NON-CONSENSUAL ARBITRATION AND THE COURTS

by

Justice Andrew Rogers
A Judge of the Supreme Court of New South Wales

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> "It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all."
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> (Judge Griffin Bell, The Pound Conference: Perspectives on Justice in the Future 300 [A.L.Levin & R.Wheeler eds. 1979])

Judging by overseas experience, the next great surge in utilisation of arbitral procedures in Australia may well come from so-called court-annexed arbitration. I would suggest that there is a great opportunity for the Institute of Arbitrators to help shape and participate in a programme designed to further the values outlined by Judge Griffin Bell.

The major goals of court-annexed arbitration are to decrease the time and expense required to dispose of civil litigation without diminishing either the actual or apparent quality of justice. The extent to which the objectives I have identified are achieved is still the subject of hot debate.

Supporters of the scheme claim that the objectives are achieved in one of two ways. First, by obtaining a non-binding award through an informal but trial-like proceeding. Such an advisory verdict might resolve the case prior to trial, either by being accepted by the parties or by serving as the basis of a subsequent settlement. Second, and alternatively, the early date for an arbitration hearing may bring about an earlier settlement than might otherwise be the case by requiring the lawyers, at that time, to give attention to the dispute. In other words, the claim is, that, whilst it is true that most court cases are disposed of by settlement, the settlements take place earlier, following the institution of court-annexed arbitration, because the arbitration hearing is scheduled for a much earlier time than a court hearing would take place. Every practitioner knows that a large percentage of settlements take place either the day before or on the very day of the hearing. Lawyers are busy and give close attention to the dispute only when the hearing is almost on them. It is then that they prepare the evidence and are truly in a position to assess accurately the strength and weaknesses of their case and

its monetary value. They are then ready for settlement discussions. As well as the delay involved in a late settlement, there is the question of costs. A full scale trial is an essentially uneconomic exercise. In trying to anticipate all possibilities, evidence is prepared, only a fraction of which may be used. An arbitration should not involve the same degree of preparation of evidence.

How, then, does court-annexed arbitration work? Broadly speaking, actions commenced in court are compulsorily remitted to arbitration with the option of a full rehearing de novo in court. The outstanding feature of court-annexed arbitration, as opposed to consensual arbitration, is that it is neither voluntary nor binding. Furthermore, the arbitrators are assigned by a third party rather than chosen by the parties or by an institution agreed on by the parties.

As with so many recent experiments in dispute resolution, the procedure had its genesis and enjoys its greatest popularity in the United States.

Pennsylvania was the first to institute court annexed arbitration in 1951 in Philadelphia. Within a short time, the scheme was extended to approximately 50 counties in the State. The results were dramatic. In Philadelphia, the backlog of civil cases was reduced in two years from 48 months

to 21 months. In 1974, more than 12,000 of approximately 16,000 civil cases were resolved through arbitration. This was made possible, in part, because of the large numbers of adjudicators who are available to supplement the judges. In the United States, lawyers who are willing to make themselves available are almost invariably in plentiful supply. To give an example, in 1982 in Philadelphia alone, some 3,200 lawyers had volunteered and qualified . Furthermore, they give their services for a merely nominal fee. Unfortunately, as will be seen, this experience has not been replicated in Australia.

In 1976 the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (popularly known as the "Pound Conference"), was called in response to the widely felt problems of delay, expense and overburdened courts. Participants were impressed by the experience of State courts which had established compulsory arbitration programmes. A Task Force was established, chaired by Judge Griffin Bell. When the Judge became Attorney-General of the United States in 1977, the Department of Justice instituted pilot programmes for court-annexed arbitration in three Federal district courts, the Eastern District of Pennsylvania, the District of Connecticut and the Northern District of California. The District of Connecticut discontinued its programme in 1981 because it appears they preferred a pre-existing mediation programme for handling the arbitration eligible cases.

The Federal Judicial Centre was requested to monitor and evaluate the use of mandatory arbitration. Its original report was published in 1981 and updated in 1983. The conclusion was that arbitration in federal courts held realistic promise for conserving judicial time, expediting resolution of disputes and reducing litigants' costs. Congress took the view that an enlarged pilot programme was justified and, in 1984, eight additional district courts were selected to experiment with court-annexed arbitration. As will be seen, because the programmes are implemented by local rules, there are substantial differences between the practices of the different courts. Although all the pilot programmes have certain features in common, there are significant differences between them reflecting the particular court's goals and resources as well as the nature of its local legal community.

From 1 December 1988, the Federal Judicial Improvements and Access to Justice Act has authorised the enlargement of the experimental pilot programme of court-annexed arbitration to a further ten selected Federal courts. The purpose of the programme is to encourage prompt, informal and inexpensive resolution of civil cases. The Act authorises the implementation of a study to evaluate the effects of

components of a successful arbitration programme. The proposed study should be invaluable in providing information which will enable selection from the best features of each programme. A Research Fellow in the Federal Judicial Centre had updated the 1981 and 1983 material in a draft report in 1988 but that is not yet available in Australia. The study authorised by the 1988 Act will of course be able to draw on data from many more courts working under different rules.

As was pointed out during a Congressional hearing, experimentation with pilot programmes can provide a foundation for well-informed decisions. The dilemma which confronts a decision-maker, however, is that information about whether to proceed can only be obtained by proceeding.

Court-annexed arbitration programmes are designed so that certain types of proceedings come to them automatically because the case qualifies under jurisdictional criteria prescribed by the local rule. One of the criteria invariably is a dollar limit. It has been pointed out that the criteria are bound to be both over-inclusive and under-inclusive. There is a tension between generalised rules that, on the one hand, relieve judges of the need to make individual decisions on cases to be remitted and on the other the need to determine, with sensitivity, whether a particular case should be remitted. Originally, only certain types of cases, most

commonly those involving contracts and torts, were mandatorily referred to the programme. Now, in some of the districts where pilot programmes are undertaken, all civil cases, with relatively few exceptions, within a particular dollar ceiling limit are remitted to arbitration. In others, there are still only limited classes of cases which are so remitted. In October 1984, the Bar Associations of the relevant areas urged the courts to expand their programmes to include all civil cases in which money damages only were being sought in an amount not exceeding $100,000. Jurisdictional limits today range from $50,000 to $150,000. It is generally agreed that there needs to be some limitation on the amount in controversy. In actions where money damages only are being sought, the amount in controversy needs to be limited to an amount which makes it economically unwise for litigants to demand a trial de novo. Otherwise the arbitration programme would become just one more layer of litigation. The savings to litigants as well as to the courts is not realised whenever the amount in controversy encourages the losing party to demand a trial de novo. It was for this reason that the amount in Pennsylvania was limited to $75,000. When the plaintiff files his or her complaint, the local rule there provides that damages are presumed to be not in excess of $75,000 unless counsel certifies otherwise. The Court may set aside any certification by counsel if it finds that the damages are not likely to exceed $75,000.

Nonetheless, as well as enlarging the category of cases assigned to arbitration, the dollar ceilings have been steadily enlarged. Under the Judicial Improvements and Access to Justice Act, the limit may be as high as $150,000.

The Federal Judicial Centre sponsored a very important meeting in August 1985, in Kansas City where 18 United States District Judges, who had employed some, or all, of the court-annexed alternative dispute resolution techniques, gathered for a two-day symposium. The paper written by the Federal Judicial Centre Fellow served as a part of the basis for that meeting and the paper discussed the varying methodologies employed and the reasons for employing them.

The paper suggested that those courts which have employed court-annexed arbitration believed that the guidelines on the dollar amount and the non-equitable relief supply the clearest answer on when to utilize this technique. The debate on court-annexed arbitration centred around the dollar limit which should trigger the arbitration track, the number of arbitrators who should be employed by the court, and whether equitable claims ought to remove a case from arbitration.

The early studies, conducted by the Federal Judicial Centre, suggested that cases referred to arbitration ought not be too factually or legally complex for a truncated procedure; nor should they involve legal issues which are so uncertain that resolution by a non-judge would be considered unpersuasive by most practitioners. The study pointed out that "straight-forward" compensation cases were better suited to the process. The judges at the Kansas City meeting, who were utilizing arbitration, were in agreement with the studies. All believed, however, that their local court rules and the practice of "un-tracking" an arbitration case and returning it to the trial calendar, achieved the result the study suggested.

In some programmes, the number of arbitrators is three; in others, it is a single arbitrator. The arbitrators serve either free of charge or at only a nominal fee. In order to qualify as an arbitrator in the federal programme in Pennsylvania, a person has to be a lawyer, admitted to practice before the Court, have been a member of the Bar for at least five years and be determined by the Chief Judge to be competent to preside at the hearing. At the time of certification, each arbitrator states his or her primary area of practice and the clerk endeavours to ensure that each panel of three arbitrators consists of one lawyer whose practice is primarily representing plaintiffs, another whose practice is primarily representing defendants and a third whose practice does not fit either

category. It is reported that the concept of a panel of three arbitrators has been well received by litigants and the Bar. It has alleviated the fear of some litigants that one arbitrator might in some way be biased against their cause. The panel does not file findings of fact, conclusions of law or opinions of any kind. The panel is also instructed that there is to be no indication as to whether the decision is or is not unanimous.

The award becomes a final judgment unless within 30 days of the filing of the award, either the plaintiff or the defendant or both demand a trial de novo. The arbitration fees which the party demanding a trial de novo is required to pay are held by the clerk of the court and returned to the party demanding the trial de novo only in the event that such party receives a final judgment, exclusive of interest and costs, more favourable that the arbitrators' award. In the event that the party demanding the trial de novo does not receive a final judgment more favourable than the award, the fees are forfeited. Appropriate sanctions are crucial in the success of the scheme. If a party fails to participate in the arbitration process in a meaningful manner, the Court may deny that party's demand for trial de novo.

A study carried out by the Federal Judicial Centre in 1986 mentioned the need for more attention to the issue of training of arbitrators and mediators. It pointed out that there is a school of thought that the skills of mediation and arbitration are quite different from those of litigation and that effective dispute resolution requires special training. Some of the District Courts now require a brief training course for arbitrators. The Middle District of North Carolina refers all arbitration cases to the Private Adjudication Centre at Duke Law School which takes responsibility for the training of arbitrators.

It has been pointed out by commentators that a scheme of court-annexed arbitration depends crucially on how well it is administered. Time limits must be strictly enforced otherwise procrastination will occur and the arbitration will be slower than the court proceeding would be.

The Federal programme in Pennsylvania has been described in laudatory terms by Judge Broderick in an article "Court-annexed Compulsory Arbitration; It Works", 72 Judicature 217 (December/January 1989). The Judge is satisfied that the programme provides litigants with a speedier and less expensive alternative to a traditional courtroom trial. He draws attention to the difference between court-annexed compulsory arbitration and other methods of alternative dispute

resolution, mediation and conciliation. Unlike mediation, the function of the procedure is not to enable the parties to fashion a mutually agreeable compromise. In his view, the programme was not designed primarily as a settlement programme and should not be confused with the settlement conference. However, this is not to a universally held view (infra, p.18). According to Judge Broderick, one of the reasons for satisfaction with the scheme is "availability of this opportunity to present the facts of a case to a neutral third party - at an earlier date and without the time and expense that accompany a traditional trial - that provides a basis for believing that arbitration programmes can serve to broaden access to the justice system".

Arbitrations are conducted in essentially the same manner as civil cases are handled in court. Most districts hold the hearing in a courtroom. The typical arbitration rules provide for a liberalised application of the rules of evidence. Although a transcript may be made by any party, at his, or her own expense, very few parties incur that expenditure. Hearings are scheduled to last for one day or less. The consequent saving in costs is obvious. In Pennsylvania it was found that the hearing time was less than half the time normally allotted to trial of cases of that type. The parties are required to be present.

As well as the Federal programme, there are 20 State court systems utilising court-annexed compulsory arbitration. One of the most detailed projects is Hawaii's Court-annexed Arbitration Programme (CAP). In July 1986 the scheme was enlarged so that it applies to all tort cases with a threshold limit of $150,000. That limit theoretically made 80% of all tort actions commenced in Hawaii eligible for the programme. Following on legislative changes, the Judicial Arbitration Commission recommended new procedures which are claimed to make CAP unique in the United States. The central features of the plan depend on two aspects of US litigation procedure which have no equivalent in Australia. First, the very expensive and lengthy United States discovery process which inevitably precedes the court hearing is reduced. Second, generally parties do not receive an order for costs. One of the most interesting features of the Hawaiian programme is its research aspect. By random selection, every third action is taken out of the arbitration programme and streamed through the traditional court process. The data will be analysed and will contribute invaluable information on the value of CAP. Interestingly, contrary perhaps to what one might expect, the protests have come not from those in the programme but the randomly selected cases that were excluded.

The experience in the State Court in Pennsylvania has been that only nine per cent of all arbitration trials have resulted in a demand for a trial de novo. Furthermore, only ten per cent of the nine per cent, demanding a trial de novo, i.e. .9% of the cases sent to arbitration, have actually required the traditional courtroom trial. In the Federal Court in Pennsylvania, in a period of 99 months, only about two per cent of the 11,165 cases in the arbitration programme, that is 214, required the traditional courtroom trial following arbitration. Judge Broderick told a Committee of Congress that in contrast, during the same period, 8% of civil cases, which were not eligible for the arbitration programme, required the traditional courtroom trial. Obviously, it is inappropriate to draw simplistic conclusions from those two figures. To start with, one would expect that the cases that would not qualify for the arbitration programme were the more complex disputes involving larger sums of money and perhaps, as well, more intricate questions of law. Nonetheless, as an indication, the difference of 400% is stark. Apparently, about 30% of the civil case load of Federal Court in the Eastern District of Pensylvania goes through the programme. However, in California, which has the same dollar limit of $100,000, only 10% of the total number of cases fall within the programme.

In Pennsylvania, the median time from the filing of complaint to the date of arbitration was five months in contrast to cases outside the programme where a median time of eleven months elapsed between filing and hearing. I should mention in parenthesis that the waiting time for a court hearing was reduced from 14 months to eleven months by sending disputes to arbitration.

Notwithstanding the warm endorsement from lawyers and judges, empiricists are questioning whether there is any available evidence that court-annexed arbitration will assist the process of civil litigation. This, of course, demands an answer to questions such as: What are the proponents of the procedure attempting to accomplish? Are they attempting to settle apparently unsettleable cases? Are they attempting to cull out of the litigation process some kinds of disputes which are better resolved outside of the courtroom? Are they interested in responding to the "litigation explosion?" Is their goal the reduction of costs and time for the litigating public? These are all appropriate goals to one degree or another.

It is certainly undisputed that one of the goals, proponents of court-annexed arbitration seek, is a less expensive way, both in money and time, to seeing civil litigation to a conclusion. It appears to be generally accepted that nearly ninety per cent of all civil cases filed are terminated without

adjudication. Because that figure is fairly accurate, one question is what prevents these cases from settling earlier?

The view is taken in the US that part of the problem appears to focus on the lawyers and litigants. Lawyers appear to be concerned about initiating settlement discussions because it may be viewed by their opponents as a sign of weakness. Lawyers also tend to become as convinced as their clients about the merits of the case, resulting in the lawyer possessing "wholly unrealistic expectations" about its value. Moreover, the settlement process is not only difficult to launch, but it also has pitfalls involving, among other things, uncertain notions about how to negotiate.

Judges and lawyers often share this same deficiency in not possessing settlement and negotiation expertise. While they are trained in law schools in civil procedure, appellate procedure, and the rules of evidence, there used not exist much in the law school curriculum that assisted them in developing negotiation abilities. This is more remarkable because of the fact that ninety per cent of the litigation cases settle. Lately, law schools have begun to cure this deficiency by adding courses to bolster these skills. Nonetheless, adversarial lawyers and adversarial clients, in the main, do not seem to know how to go about negotiating a settlement. Judges have no greater skills, and really do not know what to

do in the settlement conference except what they have heard from their colleagues, or believe to have been successful in the past. I have no doubt that in Australia lawyers would deny that any of these comments are applicable to them. There can be no denying however that, whatever the reason, Australia shares with the US the problem that settlements occur so late in the process as not to assist greatly in cost and time reductions.

Judges and lawyers in the United States confess that they lack reliable information about the impact of the procedures in the courts which tried them first, and that it is uncertain how transferable the ideas are. It will be difficult to gauge how successful a procedural transplant from one district in the US to another will be for four reasons:

(1) no innovation stands alone (other characteristics of a court will impact on innovative ideas);

(2) details matter;

(3) personalities count (personal styles vary widely); and

(4) expectations about the conduct of litigation vary from district to district.

In spite of its apparent success, court-annexed arbitration remains controversial. Many judges and academics remain sceptical, questioning whether settlement should not be left to

the parties. Moreover, this disagreement is not apt to dissipate in the near future, given the absence of unequivocal evidence that court-annexed arbitration has a dramatic effect on the rate at which cases go to trial and how they settle. Thus Lind and Shepherd in "Evaluation of Court-Annexed Arbitration in Three Federal District Courts" 5 (rev ed 1983) claim (p 76) that in a comparison group of cases filed before the arbitration programme began, 50% of cases terminated within one year. After institution of the programme, 59% of comparable cases terminated within one year.

Judge Posner of the Seventh Circuit appears to consider court-annexed compulsory arbitration as a procedure designed solely to increase the likelihood of settlement. That is strongly denied by supporters of the scheme and Professor Levin has pointed out that "to make court-annexed arbitration little more than a mechanism for achieving settlement is to run the risk of diminishing its effectiveness in terminating cases and of reducing litigant's satisfaction with the process". (Levin and Golsah "Alternative Dispute Resolution in the Federal District Courts" 37 University of Florida Law Review 29 [1985].) Arbitrators appointed in Pennsylvania are specifically instructed not to discuss settlement and are admonished that fact-finders should not participate in settlement discussions. On the other hand, in a paper prepared in 1988 by the Federal Judicial Centre on the

programmes in the Western District of Oklahoma, it is said that the programme is viewed strictly as a settlement technique designed to effect earlier and less expensive case resolution. Personally, I regard as highly realistic the statement by the judges in that District that "the focus on earlier settlements, rather than increasing the number of settlements, stems from the judges' belief that they are unlikely to improve on the 96% settlement rate already achieved through other efforts."

In the United Kingdom, s 64 of the County Courts Act provides that the rules may prescribe cases in which, without any order of the court, proceedings are referred to arbitration. By O 19 r 2(3), claims involving £500 or less are automatically referred upon a defence being filed. That reference may be rescinded in appropriate cases, e.g. where there is a difficult point of law but also if the parties agree that the dispute should be tried in court. A reference may also be ordered on the application of a party where the amount in dispute exceeds £500. The hearing is informal. The strict rules of evidence do not apply. The arbitrator may adopt any method of procedure he considers convenient and which affords a fair and equal opportunity to each party to present his case.

A problem, which is frequently encountered also in Australia, was answered in a way which poses further problems for arbitrators in Chilton v Saga Holidays plc Ltd [1986] 1 AER 841. The plaintiffs brought an action in the county court in respect of a holiday organised by the defendants. The action was automatically referred to arbitration before the registrar. At the hearing, the plaintiffs appeared in person The defendants were represented by a solicitor. When the defendants' solicitor sought to cross examine the plaintiffs, the registrar, took the view that it would give the defendants an unfair advantage if, by being represented, they could cross examine the plaintiffs, whereas the latter could only approach the cross examination as laymen, refused to allow him stating that all questions to the plaintiffs were to be put through him. The Court of Appeal said that this was wrong. The Master of the Rolls said (p 844):

> "The problem which arises where you have one represented party and one unrepresented party is very well known to all judges and in particular to judges who deal with small claims in the county court. It becomes the duty of the judge so far as he can, without entering the arena to a point where he is no longer able to act judicially, to make good any deficiencies in the advantages available to the unrepresented party. We have all done it; we all know that it can be done and that it can be done effectively. That is the proper course to be adopted. The informality which is stressed by the rule and the requirement that the arbitrator may adopt any method of procedure which he considers to be convenient (it would have been better perhaps if it had said 'just and convenient') covers the situation where, as so often happens, a litigant in person is quite incapable of cross-examining but is perfectly capable in the time available for cross-examination of putting his own

> case. The judge or the registrar then picks up the unrepresented party's complaints and puts them to the other side."

In a praiseworthy endeavour to reduce costs in such cases, the Rules provide that, generally speaking, no legal costs will be allowed as between party and party in disputes referred to arbitration. This rule led to an interesting debate in Russell v Wilson (C/A unreported 25. 5.89). A claim for £263.50 for repairs to a motor car as a consequence of a collision was automatically referred to arbitration. One of the drivers had taken out legal expenses insurance. The legal expenses insurer applied, in the name of the insured, to have the dispute moved back to the court so that if successful, an order for costs could be obtained. As the Master of the Rolls said, in the end the argument was that it was unreasonable that parties who, being insured, could afford to be and were represented by solicitors, should be removed from the ambit of the ordinary rule that costs follow the event. That argument was rejected. Lord Donaldson said that the legislative policy was quite unaffected by whether either or both the litigants were paupers of millionaires - or even insured.

The Civil Justice Review, recently published in the United Kingdom, recommended that cases in which less than £25,000 was claimed and which did not raise issues of great importance or complexity should be transferred to a county court. The

Chartered Institute of Arbitrators thereupon proposed a scheme to the Lord Chancellor for court-annexed arbitration instead of disposition in the county court of such of these cases as would benefit from being heard by a specialist tribunal. Under the scheme, parties would be given the option, at the directions stage, of submitting their dispute to arbitration instead of having it remitted to the county court.

The objectives of the scheme include:

(1) To provide the parties with a quality of decision making not inferior to that available in the County court.

(2) To produce a determination more quickly than the County court.

(3) To ensure that the costs to the parties should be no greater and in many cases lower than the costs of trial in the County court.

(4) To be based upon the consent of the parties; that is to say, arbitration should be chosen by them for the advantages that they see in it, and not by compulsion.

(5) To produce a significant saving to public funds. The savings will come from paying arbitrators by the day, which is cheaper than increasing the establishment of judges, from requiring fewer support staff and from accommodation costs which should be smaller than providing additional court accommodation.

Further advantages of the scheme claimed by the Institute are that the arbitrator would be a person experienced in the subject matter of the dispute; a county court judge may or may not be. An interesting feature of the Institute's proposal is that parties should have complete freedom in their choice of representation. Possibilities range from a friend, through a specialist, like an architect or builder, to a legal professional. In conformity with his attitude of shaking the legal profession to its core, the Lord Chancellor, in a recent speech to the National Association of Citizens Advice Bureau said that these were "sound reasons for regarding lawyer-free litigation as a desirable end in its own right". On the other hand, the scheme proposed that, in appropriate cases, legal aid should be available in the same way as it would be if the hearing were in the county court. It is claimed that the freedom of representation, a specialist advocate appearing before a specialist tribunal and freedom in the preliminary shaping of the case, will all produce substantial saving of

costs. It is proposed that the arbitrators be paid out of public funds and not by the parties. Even so, there would be a saving for public funds, as well, simply because it is cheaper to hire arbitrators and rooms by the day than to appoint judges and build courtrooms. A number of questions have been left outstanding, one of the most important of which is, what right of appeal or review should be allowed?

In New South Wales, provision for court-annexed arbitration is made for actions in the Local Courts by s 21H of the Local Courts (Civil Claims) Act, 1970. The Local Court may make an order for arbitration on its own motion as well as on application. An order shall not be made if the action involves complex questions of fact or law or the hearing is expected to be lengthy. Interestingly, by r 101, no order may be made unless the court considers that the possibilities for settlement have been sufficiently explored and that the action is unlikely to be settled. By r 103(7), where an arbitrator fails to complete his determination within three months, he is required to inform the court of his reason for the failure. The arbitrator's powers and duties are further set out in the Arbitration (Civil Actions) Act, 1983. Arbitrators are suitable persons appointed by the Chief Magistrate and, in the case of District Court actions, by the Chief Judge. A barrister or solicitor, nominated in the prescribed manner by a prescribed person, may be appointed arbitrator. By s 7(1A),

an arbitrator has all the powers and authorities of the referring court. The right of appearance before the arbitrator is restricted to the same category of persons as may appear in the referring court. By s 9, an arbitrator shall not bring in an award until he has used his best endeavours to bring about a settlement. Section 10(2) provides as follows:

> "(2) Subject to the rules of evidence being complied with, an arbitrator shall act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms."

The arbitrator is required to give reasons for his award (s 15[1]). Rehearing, dealt with by s 18, may be requested in all matters where the claim exceeds $1,000. Coopers & Lybrand in their Report on the New South Wales Court System said that they were informed that in the Local Court, applications for rehearing are filed in only 3-4% of referred matters.

An action may also be referred by the District Court to an arbitrator under s 63A of the District Court Act, 1973. Under the District Court Rules, Pt 51A, matters may be referred to arbitration in Sydney or Parramatta without monetary limit and elsewhere in cases where the court is of opinion that a judgment is unlikely to exceed $20,000. The Rules also require that in nominating the arbitrator, regard should be had to any appropriate special skill or experience of an arbitrator with regard to a referred action involving technical issues. The District Court uses two panels of arbitrators:

(a) Panel 1, consisting of about 40 senior barristers and solicitors, who undertake the more serious personal injury cases;

(b) Panel 2, consisting of other barristers and solicitors, who undertake general civil work, mainly matters involving less than $20,000.

There is a scheme of referred arbitration running in Sydney, Parramatta and Wollongong, but the arbitrations in the other District Courts are by consent of the parties only.

There is an agreed scale of fees payable by the court to arbitrators, comprising, broadly, an initial fee of $80 plus a time rate of $90 per hour in hearing the case and $75 for preparing an award after reserving decision. The arbitration costs are not directly recovered from the parties, who pay only the basic court filing fee, whether or not the case is subsequently ordered to arbitration. The District Court filing fee is currently $90.

If, following arbitration, one of the parties seeks a rehearing by the Court, a further rehearing fee of $180 is payable. The higher rehearing fee is designed, apparently, as a discouragement to unnecessary rehearings.

In the District Court, in the 12 month period April 1988 to April 1989, 3,103 claims were referred to arbitration. Of these, 1,459 were personal injuries actions, 626 were for property damage and 994 were commercial claims. 737 matters were settled before hearing by the arbitrator, 378 settled after hearing commenced and 1,038 verdicts were handed down. Rehearings were requested in 236 matters. Rehearings were requested in approximately 7% of all referrals or 25% of matters heard by arbitrators. In personal injuries cases, rehearings were requested in 3% of all referrals or 18% of matters heard. Not all matters, in which a rehearing is initially requested, proceed to hearing before a judge.

Proposals were made to Coopers & Lybrand that parties should pay the cost of arbitration. However, the Attorney-General's Department, took the view that, to do so, would tend to force more cases back to the courts. A possible solution suggested by Coopers & Lybrand was to raise the basic court filing fees substantially, to full registry cost recovery, and to then have additional sliding scales of fees, based on the time taken, at full cost recovery, in the court or at arbitration, as the case may be. On a full cost recovery basis, court fees on a time basis would be higher than arbitration fees, thus providing incentive for settling through arbitration. In such a system, the sharing or allocation of costs would need to be part of the arbitration award or any earlier settlement agreement.

The scope for extending the arbitration system in the District Court is more restricted than in the Local Courts. The reasons are that the more complex cases are before the District Court and the difficulty in finding legally qualified arbitrators who have the experience, right attitude and respect of the profession. It is possible that the presently relatively low fee scale for arbitrators may inhibit some senior practitioners from accepting arbitrator appointments and an increase in fees might result in a greater supply of arbitrators. Unfortunately, the United States concept of pro bono work is not widespread in Australia.

Coopers & Lybrand recommended that the arbitration referral system should be extended for appropriate civil cases to all courts suffering serious delays, in all regions where suitable arbitrators can be appointed. To encourage senior practitioners to act as arbitrators, they recommended that consideration be given, in consultation with the profession, to a significant increase in the arbitration fee scale. In relation to the country courts that do not have an arbitration scheme operating and where it would be unlikely that arbitrators could be found locally, it was suggested that consideration be given to introducing a scheme of arbitrator circuits, much like the existing judicial circuits, which would involve arbitrators from the metropolitan areas spending

periods in these country areas, to help clear the local backlog of civil matters.

Victoria has a similar scheme in operation in the Local Court. One essential and crucial variation is that the arbitrator is the magistrate. Untrammelled by the formalities of court procedure and the rules of evidence, magistrates apparently manage to dispose of arbitrations very expeditiously. Initially, the Magistrates Court Bill, 1989 provided for the abolition of the right to legal representation in arbitration hearings of claims below $5,000. The Law Institute of Victoria counts it amongst one of its achievements that it managed to have this provision deleted from the Bill. As well, the Government proposed that in claims involving less that $5,000, the parties should be left to pay their own costs. The Institute succeeded in having this provision modified so that there will be a cap on costs.

What contribution can and should the Institute of Arbitrators and its members make to schemes of court-annexed arbitration in Australia? In the US there are now some private programmes which accept mandatory referrals. As a pilot project, judges in the Southern District of New York have begun ordering selected cases to the American Arbitration Association for evaluation of the prospects of utilising one or other of the methods of alternative dispute resolution. On referal, the

parties are supplied with a brief description of the various methods available. Litigants are made aware of the availability of arbitration as well as other forms of alternative dispute resolution. An AAA staff attorney helps the parties evaluate the options. The evaluation session is free but litigants pay a fee for the dispute resolution procedure they select. Litigants have the option, however, of returning to the court without going through any of the procedures the AAA has available. The Institute could consider a like scheme. Alternatively, the Institute could aim for the model suggested by the Chartered Institute. There must be an immense opening for a contribution to be made by the members of the Australian Institute . After all, the problem identified by the Coopers Lybrand has been the shortage of arbitrators. I would suggest that it would make this conference in Hawaii a memorable milestone if the Institute were to commence work on a scheme which will fill the gap in the system of dispute resolution in Australia.