COMMERCIAL DISPUTE RESOLUTION: LITIGATION AND ARBITRATION IN AUSTRALIA

by

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> "The fundamental problem which we face is how to reconcile justice with expedition. Perfect justice requires the most careful scrutiny of every fact and document: endless opportunity for every party to explore the case, to question and answer the other side, to persuade the tribunal. Expedition can therefore be seen as the enemy of perfect justice. But we all know that nothing in this world is perfect. We all know that a balance has to be struck. The question is: where are we to strike that balance?" Lord Goff (1987) 53 Arbitration 9 @ 11

The topic assigned to me is so vast that, in the time available, I will be able to give only a bird's eye view of some of the more outstanding features. As a matter of convenience and because of my limited experience of practice today in the other States and in the Federal Court, I will use the New South Wales Practice Note relating to the Commercial Division (1986) 6 NSWLR 119 as the framework. The Practice Note does seem to have attracted a following in Queensland (Practice Direction No 4 of 1987) and New Zealand. Whether it strikes the correct balance or not the Practice Note attempted to respond to the question posed by Lord Goff.

There is a threshold question to which no satisfactory answer has ever been returned. The essence of resolution of commercial disputes is speed. The secondary aspect is some acquaintance by the Tribunal with commercial practice. This will contribute not only to the correctness of the decision made but also speed of assimilation and delivery of judgment. The result was the creation, first in England and subsequently in some of the Australian States, of specialised commercial lists. The resulting expedition in resolution of commercial disputes may have been acceptable in the days when all court proceedings received a hearing within a relatively short time. Today, the combination of long delay in curial proceedings and a more caring society has made more acute the difference of opinion between those who think that the economy requires that the needs of the commercial community be met with expedition and those who take the view that a paraplegic is entitled to as much, if not more, expedition than a predatory takeover artist. A related question is whether wealthy corporations should be entitled, for a cost of a couple of hundred dollars only, to be supplied by the community with the services of a judge, supporting staff, courtroom and ancillary facilities for weeks and sometimes months.

Another interesting feature of this section of the legal landscape is the ever present tension between supporters and reformers of curial procedure on the one hand and the arbitral process on the other. It used to be that the informality and

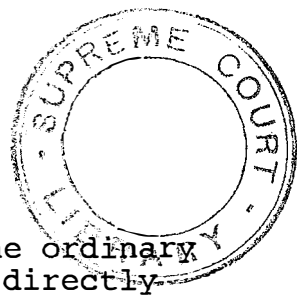
speed of the arbitral process, handled by persons experienced in the field, gave an overwhelming advantage over the court process encrusted, as it was, with archaic pleadings and slow, if methodical, elucidation of the evidentiary material. Then, gradually, as lawyers took a closer interest in and participated more in arbitration, it came to take on more and more the character of a curial proceeding out of a court room. Today, it is the curial process that is leading the advance towards speedy despatch and it is the arbitral process that is lagging behind.

The Practice Note seeks to provide for the most economical means of conveying information from the parties to the court in the shortest possible time. After all, in Hill v Scott (1895) 1 Comm Cas 200 @ 204 Lord Esher described the main object of the newly established Commercial List in England:

> "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".

In the same vein, Moffitt P said in Stanley-Hill v Kool (1982) 1 NSWLR 460 @ 461:

> "... 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, minimizing 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 the discretions conferred by s 56(3) 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. Accordingly, he is in a superior position to decide by what directions or orders any such manoeuvre can be neutralized and how best the true issue can be fairly determined with expedition."

Probably the outstanding feature of the procedure called for by the Practice Note is the increase in the work that is done out of court, both before the trial and in the course of trial. The reduction in hearing time and the consequent savings of costs, both public and private, justify the time and expense of the out-of-court preparation.

Nonetheless, I am bound to recognise the accuracy of the remark made by a contributor in the South Australia Law Society Bulletin (February 1988), when he said (p 12):

> "It should be borne in mind, however, that in some cases the intensified activity of preparation for trial carries with it its own premiums in terms of additional professional costs, and particularly where extra administrative, clerical or expert assistance is required at short notice or where additional rather than fewer interlocutory steps are required."

In both New South Wales and Victoria there has been a new definition of the work to be carried out by the Commercial List. Partly as a result of this and no doubt for other reasons as well, there has been in 1988 alone a 100% increase in actions commenced in the Commercial Division. This is so, notwithstanding that, in New South Wales, for historical reasons, the company work has been preserved to the Equity

Division. This involved a rather illogical separation of true commercial work. Indeed, it would appear that in Victoria the staple fare of the Commercial List has been the disputes that have erupted between offerors and offerees in takeover battles.

The essential features of the practice followed are twofold. First, as soon as the proceedings are instituted the matter comes before a Judge for directions. Second, Judges maintain continuous control over the progress of interlocutory steps designed to secure an early hearing. This ensures that the action progresses at an appropriate rate and, further, that no unnecessary interlocutory steps are indulged in. Thus, we have just about managed to eradicate the lengthy requests and answers to Requests for Particulars that used to consume six weeks or thereabouts. The grasp which the Judge obtains of the proceedings and his ability to ensure that all steps, but only the steps which will assist the Court, are taken expeditiously, is of extreme value.

Proceedings are commenced by Summons in the form set out in Annexure 1 to the Practice Note. The plaintiff is required to specify the nature of the dispute, the issues likely to arise and a summary of its contentions. What is expected, pace Bullen and Leake, are short, succinct, pungent statements. Let me illustrate:

"Nature of Dispute:

1. The plaintiff obtained a fire policy from the defendant.

2. During the period of insurance, on 5 June 1986, the insured property was destroyed by fire.

3. The plaintiff claims, $1 million, the cost of reinstatement.

Issues Likely to Arise:

1. The defendant alleges non-disclosure of a material fact, a previous fire at 5 Smith Street, City on 7 October 1981.

2. The defendant claims that in breach of conditions of the policy the plaintiff failed to assist in the determination of its claim by withholding books and invoices.

3. In reply the plaintiff will claim that:

   (i) the previous fire was not material - the plaintiff had no connection with the premises or the fire;

   (ii) the defendant waived the requirement for disclosure by advertising that it will insure everyone;

   (iii) rely on ss 18 and 18A of the Insurance Act (NSW).

Summary of the plaintiff's contentions:

1. The defendant was not entitled to avoid the policy.

2. The plaintiff was not in breach of the conditions of the policy.

3. The New South Wales Insurance Act is still operative notwithstanding enactment of the Commonwealth legislation."

The defendant's representative is expected to be sufficiently briefed to inform the Court at the first Directions Hearing of the actual defences and the issues which arise. Where the issues are simple, driven by the desire to avoid the parties

incurring unnecessary costs, no Defences, Replies or other pleadings are filed. We hark back to the days when the Commercial Court in England directed the solicitors for the parties exchange letters in which they agreed on the issues. Proceeding in this way will both save costs and ensure an early hearing. For example, the plaintiff may allege that the defendant repudiated a distribution agreement and that repudiation had been accepted and damages are sought. The defendant alleges that defaults in performance of the plaintiff's obligations had been such as to constitute repudiation on its part and the defendant merely accepted it. Now, what is the point in pleadings? True, the defendant will have to provide particulars of the alleged breaches by the plaintiff but the issues are simple. In many cases, the issues may be distilled into a dispute as to whether certain conversations took place. The Court will order affidavits to be filed and the dispute will be readily and speedily determined.

The Court requires the parties to state with specificity what the issues are. The defendant will be aided by the definition of issues in the Summons. Very many of the proceedings in the Division involve actions on guarantees. Equally numerous are the instances where what is relied on by way of defence is the Contracts Review Act. The defendant's case can be put on affidavit with no great difficulty and the defendant can be cross examined. There is an interesting review of the methods

which have been adopted in England from time to time for the definition of issues in Colman "The Practice and Procedure of the Commercial Court".

Even where some more formal statements of contention are required, only Points of Claim and Points of Defence will be ordered. Appendix B to the first edition of Matthew's "Practice of the Commercial Court" provides excellent examples of such documents of earlier days stripped of excessive verbiage and technicality. The 1962 Report of the Commercial Court Users' Conference lamented the departure from them:

> "We express our dissatisfaction with both the prolixity of modern pleadings in the Commercial Court and the time which is consumed in their delivery.
>
> The original conception in the Commercial Court of short 'Points of Claim' and 'Points of Defence' seems now to have been forgotten and pleadings in the Commercial Court have become as lengthy as the more formal pleadings current in the Common Law Courts. Further, it has become the exception rather than the rule for either of the parties to deliver their pleadings within the times specified in the Order for Directions, and extensions of time are freely and frequently agreed. We find that much of the delay in bringing commercial cases to trial is due to the preparation and delivery of pleadings.
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> We appreciate that pleadings can perform a useful function in preventing either party being taken by surprise at the trial. We agree that in the comparatively rare commercial cases in which fraud or misrepresentation is alleged pleadings are essential. But we recommend that, subject to these safeguards, pleadings should be avoided in the Commercial Court wherever possible and that far more use should be made than at present of trial on agreed statements of fact."

Orders for discovery and interrogatories will only be made where it is clear that they are necessary. In most cases, an order will only be made once issues are defined. We

appreciate that in most cases some discovery is necessary. However, it is inappropriate to invest discovery with the significance it does not possess. It should be possible to restrict discovery to areas of the dispute where it really matters. Furthermore, there is absolutely no point in discovering seven copies of the same document except in cases where one or more of the copies may bear some endorsement relevant to an issue. I am quite horrified at the cost of discovery and cannot understand why it should be the function of the Court to try and restrict its scope in order to save expense to the litigants. Parties should be imaginative in devising ways of reducing the burden of an order for discovery. However, problems exist at the other end of the scale as well. From time to time, where it has been thought appropriate to order discovery, it was insufficient. It is meaningless to tell a layman that all documents should be produced. It is necessary for a solicitor to be astute in describing to the client the purpose of an order for discovery and in exploring with the client the kinds of documents likely to be available and required to be produced.

Commentators from a large Sydney firm (cf "Dispute Resolution in Commercial Matters" p 102 et seq) have pointed out, in a joint paper, that the discovery process is significantly dependant upon trust and that, if there is concealment of a document of which the other party could not be expected to be aware, its existence is not likely ever to come to light. It

has been suggested that the chief executive or some other very senior officer of a company be required to swear the discovery affidavit and that substantial personal penalties should be imposed in the case of an incorrect affidavit. In fact, at present, no steps are taken where the Court is informed that one party or the other concedes that insufficient discovery had been given, notwithstanding that an officer of the company concerned had sworn that the list of documents was complete. Consideration may have to be given to a requirement that, where it is conceded that discovery had not been complete, an explanation be given as to the reason for the failure, not only by the party concerned, but an exploration be made of the steps taken by the solicitor for the party to explain to the client the obligations cast by an order for discovery.

Again, photocopy machines make it much easier to produce everything with the remotest relationship to the dispute. Real issues and essential evidence are not identified. This mass of irrelevant documentary material is often placed before the Court - it is quicker to copy than to select.

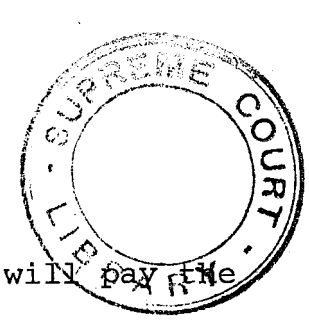
The administration of interrogatories has been restricted. As a matter of interest, they are seldom allowed in England in the Commercial Court. They occasion untold delay and expense. The problem is not new. In a letter to "The Times" of 9 August 1892, an eminent Judge wrote (Matthew "The Practice of the Commercial Court" 1st Ed, p 7):

> "In perfecting for the uses of common law the nicely-adjusted machinery of interrogatories and of discovery, the Judicature Acts placed within the reach of every litigant and his advisers weapons of admirable precision, but too expensive and dilatory for daily and hourly employment at common law. The result was to add a large percentage of cost to the expenses of an ordinary action. Interrogatories began to be administered in every case, the answers to which were generally useless. Piles of documents were sorted, classified, inspected, and copied, without any real advantage or necessity."

The circumstances in which leave should be given for the administration of interrogatories were explored by Clarke J in some detail in an illuminating exposition in The Coal Cliff Collieries Pty Limited v C.E.Heath Insurance Broking (Aust) Pty Limited (1986) 5 NSWLR 703. His Honour summarised the position thus (p 7):

> "As a general rule it will be necessary, for instance, for the applicant to show that the provision of the answer will, or may, provide relevant information (such as admissions of facts and other material such as would facilitate the just and expeditious disposal of the proceedings) which the interrogating party has been unable to extract from his opponent. Because, however, of the pre-trial procedures in the court and its requirement that the parties make all admissions or concessions necessary to focus attention on the nature of the real dispute, I envisage that an order will be unnecessary in many cases. In particular the court will be unlikely to accede to a submission that 'pretty nearly anything that is material may be asked'." (cf Marriott v Chamberlain 17 QBD 154 at 163)

A party is permitted to amend any document or statement of issues without leave at any time up to six weeks prior to the date fixed for hearing. However, the cost burden will not only remain but will be reinforced. In the absence of any



other order, a party making the first amendment will pay the costs of all other parties occasioned by reason of the amendment. Furthermore, the costs consequent and arising from the amendment, if ascertainable, may be taxed forthwith and there will be no need to wait for completion of the proceedings before recovery of costs thrown away.

Prejudice caused by an amendment usually can be cured by an order for costs (but cf Kelleman v Hansel Properties [1987] AC 189 @ 221). Mr Justice Hutley remarked (J & H Manktelow P/L v Alloway Grazing P/L [1975] 1 NSWLR 385 @ 391) that it used to be thought that an order for costs cures any prejudice. This may no longer be the the case in days of inflation even where the verdict carries interest at a commercial rate. In some appropriate cases an affidavit as to the facts is required before granting leave to amend. This should preclude forlorn attempts at amendment which achieve delay, often the desire of some litigants.

Insufficient use is made of notices to admit facts and of resort to the provisions of s 82 of the Supreme Court Act which allow for informal proof of matters not bona fide in dispute. As well, the Judge may in such cases require admissions to be made. Australian decisions on like provisions have been collected in the judgments of the Federal Court in Pearce v Button [1985] 65 ALR 83 and it may be thought that the evident width of the provisions has been read down too much. It would

be rewarding to set up a research group to determine whether such provisions could be improved in their operation. I think one of the reasons why insufficient use of such provisions is made is because the practice of getting Advices on Evidence has completely fallen by the wayside. Obtaining an Advice on Evidence from counsel ensures that parties apply their minds to the evidence which will be required at the trial at a relatively early stage. It should also obviate last minute amendments. I readily understand that getting an Advice out of popular counsel is not an easy task.

The Practice Note seeks to achieve reduction in the hearing time by the "Usual Order for Hearing". The order calls for timely exchange of statements of evidence by prospective witnesses as well as experts' reports. Compliance does involve heavier costs prior to hearing. On the other hand, the saving of time in court has been quite startling. Statements are tendered as the evidence in chief and their prior receipt enables the cross examiner to focus more closely on the points that really matter. The exchange of statements serves to clarify what facts are truly in dispute and precludes surprise at the hearing.

There is also a consequent opportunity and encouragement for the parties to consider settlement before coming to court. It enables settlement to be considered in a more realistic light, with a better appreciation of the case to be mounted by

the other side. In some exceptional circumstances it is necessary for one party or the other to conceal some material. The Practice Note contemplates that an ex parte application may be made to a Judge to be relieved at least in part from compliance with the order. However, these instances will not be frequent.

Where statements have been exchanged, it is appropriate that opposing counsel indicate to each other, in good time before the witness is called, what, if anything, in that witness' evidence is objected to.

Asking all counsel to give a short responsive opening after the plaintiff's counsel has opened the case is another useful tool in ensuring that the Court has a full grasp of the matters in issue and that irrelevancies are expunged. In long cases, provision is sometimes made for the opening statements to be delivered some weeks before the date fixed for hearing so that the Judge may give any final directions, the desirability of which may not have been apparent any earlier.

Counsel often feel obliged to put every facet of their case to an opposing witness, notwithstanding that it is obvious what their case is and equally obvious that it cannot be reconciled with the evidence given by that witness. Where there is personal criticism intended to be made of a witness or accusations made against him, the details should be expressly

put. This apart, the putting of the case for form's sake is discouraged.

We have not yet had occasion to experiment with the proposal the Practice Note makes for the hearing of the whole of the lay evidence prior to calling any of the expert evidence. Nonetheless, it stands to reason that the experts will be able to focus more readily on expressing a view which is likely to be of assistance once the conflict of lay evidence has been fully exposed and refined. It will be unnecessary, in many instances, to explore all the factual hypotheses which might otherwise be available and in relation to which expert evidence otherwise may need to be heard. The procedure that experts for the parties confer prior to the hearing and refine the points on which they differ and the reasons for their respective contentions has worked well. These conferences, of course, are "without prejudice" except to the extent that some agreement may be arrived at.

Considerable use has been made of the provisions of Pt 72 of the Rules. The Rules permit the whole or any part of proceedings to be remitted to a referee for report or determination. Where technical issues can be segregated from other issues and remitted to an appropriate expert, an immense amount of court time is saved. It has freed judges to attend to matters where their particular expertise can be fully utilised. In Park Rail Developments Pty Ltd v R.J.Pearce

Associates Pty Ltd (unreported 23 February 1987), Smart J held that the power of the court to refer a matter pursuant to Pt 72 did not depend on the wishes of either party and could be exercised even against the will of both parties.

There are two clouds on the horizon. In Qantas v Dillingham Corporation Ltd No 2, where the provision has been utilised to send to Mr Simos QC for report a dispute estimated to require hearing time of between six months and two years , it was submitted to the Court of Appeal that Pt 72 was ultra vires the Supreme Court Act. The Court has reserved its decision. If the submission is upheld and no remedial action taken by the Parliament, the Court will suffer greatly. The other problem arises when, on an application to adopt the report of the referee, it is challenged by the unsuccessful party. Mr Justice Marks of the Supreme Court of Victoria has given a most useful judgment on the appropriate approach to such problems in Integer Computing Pty Ltd v Facom Australia Ltd (unreported 10 April 1987). Yeldham J in N.S.W., is at the moment pondering the same issue.

Mr Justice Pincus of the Federal Court has recently breathed new life into the use of a Court Expert. He was confronted with a building dispute, the costs of which were estimated to equal the amount in issue. He appointed an architect to report to the court at a cost one-hundredth of the estimated legal costs (cf Newark Pty Ltd v Civil & Civic Pty Ltd 75 ALR 350).

In another approach to the problems thrown up by highly technical issues, with the consent of the parties, I had fixed a matter for hearing with an assessor. The dispute involved the installation of highly sophisticated computer equipment at a government agency. The assessor was an expert in computers. I took considerable care to ensure that the parties were kept abreast of the discussions I had with the assessor. The only exception to a full disclosure to the parties was straight out technical tuition the assessor gave me in the intricacies of computer software and which was of a purely non-partisan, technical nature. The proceedings were settled before the utility of a hearing with an assessor could be tested.

A solicitor who frequently appears in commercial matters has made a valuable suggestion for the use of assessors derived from his experience in England. Apparently, there, in Town and Country Planning Appeals, the Minister appoints an inspector. Often an assessor is appointed to sit with the inspector and the assessor is permitted to ask questions of expert witnesses and required to prepare a report for the guidance of the inspector. The assessor's reports are published, along with the inspector's report, and are, like the inspector's report and the minister's decision itself, susceptible to being the subject of an appeal. The suggestion is that any assessor sitting with the Judge should publish a

report to the Judge which would be as capable of attack on appeal as any finding of the Judge. The Judge would be obliged to consider the report and explain in his judgment what his reasons were for not adopting it should he fail to do so.

Certainly, as we experiment with the use of assessors, experience will guide us in improving the methodology but there can be no doubt of the value of the underlying notion as to the use of assessors. As was said by Bingham J ("Current Legal Problems" 1985, p 25):

> "It could not plausibly be argued that the elucidation of complex technical issues could not be more quickly and economically achieved between judge and assessor out of court than by the laborious processes of question and answer in court. The assessor will not decide the case. The responsibility of arriving at a judicial conclusion remains that of the judge alone."

Particularly, in long cases, written submissions are frequently called for at the conclusion of the evidence. There is then an opportunity for counsel to speak to their written submissions and for the Judge to put forward any difficulties the Court feels need to be further addressed or clarified.

I cannot leave discussion of curial proceedings without referring to an experiment, which I would hazard to guess, will have substantial consequences in the treatment of commercial disputes. Queensland Practice Direction No 4 contemplates directions that the parties confer on a "without prejudice" basis for the purpose of resolving or narrowing the points of

difference between them. The conference will be attended by representatives of the parties with authority to compromise the dispute. Cl 6(b) provides that "in an appropriate case the Judge in Charge of the Commercial Causes A List may conduct such a conference in which event he will not preside at any subsequent trial of the action". I see the great good sense of the last segment of the rule. Yet it may be argued that the best person to facilitate mediation is the judge who has a knowledge of the facts and is in a position to point out to the parties the strength and weakness of their respective cases.

The Queensland experiment is but part of a worldwide trend in which judges are experimenting with techniques designed to avoid lengthy court battles. We should join in this process.

Mediation by judges has been utilised in the United States for some time. An essential feature of this procedure is the separate meeting the mediator holds with each of the parties. In the course of it, information may be obtained which a party would not disclose in the presence of the other. Thereafter, in a joint session, the mediator summarises areas of agreement or disagreement. The mediator then employs two fundamental principles of effective mediation: first, creating doubts in the minds of the parties as to the validity of their positions on issues and, second, suggesting alternative approaches which may facilitate agreement. These are functions which parties are often unable to perform by themselves. The mediator

produces options, discusses the workability of each option, encourages the parties by noting the probability of success where appropriate and suggests alternatives not raised by the parties.

Mediation by judges has been a natural evolution in the United States from pre-trial hearings. The temptation to attempt to dispose of the whole of the dispute proved irresistible to activist judges. It was in the State courts that settlement oriented pre-trial with active judicial participation really took off. Initially, the judge enquired from counsel what they considered a case to be worth then expressed an opinion what the settlement figure should be. If that was not acceptable, the case was reassigned to another judge.

The next development lay in the words of a Federal District judge:

> "I urge that you see your role not only as a home plate umpire in the courtroom calling balls and strikes. Even more important are your functions as a mediator and judicial administrator."

Today, in the U.S. the virtue of active judicial participation in settling civil cases is part of the received wisdom. As has been said: "Judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family." Judges are more aggressive and inventive in pursuing settlement and they regard it as an integral part of their judicial work. As Professor Galanter of the University

of Wisconsin-Madison, remarked, "We have moved from dyadic to mediated bargaining." The hallmark of change is that mediation is not regarded as radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous. Interestingly, research has not so far confirmed that more judicial intervention produces more settlements.

An increasingly important problem is posed by the marathon cases running for periods in excess of six months. McLelland J of the New South Wales Supreme Court has just reserved judgment in an action heard over a period of some nine months. In order to cope, he devised his own computer programme. It seems to me to be the only method by which a judge can ensure that nothing in the evidence is overlooked. At a recent seminar held by the AIJA, Meagher QC gave the Bar's experience in utilisation of computers in complex cases. There can be no doubt that the day of the technological court room has arrived.

Few areas of the law have been subjected to such dramatic changes, in so short a time, as the field of commercial arbitration. The activity has been in the field of international, as well as domestic, commercial arbitration.

At the forefront of change stands the enactment of the uniform legislation of which the Commercial Arbitration Act, 1984 (NSW) is the New South Wales counterpart. The avowed purpose of the legislation is to create a more hospitable climate for arbitration in Australia. The title of the Act is a misnomer. The provisions of the Act are in no way confined to commercial matters. Disputes of all kinds may be subjected to arbitration conformably to the provisions of the Act.

The outstanding feature of the Act is its acceptance of the principle of party autonomy. Time and time again, one finds provisions which confide to the parties the entitlement to depart from what used to be the accepted norm. The other principal feature of the Act is the relaxation of judicial control over arbitrators and arbitrations. I must mention at once the abolition of the procedure of the stated case. There is no doubt in the mind of anyone who has practised in the field that, in recent years, requests to arbitrators for cases to be stated had become instruments of abuse in the hands of disputants determined to postpone the delivery and enforcement of an award or to crush an economically weaker opponent by making the proceedings both longer and more expensive. The abolition of the procedure will be regretted by no one who wishes to promote arbitration as a method of dispute resolution.

Section 19(3) of the 1984 Act provides that, unless otherwise agreed in writing by the parties, an arbitrator or an umpire 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. This is a reversal of what had been a fundamental principle of English law and had been received into Australian law. That arbitrators were ordinarily bound by the laws of evidence was laid down in England more than a century ago in Attorney-General v Davison (1825) M'Cl & Yo 160; 148 ER 366 and emphatically reaffirmed in Re Enoch and Zaretzky Bock & Co [1910] 1 KB 327. The change will allow a more widespread use of the technique of sniff and smell arbitrations as well as the full and proper application of the arbitrator's own expertise. Sniff and smell arbitrations are those where the matter in issue is the qualify of goods and the arbitrator inspects the goods in question and, applying his own expertise, determines whether or not they are up to the standard required. The benefits of such a procedure, as compared with court proceedings where a judge has no idea of what is required of the goods in question, or even with an arbitration in which experts have to be called, is quite obvious. Of course, the section contemplates that dispensing with rules of evidence may be taken considerably further. Arbitrators will need to exercise their power carefully so that it does not become a weapon of oppression in their hands. On the other hand, it will more fully give effect to the commonsense purpose in appointing as arbitrator,

not a lawyer, but an expert in the field. I regard the provision as a powerful weapon in the endeavour to reduce costs and expedite the resolution of technical disputes.

An equally far-reaching provision is s 22(2) of the 1984 Act. Sub-section (1) reiterates the existing law that any question arising for determination shall be determined according to law. However, this obligation is relaxed by sub-s (2) which enables the parties to agree in writing that the arbitrator may determine any question as amiable compositeur or ex aequo et bono. The basic principle expressed in sub-s (1) embodies the long-held view, best expressed in the graphic phrase of Lord Justice Scrutton, in Csarnikow v Roth Schmidt and Co [1922] 2 KB 478 at 488, that "there must be no Alsatia in England where the King's writ does not run". The English courts were determined to ensure that mercantile arbitrators would not create two systems of law in England, one applied in the courts and the other in arbitrations. In the result, arbitrators were required to apply, as best as they could, principles of law in the same way as any judge. Attempts by parties to agree otherwise were held ineffective as being contrary to public policy. The effect of utilization of the provisions of s 22(2) will be many. For one, arbitrations are likely to reach results which more accurately reflect the sense of the commercial community. Probably, its outstanding effect, so far as lawyers are concerned, will be that it will make any right of appeal from a decision of an arbitrator for error of

law impossible to implement. Having regard to the fact that the arbitrator is given a charter to depart from accepted principles of law, how can it be said that his award infringes otherwise applicable principles of law? The problem has engaged the attention of learned commentators. Eminent as the editors of Mustill and Boyd on "Commercial Arbitration" are, and with the very greatest of respect to them, their attempt to accommodate the conflict between a determination as amiable compositeur and a continued right of appeal on questions of law is unconvincing. It might also be thought that the role of lawyers may need to be re-evaluated in arbitrations of this kind.

In international commercial disputes grant of a stay of court proceedings, commenced in the face of an arbitration clause, is mandatory (Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd [1979] 2 NSWLR 243). In Qantas Airways Ltd v Dillingham Corporation [1985] 4 NSWLR 113 I expressed the view that the old authorities on the exercise of discretion to grant a stay of domestic disputes were no longer an accurate guide. In Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd [1987] 71 ALR 125 French J took a rather more orthodox view than I did. I attached greater significance than did His Honour to the desirability of keeping the parties to their bargain. For example, French J was greatly troubled by the possibility of inconsistent findings of fact if there was both arbitration and curial litigation as a result of the fact that only some of the

parties to the litigation were bound by the arbitration clause. There is respectable authority for this concern. However, in Bulk Oil (Zug) AG v Trans Asiatic Oil Ltd [1973] 1 Lloyd's Rep 129 Kerr J pointed out, after an examination of the same authorities relied on by French J, that the true test was possible ultimate injustice. He said:

> "Further, I do not see how it can be said that the risk of different conclusions being reached by the two tribunals is in itself a potential source of injustice to the defendants. The defendants' contention here is that they are likely to succeed on the issues of liability under the transportation agreement. They cannot be prevented from raising them by way of defence to the charter-party claim. Suppose then that - as they say - all these issues in fact have to be investigated and determined and that the defendants satisfy the Judge that the plaintiffs wrongfully repudiated the transportation agreement. What injustice - apart from the resulting inconvenience and additional costs and delay, due to the duplication of issues, for which the defendants must take responsibility - is then liable to be done to them if the Geneva tribunal should reach a different conclusion, which in itself is not to be supposed? The defendants could not be heard to say, and have not sought to say, that the Geneva arbitration tribunal is in itself more likely to arrive at a wrong conclusion that this Court.
>
> The defendants are therefore not in the same position as the plaintiff in The Pine Hill and in Taunton-Collins v Cromie, in which the plaintiffs were faced with a duplication of issues before different tribunals through circumstances for which they were not directly responsible, and were also faced with the risk of losing both their alternative claims due to this duplication, which would have been an unlikely result if both claims were tried by the same tribunal." (emphasis added)

Relieving arbitrations from judicial control has been achieved by restrictions on appeals from arbitrators. Unless all parties consent, leave to appeal is now required and is

available only on questions of law. There is still alive in Australia a difference of view as to whether the restrictive guidelines laid down by the House of Lords in Antaios Compania Naviera SA v Salen Rederierna AB (1985) AC 191 should be followed in considering an application for leave. The Court of Appeal in New South Wales in Qantas Airways Limited v Joseland & Gilling (1986) 6 NSWLR 327 said that the guidelines were an inappropriate restriction on the discretion confided to the Court. In Victoria the preponderance of judicial view seems to be in favour of following the English approach under which leave to appeal will be granted only where the guidelines in Antaios are satisfied.

Another very interesting feature of the new uniform legislation is the provision whereby arbitrators are called upon to attempt to conciliate the dispute and are specifically enjoined to carry on with the arbitration even if their efforts as conciliators fail. This, of course, has created profound philosophical difficulties. It is almost inevitable in the course of an attempt to conciliate to obtain information which, on orthodox theory, would be an embarrassment to an arbitrator when it comes to making a determination. It will be interesting to see how the difficulties which are perceived by the legal profession in this regard are finally resolved.

There is a Chinese saying to the effect that the best arbitrator is a failed conciliator. A practice in arbitrations in Europe shows an interesting accommodation to the problem. The arbitration tribunal is made up of three persons. Two of them may attempt mediation whilst the third

one holds aloof. If the attempt fails, the arbitration proceeds with the third person unaffected by any disclosures which may have been made in the course of the mediation. The other two members continue to participate in the hope that the mediation may be resumed at a later stage. Ultimately, if all attempts at an amicable solution fail, the third member delivers the award. The advantage of such a procedure is manifest but the sum involved will need to justify the additional expense involved.

It has been said that, on the whole, arbitration is the superior fact finding mechanism in disputes of a technical nature because the evidence adduced can be analysed by a technically knowledgeable and percipient person, even if not expert in all departments of the subject area. It must be accepted that an arbitrator receiving technical evidence in the field of his own expertise must be able to act more speedily and in a more likely to be accurate way than any lawyer. On the other hand, there is the perception that an arbitration today is but "the pale image of a High Court action". Perhaps in the same way that judges call on the assistance of technical experts as assessors, arbitrators may be assisted by having as an assessor a person with legal qualifications. Ideally, in my view, there should be two arbitrators, one with legal, the other with technical, qualifications. Of course, the expense may make this impractical.

With the increasing perception that courts and arbitrators should be engaged in a mutually co-operative efforts and with the perceptible lessening of hostility to arbitration by the courts, coupled with the efforts of the Institute of Arbitrators to improve the quality of arbitrations, there should be a satisfactory adjustment of the competing interests of arbitration and curial dispute resolution.