they did (i.e. the particular usage and context of the expression 'appoint'), the parties agreed that they would be bound by the President's selection and appointment. The court's central finding was that the appointment itself does not depend upon any further consent or action of the parties. However, the appointment can have no effect as an appointment until the parties have been notified of it and have entered into a contract with the appointee to undertake his duties as an expert.[8]

Based on the court's reasoning on this first aspect, could it be argued that Nepean is authority for a converse proposition? Where the dispute resolution clause uses the expression 'nominate' and not 'appoint', could it be said that the parties have agreed in their ADR clause not to be bound by that nomination and hence would be free to repeatedly reject any nomination whether for good or bad motive? This is considered later, however, except in the most poorly drafted dispute clause, it is unlikely that mere use the expression 'nominate' of itself would have the result of the parties not being bound to accept the nomination. As will be seen, it is of course a matter of contractual construction dependent on the facts of each case.

Second: Implied Term that Expert's Appointment will be on Terms which are Reasonable

The second issue considered in the Nepean case arose because the agreement containing the mechanism for appointing an expert to resolve the dispute was silent as to provision of an indemnity for the expert for acting in the role. The Court of Appeal noted the necessity of setting out the expert's terms and conditions for acting and regulating the relationship between him or her and the parties to a dispute. It stated that it cannot have been the parties intention that that the operation of the elaborate dispute resolution mechanism they had agreed on would be nullified for uncertainty or for want of prior agreement on the expert's terms of appointment, particularly where there was evidence that usual and reasonable terms are commonly requested and agreed upon by parties seeking the assistance of a dispute resolver.[9]

The silence of the parties' agreement on the question of the expert's terms necessarily gives rise to an implication that his appointment will be on terms which are reasonable. Without such a term, the agreement would be unworkable. The Court of Appeal held that the fact that, on the evidence, the content of such terms can be readily ascertained lent weight to the conclusion that it should be implied and is an

7 Ibid. paragraph [24].
8 Ibid. paragraphs [25] and [26].
9 *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd*, paragraph [28].

answer to any contention that the appointment clause is uncertain. On the criteria for implying a term into a contract the court relied on *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*:[10] the implication of the term was necessary for the effective operation of the agreement; the making of the implication is so obvious that it 'goes without saying'; it is capable of being clearly expressed and does not contradict express terms of the contract.

The court found that the particular form of indemnity sought by the last expert appointed (and indeed all the prior appointees) was reasonable on any view of the evidence. The indemnity was consistent with equivalent terms in rules published by bodies such as the Australian Commercial Disputes Centre, the London Court of International Arbitration and the statutory protection afforded by the Supreme Court itself[11] for Court appointed arbitrators and mediators. Accordingly, the court held that the landlord Nepean was bound by its agreement with the tenant, Abnote, and bound to accept the appointed expert upon the reasonable terms set out in the expert's draft agreement.

Third: Mandatory Requirement to Complete Agreement

The third decision of the court concerned the question of whether the landlord, Nepean, could be compelled to sign the agreement with the expert and thereby enable the dispute resolution process to be undertaken. The court, relying on the High Court of Australia decision in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*,[12] in turn supported by *Butts v O'Dwyer*,[13] held that where both parties have agreed in a contract that something shall be done, which cannot effectually be done unless both concur in doing it, there is an implied term that each party agrees to do all that is reasonably necessary to be done by them for the carrying out of that thing.[14] The imposition of such an obligation is not new and in fact relies on the authority of Lord Blackburn's judgment of 1881 in the English decision of *Mackay v Dick*.[15] The Court therefore confirmed the correctness of the trial Judge's order granting a mandatory injunction compelling the landlord, Nepean, to execute the expert's agreement on his terms for the conduct of the expert determination.[16]

There was an additional ground in support of compelling the parties to execute the expert's agreement (once it found an implied term as to the expert's terms and that these were reasonable). This ground was a 'further assurance' clause contained in clause 20.4 of the parties' agreement. The court held that this added little to the obligations already imposed upon Nepean by the agreement itself, the common law and the implied terms.

10 (1977) 180 CLR 266.
11 Supreme Court Act 1986 VIC s27A.
12 [1982] HCA 53; (1982) 149 CLR 600.
13 [1952] HCA 74; (1952) 87 CLR 267.
14 *Campbell v Back Office Investments Pty Ltd* (2009) 238 CLR 304, 358 [169] (Gummow, Hayne, Heydon and Kiefel JJ) citing Mackay v Dick (1881) 6 App Cas 251, 263 Lord Blackburn.
15 *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* [2009] VSCA 308 (unreported) at [36] citing Mackay v Dick (1881) 6 App Cas 251, 263.
16 Ibid at [15] and [39].

Broader Application of *Nepean's* Case

On the initial question of any difference between the effect of the expression 'appoint' as distinct from 'nominate', the court acknowledged the primacy of the agreement between the parties. The court similarly looked to the parties' agreement in reaching its finding that a term could be implied that the parties had agreed to the appointment on terms which will be reasonable. The Nepean case is not groundbreaking in a jurisprudential sense, but the case does serve to bring into full view an issue that has a bearing on all ADR disciplines other than just expert determination. Namely, what happens if a party rejects the dispute resolver's terms and conditions and how does the dispute resolution clause under which the appointment was made stand up?

Any broader application of the principles enunciated in Nepean where there is disagreement over appointing a dispute resolver will now be considered for the following areas:

(a) First, any difference between interpretation of 'appoint' or 'nominate' and any impact where there is no agreement on the dispute resolver's terms and conditions:
   - for other examples of dispute resolution clauses used for both expert determination and mediation; and
   - for dispute resolution clauses for expert determination and mediation which incorporate institutional rules prescribing procedures where parties disagree on appointments

(b Second, any difference between interpretation of 'appoint' or 'nominate' and any impact where there is no agreement on the dispute resolver's terms and conditions:
   - for dispute resolution clauses used in arbitration and adjudication including where the agreement incorporates institutional rules
   - where legislation exists for arbitration and adjudication which prescribe procedures in the event of procedural disputes

Expert Determination and Mediation: Example Dispute Resolution Clauses which 'Appoint' or 'Nominate'

Nepean's case is one that demonstrates that there are a number of avenues by which a reluctant party may seek to undermine the ADR process by challenging the default mechanism for appointing a dispute resolver. However, the importance of precision when drafting such clauses is heightened in cases of expert determination and mediation. This is because unlike arbitration and adjudication, expert determination and mediation are not regulated by supportive legislation.

The efficacy of an expert determination dispute resolution clause was considered in *Incorporated Owners of Repulse Bay Towers v Bolton Construction Ltd*.[17] The Supreme Court of Hong Kong considered the construction of the dispute resolution clause on the questions of any difference in meaning between 'appoint' and 'nominate'. It found that 'nominate' and 'appoint' are words with different meanings and that nominate in the context of that case did not bind the parties to the nomination. The clause in that case dealt with the appointment of the expert as follows:

17 [2003] 3 HKLRD 823 (Supreme Court of Hong Kong).

> *... such [expert] … as the Employer shall* **nominate** *for that purpose, [and] not being a person to whom the Main Contractor shall* **object***. Provided always that such person* **subsequently appointed** *to be the … expert …* [bolding added]

The court noted the three key words and stages in the clause were nominate, object and appoint. It held that under the clause, first there is a nomination, then the possibility of an objection and later an appointment. Given the wording of the relevant clause in this case, the court's reasoning that the initial nomination was not binding could hardly be faulted. It is consistent of course with the principle noted in Nepean that construction of the meaning is to made in the context of the particular agreement.

Another example of an expert determination clause reads:

> *If … unable to agree upon the identity of the expert …. either party may* **request** *the … Australasian Disputes Centre to* **nominate** *the expert.* [bolding added]
>
> *The Builder and Client are … to execute any agreement which may be reasonably required by the expert.*

This clause uses the expressions 'request' and 'nominate', not 'appoint' as considered in Nepean's case. Nevertheless, it is difficult to see in this case that a party could dispute the nomination and argue that it is not binding in the nature of an 'appointment'. This clause is an example of the expressions 'nominate' and 'appoint' varying depending upon context. Employing the reasoning of Nepean's case, this example clause:

- does not depend upon the further consent of the parties
- confers upon the expert, once nominated, the function of resolving the dispute
- the mechanism for the dispute resolution would be rendered useless by one party refusing to accept the nomination

The second limb of the example clause requiring execution of an agreement reasonably required by the expert provides additional support that the process for nomination of the expert itself was intended to be something that did not require any further consent of the parties.

One more example, which concerns a nomination for a mediation, presents a different hue. The clause reads:

> *If the parties are unable to agree on a mediator ... either of them may refer the dispute for mediation to a mediator* **nominated** *by the then Chairman of the State Branch of the Institute of Arbitrators and Mediators Australia and the parties must thereafter mediate the dispute.* [bolding added]

The words contained in the last line leave little doubt as to the process intended by the parties. Whilst the word 'nominate' has been used, the express admonition that the parties must thereafter proceed upon the mediation could hardly be interpreted as leaving open the possibility that the parties did not intend to confer upon the nominee the function of mediating the dispute.

The contrasting meanings to be attributed to 'appoint' and nominate' according to context of the agreement can be seen from the above examples. They are also an answer to one of the questions posed

18 Refer page 86.

earlier[18] that the use of 'nominate' instead of 'appoint' does not necessarily mean the resulting identification of the expert (or mediator) is of a less binding nature. In fact, subject to the context of the agreement, it can have the same force as use of the expressions 'appoint' or 'appointment'.

The examples considered were concerned with appointments or nominations for both expert determinations and mediations. As discussed before, mediation and expert determination are similar in that they do not have some of the procedural advantages afforded by legislation for arbitration and adjudication. Apart from the importance of drafting appointment clauses clearly, the incorporation of institutional rules into expert determination or mediation agreements can be used as an aid to avoid unnecessary disputation that can seriously derail the ADR process.

Expert Determination and Mediation: Incorporation of Institutional Rules into Dispute Clauses

The choices available for institutional rules to govern a dispute are many and varied. A review of two approaches taken by the Institute of Arbitrators & Mediators Australia and the Arbitrators' and Mediators' Institute of New Zealand Inc will give a flavour of what can be the effect of the adoption of different rules for expert determination and mediation dispute resolution clauses. The incorporation of institutional rules by the parties to the contract makes the rules part of the dispute resolution agreement and thus relevant to construction and interpretation, including questions on the effect of the use of the expressions 'appoint' or 'nominate' and procedures where the agreement may be silent about terms and conditions of the dispute resolver.

The IAMA Expert Determination Rules[19] (and similarly the IAMA Mediation Rules)[20] in rule 2 (1)(b) provide that the expert determination process shall be conducted:

> *if the parties are unable to agree on the identity of the person … to be appointed, [then] by a person … nominated by the Institute.*

Schedule A, rule A1(4) of the rules further provides for where the parties are unable to agree on the identity of the expert:

> *… then the dispute … shall be and is hereby referred to expert determination by an Expert nominated by the Institute.*

Notwithstanding that these rules use the expression 'nominate' and not 'appoint' their context and expression is reasonably clear. It would be hard put to argue that Nepean stands as authority for 'nominate' in this context having a meaning that did not bind the parties to the expert so identified. Subject to the usual requirements for no conflict or other apprehension of bias, the appointment of an expert as expressed in the IAMA rule in the parlance of Nepean, does not depend upon the consent of the parties.

The next step for consideration is what is the position if the parties' agreement is silent on the nominated dispute resolver's terms and conditions for acting? In Nepean, it was necessary for the court

19 Institute of Arbitrators & Mediators Australia, Expert Determination Rules, 22 November 2001.
20 Institute of Arbitrators & Mediators Australia, Mediation Rules, 5 April 2007.

to imply a term that the appointment is to be made on reasonable terms and conditions. However, if the parties had incorporated the IAMA Expert Determination (or Mediation) rules, would a court be similarly disposed to imply such a term?

Both the IAMA Expert Determination rules and the IAMA Mediation rules specifically provide for the situation where there is a disagreement on the Nominee's terms and conditions. Rule A4(1) states:

> *Where any party does not agree with the conditions advised by the Nominee,*[21] *then the Nominee shall notify the parties in writing … as to whether he or she accepts appointment as Expert [Mediator] notwithstanding that disagreement [as to costs]. On acceptance of the appointment, the Nominee shall be deemed to have entered on the reference …*

On the other hand, where the Nominee Expert (or Nominee Mediator) decides to decline the appointment due to lack of agreement on his or her terms and conditions, rule A4(2) provides that the Institute shall nominate a replacement Expert [Mediator] and, under sub rule (3):

> *any dispute as to the reasonableness of the conditions notified by the replacement Expert [Mediator] shall be determined by the President of the Institute … which determination shall be final and binding.*

The IAMA rules are clear on several matters. First, the Nominee could accept the appointment in the absence of any agreement on terms and take the risk of subsequently seeking payment of fees on a quantum meruit basis (or be prepared to accept some lesser terms and conditions). Rule 17 also expressly provides for the exclusion of liability for negligence by an expert.[22] Second, if the Nominee decides to decline the appointment due to disagreement on terms and conditions, whilst his or her nomination has been frustrated and is at an end, the nomination of a second, replacement, nominee by IAMA cannot be similarly frustrated given the power bestowed on the President of IAMA to make a final and binding determination on the reasonableness of terms and conditions sought. Third, by the incorporation of the IAMA rules, the dispute resolution clause is no longer silent in providing for a resolution of disagreement on terms and conditions. The contract is not wanting for certainty. A court is unlikely to imply a term given that a process has been expressly provided to deal with the case of a disagreement.[23] The IAMA mechanisms are not ideal but they at least prevent a party from derailing the ADR process as occurred in Nepean.

It can be concluded that both the IAMA Expert Determination and the Mediation rules, if incorporated by the parties into their dispute resolution clause, will avoid some but not all of the pitfalls that befell the parties in Nepean. The appointment of the first nominee could still be frustrated by a recalcitrant party simply refusing to agree terms and conditions. However, adopting the IAMA rules would prevent a continuation of such recalcitrance in respect of a second nominee, given that the

21 Nominee is defined in Rule 1 as an expert [mediator] nominated by the Institute but who has not accepted the appointment as expert [mediator].

22 IAMA Expert Determination Rules, rule 17; IAMA Mediation Rules, rule 13.

23 The courts will uphold agreement of parties which expressly provides for a way in which a failure to agree can be resolved: *Prior v Payne* (1949) 23 ALJ 298.

President may make a final determination as to reasonableness of the appointee's terms.

This suggests that there is room for reform of the IAMA expert determination and mediation rules. If the rules were to expressly state a minimum default basis for agreeing on terms and conditions, it may assist in avoiding unnecessary obstruction or delay. A clause like:

> *in the absence of any prior agreement on the dispute resolver's terms and conditions for acting, the parties agree that the appointment will be on such terms and conditions as are reasonable or usual having regard to his or her qualifications and expertise, the nature of the function to be performed and responsibility to be undertaken.*

Such a clause is not bullet proof. However, it does require that any dispute over terms and conditions must be addressed limited to a question of fact to be determined objectively.

AMINZ does not provide rules for Expert Determination but it does have rules for mediation termed the Mediation Protocol.[24] Article 3 arguably provides a very clear recording of the parties' intent when it has been incorporated into the parties' dispute resolution agreement. It states:

> *3.2 If no mediator is appointed by agreement, the parties will accept the appointment of a mediator by the President of the Arbitrators' and Mediators' Institute of New Zealand Inc.*
>
> *3.4 The appointment shall not be complete until agreed to in writing by the parties and accepted in writing by the mediator.*

Article 3.4 is express in stating that the appointment is not complete until agreed in writing, initially by the parties themselves. At first sight it seems that one party could conceivably withhold its consent to sign an agreement and thereby frustrate the appointment process. The Court of Appeal in *Nepean*, after a review of the common law stated:[25]

> *The appointment of an expert pursuant to clause 12.4 does not depend upon the consent of the parties, but it can have no effect as an appointment until the parties have been notified of it and have entered into a contract with him [the expert] to undertake his duties …*

The court further opined that the nature of the clause appointing the expert was that the President was not requested simply to suggest and expert who might, if the parties agree, resolve the dispute. On the contrary, by adopting the clause they did, the parties had agreed to be bound by the selection of the expert, provided terms of engagement are not unreasonable and subject to due exceptions such as independence.

It seems reasonable that the principles enunciated in the *Nepean* decision, relying as it does on settled principles of common law, in the absence of New Zealand authority to the contrary, could be applied in determining the meaning and force behind the operation of article 3.4 (where it is incorporated into the parties' dispute resolution agreement). The appointment made pursuant to article 3.2 does not depend upon the consent of the parties but the appointment can have no effect, or be complete, until the

24 Arbitrators' and Mediators' Institute of New Zealand Inc., Mediation Protocol, Version 07/2004.

25 1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd [2009] VSCA 308 at paragraphs 25 to 26.

parties have agreed in writing between themselves and the mediator. The parties in adopting the AMINZ Protocol must be taken to have agreed that they will be bound by the selection of mediator provided the terms are not unreasonable.

Article 10.2 of the AMINZ Protocol reads:

> *Unless otherwise agreed between the parties and the mediator, the mediator's fees shall be charged as agreed, for instance on a time basis at an hourly rate to be agreed in writing with the parties prior to commencing the mediation …*

The article appears to address the situation where terms and conditions for acting have not been previously agreed. The construction of article 10.2 is difficult. The problem is that it falls short of providing a deadlock breaking mechanism where the parties disagree on the appointee's terms. Whilst mediation is a voluntary process, if the parties under their contract are compelled to go through mediation, there is a risk of delay and obstruction to the process where the dispute clause lacks clarity.

It therefore makes sense to address AMINZ article 10.2 in a similar fashion to that suggested for reform of the IAMA rules, namely the addition of words stating that the appointment will be on terms and conditions which are reasonable in the circumstances. Of course, the most effective way of avoiding these issues is to clearly address them in the parties' dispute resolution agreement in the first place.

Arbitration and Adjudication: Incorporation of Institutional Rules into Dispute Clauses and the Effect of Legislation

Where a dispute arises over the appointment of a person or their terms and conditions for acting, the position of arbitration and adjudication is different to expert determination and mediation both in the adoption of institutional rules and the effect of governing legislation.

It is not necessary to separately review examples of dispute resolution clauses for arbitration and adjudication on the question of any difference between using the expressions 'appoint' or 'nominate'. The rules of construction in the context of the particular agreement and the principles discussed in the Nepean case for expert determination apply with similar effect. However, if a party did disagree on the ability of a nominating authority or institution to make a final appointment of an arbitrator under the terms of the arbitration agreement and so seek to frustrate the arbitral process, the uniform arbitration legislation in most Australian states (*Uniform Act*)[26] allows the court to make an appointment upon the application of a party.[27] Similar provisions exist under the *Arbitration Act 1996*, New Zealand (*New Zealand Act*)[28] and the recent *Commercial Arbitration Act* 2010, New South Wales (*New South Wales Act*).[29]

Assuming that the arbitrator (or adjudicator) has been appointed in the sense that no further consent of the parties is required in the manner discussed for Nepean's case but that there is disagreement on the terms of the appointment, such as fees or exclusion of liability. Could the refusal of one party to

26 For convenience, in respect of legislation applying in Australian jurisdictions other than New South Wales, references are to the uniform commercial arbitration legislation (Uniform Act) generally, with particular references to the *Commercial Arbitration Act 1984*, Victoria.

27 For example, refer s10 of the *Commercial Arbitration Act 1984*, Victoria.

28 *Arbitration Act 1996*, New Zealand, schedule 1, s11(4).

29 *Commercial Arbitration Act 2010*, NSW, s11(4). The Act is expected to be proclaimed on 1 October 2010.

execute agreement with the arbitrator (or adjudicator) frustrate the dispute resolution process in the way that it did in Nepean's case?

The position for arbitration or adjudication diverges from that of expert determination and mediation. This is due to the existence of legislation governing arbitration and adjudication which stipulates procedures where, for whatever reason, the parties' agreement fails to work. For example, the *Uniform Act* may imply certain terms[30] or provide mechanisms to complete possibly defective dispute resolution procedures[31] in order to give effect to the arbitral appointment. In addition, the parties may have incorporated into their dispute resolution agreement institutional rules for the conduct of the arbitration or adjudication. These rules tend to reflect the fact that arbitration and adjudication are regulated by legislation so that the rules are consistent with the legislation or do not prescribe procedures where the legislation has already covered the situation.

In respect of arbitration, under the IAMA Arbitration Rules,[32] rule 9(6) provides that the nominee arbitrator may accept the appointment and enter on the reference as arbitrator even though the parties have not agreed to the conditions of appointment. In contrast, in the case of expert determination, the nominee would be less sure and feel constrained from acting until such time as an agreement with the parties had been concluded. But where does this leave a nominee arbitrator if a party has not agreed to the nominee's fees or to a requested exclusion of liability?

The IAMA Arbitration Rules baldly state that an arbitrator, despite absence of agreement on his or her terms, may enter upon the reference as arbitrator. The rules do not take the matter any further. In Australia under the *Uniform Act* (other than New South Wales), for example s34(1) of the *Commercial Arbitration Act 1984*, Victoria, provides that fees are at the discretion of the arbitrator. There are equivalent provisions in the *New South Wales Act*[33] and the *New Zealand Act*.[34] These provisions are consistent with the IAMA rule that the arbitrator does not require the consent of the parties on fees. Also, s51 of the *Uniform Act* provides the arbitrator with a broad exclusion of liability for matters done in the capacity of arbitrator.

Thus, if the nominee arbitrator has entered upon the reference, even where the arbitration agreement is silent as to terms and conditions such as fees and scope of an indemnity, there is little opportunity for a recalcitrant party to derail the arbitral process. In addition, whilst the arbitrator may claim fees as determined by him or her, if there is a dispute, the *Uniform Act* in Australia provides[35] at s35 that the fees may be taxed by the court with the arbitrator entitled to such sum as may be found reasonable. An arbitrator is afforded far greater protection than a person charged with an expert determination. Indeed, an arbitrator should act with confidence and firmness in entering on the reference notwithstanding a party's refusal, whether for good or ill motive, to agree on his or her terms.

It is of interest to note a recent divergence in Australian arbitration legislation on the question of establishing the reasonableness of an arbitrator's fees. As noted, under the *Uniform Act*, an arbitrator

30 For example, *Commercial Arbitration Act 1984*, Victoria, s35(4) for arbitrator's fees.

31 Ibid. s10 for general powers of the court.

32 *The Institute of Arbitrators & Mediators Australia, Arbitration Rules (incorporating the Fast Track Arbitration Rules),* June 2007.

33 *Commercial Arbitration Act 2010*, New South Wales, s33B(1).

34 *Arbitration Act 1996*, New Zealand, schedule 2, s6(1).

35 *Commercial Arbitration Act* 1984, Victoria, s35(2) & (4).

may be required by a party to have fees taxed by the court. In contrast, the recent *New South Wales Act*, which in the main follows the UNCITRAL Model Law,[36] appears to have moved away from the protection previously afforded by s35(2) and (4) of the *Uniform Act*. S33B(5) of the *New South Wales Act* provides for assessment by the court of costs of the arbitration directed to be paid under the award 'other than the fees or expenses of an arbitrator'. The express ability of a party to dispute the reasonableness of the arbitrator's fees by seeking taxation by the court as provided under the *Uniform Act* is absent. The *New South Wales Act* now provides less clarity in how a dispute as to the reasonableness of the arbitrator's fees may be efficiently resolved.[37] Interestingly, New Zealand, which adopted the Model Law back in 1996 retained the right of a party in a domestic arbitration, unless otherwise agreed, to seek recourse to the court on any issue as to reasonableness of costs.[38] The New Zealand approach (for domestic arbitration) is in a similar vein to the position adopted under the United Kingdom legislation.[39]

The final area for consideration is adjudication. Adjudication is a statutory scheme applied to the building and construction industries and is provided for in the different jurisdictions of Australia and in New Zealand. Adjudication provides a legislative process for hearing and deciding upon entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts. The problems that Nepean's case addressed are much less likely to arise under the prescriptive scheme adopted in most jurisdictions for adjudication. The appointment of the adjudicator is made under the legislation by an approved appointing authority. If the appointee meets the required criteria and does not fail for reason of prescribed ineligibility, under the legislation in Australian jurisdictions, once the appointee accepts the nomination, he or she is taken to have been appointed.[40] The position is to similar effect in New Zealand.[41] In respect of an adjudicator's fees, these are prescribed, either as agreed between the parties and the adjudicator or otherwise the adjudicators is entitled to be paid fees that are reasonable having regard to the work done and expenses incurred.[42] Exclusion of liability for an adjudicator is also provided.[43] With adjudication being a creature of statute and given the nature of the legislative prescription, there is little opportunity for the vexing situation of repeated rejection of the appointed dispute resolver as encountered in Nepean's case for expert determination.

36 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (as amended to 2006) (UNCITRAL Model Law).

37 *Commercial Arbitration Bill 2009*, New South Wales, consultation draft, 15 October 2009, s33C dealing with assessment of the arbitrator's fees by the court, omitted from the final enactment of the NSW Act.

38 *Arbitration Act 1996*, New Zealand, s6(2) and schedule 2, s6(3). For international arbitration the right is included only if the parties so agree.

39 *Arbitration Act 1996*, UK, s4, s64 and Schedule 1.

40 For example, *Building and Construction Industry Security of Payments Act 2002*, Victoria, s20(1) and (3).

41 *Construction Contracts Act 2002*, New Zealand, s35(2) & (6).

42 *Building and Construction Industry Security of Payments Act 2002, Victoria, s45(2); Construction Contracts Act 2002*, New Zealand, s57(1).

43 *Building and Construction Industry Security of Payments Act 2002, Victoria, s46; Construction Contracts Act 2002,* New Zealand, s70.

CONCLUSIONS

The insights gained from Nepean's case and the consequences of different approaches in drafting dispute resolution clauses including the role of institutional rules may be summarised as follows:

(1) It remains of the utmost importance that all dispute resolution clauses be carefully considered. Drafting should take into account the availability of third party institutional rules. This is of great importance where the particular ADR process is not underpinned by legislative regulation.

(2) The expressions 'appoint' and 'nominate' are capable of having various different meanings. But, the use of either expression in institutional rules incorporated into the parties' agreement, consistent with the reasoning in Nepean, is likely to make clear that the parties' intended to confer on the appointee the function of resolving the dispute.

(3) For expert determination, the difficulties encountered in Nepean's case are avoidable. A mechanism for resolving disagreement on terms and conditions can be added to the dispute resolution agreement to avoid the potential contractual implications that flow from a contract being uncertain.

(4) There is scope for improvement and clarification of institutional rules such as IAMA rules and AMINZ protocol to provide a more certain mechanism to address the situation of a failure to agree on terms.

(5) Whilst recognising that each case where uncertainty may exist must be construed according to its own facts, Nepean's case provides further evidence of superior courts in Australia, and Victoria in particular, of supporting alternative dispute resolution where that choice of process is the clear intent of the contracting parties. This was underlined by the court's preparedness to grant a mandatory injunction to compel the execution of the expert appraiser's agreement.