# RESOLVING COMMERCIAL DISPUTES, ARBITRATION AND LITIGATION IN AUSTRALIA

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It seems to me that the most convenient way of illustrating the methods of resolution of commercial disputes practiced in Australia and of highlighting the differences between Australian and United States procedure is to trace the treatment, in the Australian system, of a hypothetical dispute.

Imagine that the Australian Internal Telecommunications Service wishes to improve its facilities by launching a satellite into orbit over Australia. It enters into a contract with a company, incorporated in and carrying on business in California, for the supply of the satellite and the telecommunications equipment. The contract provides that the law of California shall apply. It also enters into a contract with an Australian company for launching the satellite. Something goes wrong and the satellite, although in orbit, malfunctions. The Service does not know whether the malfunction is due to the equipment in the satellite, the satellite itself, or some error in the course of throwing the satellite into orbit. The Californian company and the Australian launcher each deny that the malfunction was due to work done or equipment supplied by it. It is necessary to take proceedings against both in order to ascertain liability. For obvious reasons the Service desires to have the dispute resolved in Australia. Equally obviously the Californian

company wishes to have the matter litigated, if litigated it has to be, in the United States. For the moment I will assume that in the absence of a binding submission to arbitration, the dispute will be resolved by Court process rather than by arbitration. I will treat questions thrown up by arbitral procedures, partly in the course of discussion of curial procedures and partly as a topic of its own.

At the outset a decision has to be made as to whether both Australian Court systems, or either of them, have jurisdiction to treat the dispute and if both have jurisdiction which is to be preferred. Since 1977 Australia has embarked on the system of parallel Courts with which the United States is blessed. In that year, the Federal Government established the Federal Court of Australia, as a specialist Court, with defined and fairly narrow areas of jurisdiction. In some fields its jurisdiction is exclusive, in others it is concurrent with the Courts of the States. It has been held that, where the Federal Court has express jurisdiction to grant some of the relief sought, or treat one or more areas of the dispute, then, so long as the other claims to relief rest on a common substratum of fact with that giving rise to undoubted jurisdiction, the Court will enjoy pendant or ancillary jurisdiction in relation to the balance of the matters in dispute. It will be perceived that the doctrine owes a great deal to decisions of the Supreme Court of the United States in resolving jurisdictional conflict between the Federal and State Court systems in this country. The converse has no

application. Because Federal law prevails, in so far as Federal legislation may provide for the Federal Court to have exclusive jurisdiction, no State Court can claim any pendant or ancillary jurisdiction. As will no doubt appear from the paper read by Mr Williamson, Q.C. the, perhaps somewhat suprising, outcome of the formulation of the Australian Anti-Trust Legislation, known as the Trade Practices Act, is that a dispute, of the nature we have been considering, could conceivably fall within the Act provided that it can be shown that there has been some misleading or deceptive conduct on the part of the Californian company in describing the capabilities or performance of the satellite or its technology. In such a case not only would the Federal Court have jurisdiction but it would be exclusive jurisdiction. Although an interesting field for discussion in itself, it would be unrewarding, in the present context, to explore the ways in which the jurisdiction of the Federal Court could be invoked to hear the entirety of the dispute.

If I may say so, without offence, the Courts of the United States have not demonstrated any great reluctance to assume jurisdiction with respect to foreign based defendants. I am bound to say that, in more recent times, Australian Courts have substantially shed any earlier reluctance they may have had to become involved in the resolution of disputes where all or some of the defendants are based outside the country, or in the case of a State Court outside the State in question. Either the Federal Court, or a State Court of general jurisdiction, is entitled to exercise jurisdiction

as against a foreign defendant, so long as there is an Australian defendant, (the launching company), properly served within the jurisdiction and the Californian company is a necessary party to the resolution of the dispute. Conformably to current theories of conflict of laws in Australia, the only question for debate would be whether the Australian Court would be a forum non conveniens. An unseemly wrangle would undoubtedly ensue, with the California company claiming that the Australia Court, of whichever type, would be a forum non conveniens. In such a contest it would undoubtedly be pointed out that the technological and other expert witnesses who would have to be called are located in California, the contract was made in California and the contract was governed by the law of California. Thus, not only would it be necessary for the Australian Court to hear the evidence of overseas technical witnesses but, in determining the claim of the Service against the California company, the Court would have to apply the law of the State of California. Suffice to say that the latter differs from relevant Australian legislation and Common Law in important and material respects. Once again it is outside the scope of this paper to discuss in detail the competing considerations in determining the question in issue. However, let it be assumed that, for good and sound reason, the Australian Court holds that it is the forum conveniens.

Even if some basis for exercise of jurisdiction by the Federal Court could be constructed it is most likely that the proceedings would be commenced in the Supreme Court of one of the States. These

Courts have an unrestricted general jurisdiction. They function both as trial Courts and as appellate Courts. In some of the States the appellate function is discharged by permanently constituted Courts of Appeal. More generally three Judges of the Court constitute an ad hoc appellate body reviewing the decision of one of their number. In the discussion which follows I will address myself to the Supreme Court of New South Wales, the most populous of the six Australian States and probably the busiest of the country's Courts.

The dispute I have visualised, is clearly of a kind which qualifies for the Commercial List of the Court. Proceedings "arising out of the ordinary transactions of merchants and traders, or relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking, mercantile agency, or mercantile usages may be entered in the Commercial List". There is a very large residual discretion in the Judge as to whether or not he should admit a matter to the List. The Judge may of his own motion remove a matter from the list. Because matters in the list are dealt with in a time span far shorter than in the General List the threat of removal is a powerful sanction in the Judge's hands.

A Commercial List was established in New South Wales not long after the turn of the century and whilst the Commercial Court in England was itself in its infancy. In Hill v. Scott 1 Comm. Cas 200 at 204 Lord Esher, in 1985, described one of the

main objects of the founders of the commercial Court thus:-

> "to avoid both expense and delay in the trial of commercial causes by abridging all those useless and idle proceedings of which litigants can, under the present rules, avail themselves, before an action comes on for trial."

The reasons which worked to require the establishment of the Commercial Court in England had the same impact in New South Wales. Commercial men notoriously require a cheap, speedy and non-technical resolution of their disputes. To a greater or lesser extent I think every system of administration of justice seeks to satisfy that cry from the commercial community. One way of achieving the desired result has been thought to be the establishment of specialist tribunals staffed by Judges who have particular experience in commercial disputes. In a sense this approach harks back to the old Courts Merchant which flourished in Europe in the Middle Ages and often comprised merchants as the judges with a lawyer merely assisting as assessor. My colleagues, with whom I staff the Commercial Court of our Supreme Court, continously seek to refine and fine tune the system in order to improve the service which we believe we can provide to the commercial community. The result is that we can provide a Judge and, what we believe to be, an efficient system for resolution of mercantile disputes, which, depending on extraneous factors, will throw up a verdict within a period ranging from 1 week

from the date of filing to a more usual average of about 8 months or so. There are obviously disputes which take longer to dispose of and I will in the course of this paper deal with some aspect of the reasons. However, as all of you readily appreciate, in order to adhere even to a disposal period of 7-8 months requires a deal of co-operation between the Court and the legal profession.

When the originating process is filed, a time is appointed for the parties to come before the Court for directions to be given for the future conduct of the proceedings. The President of the New South Wales Court of Appeal explained the working of the Commercial List and the purpose of directions hearings in these words:-

> "Wide discretions particular to commercial cases, are given to and ought to be exercised by the Commercial Judge, as indeed they have over the years, so that the Court comes with expedition, minimising expense, to the real matter in issue, setting aside, so far as reasonably proper, procedures and rules of evidence which stand in the way of so doing. The Judge is in a particular position of advantage in the exercise of discretions when he sits in the directions and other hearings preliminary to the trial. He is in a position to discern from the detail of what passes before him any tactical manoeuvre which seeks to exploit the ordinary procedures or rules of evidence and thereby directly delay or prevent the determination of the real question in dispute or thereby

indirectly do so by subjecting the opposing party to the pressures of delay or expense."

In what might be called the standard type of case, there is little variation in directions given for the interlocutory steps. Those proceedings which promise to be of a complex nature call for a regime of their own. The hypothetical proceedings that we are considering do not fall into this latter category. More often then not a Defence needs to be filed. However, I do not wish it to be thought that is an automatic requirement which is imposed. If in fact all that a Defence would do would be to deny some essential allegation in the Plaintiff's claim, the filing of the Defence would be a useless formality. It is far preferable in those circumstances to determine what the issues are and to state them in a succinct form. However, in the hypothetical case that we are considering, there may be defences relying on exclusion clauses in the contract between the parties, defences thrown up by the law of California and generally defences which it is convenient to have stated a written statement of Defence so that the parties may clearly understand in what particulars they are at issue. In proceedings where there may be a claim which is, prima facie, clear cut, say on a bill of exchange or on a guarantee, or where it appears that a defendant may be seeking to delay payment, the Judge may think it appropriate to order not only that a defence be filed, but as well an affidavit setting out the facts and circumstances relied upon as constituting the grounds of defence.

In order to determine what orders to make, it is

necessary for the Judge to explore the issues. The plaintiff's case will appear from the Statement of Claim or Affidavits filed. The defendant's contentions have to be extracted from defendant's Counsel. One of the obvious causes of delay is subsequent amendment of issues. This seems an almost inevitable concomitant to the hearing of commercial disputes. In the old days, amendments to pleadings were required to be underlined in different coloured ink depending on whether it was the first, second or whatever amendment. After a considerable number of amendments, pleadings became quite an attractive multi-hued document. The received doctrine is that a Judge is obliged to grant any appliation for an amendment so long as the other party can be adequately compensated by an order for costs. This, of course, rather tends to conflict with the statutory injunction addressed to us to achieve a "speedy determination" of the real questions between the parties. We sometimes get applications to amend and reopen the case for a party in the course of final addresses.

To revert to the first directions hearing, a timetable is laid down within which the various interlocutory steps are required to be taken. If the timetable is not adhered to, the matter has to be brought before the Judge. The ultimate sanction for failure to adhere to the prescribed timetable, is removal from the Commercial List. Of course that is no threat to a defendant anxious for delay. For such a defendant it may be that failure should be visited by summary judgment. Where the fault lies with the legal representatives, it is sometimes ordered that the

respective clients should be supplied with a copy of the timetable which had not been adhered to so that they may, if they choose, take some action, such as changing their lawyers. We do not seek to fine lawyers as appears to be the practice in some parts of the U.S.

After the issues are defined, or Defence is filed, the next interlocutory step is the discovery of documents. Discovery is a procedure which, in Australia, has a role completely different from that in the United States. First of all it is not automatic. There is a myriad of cases where the expense of discovery is considered to be unjustified. If it is permitted, then its boundaries are strictly circumscribed. A party is bound to produce a list of documents presently in that party's possession or control or, which have, at some time in the past, been in its possession or control and which relate to any matter in question between the parties. The other party is then entitled to inspect those documents unless they are protected by legal professional privilege. Once again the Judges dealing with matters in the Commercial List are particularly aware that both delay and expense are imported by the need to ferret out forgotten documents or locate ones long ago put in storage. Oddly enough, the lawyers for the parties regularly unite to press for an order for discovery from a reluctant Judge. Discovery is a fertile source of delay for another reason. With distressing frequency, supplementary lists are filed as further documents are located well after the time prescribed.

The other common interlocutory step which is available is the administration of interrogatories. They are written questions which the other party is required to answer. Once again the boundaries within which interrogatories may be administered are restricted. Just as an example, no interrogatories are permitted on matters which bear on the credit of a party as distinct from an issue. Again no questions are permitted which would constitute cross-examination. The general experience of the Judges is that both discovery, and in particular interrogatories, are abused. It is not uncommon to find out that, of some 100 or more questions which may be asked, the answers to no more than perhaps one or two are tendered at the actual hearing. I recognise that interrogatories serve purposes going beyond securing material to be tendered as admissions or otherwise. Nonetheless the administration of interrogatories is a fertile field for the Court to control, both the breadth and expense of the litigious process.

I think that what I have said gives a ready indication of the vital difference that exists between these preparatory stages of the curial process in Australia and those which obtain in the United States.

Let me then revert to the hypothetical case that I have propounded for consideration. The crucial questions in the determination of the dispute, will obviously be of a highly technical nature. The Court would be anxious therefore to order an exchange of experts' reports at the earliest possible time. Consideration could then be given

to requiring a compulsory conference to be held between the experts for the opposing sides with a view to narrowing the areas of disagreement between them and determining the reasons for the opposing view points. My experience has been that, although the written reports may show the experts' respective positions to be wide apart, a substantial area of agreement may be obtained by this form of compulsory conference. It is seldom that respectable scientific experts maintain completely divergent views to those of their peers.

Nonetheless, in a dispute of the nature envisaged, at the end of the day, there will be remaining areas of technical disagreement of some considerable complexity. I have deliberately chosen a somewhat sophisticated technical dispute in order to throw in high relief, one of the most troublesome problems which we encounter. For generations, Courts have been content to proceed in the determination of disputes of a technical nature by calling experts on each side who would then tutor the tribunal in the particular field of their expertise and eventually and hopefully, enable the tribunal to make an informed decision as to which side is to prevail. In any dispute which involves matters of considerable complexity, the time taken to bring the Judge to a suitable level of understanding must be considerable. The exercise which has customarily been conducted is for the experts on each side to tutor the lawyers, both by written reports and in conference and then for the lawyers to guide the experts in tutoring the Judge. That seems to me to be an expensive

and inappropriate method where the grounding which is required is detailed and lengthy. To overcome such problems, we are considering two alternative approaches. One is the appointment of an expert to assist the Judge. The other is to appoint an assessor who would, in effect be, a member of the tribunal although not necessarily with a vote in the decision making progress. The advantage of the latter course is that the role of the expert is displayed more publicly and gives the parties a better opportunity to influence the views of the Court's expert and satisfy that expert's doubts and concerns directly rather than through medium of the Judge. We recognise the great care that would have to be taken to ensure that the decision which ultimately is given is not in fact, nor is it conceived to be, that of the expert rather than that of the Judge. A delicate balance will have to be preserved in seeking the assistance of the expert or assessor on matters of technical difficulty and in a sense, even deferring to the expert's assistance and guidance but, at all times, reserving to the tribunal the obligation of making the ultimate choice between the competing views and therefore the task of the ultimate decision making. Another problem which intrudes in the employment of assessors or experts is the need to keep the parties abreast of the information which is provided by this person to the Judge, in private, so that parties may meet the objections and difficulties which may be propounded by the expert for the Judge's consideration. Notwithstanding the difficulties which are posed by the problems I have mentioned, I think that there is a great deal of advantage to

the Court in having its own expert. Firstly, there is no doubt about the loyalty of the expert. Barring cases where the expert may be inclined to one view, or the other, simply as a matter of preconditioned scholarship, about which I will say something in a moment, the expert will not be partisan. The Judge may expect an unbiased view. The Judge can obtain guidance from the expert from the very early stages of the dispute and therefore be in a substantially stronger position when making interlocutory orders for clarification of points of issue and the route to be followed. Again the Judge can be tutored in the state of the art in the privacy of his chambers at a pace which is adjusted to his level of knowledge of the topic and in a way which will best ensure that his field of knowledge is enlarged, not necessarily in the way envisaged by, or wished by, the legal representatives or experts from one side or the other. It is fair to acknowledge at this point, another, yet unstated, difficulty. Whilst the choice of expert may no doubt be safely made by obtaining a panel of names from the appropriate professional association, the Judge may not be aware whether or not the expert he chooses, holds some preconceived views one way or another on a matter vital to the matters in issue. To take an instance from a field with which we are all reasonably familiar, but removed from commercial/litigation, many medical practitioners hold preconceived views concerning traumatic injuries to backs as against degenerative changes. There are doctors to whom all back pains are attributable to an early onset of a degenerative

change. There are doctors who have a view as to a uniform cause for a heart attack. Another more seldom encountered difficulty, is that the recognised world experts in the particular field may number few, each of whom may have a precommitment to one side of the dispute, or the other. However, I think that all these problems are capable of solution and, if properly approached, may be a powerful weapon in the Court's armoury for achieving a speedy and, dare I say, correct solution. I might add that I do not claim credit for any of these ideas. For centuries, the Admiralty Judges in England, have sat, in shipping cases, with Elder Bretheren from Trinity House, assisting them as assessors. Occasionally, in patent cases, Courts have appointed their own experts to advise them. I understand that in the United States, in a celebrated instance, in an anti-trust case of great complexity, a Judge appointed a professor of economics as his law clerk for the duration of the case. I would be quite fascinated to know how the parties felt about the Judge receiving technical information, the nature of which was not disclosed to them.

The consideration of the work of expert advisors, in reported judgments, is not extensive but it is of great interest. In Adhesives Pty Ltd v. Aktieselskabet Dansk Gaerings Industri (1936) 55 C.L.R. 523 at p. 559, Evatt J. said:-

> "There are some additional observations which I wish to make. In order to deal with the technical aspect of many of the questions,

the parties have provided me with two very skilled assessors, and much of what I have said and am about to say is based upon their expert knowledge of scientific processes, and their opinion and explanation of the results of the experiments actually carried out during the course of the case".

See also pp. 571-2.

This case went on appeal and Rich J. at p.580 said:

"His Honour at the conclusion of his judgment acknowledges his indebtedness to the scientific assessors. There can be no doubt that the decision of this case must be largely affected by the degree of comprehension of the scientific and industrial information and practice the existence of which was assumed by the draftsman of the specification. Courts cannot hope to obtain the necessary standpoint in matters of this description. This fact has been emphasized in a recent case discussed in Industrial and Engineering Chemistry, vol. 26, No. 11, November 1934, Editor's page, 1125, 1126. It is there said that, 'if full justice is to be done in the adjudication of patents, the judges should have associated with them in a confidential and intimate capacity unbiased, thoroughly competent, scientific aides. It is becoming more and more apparent that the Courts as now constituted can rarely reach just conclusions in matters where new and

complicated scientific truths must be interpreted and serve as the only guide posts. In the past we believe there have occasionally been competent judges wise enough to realise this situation. They have known intimately scientists who were qualified and who could be called privately to their assistance to help interpret the mass of highly scientific data recorded by experts in the course of a trial. Such Judges have been able to reach the right decisions, for they understood the law and they found a proper way to have the science interpreted to them... Apparently the protection of both science and the public interests requires that provision be made so that authoritative, capable, and unbiased scientific aid may be available to the Courts in all patent litigation. Such a plan is not untried, for it is practised with success elsewhere and with modifications could be adopted with safety and advantage in the United States.'" (My emphasis.)

In Cement Linings Ltd v. Rocla Ltd (1940) 40 S.R. (N.S.W.) 491. at p. 494 Nicholas J. said:

"Both plaintiff and defendant conducted a series of experiments, the defendant for the purpose of showing that the Rocla tool did not remove moisture or slurry in anyway comparable to the Tate tool, and the plaintiff for the purpose of showing that each tool removed moisture or slurry approximately to the same extent, and each

party then argued that the experiement of the other was vitiated in such a way that it threw no light on this litigation.

In view of these results, I requested the Dean of the Faculty of Engineering in the University of Sydney to arrange for experiments to be carried out at the University. Experiments were carried out by Sir Henry Barraclough and Mr Wilkins and I am much indebted to these gentlemen for their trouble. Their report was forwarded to me but was not disclosed to the parties and is annexed with the relevant correspondence to this judgment. I arranged for these experiements in accordance with the advice of Rich J. in Adhesives Pty Ltd v. Aktieselskabet Dansk Gaerings-Industri 55 C.L.R. 523 at p. 580, and the action of Evatt J. referred to in that case 55 C.L.R. 523 at p. 565: see also Halsbury, 2nd edn. vol. 24 at pp. 685 and 688." (My emphasis.)

The English Law Reform Commission in its 17th Report (Command 4489) said:-

"Consultation between the Judge and the nautical assessor is continual and informal, both in Court and in the Judge's room. The advice which the Judge receives from the assessor is not normally disclosed to Counsel during the course of the hearing, although the Judge may do so if he thinks fit. In his judgment he does usually state what advice he has received on particular matters and

whether he has accepted it or not. But he is under no obligation to do so and the practice is not uniform among all judges."

Indeed in Admiralty matters there is a rule that expert evidence is inadmissible on matters within the special skill or experience of the assessors.

May I now mention another method we have tried in the solution of complex technical issues. Our Arbitration Act permits the Court, in all cases, where the parties consent, or where the case requires "any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Judge be conducted by the Court through its ordinary officers to remit either the whole matter or any question or issue of fact arising therein to be tried before an arbitrator or referee". Reverting, once again, to the hypothetical dispute I have envisaged, one might, instead of the appointment of an assessor or expert remit the technical issues for determination by an arbitrator or referee. However, in such event, the Judge would need to retain careful control of the proceedings and be ready to assist the arbitrator on short notice. If I may quote from a judgment I gave:-

"If the technical expert feels it appropriate, I will be ready to assist at

each stage of the hearing before him, including the formulation of the issues. If the technical expert feels it would be of assistance there can be periods where the hearing can be conducted before us jointly, and I can and will make such rulings on evidence or questions of law as may arise and as will facilitate a speedy resolution. I have all the necessary powers to give directions by virtue of Section 16(1) of the Act."

That Section provides that where there is a reference from the Court, the referee or arbitrator, shall be deemed to be an officer of the Court and shall have such authority and shall conduct the reference in such manner as the Judge may direct.

There are other, alternate ways, in which a dispute may be brought to an early resolution. For example, to once again revert to the imaginary dispute earlier suggested, let it be assumed that the Californian company has clauses in the Contract which completely exclude liability. The Court may order that it be determined, as a separate issue, whether the provision does indeed provide the complete protection which it seeks to confer against the plaintiff's claim. A decision in favour of the Californian company on this short issue would bring the proceedings to an end so far as that company was concerned.

Whatever the issues which ultimately require resolution, some evidence will most likely be

necessary from overseas witnesses. Once again, the Court regularly takes measures to try and avoid unnecessary expense being incurred. Once the nature of the issue has sufficiently crystalised, in cases such as the imaginary dispute I have adverted to, an order is made that, in the first instance, the evidence of overseas witnesses be on affidavit. This will enable the Court to consider to what extent, if any, the evidence of the overseas witnesses will be contradicted or sought to be impeached. If the evidentiary dispute is on an issue which is somewhat removed from the heart of the case, the Judge may permit an affidavit to be read without requiring the deponent to attend for cross-examination. Problems can arise however, when not only is the evidence crucial to the dispute and hotly contested, but, for one reason or another, the deponent is unable to come to Australia to give evidence. There is no technical reason why a commission should not issue that the witness' evidence should be taken on commission in, say the United States. However there is a well settled body of authority that such a commission should not issue where the witness' credit is seriously in dispute. This principle harks back to the school of thought which believes that the only way that a determination can be made as to whether or not a witness is truthful, is to observe the witness' demeanour under cross-examination. The tribunal of fact will be unable to observe the witness giving evidence on commission and, so the authorities run, in those circumstances a commission should be refused. In very recent times, we have endeavoured to overcome the

evidentiary straight jacket, which is thus imposed on the Court, by appointing the Judge in charge of the case to take the evidence on commission himself. Sitting as a Commissioner, he will be able to bring to bear his appreciation of the witness when assessing the witness' credibility in the light of the totality of the evidence. The obvious advantage, however is counter-balanced by the heavy cost to the parties. We take the view that we are appointed to hear disputes as Judges sitting in New South Wales. Whilst it may be necessary, in the furtherance of the administration of justice, that we should sit as commissioners outside the State, there is no reason why the State should bear the cost of our fares, accommodation and such like expenses which are of a nature not otherwise incurred by the State. When we do, from time to time, deny applications of this nature, we consider the self-sacrifice thus involved to be worthy of mention in the annals of judicial rectitude.

The foregoing account, I think, sufficiently illustrates that, although the adversary system is of the very essence of the litigious process in New South Wales, the Judges have abandoned all vestige of a laissez faire approach to litigation. Proceedings are transacted at a pace and in the fashion dictated by the Court and not by the wishes of the parties. The view of the commercial Judges, is that the State has an interest in the speedy and proper despatch of litigious business, and that it is the duty of judicial officers to

bear in mind, not only the interests of the parties presently before it, but those whose business awaits in the queue of litigants standing behind them. Thus the Court will not allow its time to be wasted on argument on points which are not, or cannot, or should not truly be in in issue between the parties. Whilst it is appreciated that at times the Court's knowledge of what is in issue may be substantially less than that of the parties, it is the task of the Court to apprise itself of the situation so as to ensure that the available judicial time is used to the best advantage. Whilst the Judge must be careful not to descend into the arena of conflict and to hold the ring fairly between the litigant, he not only has a right, but an obligation, to ensure that the battle which takes place within that arena is conducted according to the dictates of the Supreme Court Act which require the "speedy determination of the real questions between the parties".

Another respect in which the Australian Courts have recognised the needs of present day international commerce, is their new found willingness to enter verdicts in the currency of other countries. In some cases, this may lead to some quite unusual orders. Thus recently, in a re-insurance case, there was a verdict partly in US dollars, partly in Canadian dollars, partly in pounds sterling and partly in Danish kroner. In determining the proper rate of interest some very neat problems can arise.

I have earlier mentioned that in long and complex cases, a different regime is required from that applied to the disposal of the ordinary commercial dispute. As an example, we have in the list seven actions which involve consideration of the acts and alleged omissions of the auditors of a large, publicly listed, company over a period of eight years and involving a claim for damages in the vicinity of $200,000,000.00. In respect of each year, the audits, prospectuses and certificates sought to be impeached are numerous and the particular respects in which it is alleged the auditors were negligent are considerable in number. We have sought to borrow from the United States experience and adapt the procedures practised in the disposition of long and complex cases to our own conditions. If I may be forgiven for once again quoting my own words:-

> "Existing forms of procedure need to be adapted to cater for proceedings, involving the more complex commercial organisations of today, carrying on business all over the globe, in many different fields, utilizing the international facilities made available by modern methods of communication. Unless the pleadings, the interlocutory steps and the methods of hearing are modified so as to eliminate the inessential and the contest between the parties restricted to matters truly in issue, the cost and length of hearing would make impossible trials of proceedings such as the present."

Thus we have endeavoured to refine the issues by successive editions of narratives from the opposing sides, distilling the material which comes to be agreed and the issues which ultimately remain in contest. This kind of litigation is the illustration par excellence of the need and opportunity for, searching out discrete issues for trial which may work to dispose of either, the litigation as a whole, or alternatively, large segments of it, or at least illuminate for the parties areas of possible settlement. In my view, litigation of this kind can be likened to a theatrical performance where, it is incumbent on the Judge, as stage manager, to select the outstanding passages and, by means of throwing them into high relief and focusing on them, elicit the best method of production from the parties. The nature of the trial format may require adaptation in order to ensure an economical hearing. For example, it may be desirable for the opposing parties to aduce their evidence of the primary facts, enabling the tribunal to determine those facts and thereafter, elicit the opinion of experts based on what the Court has found the facts to have been rather than have opinions expressed on competing hypothetical factual basis. I trust that I have made clear that it is our impression that the only way we can satisfy the legitimate needs of the commercial community for the efficient disposal of disputes is by adopting inovative approaches, super added on well tried procedures and by making the Judge a real participant in the fact finding exercise.

It will not have escaped any of you that, the only way procedures of the kind I have been describing, can be implemented, is by a Judge sitting alone without a jury. We do not have the problem imposed by the Seventh Amendment. A jury in a commercial matter is a rarity outside the experience of any practitioner currently at the Bar. In cases of fraud, or arson in insurance cases, applications are sometimes made but rejected. That is largely because it is felt that, whilst a jury is highly competent to find factual issues, of the kind I have referred to, the problems associated with detailed calculations in proving loss of profits, for example, would defeat the average juror.

It is appropriate that I should now turn to the problem of arbitration simpliciter as a method of dispute resolution. In many instances, little difference can be perceived between an action in Court and arbitration. Thus it was said by Lord Diplock in Bremer Vulkan Schiffbau v. South India Shipping Corporation Ltd 1981 A.C. 909 @ 976:-

> "Much reliance was placed by Counsel for Bremner Vulkan on the similarity of what he called "this kind of arbitration" to an ordinary heavy action in the Commercial Court. No doubt where heavy claims for damages under a ship buliding contract are the subject matter of a reference to English arbitration before a legal arbitrator familiar with the procedure of English courts, and the parties are represented in the arbitration by English solicitors and

> Counsel, the way in which the proceedings in the arbitration are in fact conducted, except that they are not held in public or in wigs and gowns, will show considerable resemblances to the way in which an action to enforce a similar claim would be conducted in the Commercial Court. The method of trial when it comes to the hearing will be substantially the same. So, it is suggested on behalf of Bremer Vulkan, by agreeing to an English arbitration clause the parties to the contract are, in practical reality, doing no more than to make a choice between one trier of fact, the arbitrator, and another trier of fact, the commercial Judge, by whom, in the absence of such clause, the case would fall to be decided."

With the substitution of Australian for English, there is a good deal of truth in this assessment of the situation. Generally speaking arbitration is regarded as having some clear advantages. The parties jump the queue of litigants waiting for a hearing in the Courts; they get a tribunal of their own choice; they avoid publicity; the aribtrator usually has a high degree of expertise in the field in which the dispute falls; and subject to the point I will make a little later, they get finality.

As some of you may know, in England an attempt has been made to combine which are regarded as the best features of arbitration with the knowlege and competence of the judicial officers who serve in the commercial Court. The Administration of

Justice Act, in 1970 brought into existence the Judge arbitrator, by empowering a Judge of the Commercial Court to accept appointment as an arbitrator. This secures to the parties that quality much cherished by commercial men, privacy. No longer will the dispute be dragged out in open Court for the amusement or satisfaction of commercial rivals. Again, notwithstanding that the arbitrator is a judicial officer, he may utilise all the informality which is customarily supposed to attend an arbitral disposition as opposed to a judicial determination. At the same time, the Judge can bring to the problem the experience he acquires as a judicial officer as well as his knowledge of the law. It has been said that judicial commercial arbitration is a hybrid phenomenon drawn from the parentage of the Commercial Court and commercial arbitration. As with all successful hybrids it emphasizes and displays the most advantageous features of the separate parent stock. In New South Wales we are in the throes of redrafting the Arbitration Act. I would be greatly in favour of the introduction of the concept of the Judge/ Arbitrator in the new Uniform Commercial Arbitration Act proposed by all the Australian States.

Two important new provisions in the bill for the new Act are clauses 20 and 18(3). Clause 20 provides as follows:

> "Subject to Section 18(3) and <u>unless otherwise agreed by the parties to the arbitration agreement</u>, any question that

arises for determination in the course of proceedings under that agreement be determined according to law". (My emphasis.)

The well established principle at the present time is, that an arbitrator is required to determine a dispute in accordance with applicable principles of law in the same way as a Judge. Yet clause 20 seems to contemplate an entitlement on the part of the subscribers to the agreement to discard this requirement and permit the dispute to be determined according to some other standard to be nominated by the parties.

Clause 18(3) is in somewhat similar vein although its thrust is not quite as revolutionary as the proposal in clause 20. Clause 18(3) provides that, unless otherwise agreed by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence, but may inform himself in relation to any matter in such manner as he thinks fit. The proposal may be said to represent merely a legislative recognition of existing principle. That arbitrators are ordinarily bound by the laws of evidence was laid down in England more than a century ago in Attorney-General v. Davison (1825) McCl and Yo.160; 148 E.R. 366, and emphatically re-affirmed in Re Enoch and Zaretzky Bock & Co. 1910 1KB 327. However in Macpherson Train & Co Limited v. J. Milhem & Sons 1955 2 Lloyd's Rep. 59 the English Court of Appeal held that the umpire was entitled to give effect to a rule of the General

Produce Brokers' Association of London which authorised the reception of evidence and information "whether the same be strictly admissible as evidence or not".

If the Bill is passed into law, it is reasonable to expect, that from time to time, parties to an arbitration will exclude, not only the requirement that the strict rules of evidence be adhered to, but also that the arbitration be determined in accordance with applicable rules of law. Yet for a long time the view was held, best expressed in the graphic phrase of Lord Justice Scrutton in Csarnikow v. Roth Schmidt & Co. 1922 2KB 478 at 488 "There must be no Alsatia in England where the King's writ does not run". In other words arbitrators applied as best as they could principles of law in the same way as any Court.

Even without the enactment of Clause 20 of the Bill there is a very interesting possible change in the law heralded by the decision of the English Court of Appeal in Eagle Star Insurance Co. Limited v. Yuval Insurance Co. Limited 1978 1 Lloyds Law Reports 357. There the clause of the treaty of re-insurance calling for arbitration included the following provision:-

> "The arbitrator and umpire shall not be bound by the strict rules of law but shall settle

any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this agreement".

In an earlier decision, in Orion Compania Espanola de Seguros v. Belfort Maatschappij VoorAlge Mene Verzekgringen 1962 2 Lloyds Law Reprots 257, Mr Justice Megaw held that such a provision was invalid and unforceable as being contrary to public policy. However, in the Eagle Star case the Master of the Rolls, Lord Denning, with whom the other two members of the Court agreed, rejected this view. It is this new approach to which clause 20 may be giving effect. For those whose interest is in certainty, the new provision is of no interest. For those who desire flexibility, determination by conciliation rather than arbitration, the application of abstract standards of fairness prevailing in the trade rather than the compulsion of an abstract principle of law, the provision will be of interest.

You will be surprised no doubt, that all the decisions I have referred to are of English Courts. Yet those decisions do represent the law presently applied in Australia. No doubt because of the pre-eminent position occupied by English arbitrators for the last couple of centuries Australian Courts have been content to follow English precedent in this field.

I have earlier mentioned that one of the perceived advantages of arbitration is finality. Unfortunately, the new bill fails to adopt one of

the recent improvements made to the arbitration system in England. The bill continues to allow for a review by a Court by means of a stated case. Unfortunately, this provision has been made an instrument of abuse by lawyers. In essence, the view which has been adopted in England and accepted in Australia, was that if either party asks the arbitrator to state a case for the opinion of the Court, either during the arbitration or before final award, the arbitrator is bound do to so as long as there is some point of law which can be pointed to. Some judges take a very broad view of the obligations of arbitrators in this regard. Thus a very experienced commercial judge in England Mustill J. in Mitsubishi v. Bremer 1981 1 Ll.L.R. 106 ordered an arbitrator to state a case asking the question whether there was any sufficient evidence on which the Board of Appeal could find that the sellers were not liable. As you are no doubt aware, this opportunity for delay and abuse has been abolished in England. In New South Wales, we attempt to cope with the problem by determining stated cases very quickly indeed and throwing out any which are perceived to be no more then devices for delay.

I might mention in parenthesis that if the new bill is passed into law, a very interesting question could arise in situations where the parties have availed themselves of the opportunity provided by clause 20 and determined that their dispute should be governed by principles or criteria other than the ordinary rules of law. May I ask rhetorically, how a stated case is to be determined in those circumstances?

One important feature in which arbitrations in Australia may differ from the practice in this country is the availability of interim relief t is well accepted in Australia that the Courts have power and should act in aid of the arbitrator. Many of you will have heard of the recent development in English law known as the Mareva Injunction. By such an order, the Defendant to proceedings is prevented from disposing of assets anteriorly to judgment in an effort to make himself judgment proof. That is to say he will not be allowed to ensure that by the time judgment is given against him he will have no assets. This recent English development has been adopted in New South Wales although not without substantial dissent. In recent weeks, one of my colleagues has held that the Court has jurisdiction to grant a Mareva Injunction where there were no pending or intended curial proceedings, but there was an arbitration on foot. Arbitrators have power to order discovery and interrogatories similarly to judges. Generally speaking, the exercise of such power is antithetical to the purpose and practice of arbitration, but the power is clearly there in case of need. The sanction is either to stay in the case of a moving party or summary judgment in case of a Defendant.

It is a well settled principle of Australian law that if parties have agreed to submit to arbitration any future disputes which may arise or any existing dispute, then they should be held to their bargain and the machinery of the Courts can then be invoked as an indirect means of achieving this object. In cases where the

contract contains a clause of the Scott v. Avery type the obligation to stay curial proceedings is compulsory. In other cases there is a discretion which is almost invariably exercised in favour of a stay. It is again compulsory in cases of international contracts in writing because the New York Convention has been accepted by Australia by the Arbitration (Foreign Awards and Agreements) Act, 1974. So long as the proceedings involve the determination of a matter that in pursuance of the Agreement was capable of settlement by arbitration, a stay is mandatory even if the governing law of the arbitration agreement is that of a country not a party to the convention and even if under the law of that country a stay is discretionary (Flakt Australia Limited v. Wilkins & Davis Construction Co Limited 1972 NSW LR 243). Arbitration agreement in the Commonwealth legislation has the same meaning as in the convention.

The enforcement of awards both domestic and foreign is essentially simple. An application is made to the Court for leave to enforce an award in the same manner as a judgment and to enter judgment in terms of the award. In relation to some foreign awards, there is a more simple method provided for bilateral conventions and Orders in Council for the registration of awards which then become enforceable in the same manner as a judgment. Leave to enforce an award will be given unless there is real ground for doubting the validity of the award or the rights of the successful party under it. So far as the United

States are concerned, discretion is not a live issue in view of the fact that Australia has adopted the New York convention.

Let me conclude this brief survey by once again emphasizing that we are very conscious of the fact that in order that Australia should take its place in the Pacific region as an important centre for international trade and finance, it is important not only that there be a legal frame work for the resolution of disputes, but that the institutions which apply the legal rules should do so in a manner which meets the legitimate needs of the commercial community. We accept that every just debt which a creditor cannot speedily recover, is likely to reflect a measure of discredit upon our system of justice. We do our best to ensure that the situation does not arise.