BUSINESS DISPUTES MADE EASIER

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The range of methods for resolution of commercial disputes has undergone dramatic change in the five years since I addressed the Association. Although the changes have been great, we are standing at the threshhold of even more fundamental development which will enlarge our horizons and, I hope, improve in quality and speed and reduce the cost of resolution of commercial disputes.

The Government of New South Wales has given emphatic recognition to the need to improve both curial and non-curial forms of dispute resolution. In part, the measures taken have been in response to the felt need to facilitate the evolution of Sydney as an international commercial and financial centre. In part, they mirror developments taking place overseas, particularly in the United States. It will facilitate the review of what has already been done and what is presently under consideration if I deal separately with curial and non-curial dispute resolution, although to an extent the methods remain intertwined. The judges who handle the commercial work of the Supreme Court are philosophically and practically committed to supporting appropriate systems of dispute resolution, whether within or outside the regular court system, and to ensuring that the rules of natural justice prevail.

Let me consider first, dispute resolution which takes place

basically outside the regular court system. The result may be either a binding or non-binding resolution.

The oldest and best known established method of binding dispute resolution outside the court system is arbitration. The profound change in this field, of course, is the coming into force of the Commercial Arbitration Act 1984. At present arbitration does not have a good name in the commercial community. In many instances, it has been slow and expensive. The original notion of a swift, informal and cheap determination disappeared in a morass of technicality and deliberate attempts at delay. I am afraid we lawyers are entitled to almost exclusive credit for this evolution. The purpose of the 1984 Act is to effect a change, by going back to the original concept. Time does not permit of an elaborate discussion of the provisions of the new Act. Its philosophical thrust is towards party autonomy. The Act is studded with instances where the parties are given a choice. Is the arbitrator to be bound by the laws of evidence; is the arbitrator to be bound by rules of law? Is there to be even the limited right of appeal permitted by the Act? The parties may resolve fundamental questions such as these in the way that they think most appropriate in their interests. Furthermore, the Act abolishes the procedure of a case stated which, in the hands of unscrupulous parties, has been made into a weapon of oppression and served largely to prolong proceedings. Even where the parties choose to retain a right of appeal it is strictly circumscribed.

Whilst the strait jacket of the Scott v Avery clause, which also has in some circumstances worked acts of injustice, has been removed, there has been a definite evolution of judicial approach which calls for a stay of curial proceedings commenced in breach of agreements to submit disputes to arbitration. What I have said sufficiently indicates that this long standing method of dispute resolution has undergone dramatic surgery in an endeavour to make it conform more closely to the expectations and needs of the commercial community. It is necessary that disputants, lawyers and judges work to ensure that the beneficial effects of the new Act do not disappear in a welter of technicalities and inappropriate exercise of discretion. The most delicate care will be called for in determining when a party should be permitted to litigate in court in prima facie breach of the obligation to arbitrate and when leave to appeal should be granted.

I regret to say that a feature of the legislative change has given rise to a great deal of misunderstanding and entirely needless apprehension. S 15 of the now repealed 1902 Arbitration Act, which itself was but a re-enactment of a provision dating back to the last century, gave power to the court to order the whole cause or any issue to be sent to arbitration if all the parties consented or:

> "if the cause or matter required prolonged examination of documents or any scientific or local investigation which, in the opinion of the Court, could not conveniently be dealt with by the Court or, if the dispute was wholly or in part matters of account, without the consent of the parties." (my emphasis)

It will be seen that the Parliament entrusted the judge with the determination whether a technical question could conveniently be dealt with by the Court and, if not, whether the matter should then be sent to arbitration.

The 1984 Act contains no such provision but, at the same time as the new Act was passed, s 124 of the Supreme Court Act was amended to give the Rule Committee power to make rules prescribing the cases or questions which may be sent to arbitration. The Parliament deliberately did not require the prior consent of the parties or either of them before a matter was sent to an arbitrator or referee. It did not impose any restriction on the use of the power by reference to categories of disputes or evidentiary enquiries. In proper exercise of the power, the Rule Committee made rules which now are set out in Pt 72. Some members of the Bar Council have strongly attacked the new rules. The power conferred on the court at the same time to appoint of its own motion a court expert of its own motion is suggested as some great leap into the unknown by adventurous spirits. Critics are in blissful ignorance of recommendations to this effect by the Canadian Federal/ Provincial Task Force on Uniform Rules of Evidence (1982) and of Rule 706 in the US Federal Rules of Evidence introduced in 1975.

The most vigorous attack is on the power of a judge to refer matters to arbitration or a referee of his own motion. First, it was suggested that the rule was ultra vires. The

argument appeals to the text of different legislation and totally overlooks the history of s 124(2). This makes it unnecessary to consider the argument which gets no foothold from the words of the statute. Then in an article in the Bar News it is asserted that an order should never be made where neither party desires it. Reference is made to single judge decisions in Queensland and Victoria. The decision in Tylors (Aust) Limited v Macgroarty 1928 St R Qd 170, later affirmed by the Full Court, has presumably escaped the contributor to the Bar News and the draftsman of the submission on ultra vires. After a jury was empanelled, the judge suggested to the parties that the dispute be sent to arbitration. Counsel for the defendants resisted his suggestion, both on the basis that there was no jurisdiction in the absence of consent from the parties and on discretionary grounds. The judge made the order because he thought that such a course would save expense to the parties and lead to a more satisfactory determination of all matters in dispute. The review by the judge of the historical evolution of the power to act without the consent of the parties is of interest. Before the Supreme Court Act 1921, the position in Queensland was somewhat the same as that which obtained in New South Wales under the 1902 Act. Then, in 1921, power was conferred to make rules empowering a judge either generally or in a particular case to refer any cause or matter to arbitration. The rule made in exercise of this power gave a judge power to refer any case of his own motion. The Full court affirmed the judgment (supra p 371).

The more recent single judge decisions fail to refer to Tylor's Case.

It is not simply the majority of the Rule Committee of the Supreme Court which believes such rules to be useful. The critics assert that the rare use of s 15 of the 1902 Act is evidence of its inutility. In Buckley v Benell Design & Construction Pty Limited (1978) 140 CLR 1, Jacobs J (with whom Murphy and Aickin JJ agreed) said (p 37): "The power to refer should have been one which the Court could frequently exercise" (my emphasis). Regrettably, in another, more elaborate and sophisticated attack on the rules, when referring to the decision, the writer failed to mention the clear view of Jacobs J just cited. Instead he cited two passages which deal with the consequences of upholding a previous decision. The support the writer seeks to derive is not only lacking but flows the other way. The reason for lack of use was largely, if not wholly, due to the interpretation given to the section some forty years earlier which was reversed by the High Court.

The author of the submissions attacking the rules, citing no evidence, rejects out of hand what amounts to compulsory court annexed arbitration. The Federal Judicial Centre in the United States and the ABA Action Commission to Reduce Court Costs and Delays have made extensive study of the use of court annexed arbitration as an alternative method of dispute resolution. In 1983 the Director of the Centre

wrote firmly in favour of these programmes. I confess to some surprise and mild amusement that it should be claimed that counsel and solicitors have greater personal knowledge and experience of ADR than judges. I thought that, until six years ago, I was one of those counsel. In more recent times I have had an exposure to ADR that I may claim, with all due modesty, far surpasses that of any member of the Bar Council.

I wonder if some of the internal inconsistencies of the different arguments advanced from time to time have been fully appreciated. At one point, it is argued that the concept underlying the rules is some aberration of mine, out of step with other courts in Australia and with other judges. In another submission, it is said that the right of appeal to the Court of Appeal is insufficient protection. Why is that so if the entire concept is so out of step with every right thinking judge?

Also attacked is the rule allowing for the appointment of a judge as arbitrator. This again is heralded as an innovation imposed on the profession and the public, presumably by a group of radicals running wild. The writer appeared unaware of the power to appoint a judge as an arbitrator in s 4 of the United Kingdom Administration of Justice Act 1970. The United Kingdom Commercial Court Committee received a report from a Subcommittee on Arbitration Law given as recently as 25 October 185. The

Subcommittee, chaired by Mustill LJ, numbering two silks, juniors, solicitors and arbitrators, reviewed the provision and unanimously said, "We ourselves are strongly of the view that they should be retained." The Bar Council which has not held an enquiry into the topic feels able to object to the rule. In the United Kingdom the power has been exercised on a number of occasions. Two of the awards have been published. This fact destroys yet another criticism that hearings will necessarily be in private. Closed doors are not a necessary concomitant of arbitration. When attention was drawn to the United Kingdom provision, it was said that the United Kingdom experience is irrelevant to Australian conditions. In another submission, it was suggested that the United Kingdom statute is irrelevant because it applies to voluntary submissions to arbitration. Later I will show that the Council is out of step with professional thinking, both in Australia and overseas, in relation to the use of assessors. Why is it that the drummer to whose music the draftsman of these submissions marches is the only one playing the right tune?

It is in the interests of the proper administration of justice, and therefore of the community, that important matters such as the ones under discussion should be the subject of public dicussion. Differing views are bound to arise. I respect the philosophical base, as distinct from some of the arguments, which underlies an argument in opposition to the Rules. At the same time, I am firmly of

the opinion that the arguments in their favour outweigh the disadvantages. A constructive debate cannot be conducted when the arguments are shrouded in misconceptions and misunderstanding. One quite outlandish objection to the rules is that the power to appoint an arbitrator confers an undesirable power of patronage. I am afraid all this shows is a complete lack of awareness of the proposal to set up lists of qualified arbitrators and referees through the Australian Commercial Disputes Centre. I take it that it is not suggested that appointment of a liquidator from the A or B lists is the exercise of some obscure power of patronage. In any event, I am certain that a judge will consult the parties as to the identity of the person to be appointed. An in terrorem admonishment in one submission is that commecial work might be taken to other courts. This is the source of mild surprise as we turn away litigants from other States who wish to use the Commercial List. Unfortunately, time does not permit me to deal with other matters raised in successive editions of the objections to the rules.

All this having been said, I believe that judges are conscious of the care which will need to be exercised in determining what cases and what issues should be sent to arbitration where the consent of the parties is not forthcoming. However, history shows that there have been cases in the past where the power needed to be exercised for the benefit of all concerned and, provided all proper care is taken, the provisions will serve to enhance the interests

of justice. I do trust that when the smoke clears that is the end that we all aim to serve.

By utilising the provisions of the rules, parties to commercial disputes will be able to combine the best features of curial and arbitral decision making. Issues suitable for determination by the court, such as questions of law and construction of contracts, may be dealt with by a judge, whilst highly complex and technical issues involving, say, the merchantability of goods in a dispute about the sale of computer software may be remitted to arbitration by a suitable expert. The procedure has already been followed under the provisions of the old 1902 Act (see Maschinefabrik Augsberg-Nuremburg Aktiengesellschaft v Altikar Pty Limited Ritchie's Supreme Court Practice Vol 2 para 13033) but the streamlined procedures of the 1984 Act should make this an even more successful enterprise.

In the last few years, mainly in the United States, various methods of non-binding dispute resolution providing alternatives to litigation, commonly described as Alternative Dispute Resolution, and rejoicing in the acronym "ADR", have flowered. Their advantages have been summarised thus:

> "They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard and fulfil a need to retain control by not handing the dispute over to lawyers, judges and the intricacies of the legal system."

Research has suggested that settlements reached through mediation are more satisfying to the parties and tend to be more lasting than those imposed by the courts.

On 3 March 1986, the Australian Commercial Disputes Centre (ACDC) opened its doors ready to assist in the resolution of commercial disputes. The primary significance of the Centre is that it will, under the one roof, promote not only arbitral methods of dispute resolution but also the more creative non-binding, relatively unstructured methods of alternative dispute resolution. It is hoped that in the first instance, disputants will seek advice on the best method for the disposition of their particular problem. The Centre will seek to effect solutions, not only by the improved arbitral procedures available under the new Act but also by conciliation and mediation and perhaps also by way of the somewhat misnamed mini-trial. The common feature of all these procedures is the concept of consensus. No one can force parties to adopt any of these procedures. They have to accept that the procedure selected offers some advantage over and above litigation. It may be asked why parties should involve the services of the Centre if they are of a mood to negotiate and attempt a resolution of their dispute by settlement. The reason is that the methods proposed involve the services of a neutral third party or a panel of neutrals who will seek to explore avenues of settlement, entice parties from their entrenched positions, explore and draw attention to the strength and weaknesses of

their respective positions, forward creative ideas for the settlement of disputes and generally seek to substitute for an adversarial stance the free spirit of negotiation and settlement. There is no time to explore in detail the work of the proposed Centre beyond broad generalities.

The Centre will have to provide trained and skilled arbitrators, mediators and conciliators. It will be successful if and only to the extent to which it can provide skilled personnel. It will be necessary to set up appropriate instructional courses and provide the necessary training and facilities. The educational task of the Centre is daunting but needs to be tackled and conquered. The Centre has already had one very successful residential seminar at the end of January in which the principles of various techniques of ADR were explained to participants. A lot of work still needs to be done in exploring methods of transferring knowledge of the skill of mediation and conciliation. We have some plans in hand but helpful suggestions would be more than welcome.

The Centre will need to promote in the business community an awareness of the availability of these methods of dispute resolution. The commercial community needs to accept that a suggestion that a dispute be submitted to the Centre for mediation or conciliation should not be perceived as a sign of weakness. If successful, the Centre will be able to establish Sydney as a place for resolution not just of

domestic but also international disputes. Such an achievement could only redound to the advantage of Australia as a whole in the entire Pacific and Asian region from which it is hoped the disputants would be drawn to Sydney. There is no reason why Sydney should not ultimately replace London as the convenient and natural regional forum for the disposition of commercial disputes.

As with arbitration, from time to time, it may be necessary for parties engaged in ADR to call on the Supreme Court for assistance by way of ancillary orders. The Court may need to have some additional powers conferred on it to ensure that it can discharge such obligations.

So far as the work of the Commercial List is concerned, it is for others to judge the extent to which we have been successful in achieving our stated purpose of providing a speedy and, if not cheap, at least cost efficient method of dispute resolution. Nonetheless, we have in mind further improvements designed to further the same end. I will discuss these proposals in the context of reviewing progress in dealing with the problems I outlined in 1981.

The Government has recognised the work of the Court in the commercial field by legislating for a Commercial Division in which to concentrate the accumulated expertise of the judges in the resolution of commercial disputes. The amending Act of 1985 has not yet been proclaimed. S 53E(3) provides that

subject to the rules, there shall be assigned to the Commercial Division all proceedings of a commercial nature.

In 1981, I complained of the frequent failure to comply with the rules requiring a matter to be brought up for directions as soon as possible after entry in the Commercial List. Now, when a Statement of Claim is filed, endorsed in the Commercial List, there is automatically issued a Notice of Motion for directions returnable some little time ahead. It is served with the Statement of Claim. This has substantially overcome the particular problem. One minor matter which is a frequent irritant is that parties fail to avail themselves of the opportunity to obtain the leave of a registrar to serve a Statement of Claim outside the jurisdiction and the matter is brought into the list, occupying a judge with a matter that should be dealt with by one of the court's officers.

In many respects we are still not satisfied that we have arrived at a satisfactory situation. In the context of reviewing the rules and procedures generally, in anticipation of the formal proclamation of the new Commercial Division, Clarke J and I have been drafting a new Practice Note for the consideration of the Chief Justice. We have forwarded copies of the draft to both the Bar Association and the Law Society. We have received some useful suggestions from an informally constituted group of solicitors who regularly practice in the Commercial List.

We were in the process of settling the final form of the Practice Note when, in January, I received from Bingham J, the judge in charge of the Commercial Court in London, a Report of the Practitioner Members of the Commercial Court Committee. That Report has now been adopted by the Court and Donaldson MR announced that it was to be implemented from 1 March. We propose to borrow some of the recommendations of the Report and incorporate them in the Practice Note. I will now mention some of our proposals.

We consider that time is lost, money expended and the purpose of the List lost by the forms of pleading presently followed. It will be remembered that when the List was originally established in England towards the end of the last century, the intention was to do away with pleadings altogether and allow the parties and the judge to work out the issues for trial and go to an early hearing to determine those issues. Although we recognise that in many respects litigation has become more complex and the original approach not always suitable, we think that in the majority of cases it is still workable. Indeed, from time to time we have been able at the initial directions hearing to settle issues for trial instead of ordering a Statement of Defence to be filed. Even then, unless the plaintiff filed a Summons and affidavits, unfortunately an altogether too infrequent procedure, there is already a Statement of Claim filed.

Instead of initiating proceedings by Statement of Claim, we

propose the filing of a Summons, outlining the orders sought, which will appoint the first date for a directions hearing and therefore obviate the present Notice of Motion for Directions. The Summons will have to be accompanied by a statement setting out in summary form the nature of the dispute and the issues which the plaintiff believes are likely to arise. This should be in a summary and not technical form. As an example, the following may appear:

> "1 Plaintiff sues on a fire policy.
>
> 2 Defendant claims material non-disclosure.
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> 3 Plaintiff concedes fact of non-disclosure but claims fact not material and, alternatively, waiver."

If the defendant wishes to have proceedings transferred to the Commercial List, he will be required to file a Notice of Motion incorporating such a statement.

When the proceedings come before a judge for the first time, the parties will be expected to confer in order to determine whether the issues can be agreed in the summary form I have illustrated. We recognise that, in some cases, a dispute is too complex to allow for this to be done and that points of claim and defence may be necessary. Even in such cases, we wish these documents to be simple and concise. Parties should desist from alleging matters which do nothing towards narrowing the issues or apprising the other party of the case proposed to be made against it. In this context, we

deplore the fact that, even now, it happens far too frequently that matters are put in issue by allegations that the party does not know and cannot admit a particular fact when, by exercise of some care and energy, allegations of minor importance could be admitted so as to tender for consideration the real issue between the parties. We are not inviting practitioners to give away some right which their clients may have. Nonetheless, it is in the interests of both sides that unnecessary expense and time is not expended in tracking down dead ends.

We consider that, far too often, applications are made for summary judgment. Whilst we can understand the frustration felt by a party who believes that there is no justifiable claim or defence, as the case may be, in our experience the present entrenched principles which govern this type of procedure seldom allow for a satisfactory outcome. It is far better to order an early and, if appropriate, shortened but final hearing.

We propose that, generally, orders for discovery, inspection and interrogatories should not be made until the issues between the parties have been defined. For some time now, we have been unwilling to make orders for discovery and interrogatories as of course. We consider that it is inappropriate to make an order for discovery when the only matter which can be urged in support of it is that "we want to see what the other party has" or "they may have

something" or "something might turn up". The cost of litigation is far too high to permit every stone to be turned over and every path to be explored when more frequently than not the exercise leads nowhere. In this context I commend for your consideration the article by Judge Newman of the United States Second Circuit "Re-Thinking Fairness: Perspectives on the Litigation Process" in 94 Yale Law Journal 1643. Even where discovery and interrogatories are to be permitted, the orders may be restricted to specific documents or specific subject matters. Prolixity in interrogatories must be avoided at the risk of the disallowance of all interrogatories submitted. It is simply unrealistic to expect judges to work their way through one hundred questions, each with its sub-questions descending into sub-sub-questions, in the hope of finding some that are relevant, permissible and most of all desirable.

It is an unusual matter in the Commercial List that does not involve consideration of technical questions frequently of considerable complexity. For some time now, parties have been required to exchange, well in advance of the hearing, the reports of all experts proposed to be relied upon. This has not only served to avoid surprise but has also allowed the evidence of experts to be refined and concentrated on matters truly in issue. On occasions, orders have been made for the experts to confer. Experience has shown that discussion between honest experts devoted to assisting in

the determination of the point in issue, frequently allows for modification of views respectively held and further narrowing of points of difference. I have taken the matter a step further. On two occasions, I have allowed the expert witnesses for both parties all to be sworn and to give evidence at the same time. The experts have been allowed to ask questions of each other and in this way better inform themselves and the court. I have found the procedure to be helpful. Details of it are set out in my judgment in Spika Trading Pty Limited v Royal Insurance Australia Limited delivered on 3 October 1985. At times, it is useful to defer hearing the evidence of the experts until the evidence from all lay witnesses has been heard.

I have long held the view that the parties are advantaged and the cause of justice served if, in cases of considerable technical complexity, judges can have the assistance of assessors or can send technical issues to a court expert to advise on. Both these proposals advanced some two to three years ago have been the subject of strong objection by the Bar Council and these have been revived in the context of the power to appoint a court expert. In my view, there is no sound basis on which the objection can be justified. All valid objections can be met and were offered to be met. The practice is already in use in Australia, for example in the Trade Practices Tribunal which is, of course, presided over by a judge. Para 65 of the United Kingdom Report says this:

> "The rules providing for the judge to sit with assessors or to appoint, on application, a court

> expert are a dead letter. Use should be made of them in that small minority of cases which involves a very high expert scientific content. In such circumstances, an assessor can save a good deal of time spent in court educating a judge in the rudiments of an unfamiliar discipline. He can also be of assistance in pinpointing the real issues between the expert witnesses."

In 1984, Mr Justice O'Bryan of the Supreme Court of Victoria delivered a paper to this Association in Melbourne. His Honour had been in charge of the Commercial List of that Court for some years. He said:

> "I would suggest, that in complex commercial litigation which is likely to be lengthy in hearing time and where highly technical evidence is to be called, consideration might be given to appointing an expert to sit with the judge in an advisory capacity. I do not see why either party should be disadvantaged provided the advisor to the court is selected by the parties. The necessity to appoint an advisor might be initiated by either party or by the judge."

The NSW Bar Council stands solitary in its unqualified objection to the proposal. This is not said in order to engender hostility. We need the co-operation of the practioners and we rely on it. Please construe this as a plea for re-consideration.

We propose that a number of other changes recommended by the United Kingdom Committee should be adopted for the Commercial List. Inter alia, the following suggestions appear to us to be of advantage in all except the most simple of cases:

1 Each counsel will be required to deliver by 4.30 pm on the day before the hearing a list of the live issues to

be resolved on the hearing. Preferably, counsel should agree on the list.

2 At the same time, there should be delivered a list of propositions of law to be advanced together with the authorities to be cited in support of each proposition with page references to passages. The authors of the United Kingdom Report point out, and I agree, that to require counsel to link the authorities listed to the relevant proposition of law is likely to result in a sensible reduction in the number of cases listed. Counsel will be required to exchange these lists.

3 A chronology of relevant events.

4 A dramatis personae where the number of persons who feature in the story warrants it.

The two last mentioned items may be handed up at the hearing.

The United Kingdom Report adverts to a point also made by Gleeson QC, then President of the New South Wales Bar Association, at one of the lectures for Readers on the subject of the Commercial List. He thought that the falling into disuse of advices on evidence has had a number of deleterious effects on the conduct of cases involving, inter alia, late amendments, needs for adjournments and last minute settlements. I agree with this. The United Kingdom Report has suggested that a requirement that, at the time the date for hearing is allocated, there should be handed up a list of witnesses, both of fact and expert, proposed to be

called would ensure that counsel were instructed to advise on evidence at any early date and proper attention paid to the preparation of the case. There is a great deal to commend this approach.

The United Kingdom Report then makes a recommendation (para 41) which, on present experience, is calculated to engender great hostility. The Report suggests that, the practice of arbitrators in commercial arbitrations, directing statements of evidence of witnesses of fact to be exchanged before hearing is useful, in that:

1 it clarifies issues of fact and common ground;

2 it places the parties in a better position to consider settlement;

3 it prevents surprise at the hearing.

The authors of the Report recognise that there are cases where the interests of justice are promoted by concealing the nature of evidence until it is sprung at the hearing but comment that these are comparatively rare. The Report suggests that if the person whose statement has been produced is called as a witness then, upon confirming the contents of the statement as being true, it shall be treated as part of his evidence. If the person is not called as a witness, then the other party may not tender the statement in evidence. At present we have an open mind on the question whether we should adopt this proposal for New South Wales. We shall be interested to hear comments.

I should like to conclude by commending to you all the words of the United Kingdom Report:

> "What is crucial is that there should be a radical change of approach to proceedings in the Commercial Court so that once again judges, solicitors and counsel approach commercial litigation as a joint venture in which all are under a duty to co-operate in resolving disputes sensibly, speedily and economically."

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