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LEGAL ISSUES FOR LAY COMMERCIAL ARBITRATORS

INTRODUCTION

ARBITRATION is one of the most commonly used methods of resolving commercial disputes, both in Australia and overseas. Its use has been documented over many centuries, and early references to commercial arbitration in Europe go back to medieval times.[1]

Each Australian State and Territory now has legislation, entitled the *Commercial Arbitration Act* (hereafter referred to as "the Act"), which imposes a uniform system of controls on commercial arbitration. The first such legislation was introduced in New South Wales and Victoria in 1984. Other jurisdictions adopted similar legislation in the period between 1985 and 1990.[2] This legislation continues to apply, subject to certain later minor statutory modifications. The Act is separate and distinct from the *International Arbitration Act* 1974 (Cth), which is restricted to international commercial arbitrations.[3]

The Act replaces earlier non-uniform legislation in each jurisdiction which in some cases dates back to the nineteenth century.[4] The purpose of the Act is to promote and encourage the use of arbitration as a means of resolving commercial disputes. The major weakness of the earlier legislation which the Act seeks to address is the lack of finality of disputes. The Act ensures the effective enforcement of arbitral awards by reducing access to the courts to set aside arbitral awards. Despite certain differences, the provisions are largely modelled on similar legislation enacted in the United Kingdom by the *Arbitration Act* 1979.[5]

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1 The history of international arbitrations is even longer, with references to arbitration going back to the Hittites and ancient Greece. The first legislation in common law jurisdictions on commercial arbitration dates from 1698 in England and Ireland (9 William III c15). For a discussion of the historical origins of arbitration, see Zelling, "Judges as Arbitrators" (1993) 11 *The Arbitrator* 208; Stephen, "Historical Origins of Arbitration" (1991) 10 *The Arbitrator* 45; and Hutton, "Arbitration - Some Historical Aspects" (1994) 13 *The Arbitrator* 51.

2 1985 (WA and NT); 1986 (SA, Tas and ACT); 1990 (Qld).

3 As amended by the *International Arbitration Amendment Act* 1989 (Cth).

4 The earlier legislation was the *Arbitration Act* 1902 (NSW) (which also applied in the Australian Capital Territory); *Arbitration Act* 1958 (Vic); *Arbitration Act* 1891 (SA) (which also applied in the Northern Territory); *Arbitration Act* 1895 (WA); *Arbitration Act* 1892 (Tas).

5 There is now new British legislation contained in the *Arbitration Act* 1996.

Arbitration is seen to have several advantages over litigation as a means for resolving commercial disputes. It is designed to be cheaper and quicker, and gives the parties the right to choose the decision-maker, as well as greater procedural flexibility. Another advantage is that the parties may appoint as an arbitrator a person who is an expert in the matter under consideration rather than rely on a judge who may have no specialist training or expertise in the technical issues. Thus, in practice many commercial arbitrators are not lawyers. The majority of these will have had some training in basic principles of law relevant to arbitration provided by the Institute of Arbitrators and Mediators Australia in order to qualify as a Graded Arbitrator. However, compared with normal legal education provided to lawyers, this training is rudimentary and in itself gives lay arbitrators only limited ability to resolve the many difficult legal issues that may arise for consideration in the course of a complex commercial arbitration.

This article will attempt to shed some light on those legal issues that commonly arise and are of concern to lay arbitrators in respect of the conduct of commercial arbitration proceedings. It will consider the following matters:

- the determination of the applicable legal regime;
- the ability of the arbitrator to seek legal advice;
- the parties' right to legal representation;
- the scope of the discretion available to the arbitrator;
- whether an arbitrator can adopt an inquisitorial approach;
- the meaning of the amiable compositeur provision; and
- whether arbitrators can arbitrate a dispute in which they have acted as mediators or conciliators.

THE DETERMINATION OF THE APPLICABLE LEGAL REGIME

The most basic question of all for arbitrators is to ensure that they are applying the correct legal regime. Two issues may arise for determination here: first, what is the scope of application of the Act and, secondly, what is the respective application of the Act and current legislation governing international commercial arbitrations?

Scope of the *Commercial Arbitration Act*

The *Commercial Arbitration Act* is noteworthy for the fact that "commercial" is not defined. While the title suggests that the purpose of the Act is to facilitate commercial arbitration, it does not expressly state that it is limited in scope to disputes of a commercial

character. "Arbitration agreement", for the purposes of the Act, is defined in s4(1) as meaning "an agreement in writing to refer present or future disputes to arbitration". Section 3(6) excludes from the scope of the Act arbitrations under Supreme Court or District Court legislation, arbitrations under certain other Acts, such as the *Industrial and Employee Relations Act* 1994 (SA), and "an arbitration, or class of arbitration, prescribed as an arbitration, or class of arbitrations, to which this Act does not apply". To date, no such arbitration or class of arbitrations have been prescribed as outside the scope of the Act. Under normal rules of statutory interpretation, the specific exclusion of certain categories of arbitrations from the scope of the Act would suggest that other categories of arbitrations are subject to it.[6] Thus, perhaps strangely, the Act appears to apply to non-commercial arbitrations, such as environmental and family disputes.

Distinction between the Legislation Governing International Commercial Arbitrations and the Act

Arbitration is not simply limited to disputes between nationals of the same State. Increasingly, in times of rapid increase in globalisation and international trade, commercial disputes of a transnational nature arise involving individuals or companies in different jurisdictions. The resolution of such disputes is frequently undertaken by arbitration, as there are no international courts where private or legal individuals have standing to sue, and parties are reluctant to litigate in the different legal systems of other nations.

The resolution of international commercial disputes is governed by the Commonwealth *International Arbitration Act* 1974. This Act, in s16, enacts into law the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration adopted by the Commission on 21 June 1985.[7] This is included as Schedule 2 to the Act. The terms of this Model Law are in many respects different from those specified in the uniform State and Territory *Commercial Arbitration Acts* as regards the conduct of the arbitral proceedings.[8]

It is incorrect simply to assume in all cases that the uniform *Commercial Arbitration Act* applies to domestic commercial disputes while the *International Arbitration Act* applies to those disputes where one or both parties are not domiciled or ordinarily resident in Australia. While this has been the practice, as the submission to arbitration is a consensual transaction and as there is no provision in either legislation to the contrary, the parties may elect to adopt the terms of either legislation in any situation.

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6 See eg *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329; *Salemi v Minister for Immigration and Ethnic Affairs (No 2)* (1977) 14 ALR 1.

7 See Hoellering, "The UNCITRAL Model Law on International Commercial Arbitration" (1987) 21 *Int'l Lawyer* 327.

8 For a comparison of the terms of the UNCITRAL Model Law and the uniform *Commercial Arbitration Act*, see Cole, "The Uniform Commercial Arbitration Acts: A Model For Unity For Commercial Dispute Resolution in the Pacific Basin Area" (1990) 1 *ADRJ* 184.

What is an "international" arbitration for the purposes of the *International Arbitration Act*? This is explained in art 1(3) of the Model Law as follows:

> An arbitration is international if:
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> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
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> (b) one of the following places is situated outside the State in which the parties have their places of business:
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> > (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> >
> > (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
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> (c) the parties have expressly agreed that the subject-matter of the arbitration relates to more than one country.

The *International Arbitration Act* will not necessarily apply where the facts meet the above-mentioned definition of an international arbitration. There is nothing to prevent the parties agreeing that a transnational dispute should be decided according to the terms of the *Commercial Arbitration Act*. Where this occurs, the dispute will be conducted as if it were a domestic dispute, subject to three exceptions specified in ss11(2), 40(6) and 55 of the *Commercial Arbitration Act*.

Section 11 applies where an arbitrator or umpire is removed by the court, and permits the court, on the application of a party to the arbitration agreement to:

> (a) appoint a person as arbitrator or umpire in place of the person removed;
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> or
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> (b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

Subsection 11(2) states that paragraph (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

Section 40 concerns agreements between the parties which exclude the right to apply to the courts for orders appealing against an arbitrator's award (under s38) or which seek a judicial determination of a question of law (under s39). Section 40(6) reads:

> An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

By s55(2), s55, which has the effect of converting *Scott v Avery* clauses[9] into agreements to refer disputed matters to arbitration, does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

In respect of transnational disputes, the *International Arbitration Act* will not apply unless the dispute is commercial in nature. This is made clear in art 1 of the Model Law. Article 1(1) states that the Law applies to "international commercial arbitration". The sub-article includes the following wide-ranging definition of "commercial":

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

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9 The leading case is cited at (1856) 5 HL Cas 811; 10 ER 1121. A *Scott v Avery* clause is one which states that an arbitral award is a condition precedent to the enforcement of any rights arising under the contract. In other words, a dispute must be referred to arbitration unless both parties agree to submit the case to the courts. For a discussion of the history of this type of clause, see *Muirfield Properties Pty Ltd v Hansen & Yuncken Pty Ltd* [1987] VR 615 at 617ff per Nathan J.

Thus, unlike in the case of the *Commercial Arbitration Act*, the *International Arbitration Act* will not apply to non-commercial disputes outside the scope of this statutory definition.

THE ABILITY OF THE ARBITRATOR TO SEEK LEGAL ADVICE[10]

During the course of or at the end of a hearing, a lay arbitrator may wish to obtain legal advice about one or more matters relevant to the resolution of the dispute. Is this permissible?

A sensible solution is for the arbitrator to insist on the inclusion of a clause in the arbitration agreement giving him or her the right to take legal advice where it is considered desirable. Sharkey and Dorter suggest that the matter be considered at the Preliminary Conference and that the agreement on this point be in detail, including specifically that the legal adviser be someone who has not been connected with the dispute or either of the parties, that the parties be given actual notice of the adviser before the arbitrator consults him or her, that a copy of the arbitrator's correspondence with the adviser be given to each party, and that the advice given by the adviser also be communicated to each party.[11] Where this occurs, there will usually be no difficulty. The issue is more problematic in other circumstances, however.

The starting point is s19(3) of the Act, which reads:

> Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.

Based on this sub-section, it appears that in general terms an arbitrator may seek advice on legal issues. Nevertheless, there are certain limits to this right and in every case the arbitrator must proceed with caution. The courts have made it clear that in seeking advice the arbitrator must not substitute the opinion of someone else for his or her own opinion. In other words, it is the arbitrator who must ultimately make the decision. As stated by Hale J in *R v Smith and Harley; Ex parte Crugnale*, "any [legal] inquiry must be limited to general principles of law, and [the arbitrator] must not adopt somebody else's view instead of making up his own mind".[12]

Any overstepping of this limitation is likely to lead to a challenge to the arbitrator's award on the grounds of breach of natural justice. The most recent reported case on this point is

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10 For further discussion of this point, see Sharkey & Dorter, *Commercial Arbitration* (Law Book Co, Sydney 1986) pp91-93, 153.

11 At pp92-93.

12 [1970] WAR 43 at 51.

William Essery & Sons Pty Ltd v South Australian Housing Trust.[13] In this case, the arbitration agreement contained a clause permitting the arbitrators to consult legal advice in their absolute discretion during the hearing. The arbitrators sought such advice, but did not inform the parties of the points on which they sought legal advice and did not give the parties the prior opportunity to make submissions in relation to these points. This was argued by one of the parties to amount to a denial of natural justice. This argument was rejected by the Supreme Court of South Australia. Despite this result, prudence suggests that arbitrators should be open with the parties on this matter and should ensure that the parties are satisfied with the arrangements proposed by the arbitrator. It is far better to take all steps to avoid a legal challenge wherever possible.

THE PARTIES' RIGHT TO LEGAL REPRESENTATION

This matter is governed by s20, which aims to restrict the right of lawyers to appear and in general encourages parties to represent themselves at an arbitration hearing. This is done in order to reduce the length and associated costs of arbitration. The restrictions imposed are in a similar form to those contained in other Australian statutes creating tribunals to resolve disputes in various prescribed areas of law.[14]

The Act draws a distinction between cases where the representative is a legal practitioner and cases where the representative is not a legal practitioner. Section 20(1) applies to the former and states that representation is only allowed in the following four circumstances:

- where one of the other parties is, or is represented by, a legally qualified person;
- where all the parties agree;
- where the amount in dispute exceeds $20 000;[15] or
- where the arbitrator or umpire gives leave for such representation.

In relation to the exercise by arbitrators of their discretion as to whether to allow legal representation, Smart J in *The Commissioner of Main Roads v Leighton Contractors Pty Ltd*[16] stated that the relevant considerations are: the amount in dispute; the nature and complexity of the issues; the nature and extent of the evidence to be adduced; whether cross-examination is likely to be required; the capacity and willingness of the parties to

13 (1980) 24 SASR 213.

14 See eg *Residential Tenancies Act* 1995 (SA) s113; *Small Claims Tribunals Act* 1973 (Vic) s30; *Consumer Claims Tribunals Act* 1987 (NSW) s21.

15 By s20(1)(c), this figure may be later changed by regulation without the need for amending legislation.

16 (Unreported, NSW Supreme Court, 4 July 1986). This case is noted in (1993) 67 *ALJ* 718 and (1994) 13 *The Arbitrator* 20. See also Shelton, "The Uniform Legislation - Five Years On" (1990) 3 *CBLJ* 79.

represent themselves and their experience in so doing; the questions of law likely to arise; the costs of legal representation; and whether the granting of leave would be likely to shorten the arbitration or reduce its costs.

The Act draws a distinction between a "legal practitioner" and a "legally qualified person". As noted above, one of the situations where a party may be represented by a legal practitioner is where the other party is represented by a legally qualified person. A "legal practitioner" is defined in s20(6)(a) as a person who is admitted to practice or entitled to practise as a barrister, solicitor or legal practitioner in any jurisdiction both within and outside Australia. A "legally qualified person" includes a legal practitioner, but is more expansive and may also include "a person who, though not such a practitioner, has such qualifications or experience in law ... as, in the opinion of the arbitrator or umpire, would be likely to afford an advantage in the proceedings".

These definitions must be carefully considered and applied. The definitions are surprisingly broad. A person is a legal practitioner if they are merely admitted to practice in any jurisdiction (including those from a non-common law jurisdiction), even if they do not or in fact never have obtained a practising certificate. The definition of a "legally qualified person" is even more problematic. According to this definition, the person does not even necessarily have to have a law degree. The saving grace of this provision from an arbitrator's standpoint is that the Act leaves the decision to the opinion of the arbitrator as to whether a person qualifies under the definition. It would be extremely unlikely that a disgruntled party could challenge the decision of an arbitrator on this point. It will be difficult in some cases for an arbitrator to make up his or her mind in contentious cases. For example, is a person seriously advantaged by being represented by someone who has studied a couple of law subjects in, say, Poland or Vietnam? It may be that the representative is selected for family or other reasons, and the fact that they happen to have some limited legal experience is a mere coincidence. At the very least the arbitrator would need to make significant enquiries from the person concerned as to his or her background.

Section 20(2) applies to the case where the representative is not a legal practitioner. It limits representation to the following situations:

- where the party is a company or unincorporated association and the representative is an officer, employee or agent of the body;
- where all the parties agree; or
- where the arbitrator or umpire gives leave for such representation.

Both ss20(1) and (2) must be read subject to the absolute right to representation in s20(3). This subsection states that the arbitrator or umpire must grant an application permitting

representation where either the granting of leave is likely to shorten the proceedings or reduce costs, or the applicant would, if leave were not granted, be unfairly disadvantaged.

Pursuant to s20(4), this absolute right to representation applies "notwithstanding any agreement to the contrary between the parties". This is one of the few illustrations in the Act of the parties' wishes being overridden, and illustrates the fundamental importance of principles of natural justice and the public policy dictates in favour of supporting the speedy resolution of disputes.

THE SCOPE OF THE DISCRETION AVAILABLE TO ARBITRATORS

Section 14 of the Act reads:

> Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.

This provision replaced earlier provisions, the effect of which was to permit arbitrators to give directions as to procedural matters.[17]

The discretion conferred on arbitrators by s14 is reinforced by the terms of s19(3), cited earlier.

The critical question for arbitrators is to determine how far they may go in the exercise of their discretion in any given case without exposing themselves to court intervention. This is of particular concern for lay arbitrators, as in the past they have been criticised for taking an excessively timid and cautious approach to their discretionary powers for fear of judicial intervention.[18] It is thus vital that lay arbitrators have a proper understanding of the role of arbitral discretion under the Act.

Judicial intervention is by way of misconduct proceedings. Section 44(a) states:

> Where the Court is satisfied that -
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> (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; ...
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> the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.

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17 See *Esso Resources Ltd v Plowman* (1995) 183 CLR 10 at 26 per Mason CJ.

18 See eg Cato, "Is the Australian Arbitrator Disadvantaged over his UK Counterpart?" (1998) 16 *The Arbitrator* 252 at 255; Bernstein, "Arbitration at the Crossroads: The Arbitrator as Leader? Or just Listener?" (1996) 14 *The Arbitrator* 209 at 209.

"Misconduct" is defined in s4 as including "corruption, fraud, partiality, bias and a breach of the rules of natural justice". The use of the term in this context is technical. As stated by Kirby P in *Commonwealth v Cockatoo Dockyard Pty Ltd*:

> It may fall far short of "misconduct" in the popular sense of the word. In the context of arbitration, "misconduct" of the kind contemplated by s44 may involve no personal turpitude on the part of the arbitrator. ... It may amount to little more than a mishandling of the arbitration likely to occasion an injustice.[19]

The use of the word "including" in the statutory definition in s4 indicates that this definition is not designed to be exhaustive and that other forms of misconduct might exist. As yet there has been no judicial determination on this point. "Misconducting the proceedings" is not defined at all in the Act. The distinction between personal misconduct on the part of the arbitrator and misconducting the proceedings is of no practical significance as the remedies are identical. As Mustill and Boyd state, it is difficult to imagine how the arbitrator could misconduct himself or herself without at the same time misconducting the proceedings.[20]

The most obvious limitation on the scope of an arbitrator's discretion is the requirement contained in the introductory words of both s14 and s19(3) that the arbitrator comply with the requirements of the arbitration agreement. Thus, if the parties have imposed restrictions as to the mode of the conduct of the proceedings (and as arbitration is a consensual procedure, this is the parties' absolute right) any breach by the arbitrator of such restrictions will amount to misconduct, unless the parties give their prior consent to the procedure adopted by the arbitrator.

English case law has determined that there is an implied term in the submission to arbitration that the arbitrator will act fairly.[21] There appears to be no Australian case precisely on this point, although the existence of a duty to act fairly has been assumed in some cases.[22] However, in practice the matter appears to be regulated by the statutory requirement that the arbitrator conduct the case according to the rules of natural justice.

What is meant by natural justice in the context of the conduct of an arbitration? In the most general sense, this requires the arbitrator to avoid behaving or conducting the case in a way which is, or gives the appearance of being, unfair. One essential requirement is that

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19 (1995) 36 NSWLR 662 at 673.

20 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, London, 2nd ed 1989) p552.

21 *Faure, Fairclough Ltd v Premier Oil and Cake Mills Ltd* [1968] 1 Lloyd's Rep 237 at 240.

22 See *Xuereb v Viola* (1989) 18 NSWLR 453 at 469; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 346-347, 350. See also Bainton, "References out of the Supreme Court to Special Referees" (1998) 17 *The Arbitrator* 129 at 136ff.

the arbitrator must hear both sides of the argument. If the parties give their consent, an arbitration can be undertaken merely by the use of documentary evidence, but in the absence of such an agreement, the courts have held that there is an implied agreement that there will be an oral hearing.[23] The nature of the hearing may vary widely according to the nature of the dispute, and common sense suggests that the arbitrator must be given a wide discretion as to how to conduct the case appropriately on the facts of each case. Nevertheless, it is advisable that the arbitrator take care to avoid misunderstandings by letting the parties know where they stand.[24] Mustill and Boyd state:

> In the majority of cases, it will be obvious to all concerned with the reference what procedure is to be adopted. It is, however, the business of the arbitrator to make sure that both parties are fully aware of what is going to happen. If there is any scope for doubt, he should seek the explicit agreement of the parties to the procedure which he proposes to adopt. In particular, he should ensure that he does not by his conduct lead one or other party to suppose that there will be a hearing, and then proceed directly to an award on the documents alone.[25]

In respect to an oral hearing, natural justice dictates that the arbitrator observes the following conditions:[26]

1. Each party must have notice of the hearing.[27] Exceptions apply where there is an express agreement to the contrary[28] or where there is an implication to the contrary from the conduct of the parties.

2. Each party must have a reasonable opportunity to attend the hearing and to bring witnesses and advisers. When setting the date for the hearing, the arbitrator should ensure that each party has an adequate opportunity to prepare his or her case. In addition, the arbitrator should consider favourably any reasonable request for an adjournment on grounds such as unavoidable absence from the jurisdiction or illness. The test is one of reasonableness, and one party cannot insist that their convenience be the determining factor.[29]

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23 *Altco Ltd v Sutherland* [1971] 2 Lloyd's Rep 515 at 518 per Donaldson J.

24 See Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* p301. For an illustration of cases where such misunderstandings have occurred, see *Sokratis Rokopoulos v Esperia SpA ("The Aros")* [1978] 1 Lloyd's Rep 456.

25 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* p301.

26 At pp302-312.

27 *Oswald v Earl Grey* (1855) 24 LJQB 69; *The Warwick* (1890) 15 PD 189.

28 *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257.

29 See eg *Re Whitwham's Trustees etc and Wrexham, Mold and Connah's Quay Railway Co* (1895) 39 *Sol J* 692; *Chandmull Moolchand v C Weis & Co Ltd* (1921) 9 Lloyd's Rep 412.

3. Each party must have the opportunity to be present throughout the hearing. Except where the conduct of one of the parties is such that it is impossible for the arbitrator to conduct the hearing in a fair manner, the arbitrator has no power to exclude any party from the hearings. The exception should not be lightly exercised. In the absence of very clear evidence as to the unacceptable conduct of one of the parties, the court is likely to conclude that the arbitrator has over-reacted and has misconducted the proceedings.

4. Each party must have a reasonable opportunity to present evidence and argument in support of his or her own case.[30] The major concerns here are that the arbitrator does not by constant interference and interruption prevent a party from adequately presenting his or her case, and that the arbitrator receives all evidence which is admissible from either party which is relevant to the dispute.

5. Each party must have a reasonable opportunity to controvert his or her opponent's case. This will normally be achieved by the cross-examination of witnesses, the presentation of rebutting evidence and the addressing of oral argument. There is the further requirement that each party must have notice of the case which he is required to meet. This latter requirement means that an arbitrator should not receive argument or evidence from one party in the absence of the other.[31] Exceptions may apply where there is an express agreement by the parties to the contrary, or where one party fails to appear at the hearing after being validly notified. In the rare case where the hearing proceeds in the absence of one party, it is the duty of the arbitrator to communicate the opponent's case to the absent party. The exact form of communication is within the arbitrator's discretion and may depend upon the nature of the case, but each of the parties must know the case which has been brought against them and have the opportunity to present their own case.[32]

6. The hearing must, unless the contrary is expressly agreed, be exhaustive of the evidence and argument. An arbitrator may thus not receive evidence or argument prior to or after the hearing, and must base his or her decision solely on the evidence and argument presented at the hearing.[33]

CAN AN ARBITRATOR ADOPT AN INQUISITORIAL APPROACH?

Fundamental to the common law procedural rules is the adversarial approach. Pursuant to this approach, the role of a judge in a trial is to act as an impartial umpire and to refrain from "entering into the arena". It is generally considered inappropriate for the judge to

30 See eg *Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd* [1965] 1 Lloyd's Rep 597.

31 See eg *Government of Ceylon v Chandris* [1963] 1 Lloyd's Rep 214; *WH Ireland & Co v CT Bowring & Co Ltd* (1920) 2 Lloyd's Rep 220.

32 *Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd* [1965] 1 Lloyd's Rep 597 at 602 per Megaw J.

33 See eg *Eastcheap Dried Fruit Co v NV Gebroeders Catz' Handelsvereeniging* [1962] 1 Lloyd's Rep 283.

interrupt legal counsel excessively unless he or she has to make a ruling on a point of evidence. It is also considered inappropriate for a judge to pose questions to witnesses (except on points of clarification) or to conduct his or her separate line of inquiry. This can be contrasted with the inquisitorial approach, which prevails in all civil law systems. Here, it is considered perfectly acceptable for the judge to take the lead in examining witnesses and to follow separate lines of inquiry.

Can arbitrators or umpires adopt an inquisitorial approach or are they obliged to adhere to the common law adversary procedure? In the many arbitral cases where the parties are not legally represented, common sense suggests that arbitrators must adopt a more interventionist approach as non-lawyers are unaware of the normal court-room procedures. Nevertheless, lay arbitrators in particular will be anxious to ensure that by intervening in the hearing they do not misconduct the proceedings.

The wording of the provisions of the *Commercial Arbitration Act*, in particular ss14 and 19(3) (discussed above), strongly suggests that arbitrators should have the right in any case to adopt an inquisitorial approach wherever they consider it appropriate. Despite these provisions, however, the prevailing view amongst legal writers is that the arbitrator must proceed with great caution. Sharkey and Dorter identify five separate characteristics of the inquisitorial approach:

- a study of documents by the arbitrator before the hearing;
- greater use of written submissions;
- assistance and advice to the arbitrator on request;
- the questioning of witnesses by the arbitrator; and
- the arbitrator calling witnesses independently of the parties.[34]

They conclude that the arbitrator is justified in adopting the first three characteristics, and possibly also the fourth.

On the other hand, Mustill and Boyd argue that, in the absence of an express provision to the contrary in the arbitration agreement, the arbitrators should adopt a procedure which is adversarial in nature.[35] In support of this position, Roskill LJ, of the English Court of Appeal, stated in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation*: "an arbitrator or umpire, who in the absence of express agreement that he should do so, attempt[s] to conduct an arbitration along inquisitorial lines might expose

34 Sharkey & Dorter, *Commercial Arbitration* p208.
35 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* pp16-17.

himself to criticism and possible removal".[36] In an earlier English Court of Appeal decision, Fletcher-Moulton LJ stated in *Re Enoch and Zaretzky, Bock & Co's Arbitration*,[37] where an umpire himself procured evidence in the arbitration, that arbitral proceedings are strictly adversarial. It should be noted, however, that this case was decided under earlier, now-repealed arbitral legislation under which the courts were given greater supervisory powers over arbitrations.[38]

The argument against an inquisitorial approach appears to be that it may be contrary to the concept of a fair trial in that it may deny each party the opportunity fully and fairly to present its case and to rebut the case of their opponent. A failure to comply with these basic formalities means that the arbitrator may misconduct the proceedings, in which case the award may be set aside by the courts. However, it is submitted that, consistently with ss14 and 19(3) of the *Commercial Arbitration Act*, provided that the intervention of the arbitrator in the conduct of the hearing does not prevent the parties from adequately presenting their case or seeking to rebut the case of their opponent, no objection can be taken to the arbitrator adopting some elements of the inquisitorial approach. The normal interpretation of the legislative provisions would seem to suggest that an arbitrator could legitimately adopt any one or more of the first four characteristics of the inquisitorial approach identified above by Sharkey and Dorter.[39]

The final characteristic of the inquisitorial approach, the right of an arbitrator to call witnesses independently of the parties, is more problematic. Whilst it can be argued that this approach may be justified in light of the fact that the arbitrator is chosen for his or her specialist knowledge, the approach is alien to common law traditions. In the absence of a judicial precedent legitimising this approach, it would seem to be ill-advised for an arbitrator to adopt it.

THE MEANING OF THE AMIABLE COMPOSITEUR PROVISION

Section 22(2) of the Act permits what are commonly referred to as "equity clauses" or "amiable composition clauses". The sub-section reads:

> If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

36 [1980] 2 WLR 905 at 923.
37 [1910] 1 KB 327 at 332-333.
38 *Arbitration Act* 1889 (UK) s11.
39 See n34 above and accompanying text.

This provision is a rough copy of art 33 para 2 of the UNCITRAL Arbitration Rules, and originates from continental Europe.[40] At first glance it appears to be a startling measure and its meaning is of obvious importance. Despite the fact that similar clauses have been found for many decades in civil law jurisdictions, there has been very little legal analysis on the matter under Anglo-Australian common law.[41]

Mustill and Boyd list seven possible interpretations of the clause:[42]

- The arbitrator is empowered to adjust the contract to accord with changed circumstances. The adjustments may include changes to both the express and implied terms of the contract.
- The arbitrator is freed from any duty to respect the rules of law when resolving the dispute.
- The arbitrator need not respect the rules of law, but must give effect to rules of public policy.
- The arbitrator need not respect the rules of law, but must apply the express terms of the contract.
- The arbitrator must apply a system of law, but not that of any particular state.
- The arbitrator may ignore technicalities and strict constructions.
- The clause relates only to procedural matters, and permits the arbitrator to ignore ordinary legal procedures.

The authors dismiss the first interpretation as so broad as unlikely to be acceptable to a common law court, and the last clause as "too unambitious an assessment of the parties' intention". They do not venture a definite conclusion as to the correct interpretation, but state a preference for the interpretation that the arbitrator need not respect the rules of law, but must apply the express terms of the contract. The authors conclude:

> [This] interpretation ... is one which may be regarded as having some reasonable relation to the presumed intention of the parties. It is not, we

40 Art 33 is phrased slightly more conservatively than s22 of the Act. By art 33(3), the arbitrator is required in all cases to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction.

41 For a discussion of the amiable compositeur provision, see O'Keefe, "Role of the Amiable Compositeur" (1996) 15 *The Arbitrator* 100; Pryles, "The Arbitrator as Amiable Compositeur" (1989) 7 *The Arbitrator* 70.

42 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* pp76-83.

> believe, inconsistent with any reported decision on the meaning of an equity clause.[43]

There is only one reported Australian case relevant to the interpretation of s22(2), that of Young J of the Supreme Court of New South Wales in *Woodbud Pty Ltd v Warea Pty Ltd*.[44] His Honour cited with approval the following dictum of Lord Selborne in a nineteenth-century decision of the Privy Council:

> Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as amiables compositeurs to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity.[45]

Young J believed that s22(2) has a somewhat broader scope. His Honour stated:

> Probably the clause goes further than evidentiary and procedural problems and permits an amiable compositeur to disregard such rules as the parol evidence rule, the rule that contracts by specialty cannot be varied by oral contract and the rule that one cannot look to subsequent conduct to construe a contract.
>
> The amiable compositeur may also disregard the rule that collateral contracts cannot be inconsistent with the main contract, he or she may apply principles of rectification and perhaps may also supplement the contract by filling out the contractual regime in areas where the parties have not thought through it. It is uncertain how far, if at all, the amiable compositeur can go beyond this. Certainly the absolute ceiling is where the doctrine of manifest disregard by the arbitrator of his mandate comes into play.[46]

Although there is no express statement in Young J's judgment to this effect, it would appear that his Honour's opinion of the scope of s22(2) coincides with that tentatively reached by Mustill and Boyd. Unfortunately, his Honour's remarks cited above are obiter dicta as the decision in *Woodbud Pty Ltd v Warea Pty Ltd* was reached on a different point. The facts of the case involved a decision by an arbitrator to amend his final award in a way

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43 At p80.

44 (1995) 125 FLR 346.

45 *Rolland v Cassidy* (1888) 13 App Cas 770 at 771-773.

46 (1995) 125 FLR 346 at 355-356 (citations omitted). This case is discussed in (1995) 14 *The Arbitrator* 155.

that was objected to by one of the parties. The arbitration agreement contained an "equity clause", and it was argued that it was irrelevant that, in respect of the amended award, the arbitrator did not proceed strictly in accordance with the law. Young J held that s22(2) was irrelevant in this context as, pursuant to its wording, the equity clause only applies in respect of the determination of questions that arise "in the course of" the arbitration. The equity clause thus no longer operates after the arbitrator has given the final award.[47]

CAN ARBITRATORS DETERMINE A DISPUTE IN WHICH THEY HAVE ACTED AS MEDIATORS OR CONCILIATORS?[48]

In certain circumstances the parties may wish to interrupt an arbitration in order to attempt to resolve the dispute by mediation or conciliation, and may suggest that the arbitrator acts as the mediator or conciliator. No legal issues arise if the matter is successfully settled. However, problems of natural justice may arise if the mediation or conciliation fails and the parties agree to resume the arbitration before the same arbitrator. During the course of the failed mediation or conciliation one or both parties may have divulged confidential or damaging information to the arbitrator which they feel may prejudice the outcome of the arbitration. The issue whether an arbitrator who has unsuccessfully attempted to mediate or conciliate a dispute should resume the arbitration is a difficult one for all commercial arbitrators, but particularly so for lay arbitrators who have no detailed knowledge of statutory interpretation or administrative law.

Section 27 of the Act reads in part:

> (1) Parties to an arbitration agreement -
>
> > (a) may seek settlement of a dispute between them by conciliation or similar means;
> >
> > or
> >
> > (b) may authorise an arbitrator or umpire to act as a mediator, conciliator or non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire),

47 For further discussion of the amiable compositeur provision, see O'Keefe, "Role of the Amiable Compositeur" (1996) 15 *The Arbitrator* 100; Pryles, "The Arbitrator as Amiable Compositeur" (1989) 7 *The Arbitrator* 70; Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* pp74-86.

48 For further discussion of this issue, see O'Mara, "The Arbitration Act and Criticism of Section 27" (1996) 15 *The Arbitrator* 5; Morrisey, "ADR Procedures and Section 27 Conferences" (1993) 12 *The Arbitrator* 7.

whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

(2) Where -

(a) an arbitrator or umpire acts as a mediator, conciliator or intermediary ... under subsection (1);

and

(b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute,

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

(3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).[49]

The current view of the majority of the legal profession is that an arbitrator who conducts a s27 conference cannot later act as an arbitrator in relation to the same dispute without almost inevitably infringing the rules of natural justice.[50] Such an infringement constitutes "misconduct", pursuant to s4(1), and by ss42 and 44 justifies the court either setting aside the arbitrator's award, or removing the arbitrator if the award has not yet been handed down. The only situation in which an arbitrator should resume subsequent arbitration proceedings after conducting an unsuccessful s27 conference, it is argued, is where the parties agree in writing that the arbitrator should continue to preside. In all other situations, it is considered that the arbitrator should disqualify himself or herself from

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49 This section was amended in 1992. The earlier version of s27(1) gave the arbitrator or umpire the power to order the parties to a dispute "to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration". No material change was made to s27(2). The reference to natural justice in the present s27(3) did not appear in the earlier version. This amendment did not resolve the vexed question discussed in this part of the article.

50 See eg Sharkey & Dorter, *Commercial Arbitration* p206. For a contrary view, see Bradbrook, "Section 27 of the Uniform Commercial Arbitration Acts: A New Proposal for Reform" (1990) 18 *Aust Bus L Rev* 214.

conducting the later proceedings. It is thought that a wise arbitrator faced with a s27 situation should nominate another person to act as conciliator.[51]

This analysis is based on the danger that, in the course of the s27 conference, the mediator-arbitrator will either form or disclose his or her opinions of the merits of the parties' respective cases in such a way as to prevent him or her from being regarded as unbiased in any later resumption of the arbitration proceedings.[52] Stephen Charles QC writes:

> The process of conciliation may very well involve the conciliator in forming and necessarily stating a prima facie view to the parties as to the strengths and weaknesses of the cases of the parties. The process would involve the conciliator on many occasions arriving at a conclusion as to the rights or liabilities of one or other party before any of the evidence had been put forward. ... A mediator [may] have formed and disclosed his views of the reasonableness or pig-headedness of the parties' negotiating positions, and may well have arrived at a position of approval or disapproval of either party which is wholly inconsistent with the impartial conduct of a hearing.[53]

A further problem is that, in the course of a conciliation conference, the arbitrator may obtain information which would prejudice his or her conduct of later arbitration proceedings.[54]

These concerns are reflected in articles 19 and 20 of the UNCITRAL conciliation rules, which expressly prevent the conciliator from playing any further part at all in the subsequent arbitration, and from making any further use of the conciliation materials.

While an arbitrator must approach the issue with extreme caution, it is submitted that it is not necessarily a breach of the rules of natural justice for an arbitrator who has acted as a mediator or conciliator to resume the role of arbitrator in the same case. This conclusion is implicit from the decision of Bray CJ of the Supreme Court of South Australia in *Baroutas v Limberis & Sons Pty Ltd*.[55] This case concerned an action in a local court, where the Special Magistrate constituting the court interviewed the parties in chambers, pursuant to the *Conciliation Act* 1929 (SA), in an attempt to settle the issue. The attempted conciliation was unsuccessful, and the Special Magistrate resumed the hearing. Counsel

51 See eg Freadman, "Understanding the Commercial Arbitration Act 1984" (1986) 60 *Law Inst J* 320 at 321.

52 Charles, "Natural Justice and Alternative Dispute Resolution" (1986) 60 *Law Inst J* 1078 at 1081.

53 As above. See also Street, "The Language of ADR" (1992) 66 *ALJ* 194.

54 Freadman, "Understanding the Commercial Arbitration Act 1984" (1986) 60 *Law Inst J* 320 at 321.

55 (1974) 8 SASR 136. See also *Romeyko v Samuels* (1972) 2 SASR 529 at 557-558 per Bray CJ; *Morro v Crowle* [1967] SASR 165.

for the plaintiff objected to the Special Magistrate continuing the hearing, on the ground of bias. The magistrate refused to disqualify himself on the basis of s5 of the *Conciliation Act*. This section, which is similar although not identical to s27(2) of the *Commercial Arbitration Act*, reads:

> Nothing said or done in the course of any attempt to settle proceedings in the manner provided in this Act shall subsequently be given in evidence in any proceedings nor disqualify the person or persons constituting the court from sitting to continue the hearing of the proceedings if he or they think fit to do so.

His Honour concluded that the Special Magistrate was not legally bound to disqualify himself and had not automatically breached the rules of natural justice by continuing the hearing. He stated:

> A judge or magistrate ought not, in my view, to think fit to continue with the hearing if the circumstances are such that at common law prohibition or certiorari on the ground of bias would lie. On the other hand, if that test does not apply, then, even though ... it might be wiser for him to refrain from doing so, at least if the case can be heard by someone else without undue inconvenience, I do not think that I can hold that in thinking fit to hear it he exceeds the bounds of a judicial discretion.[56]

Bray CJ cited with approval the following test for bias laid down by the High Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*:[57]

> But when a bias of this kind is in question ... before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be "real". The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the mind of reasonable persons.

This analysis makes it clear that an arbitrator who resumes arbitration proceedings after conducting a s27 conference is not automatically biased, within the meaning of the rules of natural justice. Each case must be looked at separately. An arbitrator who acts cautiously with due regard to the rules of natural justice will not be guilty of misconduct. Perhaps the most appropriate course of action is for an arbitrator to obtain from the parties a written

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56 (1974) 8 SASR 136 at 143.

57 (1953) 88 CLR 100 at 116. See also *Ewert v Lonie* [1972] VR 308.

agreement that they have no objection to him or her resuming the arbitration in the event that the s27 conference fails to resolve the dispute.[58]

CONCLUSION

This article is designed to aid lay arbitrators to interpret certain key provisions of the Act correctly. It is hoped that light has been shed on some of the more complex issues raised. The discussion also shows that, while the Act has been under constant review since its introduction, there are a number of ambiguities in its provisions which would be particularly confusing to lay arbitrators. It is submitted that reforms should be made to the Act to achieve the following: to clarify the interrelationship between the Act and the *International Arbitration Act*; to clarify the exact scope of ss14 and 19(3) regarding the application of inquisitorial procedures; to determine the correct application of the amiable compositeur provision (s22(2)); and to resolve the issues raised by s27 regarding the role of arbitrators who unsuccessfully attempt to resolve a dispute by mediation. These ambiguities in the Act not only cause difficulties for lay arbitrators but also invite litigation, which is counter-productive to the whole purpose of the Act, namely to encourage the use of arbitration to resolve commercial disputes and to minimise litigation.

In addition to possible legislative reform, the complexity of the legal issues to be resolved suggests the need for a strengthening of the current system of legal training for arbitrators and for additional, specialised training to be provided for prospective lay arbitrators. The first matter is already in train, as the Institute of Arbitrators and Mediators and the University of Adelaide have recently entered into a joint venture to provide a National Course on Arbitration and Mediation leading to a Professional Certificate granted by the university.[59] The second matter has not yet been addressed, but would seem essential if lay arbitrators are to have the confidence to make important decisions in relation to the legal issues raised in this article.[60] Given that one of the traditional advantages of arbitration as a mode of dispute resolution is that disputes can be resolved by persons with particular expertise, rather than by a judge who may have no professional skills outside the law, the very future of commercial arbitration in this country would seem to hinge on remedial action in this area.

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58 This is the recommendation of Morrisey, "ADR Procedures and Section 27 Conferences" (1993) 12 *The Arbitrator* 7 at 15-16.

59 The content of the syllabus is explained in (1998) 17 *The Arbitrator* 152.

60 See Bradbrook, "Teaching Arbitration to Non-Lawyers", to be published in (1999) 18(1) *The Arbitrator*.